IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13164-E

GERALD HUMBERT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Gerald Humbert moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Humbert has failed to satisfy the *Slack* test for his claims, his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-24018-ALTONAGA
(14-CR-20145-ALTONAGA)
MAGISTRATE JUDGE P.A. WHITE

GERALD HUMBERT,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* movant, **Gerald Humbert**, has filed this motion to vacate, pursuant to 28 U.S.C. §2255, challenging the constitutionality of his convictions and sentences entered following a jury verdict in **case no. 14-CR-20145-Altonaga.**

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B),(C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's motion (Cv-DE#1) with supporting memorandum (Cv-DE#7), the government's responses (Cv-DE#10, 26) to this court's orders to show cause, the movant's supplemental motion (Cv-DE#13), the government's response to the supplemental motion (Cv DE# 15), the movant's reply thereto (Cv DE# 16), as well as the movant's other filings (Cv DE# 29, 30). The court has also reviewed the Pre-Sentencing Investigation report

("PSI"), the Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file under attack here, including the trial and sentencing transcripts.[1]

II. Claims

This court, recognizing that movant is *pro se*, afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). As can best be discerned, the movant raises the following grounds for relief:

1. Ineffective assistance of counsel, where his lawyer failed to object to the admissibility of jailhouse recordings (Cv DE# 1:4; Cv DE# 7:10).

2. Ineffective assistance of counsel, where his lawyer misadvised him regarding his right to testify. (Cv DE# 1:5, Cv DE# 7:11).

3. Ineffective assistance of counsel, where his lawyer failed to object to the drug quantity. (Cv DE# 1:7; Cv DE# 7:16).

4. Ineffective assistance of counsel, where his lawyer failed to object to the Armed Career Criminal and Career Offender enhancements. (Cv DE# 1:8; Cv DE# 7:17).

5. Ineffective assistance of counsel, where his lawyer failed to object to the DNA evidence. (Cv DE# 1:10; Cv DE# 7:18).

6. Ineffective assistance of counsel, where his lawyer failed to object to the conspiracy charge. (Cv DE# 1:10; Cv DE# 7:22-23).

[1]The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

7. Ineffective assistance of counsel, where his lawyer failed to obtain a chemist laboratory analysis of the drugs (Cv DE# 1:10; Cv DE# 7:23-24).

8. Ineffective assistance of counsel, where his lawyer failed to put forth a valid plant defense (Cv DE# 1:10; Cv DE# 7:25).

9. Ineffective assistance of counsel, in connection with the motion for new trial regarding the conspiracy charge (Cv DE# 13).

III. Procedural History

On April 25, 2014, a federal grand jury in the Southern District of Florida returned a five-count superseding indictment against the Petitioner and codefendant Antonio Norris (CR DE# 36). The superseding indictment charged both Petitioner and Norris with conspiring to distribute crack cocaine, in violation of 21 U.S.C. §§841(a)(1), (b)(1)(C), and 846 (Count 1) (Id.). The superseding indictment charged Petitioner separately with: possessing with intent to distribute crack cocaine, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(C) (Count 3); possessing a firearm and ammunition after previously having been convicted of a felony offense, in violation of 18 U.S.C. §§922(g)(1) and 924(e)(1) (Count 4); and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §924(c)(1)(A)(i) (Count 5) (Id.).

On July 7, 2014, Petitioner proceeded to a trial by jury where the following evidence was introduced. (CR DE# 112). Sergeant Robin Starks, of the Miami Police Department, was the supervisor of a "problem solving team" that was responsible for the Overtown neighborhood of Miami, Florida. (CR DE# 170:147-49). By the end of

2013, Sgt. Starks had identified a residential building at 1232 Northwest First Place as a location where there was a high incidence of drug trafficking. (Id.:149-51). By that time, she also had observed Petitioner conducting what she believed were hand-to-hand drug transactions at that location. (Id.:157-58).

On January 13, 2014, Sgt. Starks observed an individual purchasing what she believed to be cocaine from Petitioner in a corridor of the building at 1232 Northwest First Place. (Id.:151-53). After the transaction, Sgt. Starks observed the individual ingest the substance that he had purchased from Petitioner. (Id.). Sgt. Starks arrested Petitioner, however, the State of Florida subsequently declined to file charges against him. (Id.:153-54).

On the same day that Sgt. Starks arrested Petitioner, another member of her team, Officer Jorge Agrait, observed Antonio Norris selling narcotics near a trash dumpster at 1232 Northwest First Place. (Id.:198-200). Officer Agrait approached Norris to attempt to arrest him, but Norris fled the scene and avoided arrest that day. (Id.).

According to Norris, who subsequently became a government witness, he sold crack cocaine for Petitioner, whom Norris knew as "Chuck," for more than a year. (CR DE# 171 at 4-10, 27, 31, 55). Both were part of an organization that sold crack cocaine from 1232 Northwest First Place. (Id.:4-11). The members of the organization called their crack cocaine distribution location "Gigolo," and it was open 24 hours a day. (Id.). They also called the crack cocaine that they sold "Gigolo rocks," which they considered a "brand name" (Id.). The crack cocaine was packaged in a clear plastic bag called a "show," which consisted of five smaller bags, each containing 60

rocks of crack cocaine (Id.). The organization sold approximately 10 to 15 shows a day; it was a "million dollar" business. (Id.:18, 20). Petitioner's primary role in the organization was to pick up and pass out the crack cocaine that was sold each day by the "workers" or "servers" and to collect and drop off the money from the sales of the crack cocaine. (Id.:17-18, 22-24, 31-32, 55). Petitioner also conducted his own sales of crack cocaine (Id.:31), and, like other members of the organization, he carried a firearm to protect the organization against "rivals" and "robbers" (Id.:20-22, 56, 94).

On February 19, 2014, Norris was arrested on the drug charge for which he earlier had avoided arrest by fleeing. (Id.:57). After his arrest, Norris called Petitioner from jail on several occasions and requested him to post a bond to secure Norris's release from custody. (Id.:11-12,19). Norris believed that the Gigolo organization posted bond for any member who had been arrested while selling crack cocaine for the organization. (Id.:12-13, 38-39, 46). Norris's jailhouse conversations with Petitioner, during which the two discussed the organization's drug distribution activities, were recorded. (Id.:25-39, 43-52).

On February 14, 2014, Sgt. Starks and her team were patrolling a different area of Overtown when she observed Petitioner meeting an individual on a street corner. (CR DE# 170 at 158-63). Because it was unusual for Sgt. Starks to see Petitioner at a location other than 1232 Northwest First Place, she called out his name (Id.:163). Petitioner walked away from the corner, reached into his pocket, removed an item, and tossed it to the ground; then he turned around and walked back to speak with Sgt. Starks (Id.:163, 238). Another member of Sgt. Starks's team, Officer Brandon Lanier, observed Petitioner toss the item to the ground, and Officer Lanier

retrieved the item, a clear plastic bag that contained smaller bags of crack cocaine. (CR DE# 170:234-41; CR DE# 171:194).

