FILED
2014 Jul-10 AM 08:53
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

DON MITCHELL WILBORN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 4:13-CV-8050-VEH**
	)	**4:11-CR-0470-VEH-HGD**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION[1,2]

Now pending before the court is the Motion To Vacate Sentence Pursuant to 28 U.S.C. § 2255 (the "Motion"), filed by the Petitioner, Don Mitchell Wilborn ("Petitioner"), through counsel. (Doc. 1). The Motion was filed on November 18, 2013. The Government has responded. (Doc. 6). Petitioner has replied. (Doc. 8). Having fully considered all relevant pleadings in this case, and in the related criminal case (*United States v. Don Mitchell Wilborn,* 4:11-cr-00470-VEH-HGD), the undersigned finds that the counseled Motion is due to be denied.

---

[1] The Government filed its Response under seal. However, neither the Motion nor the Reply was filed under seal, and the court accordingly sees no reason to file this Memorandum Opinion under seal.

[2] All references in this opinion to "Doc. [No.]" and to page references within those documents are to the document numbers and page references as assigned by the court's cm/ecf system. Further, all such references are to this § 2255 proceeding, unless reference to the related criminal case is indicated.

All issues raised in the Motion, other than ineffective assistance of plea/sentencing counsel, were affirmatively waived by the Petitioner in his plea agreement and at his plea hearing. Of course, such waiver has no effect if the plea is determined by the court not to have been knowing and voluntary. However, the court finds, as it did at the plea hearing, that the plea was knowing and voluntary. Therefore, the waiver stands. Further, even if the waiver were not a bar to the issues (other than ineffective assistance) raised in the Motion, the Motion fails on its merits as to all issues raised, including ineffective assistance. Thus, the Motion is procedurally defaulted as well. The court finds no need to hold an evidentiary hearing, and thus the request for such a hearing will be denied.[3] Accordingly, the Motion is due to be denied and the case dismissed with prejudice. Finally, the court finds that any appeal from this determination would be frivolous and not brought in good faith; thus, leave to appeal in forma pauperis and for a certificate of appealablity will be denied.

[3] There is no need for an evidentiary hearing because Petitioner's claims can be resolved based on the existing record. *See Schultz v. Wainwright*, 701 F.2d 900, 901 (11th Cir. 1983) ("An evidentiary hearing is not required where, as here, the district court can determine the merits of the ineffectiveness claim based on the existing record."); *see also Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002)("[D]istrict court is not required to hold an evidentiary hearing where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous.").

PROCEDURAL HISTORY[4]

A superseding indictment charging a drug conspiracy and several substantive offenses was filed under seal against Petitioner and others on February 1, 2012. (Doc. 9). The superseding indictment was unsealed upon Petitioner's arrest and initial appearance on February 7, 2012. Petitioner was charged with six crimes: specifically, conspiracy to distribute and to possess with intent to distribute 50 grams or more of methamphetamine, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A) and 846 (Count One); four counts of intentional distribution of 5 grams or more of methamphetamine, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B) (Counts Four, Five, Six and Seven); and intentional distribution of a mixture and substance containing a detectable amount of methamphetamine, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C) (Count Eight).

On March 31, 2012, an Information to Establish Prior Felony Drug Convictions was filed by the United States against Petitioner. (Doc. 45). The Information alleged that Petitioner had three prior felony drug convictions, each of which qualified as a "prior conviction for a felony drug offense" for purposes of

[4] All references to the record in this portion of this Opinion are to the related criminal case, 4:11-cr-470-VEH-HGD, unless otherwise indicated.

the enhanced penalty pursuant to Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 851. (*Id*.).

A plea hearing was held on April 26, 2012. A plea agreement – which Petitioner, during the plea hearing, acknowledged he signed – was filed in court that same date. (Doc. 97). Consistent with the plea agreement, Petitioner pleaded guilty to Count One (the conspiracy count). In return, the Government agreed to move to dismiss, at sentencing, Counts Four, Five, Six, Seven, and Eight (the distribution counts). The Government also agreed to make certain recommendations at sentencing. The plea agreement specifically contemplated substantial assistance by Petitioner. The Government agreed that, if Petitioner provided substantial assistance, at sentencing it would file a motion requesting a downward departure in the calculation of the Petitioner's advisory guideline sentence. The Government further agreed that, should any of the counts of conviction subject the Petitioner to a mandatory minimum sentence, "the government may also seek a sentence reduction below said mandatory minimum sentence, by including in its motion a recommendation pursuant to the provisions of 18 U.S.C. § 3553(e)." (*Id*.). In the plea agreement, the Petitioner agreed to waive his right to appeal his conviction and sentence. (*Id*. at pp.14-15). This waiver was in bold print and was separately signed by the Petitioner. (*Id*.).

At the plea hearing, the Government reiterated all of these agreements. Specifically, the Government stated that it had agreed to dismiss Counts Four, Five, Six, Seven, and Eight. (Doc. 197 at p. 5). It stated that the plea agreement contemplated substantial assistance; and that, in the absence of substantial assistance, the Government would recommend an appropriate reduction in offense level for acceptance of responsibility and a low-end sentence. (*Id*. at pp. 5-6). It pointed out the page of the plea agreement where the Petitioner "waived certain rights to appeal and rights to postconviction relief." (*Id*. at p. 6). The court then went over all of those provisions with the Petitioner. (*Id*. at pp. 6-8). Each time, he said he understood. (*Id*.).

There was an extensive factual stipulation in the plea agreement. (Doc. 97 at pp. 3-10). Further, in the factual stipulation, the Petitioner and the Government stipulated and agreed as follows:

> **The parties stipulate and agree that defendant's attributable amount of methamphetamine to the conspiracy charged in Count One of the indictment is 30,793.5 grams. The parties further stipulate that at least 50 grams of this is actual methamphetamine.**

(*Id*. 97 at p. 8) (emphasis in original).

