APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 25-60014

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SHARARD COLLIER,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Mississippi
USDC No. 1:24-CV-189
USDC No. 1:19-CR-136-2

UNPUBLISHED ORDER

Before SMITH, GRAVES, and ENGELHARDT, *Circuit Judges*.

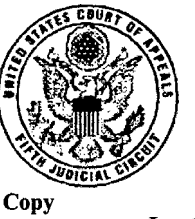
PER CURIAM:

Sharard Collier, federal prisoner # 21850-043, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion, challenging his conviction for conspiracy to possess with the intent to distribute 500 grams or more of methamphetamine. Collier argues that (a) he received ineffective assistance when his counsel (i) failed to file a

motion to dismiss the indictment based on various alleged defects; (ii) advised Collier to stipulate to various drug quantities during his rearraignment proceeding; (iii) failed to explain to him the consequences of pleading guilty, the elements necessary for the Government to prove in order to obtain a conviction, and that he would be entitled to a special jury verdict to determine drug quantity if he proceeded to trial; (iv) refused to allow him to review the Government's discovery; (v) failed to object to the district court's noncompliance with Federal Rule of Criminal Procedure 11(b)(1)(G); (vi) failed to request a pre-plea presentence report; and (vii) failed to object to the district court's amendment of the indictment during the rearraignment proceedings; (b) the district court denied him his right to counsel under the Sixth Amendment; (c) his standby counsel had a conflict of interest; and (d) he was denied his right to appeal when this court granted his motion to relieve his appellate counsel and proceed pro se on direct appeal.

A COA may issue only if the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court denies relief on the merits, an applicant must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Collier fails to meet the requisite standard. *See id.* His motion for a COA is DENIED. As Collier fails to make the required showing for a COA, we do not reach the issue whether the district court erred by denying his motion for an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).



A True Copy
Certified order issued Jun 16, 2025

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 7, 2025
Lyle W. Cayce
Clerk

No. 25-60014

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SHARARD COLLIER,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:24-CV-189

UNPUBLISHED ORDER

Before SMITH, GRAVES, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

This panel previously DENIED Appellant's motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 1:19CR136-LG-RPM**
CIVIL NO. 1:24CV-189-LG

SHARARD COLLIER

MEMORANDUM OPINION AND ORDER DENYING MOTION TO VACATE UNDER 28 U.S.C. § 2255

This is a § 2255 Motion to Vacate in which Defendant Sharard Collier alleges that ineffective assistance of counsel, his uniformed choice to proceed pro se, and judicial errors render his sentence null. The Court denies this Motion. Collier's assertions of ineffective assistance of counsel fail under a *Strickland* analysis. The Court's numerous warnings against proceeding pro se show Collier knowingly and intelligently decided to proceed pro se under *Faretta*. Collier's conflict of interest claim fails because standby counsel is not counsel under the Sixth Amendment. The Court will not address Collier's assertion that the Fifth Circuit violated his right to a Direct Appeal because the Court cannot reject Fifth Circuit rulings.

BACKGROUND

On December 2, 2020, Collier entered a plea of guilty to Count 1 of a two-count indictment. Collier violated 21 U.S.C. § 846 by conspiring to possess a controlled substance with intent to distribute. Throughout the case, no less than eight attorneys have represented Collier.[1]

[1] Three attorneys withdrew due to potential or actual conflicts of interest.

Collier filed a Motion to Withdraw Plea of Guilty, and the Court denied the Motion. [166]. The Court sentenced Collier to life imprisonment and five years of supervised release. Collier filed an appeal regarding the Judgment and sentence. The Fifth Circuit dismissed the appeal for want of prosecution and denied Collier's motion to reinstate the appeal. [232; 233]. Collier filed the present [234] Motion to Vacate under 28 U.S.C. § 2255. The parties have fully briefed the issues.

DISCUSSION

To succeed on a § 2255 motion, the movant must establish: "(1) his sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack." *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995) (citations omitted). Collier asserts that his Sixth Amendment right to effective assistance of counsel was violated by Mr. Seller's performance. Collier claims the Court also violated his Sixth Amendment right to counsel when the Court determined that he knowingly and intelligently waived his right to counsel. Collier further claims that when the Court allowed Mr. Harenski to remain as standby counsel at the sentencing hearing, it violated his Sixth Amendment right to counsel without a conflict of interest. Collier additionally asserts that his Fifth and Sixth Amendment rights were violated by the Fifth Circuit Deputy Clerk's entry of an order granting an appellate attorney's motion to withdraw.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

"A voluntary guilty plea waives all nonjurisdictional defects in the proceedings against the defendant." *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000) (citation omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *United States v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir. 1991) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). "This includes all [ineffective assistance of counsel] claims 'except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary.'" *United States v. Palacios*, 928 F.3d 450, 455 (5th Cir. 2019) (quoting *Glinsey*, 209 F.3d at 392).