After Officer Lanier had retrieved the drugs that Petitioner had discarded, he signaled to Officer Agrait to arrest Petitioner. (CR DE# 170:241-42). Officer Agrait arrested Petitioner, patted him down, and seized currency from him. (Id.:198-202). The officer ended the pat-down prematurely, however, because Petitioner was uncooperative and because a hostile crowd had gathered at the scene (Id.:202-04). Officer Agrait placed Petitioner in the back seat of Officer Stanley Paul-Noel's patrol car. (Id.:204, 280-84). Petitioner was seated next to David Hipp, who had been arrested earlier that day for possessing cocaine (Id.:253-62, 284-85). Hipp recognized Petitioner because Hipp previously had purchased crack cocaine from Petitioner. (Id.:258).

Officer Paul-Noel began to drive Hipp and Petitioner to a police station that was approximately two miles from where officers arrested Petitioner. (Id.:284-85). During the drive, Officer Paul-Noel observed that Petitioner, who was seated directly behind him and separated from him by a non-bulletproof plexiglass shield, was "moving around and standing up" (Id.:286). The officer instructed Petitioner to stop moving, but Petitioner did not comply. (Id.). Hipp also observed Petitioner moving around and, at one point, Hipp observed that Petitioner had managed to place a firearm on his lap even though his hands were cuffed behind his back. (Id.:264-65).

After Hipp had observed Petitioner with the firearm on his lap, Officer Paul-Noel observed Petitioner lean forward, stand up, and angle his body toward the patrol car's window, which was open but had bars across it. (Id.:285-87). Hipp saw Petitioner toss the

firearm out of the window. (Id.:274). Officer Paul-Noel saw only the firearm as it went out of the window, through the bars (Id.:287). The officer immediately stopped the patrol car and retrieved the firearm from the street. (Id.:290). The firearm was loaded, with a round of ammunition in its chamber; Officer Paul-Noel unloaded the firearm and placed it in the trunk of the patrol car. (Id.). Thereafter, he searched Petitioner to make sure that the latter did not have another weapon. (Id.:291). Officer Paul-Noel was "shocked" by the incident because he believed that Petitioner could have shot him to death. (Id.:291-92).

The firearm that Petitioner had tossed out of Officer Paul-Noel's patrol car was a .40-caliber Taurus semi-automatic pistol, loaded with 10 rounds of ammunition. (CR DE# 171 at 169). The pistol had been manufactured in Brazil, and the ammunition had been manufactured in South Korea and Illinois (Id.:169-70). The pistol had been reported as stolen in 2010 (Id.:172). A forensic examination of the pistol revealed that it had several DNA "indicators" on it that were consistent with Petitioner's DNA profile. (Id.:120-58). Petitioner had prior Florida felony convictions for selling cocaine and heroin and unlawfully possessing a firearm. (Id.:193-95). Because of those convictions, he was not lawfully authorized to possess a firearm or ammunition on February 24, 2014 (Id.:194).

After three days of trial (CR DE# 120), the jury found Petitioner guilty of the superseding indictment, as charged. (CR DE# 122, 123).

Prior to sentencing, a Presentence Investigation Report was prepared, setting the movant's base offense level at 38, for an offense involving at least 8.5 kilograms of cocaine base, violation

of 21 U.S.C. §§841(a)(1) and 846, pursuant to U.S.S.G. §2D1.1 (2013). (PSI ¶26). Because petitioner maintained a premises for the purpose of manufacturing or distributing a controlled substance, his base level was increased by 2 levels, §2D1.1(b)(12). (PSI ¶27). Because Petitioner was a manager or supervisor, a three level role adjustment was added, §3B1.1(b). (PSI ¶29). The PSI included chapter four enhancements because the Petitioner was a career offender and an armed career criminal. (PSI ¶32). The PSI relied on prior convictions for selling cocaine with intent at a school in case no. F03-8696, resisting an officer with violence in case no. F07-33148, and selling cocaine and heroin with intent in case no. F09-36977. (PSI ¶32). The total offense level was set at 43. (PSI ¶34).

Petitioner had a total of 12 criminal history points. (PSI ¶52). Because Petitioner was a career offender and an armed career criminal, the criminal history category was VI, §4B1.1(b). (PSI ¶53).

Statutorily, as to Counts 1 and 3, the maximum term of imprisonment was 30 years, 21 U.S.C. §§841(b)(1)(C) and 851; as to Count 4, the term of imprisonment was 15 years to life, 18 U.S.C. §924(e)(1); as to Count 5, the term of imprisonment was five years and to life, 18 U.S.C. §924(c)(1)(A)(i). (PSI ¶95). The court was required to impose a consecutive term as to Count 5. (PSI ¶96). Based upon a total offense level of 43 and a criminal history category of VI, the guideline imprisonment range was 360 months' to life imprisonment. (PSI ¶97). Pursuant to §5G1.2(d), if the sentence imposed on the count carrying the highest statutory maximum was less than the total punishment, then the sentence imposed on one or more of the other counts was to run consecutively, but only to the extent necessary to produce a

combined sentence equal to the total punishment. In all other respects, sentences on all counts were to run concurrently, except to the extent otherwise required by law. (PSI ¶98).

Defense counsel filed objections to the PSI and a motion for new trial. (Cr DE# 147, 143).

The movant appeared for sentencing on October 30, 2014. (Cr-DE# 175, Sentencing Hearing). The court ruled that after having considered all of the arguments advanced by the parties, the written memoranda, the §3553 factors, the court sentenced petitioner to 280 months' imprisonment, followed by six years of supervised release. (Id.:47). The formal, written Judgment was entered on the docket on October 30, 2014. (Cr-DE#153). In the final judgment, the court denied the motion for new trial. (Id.). Movant prosecuted a direct appeal. (Cr-DE#154).

On appeal, movant argued that his conviction was "impermissibly tainted by improper remarks by the government and extraneous influences on the jury." United States v. Humbert, 632 Fed. Appx. 542 (11 Cir. 2015). On **November 23, 2015**, the Eleventh Circuit Court of Appeals affirmed the judgment of conviction in a written, unpublished opinion. Id. No certiorari review was filed.