The Petitioner signed his name immediately following the factual basis for the plea as set out in the plea agreement. Specifically, by signing his name, he stated

that

> **The defendant hereby stipulates that the facts stated above are substantially correct and that the Court can use these facts in calculating the defendant's sentence. *****

(*Id*. at p. 10) (emphasis in original). Further, the court specifically offered to have the Government read into the record the factual basis for the plea. (Doc. 197 at p. 19). Defense counsel stated that would not be necessary, that he and the Petitioner had gone over the factual basis for the plea as set out in the plea agreement "extensively," and that the Petitioner would stipulate to the factual basis as set out in the plea agreement. (*Id*.). The Petitioner confirmed to the court that he did not need to have the factual basis read out loud in court, and that the facts as set out in the factual basis for the plea agreement were substantially correct. (*Id*.). Further, the following exchange occurred at the plea hearing.

> THE COURT: Did you do the things that in the factual basis for the plea agreement it is said that you did?
>
> THE DEFENDANT: Yes, ma'am.

(*Id*. at p. 20).

In the plea agreement, Petitioner is advised of his maximum punishment for conviction of Count One. Specifically, the plea agreement states:

> The defendant understands that the maximum statutory punishment that may be imposed for the crime of Conspiracy to Distribute and Possess

with Intent to Distribute a Controlled Substance, in violation of Title 21, United States Code, Sections 846, 841(a)(1) and (b)(l)(A), as charged in COUNT ONE, is:

a. Imprisonment for not less than 10 years (if the defendant has two or more prior felony drug convictions, then the mandatory term of imprisonment becomes LIFE);
b. A fine of not more than $10,000,000 (if the defendant has two or more prior felony drug convictions, then the maximum fine becomes $20,000,000), or,
c. Both (a and b);
d. Supervised release of not less than 5 years (if the defendant has two or more prior felony drug convictions, then the supervised release term becomes at least 10 years); and
e. Special Assessment Fee of $100 per count.

(Doc 97 at p. 2).

At the plea hearing, the undersigned specifically asked both the Petitioner and his counsel whether defense counsel had answered all of the Petitioner's questions to the Petitioner's satisfaction. Defense counsel responded that he had, except that the Petitioner wanted to know what his sentence would be, and defense counsel had told him that was up to the court and that he couldn't tell the Petitioner what the court would decide. (Doc. 197 at pp. 8-11). The court confirmed Petitioner's satisfaction with his counsel, and further advised him that, until after the court had seen the presentence report, even the undersigned could not predict what that the sentence might be, but that the court would advise him at the plea hearing as to what his maximum potential penalties would be for pleading

guilty to Count One. (*Id*.).

In going over the maximum penalties, the undersigned told the Petitioner that, since he was only pleading guilty to Count One, the court was only going to go over the maximum penalties for that count. (*Id*.). The undersigned then stated that an Information seeking enhanced penalties for prior felony drug convictions had been filed. The undersigned confirmed with the AUSA that the Information was alleging more than one prior felony drug conviction. (*Id*. at pp. 12-13). The undersigned then advised the Petitioner that the court was going to tell him his maximum penalties with the enhancement for more than one prior felony drug conviction. The undersigned told him those penalties were:

> a fine of not more than 20 million dollars, custody -- a mandatory custody period of life. And the custodial period would be followed by a supervised release period of not less than 10 years. The guidelines apply, but they are trumped by the statute, which says life.
>
> There is a denial of specific federal benefits pursuant to [Title] 21, United States Code, Section 862. And there can be no probation or suspension of your sentence.
>
> Also, the government is seeking forfeiture, and they've put you on notice of forfeiture.
>
> Also, if you're not a United States citizen, you may be subject to deportation because of the plea of guilty you're entering here today.
>
> Do you understand these maximum penalties I have just outlined?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you also understand that in determining a sentence, the Court must consider applicable sentencing guidelines but that they are not binding on the Court?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that a statute that says a maximum or a minimum term is binding on me absent some other statutory provision like a 3553(e) or a 5K motion?

THE DEFENDANT: Yes, ma'am.

(*Id*. at pp. 12-13) (emphasis supplied).

The court told the Petitioner several times that the plea agreement was not binding on the judge or the court. Regarding his sentence, the undersigned told the Petitioner:

> THE COURT: In other words, do you understand, Mr. Wilborn, that if I accept your plea of guilty, when I impose a sentence I could structure a sentence totally consistent with the plea agreement or recommendations made by the U.S. Attorney or I could impose a sentence that could be viewed as substantially more severe or substantially less severe than the sentence that you anticipate I will impose, and yet you would have no right to withdraw the plea of guilty you're entering? Do you understand that?

(*Id*. at p. 11). The Petitioner responded, "Yes, ma'am." (*Id*. at p. 12).

The Petitioner was advised by the court that he had a right to plead "not guilty." The Petitioner was advised of the rights he was giving up by pleading guilty. He said he understood. (Doc. 197 at pp. 13-14).

The court also told the Petitioner what the Government would have to prove in order for him to be convicted of the crime charged in Count One. He said he understood that as well. (*Id*. at pp. 17-18).

The Probation Office prepared a Presentence Investigation Report ("PSR"). On November 27, 2012, the court held a sentencing hearing and entered a final judgment. (Doc. 198, "Sentencing Hearing Transcript"; doc. 172, "Judgment of Conviction"). In response to defense counsel, the PSR was amended to make certain clarifications and corrections. (Doc. 198 at p. 2). No party filed or stated any objections to the PSR. The court specifically asked Petitioner if he had any objections to it, after the addendum, and he said "no." (*Id*. at pp. 3-4). The Petitioner further specifically affirmed the prior felony convictions set out in the Section 851 Information. (*Id*. at pp. 2-3).