The Sixth Amendment guarantees the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). "The Sixth Amendment right to counsel extends to the plea-bargaining process[.]" *Anaya v. Lumpkin*, 976 F.3d 545, 550 (5th Cir. 2020). The *Strickland* test "applies to challenges to guilty pleas based on ineffective assistance of counsel" ("IAC"). *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). There are two prongs to prove IAC under the *Strickland* test: (1) "counsel's performance was deficient because it fell below an objective standard of reasonableness[,]" and (2) "the deficient performance prejudiced the defense." *United States v. Lincks*, 82 F.4th 325, 330 (5th Cir. 2023) (citing 466 U.S. at 689–94). Collier's claims of IAC fail if he "cannot establish either" prong, and "a court need not evaluate both if he makes an

insufficient showing as to either." *Blanton v. Quarterman*, 543 F.3d 230, 235–36 (5th Cir. 2008) (citations omitted).

To determine deficiency "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. A court is highly deferential towards counsel's performance, and the defendant carries the burden to overcome the presumption that "the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case" at the time of the conduct. *Id.* at 690.

The second prong, prejudice at the guilty plea stage, turns on whether "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*, 474 U.S. at 59; *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) ("[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."). A court looks to the totality of the circumstances when determining prejudice under *Strickland*. *United States v. Kayode*, 777 F.3d 719, 725 (5th Cir. 2014). "The focus of this inquiry is on what motivated the individual defendant's decision-making." *United States v. Alston*, No. 21-30090, 2023 WL 3843071, at *6 (5th Cir. June 6, 2023) (per curiam) (citing *Lee v. United States*, 582 U.S. 357, 367 (2017)). A court "should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's

deficiencies." *Lee*, 582 U.S. at 369. Instead, a court looks "to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* The relevant factors may include: "[Collier's] evidence to support his assertion, his likelihood of success at trial, the risks [he] would have faced at trial, [his] representations about his desire to retract his plea, . . . and the district court's admonishments." *See Kayode*, 777 F.3d at 725.

Collier alleges that Mr. Sellers was ineffective because: (1) he failed to file for dismissal based on an alleged fatal defect in the indictment; (2) he advised Collier to stipulate the drug quantity and did not "insist" that Collier plead guilty without stipulating the drug quantity; (3) he failed to explain the plea consequences, discovery, and the elements; (4) he failed to object to the Court's alleged non-compliance with Fed. R. Crim. P. 11; (5) he failed to request a Pre-plea Presentence Investigation Report (PPSR); and (6) he failed to object to the alleged "Constructive and/or Literal Amendment" of the indictment during his plea colloquy. The Court will address each IAC argument and conduct the *Strickland* test, in turn.

1. Counsel's Failure to File for Dismissal Based on Alleged Fatal Defect in Indictment

This claim fails under the first prong because filing for dismissal would have been meritless, *see United States v. Lopez*, 749 F. App'x 273, 276 (5th Cir. 2018) (citation omitted), as the indictment met the minimum constitutional standards. "An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant what charge he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions for the same

offense." *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986) (citations omitted). The test is "whether it conforms to minimal constitutional standards." *Id.* Collier alleges that Mr. Sellers failed to object to the allegedly fatal defects in the Indictment: its omission of the mens rea element of 21 U.S.C. § 846; its omission of the penalty provision; and its failure to "track the required statutory language" regarding the threshold drug amount. [234 p. 5].

a. Mens rea Element

Collier first argues that the Indictment's Count 1 to Conspiracy to Possess with Intent to Distribute a Controlled Substance omitted the essential mens rea element of "intentionally" committing the act pursuant to 21 U.S.C. § 846. [236 p. 3]. The essential elements for a § 846 drug conspiracy are: "(1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that the defendant knew of the agreement, and (3) that he voluntarily participated in the agreement." *United States v. Maltos*, 985 F.2d 743, 746 (5th Cir. 1992). Collier's argument fails, as the term "conspiracy" "incorporates willfulness and specific intent[,]" and the "intent to accomplish an object cannot be alleged more clearly than by stating that parties *conspired* to accomplish it." *United States v. Purvis*, 580 F.2d 853, 859 (5th Cir. 1978) (emphasis added) (quoting *Frohwerk v. United States*, 249 U.S. 204, 209 (1919)). The Indictment stated the defendants "did knowingly *conspire* with each other and others both known and unknown . . . to possess with intent to distribute methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1). All in

violation of Title 21, United States Code, Section 846." [35 p. 1] (emphasis added). Therefore, it contained the essential mens rea element of intentionality found in 21 U.S.C. § 846 through the term "conspire." *See Purvis*, 580 F.2d at 859; *Frohwerk*, 249 U.S. at 209. The Indictment was not fatally defective because it listed the mens rea element.