Thus, the movant's judgment of conviction became final on **Monday, February 22, 2016,**[2] when the 90-day period for seeking

[2]Under Fed.R.Civ.P. 6(a)(1), "in computing any time period specified in ... any statute that does not specify a method of computing time ... [the court must] exclude the day of the event that triggers the period[,] count every day, including intermediate Saturdays, Sundays, and legal holidays[, and] include the last day of the period," unless the last day is a Saturday, Sunday, or legal holiday. Where the dates falls on a weekend, the Undersigned has excluded that day from its computation.

certiorari review with the U.S. Supreme Court expired.[3] The movant had one year from the time his judgment became final, or no later than **Wednesday, February 22, 2017**, within which to timely file this federal habeas petition. Applying the anniversary method[4] to this case means movant's limitations period expired on **February 22, 2017.**

The movant returned to this court, filing the instant motion to vacate, with supporting memorandum, on **September 8, 2016**, after he signed and handed it to prison authorities for mailing, in accordance with the mailbox rule, as evidenced by the prison mail stamp.[5] (Cv-DE#1:14). He filed a supplement to the motion on October 5, 2016 (Cv DE# 7) and January 27, 2017 (Cv DE# 13).

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[3]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v. Kaufman, 282 F.3d 1336 (11th Cir. 2002); Wainwright v. Sec'y Dep't of Corr's, 537 F.3d 1282, 1283 (11th Cir. 2007) (conviction final under AEDPA the day U.S. Supreme Court denies certiorari, and thus limitations period begins running the next day). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

[4]See Downs v. McNeil, 520 F.3d 1311, 1318 (11 Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11 Cir. 2007) (this court has suggested that the limitations period should be calculated according to the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10 Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7 Cir. 2000)); see also 28 U.S.C. §2255.

[5]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

IV. Threshold Issues-Timeliness

The movant's §2255 motion to vacate, supporting memorandum, and supplement to the motion were filed on September 8, 2016, October 5, 2016, and January 27, 2017, respectively. All three were timely filed before the expiration of the one-year limitation period on **February 22, 2017**. Petitioner, therefore, raised all nine claims in a timely manner.

V. General Legal Principles

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. 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). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent ...."

The movant raises multiple claims challenging counsel's

effectiveness during all stages of the proceeding. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When assessing counsel's performance under Strickland, the Court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance ...." Burt v. Titlow, ___ U.S. ___, 134 S.Ct. 10, 18, 187 L.Ed.2d 348 (2013). To prevail on a claim of ineffective assistance of counsel, the movant must demonstrate (1) that his counsel's performance was deficient, i.e., the performance fell below an objective standard of reasonableness, and (2) that he suffered prejudice as a result of that deficient performance. Strickland, 466 U.S. at 687-88.

To establish deficient performance, the movant must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. Strickland, supra. See also Cummings v. Sec'y for Dep't of Corr's, 588 F.3d 1331, 1356 (11th Cir. 2009)("To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place.")(internal quotation marks omitted). The Court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000)(*en banc*), cert. den'd, 531 U.S. 1204 (2001)(quoting Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638

(1987)). There are no absolute rules dictating what is reasonable performance because absolute rules would restrict the wide latitude counsel have in making tactical decisions. Id. at 1317. The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Chandler, 218 F.3d at 1313. Instead, the test is whether what counsel did was within the wide range of reasonable professional assistance. Id. at 1313 n.12.

Regarding the prejudice component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Strickland, 466 U.S. at 689. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs. Stickland, 466 U.S. at 697. See also Brown v. United States, 720 F.3d 1316, 1326 (11 Cir. 2013); Butcher v. United States, 368 F.3d 1290, 1293 (11 Cir. 2004). Further, counsel is not ineffective for failing to raise non-meritorious issues. Chandler v. Moore, 240 F.3d 907, 917 (11 Cir. 2001). Moreover, counsel is not required to present every non-frivolous argument. Dell v. United States, 710 F.3d 1267, 1282 (11 Cir. 2013).

A court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional

assistance." Strickland, 466 U.S. at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Id. at 690-91. To uphold a lawyer's strategy, the Court need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. No lawyer can be expected to have considered all of the ways. Chandler, 218 F.3d at 1316.

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance. Smith v. White, 815 F.2d 1401, 1406-07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d 1320, 1333-34 (11th Cir. 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir. 2012) (citing Yeck v. Goodwin, 985 F.2d 538, 542 (11th Cir. 1993)); Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990) (citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 F. App'x 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. Williamson v. Moore, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle, 480 F.3d at 1099 (quoting Adams v.

Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but was counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992).

As will be demonstrated in more detail below, the movant is not entitled to vacatur on the claims presented.[6] When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the movant a fundamentally trial and due process of law. The movant therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9th Cir. 1999) (holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the movant's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

VI. Discussion

[6]Briefly, the evidence against the movant was more than sufficient to support his conviction. The movant has not shown that the result of the trial or appeal would have been affected had counsel proceeded differently. Further, no denial of due process has been demonstrated. To the contrary, it is clear after independent review of the record that the movant received a fair trial, and that no constitutional violations occurred. Even if constitutional violations did occur, it did not rise to the level that it would warrant the grant of a new trial. Consequently, he has failed to demonstrate that he is entitled to relief in this collateral proceeding.

Under **claim 1**, Petitioner alleges ineffective assistance of counsel, where his lawyer failed to object to the admissibility of jailhouse recordings (Cv DE# 1:4; Cv DE# 7:10).

Contrary to Petitioner's argument, defense counsel expressly objected to the introduction of the jailhouse recordings at trial to establish conspiracy. Specifically, defense counsel filed a motion *in limine* to exclude hearsay statements contained in the jailhouse records. (Cr DE# 77). The government filed a response in opposition. (Cr DE# 80, 90). The parties disputed whether the recordings made by Petitioner's co-defendant, Norris, in jailhouse recordings were admissible under the co-conspirator exception to the hearsay rule. The parties both relied on United States v. Miles, 290 F.3d 1341, 1351 (11th Cir. 2002) ("In order for evidence to be admissible under Rule 801(d)(2)(E), the government must prove by a preponderance of the evidence: (1) that a conspiracy existed; (2) that the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) that the statement was made during the course and in furtherance of the conspiracy."). Siding with the government, the District Court issued an order denying the motion *in limine*. (Cr DE# 110). Counsel's performance was not deficient as counsel did in fact object to the evidence about which Petitioner complains under claim 1. Petitioner's argument is refuted by the record.

Furthermore, there is no basis to conclude that trial counsel was ineffective on the basis of the Confrontation Clause. In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court considered how hearsay, particularly "testimonial" hearsay, impacts a defendant's right to confront the witnesses against him. Crawford, 541 U.S. at 53. The Court distinguished between

testimonial hearsay, out-of-court statements of an accuser bearing witness against the defendant, and non-testimonial hearsay, such as co-conspirator statements. Crawford, 541 U.S. at 51, 68, 124 S. Ct. at 1364, 1374.