The Government moved for downward departure pursuant to U.S.S.G. § 5K1.1 and/or 18 U.S.C. § 3553(e) and requested a custodial sentence of 300 months. (Doc. 130). At the sentencing hearing, the Government orally amended their motion to request a custodial sentence of 262 months. (Doc. 198 at p. 14). The Government also moved to dismiss Counts Four, Five, Six, Seven, and Eight. (*Id*. at p. 15). The court granted the motions and sentenced Petitioner as follows: Dismissed Counts Four, Five, Six, Seven, and Eight. 240 months custody followed

by 60 months supervised release. Forfeiture was ordered. (Doc. 172). There were no objections to the sentence. (Doc. 198 at p. 21).

During the sentencing hearing, after his sentence was imposed, Petitioner stated that he did not get involved in the conspiracy until 2010.

> THE DEFENDANT: I know in the paperwork it says I was in this conspiracy since 2002. I know it doesn't really matter, but that's totally wrong. I got involved with these guys in April or May of 2010. I don't know what --
>
> THE COURT: Well, I was surprised at that, but it was --
>
> THE DEFENDANT: I don't know what they had going on before I got involved with them or whatever. But I just wanted to clarify that for you, ma'am. I know that it probably doesn't have any weighing on anything, but that's all wrong.

(Doc. 198 at pp. 24-25) (emphasis supplied).

The court then responded:

> THE COURT: I appreciate you pointing that out. Because I departed based only on substantial assistance, because of the statutory mandatory minimum, and I departed from life to 20 years, it didn't have -- it doesn't have an impact.
>
> But I think that it's important, since I said it to your family, that you correct it for your family. So I appreciate that. So I stand corrected, and I'm certainly willing to take your statement.

(*Id*. at p. 25) (emphasis supplied).

Following the imposition of sentence, Petitioner did not pursue a direct

appeal.

THE § 2255 PROCEEDING[5]

In the pending proceeding, the Petitioner contends that his sentence was excessive, that his criminal history was incorrectly calculated at sentencing, that defense counsel was Constitutionally ineffective at both the plea and sentencing phases, and that only one of the three prior felony drug convictions set out in the § 851 Information was "prior" to the offense conduct of the conspiracy, and, therefore, the wrong mandatory statutory § 841 enhancement was applied. He seeks resentencing. He does not seek to withdraw his guilty plea or allege that he is actually innocent, either of the crime of conviction, or of the state felony drug convictions that caused his sentence to be enhanced pursuant to 21 U.S.C. § 841.

APPLICABLE LEGAL PRINCIPLES

1. Habeas Generally

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence . . . If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed

[5] All references to the record in this section of this opinion are to this § 2255 proceeding, unless otherwise indicated.

> was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255(a)-(b).

Habeas relief is an extraordinary remedy which "may not do service for a [ ] [direct] appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982). A petitioner who has waived or exhausted his right to appeal is presumed to stand "fairly and finally convicted." *Id*. at 164. "[U]nless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited . . . [A]n error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (citation and quotation omitted); *see also Burke v. United States*, 152 F.3d 1329, 1331 (11th Cir. 1998) ("Nonconstitutional claims can be raised on collateral review only when the alleged error constitutes a fundamental defect which inherently results in the miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.") (citations and internal quotations omitted).

2. Waiver by Defendant

The Eleventh Circuit has held that a defendant's knowing and voluntary waiver of the right to appeal and to collaterally attack his sentence is enforceable. *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) ("We agree with the basic reasoning of our sister circuits that sentence appeal waivers may be enforced. However, just as a guilty plea must be made knowingly and voluntarily to be effective, so must a sentence appeal waiver.") (internal citation and footnote omitted); s*ee also United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006) ("[W]here it is clear from the plea agreement and the Rule 11 colloquy, or from some other part of the record, that the defendant knowingly and voluntarily entered into a sentence appeal waiver, that waiver should be enforced . . .")(citation omitted). The "core concern" in this analysis is "the defendant's knowledge and understanding of the sentence appeal waiver." *Bushert*, 997 F.2d at 1351.

For a sentence appeal waiver to be enforced, "[t]he government must show that either (1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver." *Id*. at 1351. "A waiver of the right to appeal includes a waiver of

the right to appeal difficult or debatable legal issues-indeed, it includes a waiver of the right to appeal blatant error." *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999). "Waiver would be nearly meaningless if it included only those appeals that border on the frivolous." *Id*.; *see also Brown v. United States*, 256 F. App'x 258, 261–62 (11th Cir. 2007) (unpublished) (holding that Petitioner's right to collateral review was waived by sentence appeal waiver in plea agreement). However, to the extent that a defendant reserves a ground for such appeal or collateral attack, such ground is not waived. *See United States v. Westry*, Civ. No. 07-0425-WS, 2007 WL 3287371, at *6 (S.D. Ala. Nov. 2, 2007) (Steele, J.) (holding, on a § 2255 Motion, that where a plea agreement expressly reserved to a defendant the right to appeal based on ineffective assistance of counsel, such right was not waived).