b. Penalty Provision

Collier next argues that the Indictment omitted the specific penalty provision (21 U.S.C. § 841(b)(1)(A)(viii)) and the required statutory language, which rendered the Indictment fatally defective. [236 pp. 3–4]. But it is not fatal "[t]hat the indictment does not specifically cite the number of the penalty section[.]" *Webb v. United States*, 369 F.2d 530, 536 (5th Cir. 1966); *see Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (finding an indictment "need not set forth factors relevant only to the sentencing"). So long as "the indictment plainly followed the penalty statute and sufficiently informed him of what he had to meet in his defense[,]" the indictment meets minimal constitutional standards. *See Webb*, 369 F.2d at 536. Specifically, an indictment seeking a drug quantity enhancement must allege the drug quantity to place the defendant on notice of the possible applicable enhancement statutory provisions. *See United States v. Moreci*, 283 F.3d 293, 297 (5th Cir. 2002).

Here, the Indictment under Count 1 alleged a conspiracy under § 846 to violate § 841(a) and alleged that 500 grams or more of methamphetamine were attributable to Collier. [35 pp. 1–2]. Under § 846, "[a]ny person who attempts or

conspires to commit any offense defined in this subchapter [including § 841] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846. Therefore, the Indictment fairly informed Collier that he would be subject to the § 841 penalty provisions, and specifically § 841(b)(1)(A)(viii), because the Indictment alleged 500 grams or more of methamphetamine. The Indictment was not fatally defective for failing to label the specific penalty provision.

c. Threshold Drug Amount

The Government was not required to add statutory language regarding the threshold drug amount. Count 1 of the Indictment was based on 21 U.S.C. § 846 Conspiracy to Possess with Intent to Distribute a Controlled Substance. Drug quantity and type are not formal elements for § 846. *See United States v. Daniels*, 723 F.3d 562, 572–73 (5th Cir. 2013) (collecting cases); *Maltos*, 985 F.2d at 746. As stated previously, the Indictment's factual allegations adequately labeled the essential elements of § 846. *See* [35 p. 1]. Therefore, the minimal constitutional standards did not require § 841(b)(1)'s language describing the detectable levels of methamphetamine attributed to Collier in the Indictment. *See Gordon*, 780 F.2d at 1169.

In sum, the Indictment does not contain fatal defects, and Mr. Sellers did not act deficiently for "failing to make a meritless objection." *See Lopez*, 749 F. App'x at 276; *United States v. Garza*, 340 F. App'x 243, 245 (5th Cir. 2009). Collier's IAC

argument regarding the failure to file for dismissal because of the alleged fatal defects does not survive under the first prong of *Strickland.*

2. Counsel's Advice to Stipulate the Drug Quantity

The claim fails under the deficiency prong of *Strickland* because Collier does not overcome the presumption that Mr. Sellers' advice to stipulate the drug quantity was reasonable. *See* 466 U.S. at 689–90. Collier asserts that he lacked any understanding of the stipulation, Mr. Sellers failed to consult him about the stipulation or receive consent, and Mr. Sellers should have "insisted" he plead guilty without the stipulation. [236 pp. 8–9]. Collier's sworn statements in court belie these assertions. During the plea hearing, the Court asked Collier: "It is also alleged that the amount of the controlled substance involved in the conspiracy that is attributable to you is 500 grams or more of methamphetamine. Now, is this the charge to which you wish to plead guilty?" [123 p. 21]. Collier answered, "Yes, sir" and affirmed that he understood that the government would have a burden to prove beyond a reasonable doubt these facts at trial. *Id.* at 21. Collier affirmed that he reviewed the indictment, charges, evidence, and possible defenses with Mr. Sellers. *Id.* at 9–11. He knew about the 500 grams of methamphetamine. *Id.* at 26. Therefore, Collier was clearly aware of the stipulation's contents, and the only challenge left is Mr. Sellers' advice to stipulate the drug quantity.

The Court "must judge the reasonableness of [Mr. Sellers'] challenged conduct on the facts of the particular case" at the time of the conduct. *See Strickland*, 466 U.S. at 690. An attorney has control over strategic decisions, including advising his client to stipulate certain evidence, and these choices "are

virtually unchallengeable." *Id.* at 691. "[C]onscious and informed decision[s] on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Geiger v. Cain*, 540 F.3d 303, 309 (5th Cir. 2008) (citation omitted).

Mr. Sellers' advice to stipulate the drug amount was not so "ill chosen" because the Government had a wealth of evidence to prove the drug quantity. *See Berry v. King*, 765 F.2d 451, 454 (5th Cir. 1985). At the plea hearing, the Government was prepared to provide the following evidence to prove the quantity of methamphetamine seized: Agents used GPS phone data to identify the source of Whavers' methamphetamine as a person living in California—later identified as Collier; surveillance on Collier followed him to a truck stop, where Collier met Jones, "who was driving a tractor-trailer with the logo South Side Xpress, LLC"; Collier and Jones own the LLC; agents observed Collier loading black bags from the semi-truck into his own vehicle; Collier returned to Whavers' residence, and agents videotaped him unloading the black bags at the residence; agents obtained search warrants for the semi-truck and Whavers' residence; agents seized approximately 28 kilograms of methamphetamine from the semi-truck and 24 kilograms of methamphetamine from the residence; and a Drug Enforcement Agency ("DEA") crime lab analysis determined the methamphetamine seized was at 99–100% purity. [123 pp. 22–25].