The Supreme Court has cautioned that "'[t]he Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a non-testifying declarant simply because it in some way incriminates the defendant.'" United States v. Arias, 984 F.2d 1139, 1142 (11th Cir. 1993) (quoting Parker v. Randolph, 442 U.S. 62, 73, 99 S. Ct. 2132, 2139 (1979)).

The jailhouse statements at issue were not made with the primary purpose of aiding in a criminal investigation, as they were from private conversations. See Davis v. Washington, 547 U.S. 813, 821-22 (2006). Because the jailhouse statements were not uttered to aid a criminal investigation, they are non-testimonial and were admissible under the Confrontation Clause. See Whorton v. Bockting, 549 U.S. 406, 413-14 (2007) (noting that non-testimonial hearsay is not governed by the Confrontation Clause); United States v. Caraballo, 595 F.3d 1214, 1227 (11th Cir. 2010); United States v. Rodriguez, 591 Fed. Appx. 897, 901 (11th Cir. January 21, 2015); United States v. Thompson, 568 Fed. Appx. 812, 817 (11th Cir. 2014) (Noting defendant's text messages did not fall under any category defining a testimonial statement. "They were not made in affidavits, depositions, prior testimony, or during a police interrogation. Nor were they made under circumstances that would lead Wadley to believe that the statements would be used at a later trial; indeed, Wadley would have never sent these incriminating messages had he anticipated their future use in a court of law."); United States v. Vasquez, 766 F.3d 373, 379 (5th Cir. 2014).

Here, the jailhouse conversations did not constitute testimonial statements, therefore, these conversations were not subject to exclusion under the Confrontation Clause.

Under **claim 2**, Petitioner alleges ineffective assistance of counsel, where his lawyer misadvised him regarding his right to testify. (Cv DE# 1:5, Cv DE# 7:11).

It is well settled that a criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. Rock v. Arkansas, 483 U.S. 44, 49-52 (1987); United States v. Teague, 953 F.2d 1525, 1532 (11 Cir. 1992) (en banc). This right is personal to the defendant, and cannot be waived by the trial court or defense counsel. Teague, supra; Brown v. Artuz, 124 F.3d 73, 77-78 (2nd Cir. 1997). The proper vehicle for an argument that a defendant's right to testify was violated by her trial counsel is a claim of ineffective assistance of counsel, which requires analysis under Strickland v. Washington, 466 U.S. 668 (1984). Gallego v. United States, 174 F.3d 1196 (11th Cir. 1999) (citing Teague, 953 F.2d at 1534); Brown, 124 F.3d at 79-80; Sexton v. French, 163 F.3d 874, 882 (4th Cir.), cert. den'd, 120 S.Ct. 139 (1999). United States v. Tavares, 100 F.3d 995, 998 (D.C. Cir. 1996).

In Teague, supra, the Eleventh Circuit held that an attorney who refused to accept the defendant's decision to testify, or failed to inform him/her of his/her absolute right to testify "would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected," and counsel's action would not have fallen "within the range of competence demanded of attorneys in criminal cases." 953 F.2d at 1534 (quoting Strickland v. Washington, supra). The Teague court,

having the benefit of testimony from an evidentiary hearing on the defendant's motion for a new trial, found that counsel's performance had not been deficient, and therefore did not address the prejudice prong of the Strickland analysis. Teague, 953 F.2d at 1535.

Not all assertions of ineffective assistance of counsel with regard to the right to testify or not testify warrant an evidentiary hearing. Underwood v. Clark, 939 F.2d 473, 476 (7 Cir. 1991)(barebones assertion by a defendant is insufficient to require a hearing on a claim that the right to testify was denied, greater particularity and some substantiation such as an affidavit from the lawyer who allegedly forbade his client to testify are necessary to give the claim sufficient credibility to warrant a further investment of judicial resources)(emphasis added); Siciliano v. Vose, 834 F.2d 29 (1 Cir.1987)(defendant's conclusory allegation that his attorney refused to allow him to testify in his own behalf was insufficient to entitle him to hearing on issue of whether his right to testify was violated); Passos-Paternina v. United States, 12 F. Supp. 231, 239-40 (D. Puerto Rico 1998). No such affidavit has been provided by the movant here.

The Fourth Circuit has held that a hearing was not necessary where the defendant suffered no prejudice under Strickland, supra, because "his testimony at trial only helped his case...." Sexton v. French, 163 F.3d 874, 883 (4 Cir. 1998), cert. den'd, 120 S.Ct. 139 (1999). As stated, the Eleventh Circuit has not determined whether a conclusory allegation of interference with the right to testify is sufficient to warrant further inquiry, such as the grant

of a hearing.[7] See, e.g. Brown, 124 F3.d at 80. However, the Eleventh Circuit case law is also clear that an evidentiary hearing on a §2255 ineffective-assistance claim should be held only when the movant asserts facts that, if true, warrant habeas relief. See Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). The court need not hold an evidentiary hearing when the claims are frivolous, are unsupported conclusory allegations, or are contradicted by the record. Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989).

In addition, it is also clear that a movant must prove prejudice in order to be entitled to relief on such a claim. See Teague, supra. In order to satisfy the prejudice prong, the movant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra. at 694. In other words, the movant must prove "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687; see also, Lockhart v. Fretwell, 506 U.S. 364, 369 (1993), citing, Kimmelman v. Morrison, 477 U.S. 365 (1986) ("The essence of an ineffective assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.").

In Fretwell, the Supreme Court also concluded that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally

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[7]In Gallego v. United States, 174 F.3d (11 Cir. 1999) the Court rejected a "*per se* credit counsel in case of counsel rule," with regard to credibility findings in evidentiary hearings, but does not address the issue of when a hearing is actually required.

unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Fretwell, supra at 369, citing, United States v. Cronic, 466 U.S. 648, 653 (1984). The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding, and "in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'" Fretwell, supra at 370, citing, Strickland, supra at 695.

After the government presented its evidence, the following exchange took place:

> THE COURT: Please raise your right hand, Mr. Humbert.
>
> (The Defendant was sworn.)
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And, Mr. Humbert, you understand that as the accused in this trial, you enjoy the constitutional right to remain silent. You don't have to take the witness stand and become a witness.
>
> DEFENSE COUNSEL: Your Honor, he just was conferring with me about what you were talking about, I'm sorry.
>
> THE COURT: All right. Let me start, again.
>
> THE DEFENDANT: Okay.
>
> THE COURT: I am going to be asking you whether you intend to testify in your trial or not, and I need to have certain answers on the record.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: All right?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. So as the accused in the trial, you enjoy the constitutional right to remain silent, you don't have to testify. And if you don't testify, the jury cannot hold that against you. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Similarly, as the accused in this trial, you have a right to become a witness, take the witness stand and tell the jury your version of the events. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: It is your choice and yours alone to make whether to testify or to remain silent. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you feeling any pressure whatsoever from either or both of your attorneys with regard to this decision that only you can make?