3. Procedural Default

Petitioner took no direct appeal of the conviction and sentence in his underlying criminal case. In general, claims not raised on direct appeal may not be considered on collateral attack. *E.g.*, *Massaro v. United States*, 538 U.S. 500, 504 (2003). A petitioner can, nevertheless, overcome his procedural default of claims not raised on direct appeal:

To obtain collateral relief on errors that were not raised on direct appeal, [a

> petitioner] "must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167-68, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). This standard is "a significantly higher hurdle than would exist on direct appeal." *Id*. at 166, 102 S.Ct. 1584 . . .
>
> . . . "Constitutionally ineffective assistance of counsel can constitute cause" under *Frady*. *Holladay v. Haley*, 209 F.3d 1243, 1254 (11th Cir. 2000). "In order to do so, however, the claim of ineffective assistance must have merit." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000).

Brown v. United States, 720 F.3d 1316, 1333 (11th Cir. 2013); *see also Cross v. United States*, 893 F.2d 1287, 1289 (11th Cir. 1990).[6]

However, "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro*, 538 U.S. at 509. Indeed, "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." *Id.* at 504.

4. Ineffective Assistance of Counsel

The Sixth Amendment gives criminal defendants the right to effective assistance of counsel. U.S. Const., amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684–86 (1984). To prevail on a claim of ineffective assistance of counsel, the

[6] A defendant may also obtain collateral relief on errors not raised on direct appeal if he demonstrates actual innocence. *E.g.*, *Bousley v. United States*, 523 U.S. 614, 622 (1998). However, Petitioner does not assert actual innocence.

petitioner must demonstrate: (1) that his counsel's 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. Thus, a petitioner must establish both prongs of the *Strickland* test. *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001). With respect to the deficient performance prong, the petitioner must show that his counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Of course, there is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *Id.* at 689. Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Id.*

In addition to deficient performance, a petitioner asserting an ineffective assistance of counsel claim is also required to demonstrate prejudice. *Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006). Prejudice 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. It is not enough for the petitioner to show that the error had some conceivable effect on the outcome of the proceeding. Rather, the petitioner must show that the result would have been different. *Id.* at 693.

"In *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court held that 'the two part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel,' and that 'to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Pease*, 240 F.3d 938, 941 (11th Cir. 2001) (quoting *Hill*, 474 U.S. at 58–59).

PETITIONER'S CLAIMS

Petitioner asserts three grounds for relief:

• Ground 1—His sentence was excessive.

• Ground 2—His counsel was ineffective at the plea stage because he did not advise Petitioner of the "true" statutory and guideline ranges and therefore Petitioner's guilty plea was not knowing and voluntary.

• Ground 3—His counsel was ineffective at the sentencing stage because counsel failed, at sentencing, to object to the Presentence Investigation Report ("PSR"), specifically, paragraphs 63 through 81, or to the findings of court that those unobjected-to paragraphs would be adopted by the court, and, as a result,

  • Petitioner's criminal history was too high because prior sentences were improperly considered;

• Petitioner's offense level was improperly enhanced as a manager or supervisor and defense counsel failed to demand a hearing as to Petitioner's role in the conspiracy;

• The amount of drugs attributed to Petitioner was wrong; and

• The court applied an improper sentence enhancement for commission of a crime while on supervised probation.

Petitioner's various grounds for relief challenge the knowing and voluntary nature of his guilty plea and the correctness of his sentence. Accordingly, the court will first address Petitioner's ineffective assistance arguments challenging his guilty plea, as the granting of relief on any such ground would moot any claim as to his sentence. The court will then address petitioner's ineffective assistance arguments as to his sentencing. The court will then address the impact of Petitioner's plea waiver. Finally, the court will address Petitioner's procedural default.

ANALYSIS

Ineffective Assistance Challenge to the Guilty Plea

Where a defendant claims that his guilty plea was a product of his attorney's deficient performance, to show prejudice the defendant must demonstrate "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 (emphasis

supplied).

While "significant misleading statements of counsel" related to the length of a potential sentence that prompt a defendant to plead guilty can amount to ineffective assistance, *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972)[7], where, as here, a court correctly advises a defendant at the plea colloquy about his potential sentence, including its possible maximum and minimum, a defendant generally cannot establish prejudice on an effective-assistance claim based on an erroneous sentence prediction. *See, e.g.*, *United States v. Pease*, 240 F.3d 938, 941-42 (11th Cir. 2001); *Harris v. United States*, 769 F.2d 718, 720 n.1 (11th Cir. 1985); *see also Hughes v. United States*, No. 7:11-CV-90102 HL, 2012 WL 1933668, at *2 (M.D. Ga. May 3, 2012), *report and recommendation adopted*, No. 7:11-CV-90102 HL, 2012 WL 1933345 (M.D. Ga. May 29, 2012); *Jones v. United States*, No. 5:06-CR-00019 MTT, 2012 WL 2061906, at *4 (M.D. Ga. Apr. 27, 2012), *report and recommendation adopted*, No. 5:06-CR-19 MTT, 2012 WL 2061905 (M.D. Ga. June 7, 2012). Thus, Petitioner's ineffective assistance of counsel claim at the plea stage fails on the merits.

Such claim also fails because he does not even allege that, had his counsel

[7]This authority is controlling in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981, are binding in the Eleventh Circuit).

told him that he faced a maximum sentence of life imprisonment, he would not have pleaded guilty. Further, he does not seek to withdraw his guilty plea. Under *Hill*, this is insufficient to support a claim of ineffective assistance of counsel, even assuming that plea counsel affirmatively misinformed Petitioner as to the potential consequences of pleading guilty. *See United States v. Oliver*, 522 F. App'x 525, 529 (11th Cir. 2013) (unpublished) ("To establish prejudice in the context of a guilty plea, the defendant must show that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'") (citing *Hill*). Further, it is well established that, if the defendant makes an insufficient showing on one prong, the court does not need to address the other prong. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

Ineffective Assistance Challenge to the Sentence

As the Government correctly points out, "[b]ecause of the Section 851 Information, the [Petitioner] faced a mandatory life sentence regardless of his guideline range or criminal history category." (Doc. 6 at p. 8). Accordingly, the court turns to Petitioner's ineffective assistance challenge related to the Section 851 Information.