Therefore, Mr. Sellers' choice to focus on fentanyl—rather than argue against the methamphetamine quantity—and his choice to advise Collier to stipulate the drug quantity was a reasonable strategic choice.[2] Since it was a reasonable strategic choice, Mr. Sellers' conduct was not deficient under the first prong of *Strickland*.

Mr. Sellers could not "insist" Collier plead guilty because guilty pleas must "not be the product of 'actual or threatened physical harm, or . . . mental coercion overbearing the will of the defendant[] [.]'" *United States v. Urias-Marrufo*, 744 F.3d 361, 366 (5th Cir. 2014) (quoting *Matthew v. Johnson*, 201 F.3d 353, 365 (5th Cir. 2000)). Therefore, Mr. Sellers did not act deficiently under *Strickland* for this claim.

3. Counsel's Failure to Explain Plea Consequences, Discovery, and the Elements

Collier argues that Mr. Sellers failed to inform him of the plea consequences, provide him with discovery, and explain the elements of the charged offense, so his guilty plea was unknowing and involuntary. The record and Mr. Sellers' affidavit disprove these arguments. A court may rely on an affidavit where the record supports the contested facts. *Moya v. Estelle*, 696 F.2d 329, 333 (5th Cir. 1983) (citation omitted). As the record and Mr. Sellers' affidavit reflect that Mr. Collier

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[2] Furthermore, the Court asked Collier if the above information was true and correct, and Collier, under oath, said, "Yes, sir." *Id.* at 25–26. Mr. Sellers only objected to the allegation that Collier knew about the 988 grams of fentanyl, which shows that Mr. Sellers had discussed the discovery with Collier, and Collier decided to only contest the fentanyl *prior to the plea hearing*.

had full knowledge of what a guilty plea would entail, the following arguments fail under *Strickland*'s test.

a. Consequences of Guilty Plea

A defendant must have "a full understanding of what the plea connotes and of its consequence." *United States v. Hernandez*, 234 F.3d 252, 255 (5th Cir. 2000) (citation omitted). "The defendant need only understand the direct consequences of the plea; he need not be made aware every consequence that, absent a plea of guilty, would not otherwise occur." *Id.* "[T]he direct consequences of a defendant's plea are the immediate and automatic consequences of that plea such as the maximum sentence length or fine." *Duke v. Cockrell*, 292 F.3d 414, 417 (5th Cir. 2002) (citation omitted) (per curiam).

Mr. Sellers' affidavit and the record contradict Collier's claim that he was unaware of the guilty plea's consequences. [242 p. 5]. Mr. Sellers sent Collier a letter explaining the possible outcomes of a guilty plea ahead of the change of plea hearing. [242-2]. The record also reflects Collier affirming that he understood the possible consequences of a guilty plea. [123 pp. 9–10, 16–21]. He confirmed that any predictions Mr. Sellers might have made regarding sentencing guideline calculations could be different than the sentence the Court determines appropriate. *Id.* at 17–19. He was also satisfied with Mr. Sellers' performance as an attorney. *Id.* at 11. The Court informed Collier of the maximum penalties and fines for the charged offense, and Collier affirmed that he understood. *Id.* at 16–17. Therefore, Collier understood the plea consequences at the time of the change of plea hearing. Mr. Sellers' affidavit and the record show that Collier fully understood the plea

consequences, so Mr. Sellers did not act deficiently or cause prejudice to Collier under *Strickland.*

b. Discovery

The true complaint Collier has with Mr. Seller's approach to discovery is that he could not give a copy of the discovery to Collier, pursuant to a court order. Mr. Sellers met with Collier to discuss and review the discovery. [242 pp. 1–2]. Collier's claim that he was entitled to have possession of all discovery before his change of plea is simply false. [234 p. 13]. Collier, under oath, affirmed that Mr. Sellers shared the government's evidence with him. [123 pp. 10–11]. Mr. Sellers followed the Court's order regarding discovery and could not give a copy of the discovery to Collier. [48 pp. 3–4]. The Court ordered:

> All written or oral information provided by the parties to each other, both the United States Attorney and defendant, as required by Paragraphs 1 and 2 above, are to be held and used by the attorneys solely for purposes of preparation for and conducting the litigation herein, pre-trial hearings and trials; and such information is *not to be given or shown to any person, nor copied or reproduced in any manner,* except for the sole purposes of preparing for and conducting direct examination and cross-examination of witnesses at either pre-trial hearings or trials.