THE DEFENDANT: No, ma'am.

THE COURT: And what decision are you making in this regard?

THE DEFENDANT: The right to remain silent.

THE COURT: Okay. Are you feeling any pressure from anyone to make that choice?

THE DEFENDANT: No, ma'am.

THE COURT: You understand that even if your attorneys strongly advise you not to testify because, for example, your prior criminal record can be brought to light with the jury and, for example, you can be vigorously cross-examined by the prosecution, that you can insist to your attorneys that you do want to testify, and if you so insisted, they would put you on the witness stand and elicit answers from you?

THE DEFENDANT: Yes, ma'am.

(Cr DE# 172:9-9).

The Petitioner's sworn answers to the court refute his current claim that his decision not to testify was made involuntarily due to pressure from his defense counsel. Moreover, the movant's claim that counsel threatened or otherwise prevented him from testifying during trial is totally self-serving and not supported by any affidavit from counsel.[8] Movant has come forward with no evidence to support his self-serving declarations in support of this claim. Under the totality of the circumstances present here, movant is entitled to no relief on this claim. Therefore, relief is not warranted.

Under **claim 3**, Petitioner alleges ineffective assistance of counsel, where his lawyer failed to object to the drug quantity. (Cv DE# 1:7; Cv DE# 7:16).

In calculating the base offense level, the PSI determined that Petitioner was responsible for at least 8.4 kilograms of cocaine base. (PSI ¶26). In objections to the PSI, defense counsel asserted as follows:

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[8]See, e.g., White v. United States, 99 Ci. 11809, 2000 WL 546426 at *5 (S.D.N.Y. 2000) (Where movant asserted that held his counsel that he wanted to testify, but counsel rested the defenses case without calling movant, court found that movant's affidavit "fail[ed] to substantiate his allegation that trial counsel's performance was deficient." "'[T]he defendant must produce something more than a bare, unsubstantiated, thoroughly self-serving, and none too plausible statement that his lawyer (in violation of professional standards) forbade him to take the stand.'", quoting, United States v. Castillo, 14 F.3d 802, 805 (2nd Cir.), cert. den'd, 513 U.S. 829 (1994); see also, e.g., Jeffries v. United States, 234 F.3d 1268 (6th Cir. 2000) (table) (Movant "has not shown that counsel's performance was deficient as he merely made conclusory, self-serving allegations that his attorney refused to let him take the stand."); Torres v. Stinson, 2000 WL 1919916 at *5 (E.D. N.Y. 2000) ("A barebones assertion by a defendant that his counsel failed to inform him of his rights is insufficient to establish an ineffective assistance of counsel claim under Strickland.").

THE OFFENSE, Specific Offense Characteristics: Paragraph 26

The defendant objects to the Base Offense Level calculated at 38 for an offense involving 8.5 kilograms of cocaine base. The jury never decided the amount of drugs for which the defendant was responsible and thus, was not given an opportunity to make a finding that increased the defendant's minimum mandatory sentence. See Alleyne v. United States, --- U.S. ----, 133 S.Ct. 2151 (2013). As charged, the indictment simply reads: substance with a detectible amount of crack cocaine.

The evidence presented at trial was that the officers recovered 20 Ziplock bags containing a total of 1.2 rocks and two separate baggies, each containing 0.1 grams of cocaine. Thus the total amount recovered was 1.4 grams of crack cocaine.

Antonio Norris gave an estimate of drugs he thought might have been sold during the time he worked at 1232, the jury was never provided a verdict form with which to render a verdict on the applicable amount.

The issue of whether the defendant is responsible for the 1.4 grams of crack or Norris' estimate is an element which increases the defendant's mandatory minimum and as such, a jury should have made a specific finding regarding what the government proved. Without it, the defendant should not be sentenced to the amount which increases his mandatory minimum sentence. In Alleyne, supra, the Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct at 2155. The jury did not make a finding that the defendant was, in fact, responsible for a specific amount of drugs. As such, the court should not base the applicable minimum mandatory sentence and penalty applying the 8.5 kilos as estimated by Norris.

Furthermore, in light of the recent recantations by Antonio Norris that he never actually worked for Gerald Humbert at 1232 and that he was the one that ran 1232, his "estimate" of 8.5 kilograms is unreliable and should not be the basis for establishing a Base Offense Level for Mr. Humbert.

(Cr DE# 147:5-6).

In its response in opposition to the objections, the government asserted:

> The defendant's offense level has been calculated due to the amount of cocaine base assessed as relevant conduct. As the defendant has not been assessed a minimum mandatory sentence on the basis of drug quantity, Humbert's reliance on Alleyne v. United States is in error. 133 S.Ct. 2151 (2013).

(Cr DE# 148:5).

Petitioner concedes that his counsel raised the issue in the written objections but takes issue with counsel's failure to elaborate on this argument at the sentencing hearing and on appeal. Defense counsel properly presented this argument to the District Court in the written objections. The court declined to accept this argument when imposing the sentence. The trial counsel's performance was not deficient because trial counsel properly presented this issue to the district court.

It is true that appellate counsel did not raise this, properly preserved, issue on direct appeal. However, appellate counsel has no duty to raise nonmeritorious issues on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987).

"For sentencing purposes a member of a drug conspiracy is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity." United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993) (citing U.S.S.G. § 1B1.3(a)(1)); see also United States v. Seymour, 519 F.3d 700, 710- 11 (7th Cir. 2008) (noting for a conviction of

conspiring to traffic narcotics, a sentencing court can include not only the drugs the defendant directly sold or knew about, but can also include the "reasonably foreseeable quantity of drugs sold by his or her coconspirators" in its calculation of drug quantity attributable to the defendant); United States v. Crawford, 407 F.3d 1174, 1178-79 (11th Cir. 2005) (noting that district courts are obliged to consider conduct uncharged, but relevant, to calculate the advisory guideline range); United States v. Knight, 213 Fed. Appx. 835, 838 (11th Cir. 2007) (citing United States v. Ignancio Munio, 909 F.2d 436, 438-39 (11th Cir. 1990)) ("It is well-settled that the district court may hold a defendant accountable for additional amounts of drugs involved in the conspiracy, but not charged in the indictment, as relevant conduct.").

In this case, the District Court's conclusion that Petitioner was responsible for 8.5 kilograms of cocaine base was supported by the evidence introduced at trial, specifically, the testimony of Petitioner's co-defendant, Mr. Norris. Appellate counsel was not ineffective in failing to raise this issue. It follows that Petitioner is not entitled to relief under this claim.