Initially, the court notes that the law is clearly established that the enhanced

penalties resulting from prior felony drug convictions applicable to persons guilty of drug trafficking crimes[8] are mandatory statutory enhancements, not sentencing guidelines enhancements. Thus, Petitioner's arguments about the guidelines and the impact of *Booker* on the guidelines are misplaced. *Booker* in no way limited the power of Congress to enact mandatory minimum penalties. *See United States v. Castaing-Sosa*, 530 F.3d 1358, 1362 (11th Cir. 2008) (holding that "the district court remains bound by statutes designating mandatory minimum sentences even after the remedial holding of *United States v. Booker*") (citation omitted).

The statutory penalties applicable to a person found guilty of the crime *to which the Petitioner pleaded guilty* are found at 21 U.S.C. § 841(b)(1)(A):

> [S]uch person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a

[8] It is undisputed that Petitioner pleaded guilty to a drug trafficking crime. Specifically, he pleaded guilty to Count One, conspiracy to distribute, and to possess with intent to distribute, 50 grams or more of methamphetamine, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A) and 846.

> fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C.A. § 841(b)(1)(A) (emphasis supplied).

Because, if application of the § 851 enhancement for two or more prior felony drug convictions was correct, none of the other alleged sentencing errors could have had any impact on Petitioner's sentence, the court will first address Petitioner's arguments that such enhancement was error. For the reasons set out below, the court finds that such enhancement was not error.[9] As a result, the

[9] Petitioner's counsel argues that "[Petitioner] would have received a shorter sentence if trial counsel had objected to his role in the conspiracy, his criminal history range, the amount of drugs attributable to him, and the sentencing enhancement made because the crime was committed while [Petitioner] was on probation." (Doc 1 at p. 11.) This is simply wrong. None of these Sentencing Guidelines factors had the potential for any impact on Petitioner's sentence once the statutory enhancement for two or more prior felony drug convictions applied.

failure of trial counsel to object to such enhancement was not ineffective assistance.

Petitioner's counsel argues that neither of Petitioner's two felony drug convictions were "prior" to his conviction before this court, and therefore should not have resulted in application of the Career Offender enhancement under 21 U.S.C. § 841. He does not tell the court which two convictions he refers to, but he does, by footnote, reference Paragraphs 66 and 68 of the PSR. Thus, the court concludes that those are the convictions at issue. Those paragraphs are set out below.

> **66.** 12/13/2000 (Age 26)
>
> Unlawful Possession of a Controlled Substance (Methamphetamine)
> Etowah County Circuit Court; Gadsden, AL Case No.: CC-01535.02
>
> 12/15/00: Released.
>
> 02/22/05: Convicted. Sentenced to 3 years custody, suspended. Placed on 3 years probation. To run concurrently with CC 01-536 and Marshall County cases. Ordered to pay $1,000 fine (remitted), $50 victim fee, and $1,100 Drug Demand Assessment and costs. Referred to CRO for evaluation and treatment.
>
> 11/09/05: Drug Demand Assessment reduced.
>
> 12/21/06: Discharged from probation.
>
> The defendant was represented by counsel. The defendant was also charged in CC-01-535.01 with Trafficking Methamphetamine; however, that case

was dismissed on December 22, 2005.

Details: Count 1 charged that the defendant sold, manufactured, or delivered in excess of 28 grams of methamphetamine. Count 2 charged that on December 13, 2000, the defendant possessed methamphetamine.

[Paragraph 67. omitted here.]

68. 03/19/2003(Age 30)

1) Distribution of Controlled Substance (Methamphetamine)
2) Possession of Controlled Substance (Methamphetamine)
Marshall County Circuit Court; Guntersville, AL Case No.: CC-04-11 and 12

02/24/04: pled guilty.

04/02/04: Sentenced in each case to 5 years custody, split sentence, to serve 270 days, balance suspended, with credit for 270 days time served. Placed on 3 years probation. Ordered to complete Phase II drug court. Fined $100 in each case. Ordered to pay victim fee and $1,000 drug demand reduction fee.
04/25/06: Paid in full (CC 04-12).

11/14/06: Paid in full (CC 04-11)

The defendant was represented by counsel. These cases are counted as a single sentence because they were not separated by an intervening arrest, and the sentences were imposed on the same date. It is noted that these cases are not relevant conduct, and they were not included in the drug attribution amounts for the instant federal offense.

The defendant participated in and completed drug court in this case.

Details in CC 04-11: On March 7, 2003, Marshall County Drug Enforcement Unit agents had knowledge that drugs were being sold at the defendant's residence in Albertville, Alabama. Agents monitored a call in which the defendant told an informant that he (Wilborn) had drugs for sale

> and arrangements were made for them to meet at Wal-Mart in Guntersville, Alabama. Agents searched the informant prior to the transaction with negative results, fitted her with a wire, and gave her $80 to purchase drugs from Wilborn. Agents went to Wal-Mart and monitored the electronic wire. Wilborn told the informant to go into Wal-Mart, and while in the store, Wilborn shoved a baggie containing crystal methamphetamine into her right back pocket. She paid him $80, and they arranged to meet later for another transaction. The substance field-tested positive for methamphetamine.
>
> Details in CC 04-12: On March 19, 2003, Officer Segers of the Albertville, Alabama, Police Department was on patrol and while conducting a routine check of the Jamison Inn in Albertville, noticed a Jeep Cherokee. As the officer approached the vehicle, he recognized the occupants as the defendant and Michelle Barksdale. The defendant exited the vehicle and said, "Segers, man, why are you giving me a hard time?" The officer asked if the defendant had any weapons on him, at which time the defendant stuck his hand in his pocket. The officer drew his weapon and instructed the defendant to take his hand out of his pocket. During a search of the defendant's person, a pocketknife was found in the pocket the defendant had been reaching in. A warrant check revealed the defendant had an outstanding warrant. A search of the vehicle revealed a clear plastic baggie containing methamphetamine wrapped in electrical tape. Digital scales were also found in the vehicle. The substance field-tested positive for methamphetamine, and using the scales found in the vehicle, the officer found that the substance weighed 2.4 grams.