Id. (emphasis added). "[A]ll orders and judgments of courts must be complied with[.]" *See Maness v. Meyers*, 419 U.S. 449, 458 (1975). Mr. Sellers complied with a valid court order. Therefore, Collier cannot claim ineffective assistance of counsel.

c. Elements

The record reflects that Mr. Sellers explained the elements necessary to secure a conviction, and Mr. Sellers' affidavit supports this contention. The Court asked Collier if he had discussed the case and facts with Mr. Sellers, and Collier

said, "Yes." [123 pp. 7, 10–12]. Mr. Sellers' affidavit affirms that he reviewed the case and discovery with Collier. [242 pp. 1–2, 7]. The Court also informed Collier that if he chose to plead not guilty, he "would be entitled to a trial by jury[,]" "would be presumed to be innocent, and it would be the burden of the government to prove [his] guilt beyond a reasonable doubt." [123 p. 19]. Collier stated, "Yes, sir." *Id.* at 20. The Court then listed the elements necessary for a conviction. *Id.* at 21. Therefore, even if Mr. Sellers acted deficiently, of which Collier provides no supporting facts, there was no prejudice because the Court adequately informed Collier of the elements necessary for Count 1.

Additionally, Collier's argument for IAC due to Mr. Sellers' alleged failure to explain the special jury form is irrelevant to the guilty phase. A guilty plea cannot be tainted where the drug quantity does not affect the guilt phase of an § 846 violation. *See Daniels*, 723 F.3d at 572 ("Government's failure to prove the [drug] quantity does not undermine the conviction. Rather, it only affects the sentence."). As stated earlier, drug quantity is not a formal element of § 846. *See id.* The Court informed Collier that the Government had the burden to prove the facts, including the quantity of methamphetamine, beyond a reasonable doubt if he chose to plead not guilty. [123 p. 21]. Even if Mr. Sellers did not inform Collier of the special jury form for drug quantity, it did not prejudice his decision to plead guilty under *Strickland.*

4. Counsel's Failure to Object to the Court's Alleged Noncompliance with Fed. R. Crim. P. 11(b)(1)(G)

The Court followed Rule 11, so any objection by Mr. Sellers would have been meritless. Rule 11 requires, in pertinent part: "Before the court accepts a plea of guilty . . . the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands . . . . the nature of each charge to which the defendant is pleading[.]" *See* Fed. R. Crim. P. 11(b)(1). "The trial court should treat the defendant as ignorant of the nature of the charges against him." *United States v. Adams*, 566 F.2d 962, 968 (5th Cir. 1978) (citation omitted). "In relatively simple cases . . . 'a reading of the indictment, followed by an opportunity given [to] the defendant to ask questions about it, will usually suffice.'" *United States v. Guichard*, 779 F.2d 1139, 1144 (5th Cir. 1986) (quoting *United States v. Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc)).[3]

The Court informed Collier of the nature of the charge to which he entered a plea of guilty. The Court personally addressed Collier and read the Indictment's charge. The Court then asked the Government to recite the facts it would prove at trial and informed Collier that the Government bore the burden to prove its case beyond a reasonable doubt. Then, the Court asked Collier if he agreed with the presented facts and understood the Government's burden. Collier asserts that the Indictment's failure to include "intentionally" as an essential element of § 846—and

[3] "Charges of a more complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind, may require more explication[,]" and "the good judgment of the court . . . [calculates] the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence." *Dayton*, 604 F.2d at 938.

the Court's failure to advise him—violated Rule 11. As stated earlier, the Indictment's use of "conspire" adequately described the mens rea element of intentionality. *See Purvis*, 580 F.2d at 859; *Frohwerk*, 249 U.S. at 209. Therefore, the Court followed Rule 11's requirement to inform Collier of the nature of the charge.

Collier confirmed that Mr. Sellers reviewed the charges and possible defenses Collier might have. [123 p. 9–10]. He also affirmed that Mr. Sellers shared everything contained within the Government's file. *Id.* at 11. Collier did not dispute the Government's recitation of the facts apart from the amount of fentanyl attributable to him. *Id.* at 25–27. These facts, combined with the previous paragraph's recitation of the record, show that the Court properly relied on Collier's testimony to determine that he understood the nature of a § 846 charge, in compliance with Rule 11.

Since the Court followed Rule 11, any objection by Mr. Sellers would have been meritless. Therefore, Mr. Sellers did not act deficiently for failing to make a meritless objection. *See Lopez*, 749 F. App'x at 276.