Under **claim 4**, Petitioner alleges ineffective assistance of counsel, where his lawyer failed to object to the Armed Career Criminal and Career Offender enhancements. (Cv DE# 1:8; Cv DE# 7:17).

Armed Career Criminal Enhancement

Pursuant to U.S.S.G. §4B1.4(a), if a defendant is subject to an enhanced sentence under 18 U.S.C. §924(e), he is considered an armed career criminal under the sentencing guidelines. Because the movant here committed the offense of conviction, a violation of

§922(g)(1) and §924(e), his offense level was increased by the probation officer to a level 43. (PSI ¶34).

The guidelines make clear that a violation of 18 U.S.C. §924(e)(1), subjects a defendant to an enhanced ACCA sentence, if the offense of conviction is a violation of 18 U.S.C. §922(g) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. See U.S.S.G. §4B1.4 app.n.1. The terms "violent felony" or "serious drug offense" are defined in 18 U.S.C. §924(e)(2).

The PSI relied on two felony convictions for the distribution of cocaine and one felony conviction for resisting arrest with violence. (PSI ¶32, 39, 43, 48).

Pertinent to this case, the ACCA defines "violent felony" as any crime punishable by imprisonment for a term exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, ***or otherwise involves conduct that presents a serious potential risk of physical injury to another....***

18 U.S.C. §924(e)(2)(B) (emphasis added); see also, In re Robinson, 822 F.3d 1198, at *1 (11 Cir. Apr. 19, 2016). The Eleventh Circuit in Robinson explained the definition of violent felony, as follows:

First, §924(e)(2)(B)(i) covers any offense that 'has as

> an element the use, attempted use, or threatened use of physical force against the person of another. This is known as the 'elements clause.' Second, §924(e)(2)(B)(ii) covers any offense that 'is burg-lary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.' The first 9 words of that subsection are called the 'enumerated crimes clause,' and the last 13 are called the 'residual clause.'

In re Robinson, 822 F.3d 1196, 1197 (11th Cir. 2016).

On June 26, 2015, the United States Supreme Court struck down the italicized clause above, known as the "residual clause," as void-for-vagueness, under the Due Process Clauses of the Fifth and Fourteenth Amendments. See Johnson, 576 U.S. ___, ____, 135 S.Ct. 2551, 2557, 192 L.Ed.2d 569 (2015). The Supreme Court explained that the void-for-vagueness doctrine prohibits the government from imposing sanctions "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standard less that it invites arbitrary enforcement." Johnson, 576 U.S. at ____, 135 S.Ct. at 2556. Therefore, the Supreme Court concluded that an increase in defendant's sentence under the residual clause denies him due process. Johnson, 576 U.S. at ____, 135 S.Ct. at 2557. As a result, Johnson "narrowed the class of people who are eligible for" an increased sentence under the ACCA. In re Rivero, 797 F.3d 986 (11th Cir. 2015)(citing Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1278 (11th Cir. 2013)).

However, the Supreme Court did not invalidate the ACCA's elements clause or enumerated crimes clause. Johnson, 576 U.S. at ____, 135 S.Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). Moreover, on April 18, 2016, the Supreme Court announced that

Johnson is "a substantive rule that has retroactive effect in cases on collateral review." Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257, 1268 (2016). Neither party refers to Johnson in these proceedings.

A person commits the Florida felony offense of **resisting an officer with violence** if he "knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, by offering or doing violence to the person of such officer...." Fla. Stat. §843.01; see also, United States v. Romo-Villalobos, 674 F.3d 1246, 1249 (11th Cir. 2012)(concluding that the Florida offense of resisting an officer *with* violence qualifies as a violent felony because Florida law provides that "Whoever knowingly and willfully resists, obstructs, or opposes any officer ... in the lawful execution of any legal duty, *by offering or doing violence* to the person of such officer ... is guilty of a felony of the third degree ...."(emphasis in original).

The Eleventh Circuit has made clear that a Florida conviction for resisting an officer with violence, in violation of Fla.Stat. §843.01, constitutes a violent felony under the ACCA elements clause. See United States v. White, ___ Fed.Appx. ___, 2018 WL 577013 (11 Cir. Jan. 29, 2018); see also, United States v. Baez, ___ Fed.Appx. ____, 2017 WL 6616801, at *2 (11th Cir. Dec. 28, 2017); United States v. Romo-Villalobos, 674 F.3d 1246, 1251 (11 Cir. 2012); United States v. Hill, 799 F.3d 1318, 1322-23 (11th Cir. 2015). Therefore, this prior Florida conviction was properly used to support the movant's ACCA enhancement.

The ACCA defines "serious drug offense" as:

(ii) an offense under State law, involving

> manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. §922(e)(2)(A)(ii).

Petitioner has **two prior drug convictions** under Fla. Stat. §893.13(1). The Eleventh Circuit has held that a conviction under §893.13(1) is a "serious drug offense" as defined under §924(e)(2)(A). United States v. Smith, 775 F.3d 1262, 1268 (11 Cir. 2014). See also United States v. Moss, 592 Fed.Appx. 914, 916 (11 Cir. 2015). As a result, the District Court properly relied on these two convictions when imposing the ACCA enhancement.

Under the totality of the circumstances present here, given the foregoing, it is evident that the movant has at least three prior qualifying predicate offenses to support the ACCA enhancement.

Career Offender Enhancement

Section 4B1.1 of the Sentencing Guidelines provides that a defendant is classified as a career offender if (1) he was at least 18 years old at the time of the offense of conviction; (2) the offense of conviction was either a crime of violence or a controlled-substance offense; and (3) he had at least two prior felony convictions of either a crime of violence or a controlled-substance offense. U.S.S.G. §4B1.1(a). In pertinent part, a "controlled substance offense" is "an offense under federal or state law, punishable by imprisonment for a term exceeding one

year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance ... or the possession of a controlled substance ... with intent to manufacture, import, export, distribute, or dispense." See U.S.S.G. §4B1.2(b).

Under Florida law, it is unlawful to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. §893.13(1)(a). For offenses under Fla.Stat. §893.13 committed after 2002, "knowledge of the illicit nature of a controlled substance is not an element of [the] offense." Fla.Stat. §893.101(2). Therefore, a defendant may be convicted under §893.13(1)(a) even if he was unaware the substance he possessed was a controlled substance. See Id. Moreover, the Eleventh Circuit has previously held that convictions under Fla. Stat. §893.13(1) qualify as "serious drug offenses" for purposes of the ACCA and "controlled substance offenses" for purposes of the career-offender guidelines, despite the lack of a mens rea element in §893.13, because neither the ACCA definition of "serious drug offense" nor the Guidelines definition of a "controlled substance offense" includes a mens rea element regarding the illicit nature of the controlled substance. United States v. Smith, 775 F.3d 1262, 1267-68 (11 Cir. 2014). As is noted above, Petitioner had two prior convictions for serious drug offenses.