It is undisputed, even now, that Petitioner was convicted of and sentenced on February 22, 2005, for the felony drug offense listed at Paragraph 66 of the PSR, and that he was sentenced on April 2, 2004, for his conviction of the felony drug offense listed at Paragraph 68 of the PSR.[10] Petitioner's counsel argues that

[10] It is not disputed that both these convictions were for felony drug offenses. Indeed, Petitioner's counsel concedes that they were felony drug offenses. *See, e.g.*, "there are two felony drug convictions that were not final prior to the commission of the instant offense conviction."

both of these "felony drug convictions were *not* final prior to the commission of the instant offense conviction" (doc. 1 at p. 5) (emphasis in original), and, accordingly, "should not [have been] counted in the criminal history calculation because the offenses were *not* final." (*Id*.) (emphasis in original). Petitioner's counsel argues that the reasons they were not final is because the instant drug trafficking conspiracy that Petitioner pleaded guilty to and for which he was sentenced before the undersigned

> began in or about the year 2002 and continued until on or about January 18, 2012.
>
> The two offenses that were counted in the calculation of the criminal history points did not conclude and were not final until 2004 and 2005 --- well after the commission of the instant convicted offense which began in 2002. These drug convictions were then assessed at a total of three (3) points.

Id.

Petitioner relies on cases from the First and Second Circuits for his argument that the two challenged convictions had not "*become final*" "prior to sentencing for the instance convicted offense." (*Id*. at p. 4).[11] Rather, he argues that these two state court convictions should have been considered "relevant conduct" and not counted "separately" from the federal drug conspiracy to which

---

(Doc. 1 at p. 5) (emphasis omitted).

[11] The Government does not mention the cases cited by Petitioner, not does it cite any cases for its proposition that "[Petitioner] is wrong." (Doc. 6 at p. 11).

he pleaded guilty. The Petitioner's argument frankly makes no sense. The prior drug conviction referenced in Paragraph 66 of the Presentence Report was for criminal conduct that occurred no later than December 13, 2000 (the date of Petitioner's arrest for that conduct). This date is clearly prior to the year - 2002 - in which the conspiracy (and thus any relevant conduct for which the petitioner was sentenced by the undersigned) began. Although the prior drug conviction referenced in Paragraph 68 of the PSR was for criminal conduct that occurred no later than March 19, 2003 (the date of Petitioner's arrest for that conduct), which is a date after the conspiracy began, it is well before the date on which that conspiracy ended approximately nine years later, January 18, 2012. Further, it is well before 2011, the year in which the Petitioner admitted, in the factual basis for his written plea agreement, that he engaged in drug trafficking conduct as part of the conspiracy to which he pleaded guilty.

More important, however, is that Petitioner's argument seems to be that, since these prior convictions (neither of which were appealed) became final during the period that the conspiracy was in effect, they necessarily could not have been final because the Petitioner was part of a long-running drug trafficking conspiracy. In other words, so long as a drug trafficking conspiracy is in existence, any felony drug conviction of any conspirator is necessarily a part of

that drug trafficking conspiracy and so is not final prior to the last conduct that is part of the drug trafficking conspiracy. Petitioner's argument is foreclosed by binding precedent in this Circuit.[12]

In *Hagins v. United States*, 267 F.3d 1202 (11th Cir. 2001), the Eleventh Circuit expressly rejected the very arguments that Petitioner raises here. Hagins was convicted by a jury of conspiracy to possess with intent to distribute and to distribute cocaine hydrochloride and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. The alleged conspiracy dated from 1993 to November 18, 1996. Prior to trial, the government filed notice that it would seek a sentencing

---

[12] Petitioner's arguments also are not supported by the cases he relies upon, all of which are found at footnotes 37 and 43 of his Motion. (Doc. 1 at p. 6, n.37, 43). *United States v. Lopez*, 349 F.3d 39 (2d Cir. 2003), *United States v. Espinal*, 981 F.2d 664 (2d Cir. 1992), and *United States v. Flowers*, 995 F.2d 315 (1st Cir. 1993) are all cited in footnote 37 to support Petitioner's argument that "any offense committed after the instant charged offense, but adjudicated prior to sentencing, should be counted in the criminal history calculation." (Doc. 1 at pp. 5-6). However, none of these cases had anything to do with a sentencing enhancement under 21 U.S.C. § 841. Rather, they all instruct how to determine the number of criminal history points under the Sentencing Guidelines. Petitioner is correct that "For purposes of the Sentencing Guideline requiring the addition of criminal history points for each prior [felony] sentence . . . the term "prior sentence" is not directed at the chronology of the conduct, but the chronology of the sentencing." (*Id*.). However, inappositely to these cases and Petitioner's argument, the chronology of sentencing here is that Petitioner's sentences for both state felony drug convictions were imposed prior to the date on which the Petitioner was sentenced for the instant offense.