5. Counsel's Failure to Request Pre-Plea Presentence Report

Collier asserts that Mr. Sellers acted deficiently and with prejudice because he did not request a PPSR. While a court may order a PPSR, there is no "statute, rule of procedure, or case mandating the preparation of a" PPSR. *Taylor v. United States*, No. 1:21cv01073-JDB-jay, 2024 WL 1640991, at *5 (W.D. Tenn. April 16, 2024). A defendant requesting a PPSR is "an unusual step." *Gray v. United States*,

EP-18-CV-93-PRM, 2019 WL 3306012, at *4 (W.D. Tex. July 23, 2019). PPSRs risk tainting a defendant's knowing and voluntary plea, as it may create expectations about the guideline ranges "that could vary considerably from the range ultimately used at sentencing." *See United States v. Anderson*, No. 5:19cr22, 2019 WL 4979919, at *2 (N.D. W. Va. Oct. 8, 2019). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" for an IAC claim. *Strickland*, 466 U.S. at 690. Given the unusual nature of a PPSR and the "substantial potential for unfairness to the defendant and government[,]" Mr. Sellers did not act deficiently by failing to seek a PPSR. *See Anderson*, 2019 WL 4979919, at *2.

6. Counsel's Failure to Object to Alleged Constructive and/or Literal Amendment of the Indictment During the Plea Colloquy

Collier asserts that the Court asking during the Plea Colloquy if he voluntarily entered the conspiracy's agreement amounted to a constructive and/or literal amendment of the Indictment. The Court asked Collier during the Colloquy if he had voluntarily entered into the agreement, of his own free will. [123 p. 26]. Collier said, "Oh, yes, yes, yes." *Id.* The Court asked this question pursuant to Rule 11's requirement that the Court determine Collier understood the nature of the charge. Fed. R. Crim. P. 11(b)(G). A court may rephrase the Indictment's language to ensure the defendant understands the charge he is pleading to. *See Dayton*, 604 F.2d at 937–38; *United States v. Coronado*, 554 F.2d 166, 173 (5th Cir. 1977) (A district court "must explain the meaning of the charge and what basic facts must be proven to establish guilt.") (citation omitted). The Court's explanation of the charge

did not alter the Indictment. Mr. Sellers did not act deficiently by "failing to make a meritless objection." *See Lopez*, 749 F. App'x at 276; *Garza*, 340 F. App'x at 245.

In sum, the Court finds that Mr. Sellers' performance satisfies the *Strickland* requirements, and so Mr. Sellers did not violate Collier's Sixth Amendment right to effective assistance of counsel.

B. FAILURE TO GIVE *FARETTA* WARNINGS

Collier claims the Court violated his Sixth Amendment right to counsel. A defendant's Sixth Amendment rights apply during the sentencing phase. *See United States v. Fields*, 483 F.3d 313, 331–32 (5th Cir. 2007). The Sixth Amendment protects the right of self-representation. *Faretta v. California*, 422 U.S. 806, 832 (1975). "A court violates the Sixth Amendment if it allows a defendant to represent himself without first obtaining a valid waiver of counsel." *Fields*, 483 F.3d at 350 (citing *United States v. Medina*, 161 F.3d 867, 870 (5th Cir. 1998)). To find that the defendant elected to waive the right, a court must conduct a *Faretta* hearing to determine: (1) whether the defendant clearly waived the right to counsel, which may occur by statement or certain conduct; and (2) whether the waiver of the right to counsel was knowing and intelligent. *See United States v. Sterling*, 99 F.4th 783, 792 (5th Cir. 2024) (citing *United States v. Romans*, 823 F.3d 299, 313 (5th Cir. 2016)).

1. Waiver of Right to Counsel

"A defendant can waive his right to counsel implicitly, *by his clear conduct*, as well as by his express statement." *United States v. Mesquiti*, 854 F.3d 267, 272 (5th

Cir. 2017) (emphasis added) (citing *Fields*, 483 F.3d at 350). Dilatory tactics may "constitute an implied waiver of the right of counsel." *Higginbotham v. Louisiana*, 817 F.3d 217, 223 (5th Cir. 2016) (citing *United States v. Fowler*, 605 F.2d 181, 183 (5th Cir. 1979) (holding that the right "may not be put to service as a means of delaying or trifling with the court" and that failing to retain counsel may "operate[] as a waiver . . . even when the failure resulted in a pro se defense") (citation omitted). Clear conduct waiving the right to counsel also includes a defendant's "refusal without good cause to proceed with able appointed counsel" if the refusal "take[s] the form of 'a persistent, unreasonable demand for dismissal of counsel.'" *United States v. Capistrano*, 74 F.4th 756, 774 (5th Cir. 2023) (quoting *Mesquiti*, 854 F.3d at 272); *see Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984).