Thus, movant's suggestion that his prior convictions no longer categorically support his enhanced sentence is without merit. As discussed above, the movant's prior drug convictions categorically count as serious drug offenses under the Guidelines. His arguments to the contrary are foreclosed by the Eleventh Circuit's decision in United States v. Smith, 775 F.3d 1262, 1264-68 (11 Cir. 2014)(finding Fla.Stat §893.13(1) is a serious drug offense); see also, United States v. Cobb, 842 F.3d 1213, 1223 (11 Cir.

2016) (Rejecting argument that conviction for possession with intent to sell or deliver under Fla.Stat. §893.13(1) does not qualify as a serious drug offense as being foreclosed by United States v. Smith, supra). Thus, as applied here, movant's arguments to the contrary are devoid of merit. Further, his generalized, conclusory claim that counsel was ineffective during sentencing, without specifying any reasons in support thereof, also does not warrant relief. See Strickland v. Washington, 466 U.S. 668 (1984). Here, if he means to suggest counsel should have anticipated the arguments postured herein and raised them at sentencing, even if counsel had done so, no showing has been made here that the court would have granted the relief requested. Consequently, movant cannot establish either deficient performance or prejudice under Strickland in connection with his career offender enhancement.

Under **claim 5**, Petitioner alleges ineffective assistance of counsel, where his lawyer failed to object to the DNA evidence. (Cv DE# 1:10; Cv DE# 7:18).

Petitioner points to an April 1, 2014 status conference in support of his claim. (Cv DE# 7:18). At that status conference, the government informed the court that DNA analysis was ongoing. (Cr DE# 24, Exhibit A, 4/1/14 Status Conference Transcript, p. 3). Defense counsel argued that she had not learned of the search warrant until March 31, 2014 and she orally objected to the collection of her client's DNA. (Id.:3-4). Counsel noted that she was not present at the hearing before the magistrate judge during which the government obtained the warrant to collect Petitioner's DNA. (Id.:4). The court stated that because defense counsel was not notified of the proceedings before the magistrate judge, the results of the search may not be admissible. (Id.:5).

Following the status conference, the government filed a motion for reconsideration and, in the alternative, to compel a DNA sample. (Cr DE# 24). The government moved the court to reconsider its prior ruling suppressing evidence resulting from the execution of the DNA search warrant. (Id.:5-6). The court entered an order granting the motion and holding that the "results of the search warrant for the Defendant's DNA are admissible at trial." (Cr DE# 32).

Pursuant to Federal Rule of Criminal Procedure 41, generally United States Magistrate Judges, or a state judge of record in the District if a Magistrate Judge is not reasonably available, issue search warrants. See Fed.Rule.Crim.Pro. 41(b)(1-5).

"Search warrants are ordinarily required for searches of dwellings, and, absent emergency, no less could be required where intrusions into the human body are concerned." Schmerber v. California, 384 U.S. 757, 770 (1966). Here, the intrusion into Petitioner's body did not involve an emergency. Accordingly, the Government could secure search warrants post-indictment. See United States v. De Parias, 805 F.2d 1447, 1456-57 (11th Cir. 1986) (finding a District Court's post-indictment order compelling the defendant to provide hair samples was proper as the government's motion was supported by probable cause), overruled on other grounds by United States v. Kaplan, 171 F.3d 1351 (11th Cir. 1999).

In De Parias, 805 F.2d 1447, the Court noted that although styled in the form of a motion, the government provided a sworn affidavit in support of its request for hair samples. The Eleventh Circuit found that the procedure complied with the Fourth Amendment, after citing to the Seventh Circuit's opinion in United States v. Andersen which upheld a post-indictment search warrant

application for a hair sample. Id. at 1456 ("In United States v. Andersen, 739 F.2d 1254, 1256- 57 (7th Cir. 1984), the court held that a similar post-indictment affidavit established probable cause to support a search warrant compelling the production of a hair sample."). Similar to the procedure approved in Andersen, in the instant matter, the Government sought a search warrant pursuant to Federal Rule of Criminal Procedure 41 to obtain the Petitioner's saliva sample post-indictment.

As noted by other Courts, "[t]he fact that the Defendant[] [was] charged with crimes prior to the Government's efforts to obtain" DNA "is of no moment since '[t]he power to issue warrants for search and seizure does not terminate in a given case with the bringing of an indictment.'" United States v. Flanders, 2010 WL 3702512, *3 (D.V.I. 2010) (quoting United States v. Allen, 337 F. Supp. 1041, 1043 (D.C. Pa. 1972). Under Rule 41(b)(1), with certain exceptions not applicable here, a search warrant must be issued by a Magistrate Judge. This is the case both pre- and post-indictment. See Flanders, 2010 WL 3702512, at *3.

Petitioner was indicted on March 7, 2014. (Cr DE# 7). On March 13, 2014, the government sought a search warrant authorizing the collection of Petitioner's DNA pursuant to Rule 41 by presenting the warrant application to the duty Magistrate Judge, who authorized the collection of Petitioner's DNA. In light of the foregoing law, the actions taken by the government did not render the DNA evidence inadmissible. It follows that the district court properly granted the government's motion for reconsideration.

Defense counsel clearly objected to the DNA evidence at the trial court level. To the extent Petitioner is arguing that his counsel was ineffective for failing to raise this issue on appeal,

his argument also fails. Appellate counsel has no duty to raise nonmeritorious issues on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). Petitioner is not entitled to relief on this ground.

Under **claim 6**, Petitioner alleges ineffective assistance of counsel, where his lawyer failed to object to the conspiracy charge. (Cv DE# 1:10; Cv DE# 7:22-23). Under **claim 9**, Petitioner alleges ineffective assistance of counsel, in connection with the motion for new trial regarding the conspiracy charge (Cv DE# 13). These issues are related in that Petitioner is challenging counsel's arguments regarding the sufficiency of the government's evidence of drug conspiracy.

Petitioner's claim is refuted by the record. Trial counsel argued repeatedly that the evidence was insufficient to support a conspiracy conviction.

In moving for a judgment of acquittal, defense counsel stated, "as to each count" including the conspiracy count, "there is not sufficient evidence that a jury could find beyond a reasonable doubt that Mr. Humbert is guilty." (Cr DE# 171:3). Defense counsel again asserted the evidence was insufficient to support a conspiracy conviction when renewing the motion for judgment of acquittal. (Cr DE# 171:19). The court denied both motions. (Id.).