The cases cited by Petitioner at footnote 43 are similarly inapposite and unhelpful to Petitioner's argument that the prior felony drug convictions should be considered "part of the instant offense" (Doc. 1 at p. 6) and are "relevant conduct." (*Id*.). In fact, as explained in *United States v. Duty*, 302 F.3d 1240 (11th Cir.2002), it and the other cases cited in footnote 43 hold that "[p]rior sentences are not considered related [for purposes of Chapter 4 of the Guidelines] if they were for offenses that were separated by an intervening arrest." *Id.* at 1241-42 (emphasis supplied). It is clear that an arrest "intervened" between each of Petitioner's arrests at issue: 12/13/2000 (PSR ¶ 66); 3/19/2003 (PSR ¶ 68); and the instant offense (2/7/2012).

enhancement for Hagins based on a prior state conviction. Hagins's co-conspirator pleaded guilty pursuant to a plea agreement, but Hagins proceeded to trial and was found guilty. He was sentenced to a mandatory minimum of 240 months. On direct appeal, the Eleventh Circuit affirmed Hagins's conviction and sentence.

Hagins then filed a § 2255 Petition, asserting ineffective assistance of trial counsel at trial and at sentencing. As to ineffective assistance at sentencing, Hagins asserted, in relevant part, that his counsel was ineffective in: (1) failing to object to the enhancement of Hagins's sentence under 21 U.S.C. § 841(b)(1)(A) based on a prior conviction where that prior conviction was not yet final; and (2) failing to object to the same enhancement on the grounds that the conviction was relevant conduct included in the federal conspiracy charge and was not a proper predicate conviction. The district judge denied the petition but granted a certificate of appealablity on all of Hagins's issues, including the two set out in this paragraph. After review, the Eleventh Circuit affirmed the denial of the petition.

The Eleventh Circuit held that the prior conviction was both final and not relevant conduct; thus, application of the enhancement was proper. Because the issues and facts in *Hagins* are analytically indistinguishable from those raised

here, the undersigned has set out the entire relevant portion of the Eleventh Circuit's opinion.

2. Finality of Hagins's Prior Conviction

> Hagins also protests the enhancement of his sentence to a mandatory minimum of twenty years because of a prior drug conviction. On 19 February 1996, Hagins pled guilty in a Jenkins County, Georgia, court to possession with intent to distribute cocaine. Hagins was sentenced under Georgia's First Offender Act, O.C.G.A. § 42-8-60, et seq., adjudication of guilt was withheld, and he was given five years of probation. Because of Hagins's arrest for the federal offense, the state court on 22 January 1997 revoked his first offender status and sentenced him to fifteen years in prison for the state possession with intent to distribute charge. When Hagins was sentenced on the federal charge, Greene did not object to the enhancement of his sentence based on the prior state conviction.
>
> A sentence enhancement under 21 U.S.C. § 841(b)(1)(A) is proper if based on a final prior conviction. Hagins argues that his prior conviction was not final until after the conspiracy terminated *** Hagins also argues that his prior conviction was not final until he exhausted his discretionary direct appeal of the revocation of his first offender status. Accordingly, he asks us to find that [his counsel] rendered ineffective assistance by failing to object to the enhancement.
>
> ***
>
> b. Finality of Prior Conviction
>
> Hagins [] argues that his prior state conviction cannot be used to enhance his sentence because it is still not yet final. Hagins was sentenced as a first offender on 19 February 1996. According to Georgia law, he had thirty days to appeal that sentence. See O.C.G.A. § 5-6-38(a) ("A notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of...."). The Georgia courts have held that classification as a first offender starts the clock for purposes of filing an appeal. "[F]irst-offender status takes the place of a 'sentence' and once

imposed upon a criminal defendant, his case assumes the mantle of finality necessary to bring a direct appeal of his conviction." *Dean v. State*, 177 Ga.App. 123, 338 S.E.2d 711, 712 (Ga.Ct.App.1985).

Hagins argues, however, that the finality of his conviction should run from the direct discretionary appeal of the revocation of his first-offender status. This argument is specious. In *United States v. Fernandez*, the defendant had received a year of probation after pleading nolo contendere to a state charge of trafficking in cocaine. 58 F.3d 593, 599 (11th Cir.1995) (per curiam). We held that a sentence may be enhanced based on such a prior state court sentence of probation under a deferral statute. *Id*. at 599-600. *See also United States v. Jones*, 910 F.2d 760, 761 (11th Cir.1990) (holding that a similar disposition qualified as a prior conviction for purposes of determining career offender status). If such a conviction can be used to enhance a defendant's sentence without a revocation of probation, it follows that we need not wait for revocation of probation and any related appeal to deem the conviction final. Hagins's conviction became final when the thirty days available to him to appeal the original disposition expired. That date was 23 March 1996. Because Hagins's conviction was final he cannot demonstrate prejudice from [his counsel's] failure to object to his sentence enhancement on that basis.

3. Prior Conviction Was Not Part of Relevant Conduct

Finally, Hagins asserts that he was prejudiced by [his counsel's] failure to object at sentencing to enhancement of his sentence because the prior conviction was for drug activity that was part of the same course of conduct as his federal charge. He relies on *United States v. Hansley*, 54 F.3d 709 (11th Cir.1995), to argue that insufficient time passed between his state conviction and federal arrest to allow use of the state conviction as a predicate offense for enhancement purposes. In *Hansley*, eighteen months passed between the state conviction and federal arrest. *Id*. at 717. The test, however, is not mere passage of time. As the court noted in *Hansley*, because the intent of the enhancement provision is to target recidivism, the focus of the inquiry is on " 'the degree of criminal activity that occurs after a defendant's conviction for drug-related activity is final rather than when the conspiracy began.' " *Id*. (quoting *United States v. Garcia*, 32 F.3d 1017, 1019-20 (7th Cir.1994)). *See also United States v. Howard*, 115 F.3d