Similar to *Capistrano*, Collier's representation was "a continuous and long-running issue." 74 F.4th at 775. At the sentencing and withdrawal hearings, Collier repeatedly stated that he did not want Mr. Harenski, his current attorney, to represent him. Mr. Harenski was Collier's seventh attorney at this point of the case. [209 p. 14]. During the withdrawal hearing, the Court noted that Collier's actions were dilatory, and that "all the lawyers in the world representing you and withdrawing . . . they are not going to change the facts in this case." *Id.* at 14. The Court instructed Collier: "Now, I'm not going to allow Mr. Harenski to withdraw in this case unless you tell me to. And if you tell me to let him withdraw, you are going to represent yourself." *Id.* at 14, 19. The Court offered that Mr. Harenski could remain as standby counsel. *Id.* The Court took a short recess to allow Collier

and Mr. Harenski to discuss his options. *Id.* at 19. After the recess, the Court explained the role of standby counsel. *Id.* at 21–22. Collier misunderstood the role of standby counsel, and the Court found that Collier wanted to act as lawyer and client. *Id.* at 25. The Court denied the motion to withdraw because it was without good cause. [148] (citing *United States v. Jones*, 824 F. App'x 224, 233 (5th Cir. 2020)). Collier's reasons "simply reiterate[d] the same complaints Collier expressed with two of his previously retained attorneys." *Id.*

At the sentencing hearing, Collier once again wanted to fire Mr. Harenski. The Court again instructed Collier: "You can either represent yourself or you can be represented by counsel. Mr. Harenski is your counsel. If you don't want him anymore and you fired him . . . . you will represent yourself." [193 p. 5]. Collier stated he did not "want to represent myself," but he alleged Mr. Harenski would not do anything for him. *Id.* at 5–6. Although Collier never affirmatively told the Court he wished to represent himself, his actions relinquished his right to counsel. *See Capistrano*, 74 F.4th at 775. Collier does not argue he had good cause to not proceed with Mr. Harenski. *See id.* at 776; *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983) ("A defendant is entitled to appointment of an attorney with whom he can communicate reasonably, but has no right to an attorney who will docilely do as he is told."). Therefore, Collier's dilatory conduct constituted a voluntary waiver of the right to counsel.

2. Knowing and Intelligent Waiver of Counsel

The Court must also determine that Collier's waiver was done knowingly and intelligently. *See Faretta*, 422 U.S. at 835. "Defendants must 'be aware of the dangers and disadvantages of self-representation.'" *Capistrano*, 74 F.4th, at 776 (quoting 422 U.S. at 835). To satisfy *Faretta*, while "the precise nature of appropriate warnings depends on the particularities of the case," the Fifth Circuit requires "trial courts to provide warnings of substance, including at least a modicum of specificity." *Mesquiti*, 854 F.3d at 273. A court satisfies *Faretta* where: (1) it recommends several times that the "defendant allow counsel to represent him because" he is a "very good lawyer[]," and (2) it instructs the attorney to serve as standby counsel and recommends "that the defendant allow counsel to question witnesses, conduct cross-examination, and put on any evidence on his behalf." *Id.* (citing *United States v. Joseph*, 333 F.3d 587, 590 (5th Cir. 2003)).

a. The Court Recommended that Collier Allow Counsel's Representation and Specifically Warned Against Self-representation

Collier argues that the Court did not give a satisfactory *Faretta* warning to him, so the Court returns to the record showcasing the numerous warnings it gave Collier to let Mr. Harenski represent him as counsel. During the hearing on the motion to withdraw, the Court warned:

> And if you tell me to let him withdraw, you are going to represent yourself. You are going to have to represent yourself. . . . I'm telling you right now, that would be a very bad choice to represent yourself . . . . And all the lawyers in the world representing you and withdrawing, and representing you and withdrawing, they are not going to change the facts in this case. . . .

[209 p. 14]. The Court informed Collier that proceeding pro se was "a bad decision. That's the worst of all decisions." *Id.* at 19. The Court encouraged Collier to discuss

the choice with Mr. Harenski during a recess. *Id.* The Court recommended that Collier keep Counsel's representation because "Mr. Harenski enjoys a good reputation with the Court and [has] many years of experience as a criminal defense attorney in the federal court as well." *Id.* at 13. The Court restated that Collier's "best option would be to let Mr. Harenski be your lawyer . . . and make decisions that are in the best interest of yourself within the bounds of law and ethics." *Id.* at 22.

The Court explained that if he chose to proceed pro se, Mr. Harenski, while acting as standby counsel, "cannot substantially interfere with any significant tactical decisions and cannot speak in the place of the defendant on any matter of importance. . . . Standby counsel does not represent the defendant." *Id.* at 20. The Court warned that Mr. Harenski would not act as Collier's secretary, investigator, or clerk, and repeated, "[R]epresenting yourself is the worst option." *Id.* at 21–22. Collier understood that he would be making the decisions if he proceeded pro se.[4] *Id.* at 21.