Defense counsel also challenged the evidence put forth by the government to prove conspiracy when cross-examining law enforcement witnesses (Cr DE# 170:157-58), witnesses who allegedly purchased drugs from Petitioner (Cr DE# 170:258), and the government's cooperating witness (Cr DE# 171:4-10, 27, 31, 55). Defense counsel also strongly challenged the jailhouse phone call evidence which

supported the conspiracy charge. (Cr DE# 171:25-39,43-52). As a result, Petitioner cannot establish that defense counsel's performance was deficient under Strickland.

With respect to Petitioner's claim that defense counsel was ineffective in connection with the motion for new trial, his claim also fails.

Federal Rule of Criminal Procedure 33(a) provides that, "upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." The Eleventh Circuit provided the relevant analysis when reviewing a trial court's decision whether to grant a motion for new trial:

> The decision to grant or deny a new trial motion based on the weight of the evidence is within the sound discretion of the trial court. An appellate court may reverse only if it finds the decision to be a clear abuse of that discretion. United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir.1980); United States v. Indelicato, 611 F.2d 376, 387 (1st Cir.1979). While the district court's discretion is quite broad, there are limits to it. The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. United States v. Simms, 508 F.Supp. 1188, 1202 (W.D.La.1980). The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand. Indelicato, 611 F.2d at 387; United States v. Sinclair, 438 F.2d 50, 51 n. 1 (5th Cir.1971) (quoting Wright, Miller & Cooper, Federal Practice and Procedure: Criminal §553, at 487). Motions for new trials based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really "exceptional cases." Lincoln, 630 F.2d at 1319; Indelicato, 611 F.2d at 387; Simms, 508 F.Supp. at 1202.

United States v. Martinez, 763 F.2d 1297, 1312-13 (11th Cir. 1985). See also United States v. Estrada-Lopez, 359 F.Supp. 3d 1358, 1371

(M.D. Fla. 2017).

In this case, defense counsel did in fact move for new trial, arguing that the evidence in support of the conspiracy charge was inadmissible. See (Cr DE# 143). The district court rejected this argument and denied the motion. (Cr DE# 153). In light of the above case law, it is unlikely that the district court's decision would have been overturned on direct appeal. Appellate counsel is not ineffective for failing to pursue a meritless claim. Petitioner is not entitled to relief under claims 6 or 9.

Under **claim 7**, Petitioner alleges ineffective assistance of counsel, where his lawyer failed to obtain a chemist laboratory analysis of the drugs (Cv DE# 1:10; Cv DE# 7:23-24).

In this case, the government disclosed the name of the its chemist expert witness to the defense. This chemist had tested the material found and determined it was cocaine base. Defense counsel stipulated to the results of the chemist's lab tests. Petitioner takes issue with counsel's decision not to fight the introduction of this evidence. However, Petitioner fails to present any evidence that the substance was not cocaine base. Furthermore, he cannot show that the stipulation prejudiced him because, had he refused to stipulate, the government would simply have called the chemist as a witness to testify that the substance tested positive for cocaine base. See also Mickle v. United States, No. 15-61094-CIV, 2016 WL 3235112, at *2 (S.D. Fla. June 9, 2016) ("Movant cannot show how the stipulation prejudiced him because the stipulation only stipulated that laboratory testing of the substances showed they were cocaine and cocaine base . . . if Movant had not entered into the stipulation, the government would have presented testimony of the lab technician who tested the substances."). Petitioner is not

entitled to relief under claim 7.

Under **claim 8**, Petitioner alleges ineffective assistance of counsel, where his lawyer failed to put forth a valid plant defense (Cv DE# 1:10; Cv DE# 7:25). In other words, that someone planted the gun on the Petitioner.

Petitioner's claim is refuted by the record. Trial counsel challenged the government's allegation that Petitioner was the source of the firearm through both cross-examination of witnesses who testified that Petitioner possessed the firearm and with arguments made directly to the jury. See (Cr DE# 172:42) ("So the question is, if he was able to find the money in the right-front pocket, how is it he could have missed the gun? He didn't. It wasn't there because he would never have put everyone's life in jeopardy and all of them saw him pat down Gerald Humbert.").

Trial counsel cannot be deemed ineffective for trying to present a theory through argument when all other evidence was contrary and refuted by the evidence. Thompson v. United States, 2009 WL 262859, at *9 (M.D. Ala. Feb. 4, 2009), aff'd, 368 F. App'x 930 (11th Cir. 2010) ("other aspects of the record previously discussed reflect that counsel had no reasonable basis for pursuing such a defense at the time of the revocation hearing."); see also Gonzales v. United States, 2014 WL 1329281, at *5 (N.D. Ala. Mar. 28, 2014) (finding no basis to conclude counsel was ineffective for failing to pursue planted evidence).

Even if counsel's obvious efforts to present a plant defense to the jury were insufficient, Petitioner cannot establish prejudice in that two witnesses testified that he possessed a firearm. See Strickland. He did not take the stand to refute these

witnesses. Petitioner is not entitled to relief under this claim.

Finally, it is noted that this court has considered all of the movant's grounds for relief. See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013)(citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, petitioner has failed to demonstrate that he is entitled to the relief requested. In other words, he has failed to satisfy Strickland's deficient performance and/or prejudice prong. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein, the claim was considered and found to be devoid of merit, warranting no specific discussion herein.[9]

VIII. Evidentiary Hearing

Movant is also not entitled to an evidentiary hearing on the remaining claims raised in this proceeding. Movant has the burden of establishing the need for an evidentiary hearing, and he/she would only be entitled to a hearing if his/her allegations, if proved, would establish his/her right to collateral relief. See Schriro v. Landrigan, 550 U.S. 465, 473-75, 127 S.Ct. 1933, 1939-40, 127 S.Ct. 1933 (2007)(holding that if record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary

[9]To the extent the movant attempts to raise new facts and new arguments in objections to this Report, it should be rejected by this court. As previously noted, "the district court may [and should] exercise its discretion and decline to consider the argument" or new facts. Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009)(citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009); see also, Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp.2d 168 (D.Me. 2004). "Parties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

hearing). See also Townsend v. Sain, 372 U.S. 293, 307 (1963); Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989) (citing Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979))(holding that §2255 does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner simply asserts a claim of ineffective assistance of counsel, and stating: "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted by the record.").

IX. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his/her petition for writ of habeas corpus 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, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner 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 a petitioner's constitutional claims on the merits, the petitioner 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). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding,

if petitioner does not agree, he/she may bring this argument to the attention of the district judge in objections.

X. Conclusion

For all of the foregoing reasons, is therefore recommended that this motion be DENIED on the merits; that no certificate of appealability issue; and, that the case be closed.

Objections to this report may be filed with the Chief Judge within fourteen days of receipt of a copy of the report.

SIGNED this 23rd day of April, 2018.

UNITED STATES MAGISTRATE JUDGE

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