At the sentencing hearing, Collier informed the Court that he had fired Mr. Harenski. [193 p. 4]. Collier again requested different counsel. The Court declined appointing new counsel and presented the choice to proceed pro se. *Id.* at 5. The Court again reminded Collier that self-representation is a "bad idea," and "you

[4] When asked by the Court whether Defendant understood the explanation of standby counsel, Collier responded: "Yes, kind of sort of like [*Faretta*] *versus California*. . . . I'm going to be making decisions . . . I think that will suit me better if he was co-counsel [sic][.]" [209 p. 21].

would be much better off having experienced counsel represent you at a sentencing hearing." *Id.* Therefore, the Court's numerous warnings against self-representation adequately placed Collier on notice of the dangers of proceeding pro se. *See Mesquiti*, 854 F.3d at 273.

b. The Court Instructed Mr. Harenski to Serve as Standby Counsel and Recommended that Collier Allow Mr. Harenski to act on his Behalf

Once the Court determined that Collier chose to proceed pro se during the sentencing hearing, it instructed Mr. Harenski to serve as standby counsel and recommended that Collier allow Mr. Harenski to act on his behalf. *Id.* at 8, 12, 109, 113; *see Mesquiti*, 854 F.3d at 273. Before Collier cross-examined a witness, the Court asked if he would prefer that Mr. Harenski ask the questions and added, "[Mr. Harenski] is an experienced lawyer, and it may be better for him to do it." [193 pp. 43]. The Court also recommended Collier consult with Mr. Harenski during cross-examination. *Id.* at 45, 56, 64. The Court further recommended consultation when Collier presented evidence and objections. *Id.* at 69, 103–04, 110. Finally, the Court instructed Mr. Harenski to discuss with Collier whether he intended to appeal and whether he wished to file a notice of appeal. *Id.* at 127. The Court's instruction to Mr. Harenski to serve as standby counsel and its recommendation that Collier avail himself of Mr. Harenski's services as standby counsel bolster the adequacy of its *Faretta* warning to Collier. *See Mesquiti*, 854 F.3d at 273.

The Court repeatedly warned Collier of the dangers of self-representation, and Collier insisted on acting without an attorney, so the Court adequately found

that Collier's waiver of the right to counsel was knowing and intelligent. *See Sterling*, 99 F.4th at 792 (citing *Romans*, 823 F.3d at 313).

C. CONFLICT OF INTEREST

Mr. Harenski's status as standby counsel defeats Collier's argument that his Sixth Amendment right to conflict-free counsel was violated. Collier alleges that "the Court caused a Conflict of Interest by ordering Attorney Harenski to remain on Collier's case as stand-by counsel during [the] sentencing hearing[.]" [234 p. 28]. Standby counsel is not counsel under the Sixth Amendment. *United States v. Taylor*, 933 F.2d 307, 312–13 (5th Cir. 1991). There is no constitutional right to standby counsel. *United States v. Oliver*, 630 F.3d 397, 413–14 (5th Cir. 2011) (citations omitted). "[W]ithout a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel." *Id.* at 414 (alterations original) (citation omitted).

Additionally, the "right to representation that is free from any conflict of interest" does not apply to standby counsel; again, standby counsel is not Sixth Amendment counsel. *See United States v. Vaquero*, 997 F.2d 78, 89 (5th Cir. 1993); *Taylor*, 933 F.2d at 312–13; *see also Vasquez v. United States*, No. 3:14-CR-266-B-9, 2022 WL 3580779, at *2 (N.D. Tex. Aug. 4, 2022). Therefore, the conflict of interest test for counsel in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), is irrelevant. Once the Court determined that Collier decided to proceed pro se, Mr. Harenski was no longer Collier's counsel as defined by the Sixth Amendment; he remained as standby counsel. [193 p. 6]. Any alleged deficiencies or conflicts regarding Mr.

Harenski's actions as standby counsel do not arise under the Sixth Amendment's rights to effective assistance of counsel and conflict-free counsel. Therefore, the Court did not violate Collier's Sixth Amendment right to conflict-free counsel.

D. STATUTORY RIGHT TO A DIRECT APPEAL

The Court cannot address Collier's allegation that the Fifth Circuit Deputy Clerk violated his right to a direct appeal. He alleges that the Fifth Circuit "deprived [him of] a full and fair opportunity to a Direct Appeal proceeding[]" because the Deputy Clerk allowed Mr. Hornsby to withdraw from his case, which resulted in Collier's pro se status. [234 p. 32]. The Deputy Clerk, on behalf of the Fifth Circuit, granted Mr. Hornsby's Motion to Withdraw and Collier's Motion to Relieve Counsel and Proceed Pro Se. [244-2]. District courts are bound by the Circuit Court's decisions. *See generally F.D.I.C v. Abraham*, 137 F.3d 264, 270 (5th Cir. 1998); *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 789–90 (5th Cir. 2021) ("The district court was not free to overturn" a Fifth Circuit ruling.). Thus, this Court will not address Collier's argument.

CONCLUSION

For the foregoing reasons, Collier's § 2255 Motion is denied. The Court has determined that a hearing is unnecessary because "the motion and the files and records of the case conclusively show that [Collier] is entitled to no relief[.]" *See* 28 U.S.C. § 2255(b); *see also* 28 U.S.C. § 2255(f).

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant Sharard Collier's [234] Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is **DENIED**.

SO ORDERED AND ADJUDGED this the 18th day of November, 2024.

s/ *Louis Guirola, Jr.*

LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.