> 1151, 1158 (4th Cir.1997) (relying on *Hansley* to determine that conviction during course of conspiracy can serve as prior conviction for enhancement purposes when a month elapsed between state conviction and federal arrest).
>
> In *Howard*, evidence was presented that the defendant continued to engage in the conspiracy after his state conviction. *Id*. at 1158. Similarly, Hagins continued to provide drugs to Johnson as evidenced by the tape of the 28 March phone call. When Hagins was arrested, he had a significant amount of cash which he admitted he was going to use to purchase drugs. As in *Howard*, "[t]he only thing that aborted [his] participation in the drug conspiracy was his arrest in this case." *Id*. Hagins's argument that the state conviction was part of the same course of conduct and cannot serve as a predicate conviction for enhancement purposes is without merit. Accordingly, he cannot demonstrate that he was prejudiced by [his counsel's] failure to object [to the sentencing enhancement].

Hagins v. United States, 267 F.3d at 1206-08.

Like the petitioners in *Howard* and in *Hagins*, Petitioner continued to engage in the instant drug trafficking conspiracy after his state convictions. In the factual basis for his plea agreement, Petitioner admitted to multiple acts in 2011 - after both state felony drug convictions - that were part of the conspiracy to which he pleaded guilty. Specifically, he admitted that:

> On July 1, 2011, a CI recorded a telephone call in which s/he set up a deal to buy methamphetamine from Wilborn. The CI wore an audio/video recording device and arrived at the shop/outbuilding on Wilborn's property. S/He went inside and gave Wilborn $800. Also present was Kristie Gretchen Gauntt who received what looked like one half ounce of meth from Wilborn. Wilborn didn't have more, so the CI had to go back later to pick up the meth. The CI went back a couple of hours later still wearing the recording device and receives the meth from Wilborn. The CI returned to agents with the methamphetamine which was

analyzed by the DEA lab and found to be 10.6 grams of actual methamphetamine. (Count 4).

On July 7, 2011, a CI recorded a telephone call in which s/he set up a deal to buy methamphetamine from Wilborn. The CI wore an audio/video recording device and arrived at the shop/outbuilding on Wilborn's property. S/He went inside and paid Wilborn $500 for two "eight balls". The CI returned to agents with the methamphetamine which was analyzed by the DEA lab and found to be 8.8 grams of actual methamphetamine. (Count 5).

On July 8, 2011, a CI recorded a telephone call in which s/he set up a deal to buy methamphetamine from Wilborn. The CI wore an audio/video recording device and arrived at the shop/outbuilding on Wilborn's property. S/He went inside and gave Wilborn $750. Wilborn didn't have the meth ready, so the CI had to go back later to pick up the meth. The CI went back a couple of hours later still wearing the recording device and received the meth from Kristie Gauntt. The CI returned to agents with the methamphetamine which was analyzed by the DEA lab and found to be 10.8 grams of actual methamphetamine. (Count 6).

On July 13, 2011, a CI recorded a telephone call in which s/he set up a deal to buy methamphetamine from Wilborn. The CI wore an audio/video recording device and arrived at the shop/outbuilding on Wilborn's property. Wilborn, Gauntt and an unidentified male were standing outside. The CI gave Wilborn $750. The meth wasn't ready, so the CI had to go back later to pick up the meth. The CI went back a couple of hours later wearing the audio recording device and receives the meth from Wilborn. Gauntt was there. The CI returned to agents with the methamphetamine which was analyzed by the DEA lab and found to be 10.5 grams of actual methamphetamine. (Count 7).

On September 27, 2011, a CI recorded a telephone call in which s/he set up a deal to buy methamphetamine from Wilborn the next day. The CI wore an audio/video recording device and arrived at the shop/outbuilding on Wilborn's property. S/He went inside and gave Wilborn $2,800. Wilborn had to leave to go get the methamphetamine. Wilborn left his shop and agents followed him to a house located at 808 Nelson Road. He

> met briefly with two Hispanic males who arrived in a white Nissan Altima. Wilborn returned to his shop and handed the CI approximately two ounces of methamphetamine. The CI returned to agents with the methamphetamine which field tested positive for methamphetamine. (Count 8).

(Doc. 97, 4:11-cr-0470-VEH-HGD). In accord with *Hagins* and *Howard*, the undersigned finds that Petitioner's state felony drug convictions were final prior to imposition of the sentence he now challenges and were not relevant conduct to the conduct that supplied the factual predicate for such conviction and sentence.

Waiver of Claims

Because Petitioner's ineffective assistance of counsel at the guilty plea stage claims fail, the court agrees with the Government's argument that all of Petitioner's other claims are barred by his guilty plea. (Doc. 6 at p.3). The Government cites *Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. Unit B 1981)[13], for the proposition that "[a] defendant who enters a plea of guilty waives all nonjurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of the plea can be sustained." (*Id*.). This is a correct statement of the law. However, it does not join issue with Petitioner's Motion. Petitioner does not challenge his conviction, he challenges

[13]This decision is binding in this Circuit. *See Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982) (adopting as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit.).

his sentence.[14]

A sentence appeal waiver will be enforced if it was made knowingly and voluntarily. *Bushert*, 997 F.2d at 1351. To establish that the waiver was made knowingly and voluntarily, the government must show either that: (1) "the district court specifically questioned the defendant" about the waiver during the plea colloquy, or (2) the record makes clear "that the defendant otherwise understood the full significance of the waiver." *Id*.

Petitioner has not alleged that his waiver was not knowing and voluntary. Rather, he has argued, correctly, that "he cannot waive the ineffective assistance of counsel which resulted in his plea and sentence on faulty advice." (Doc. 8 at p.1). Further, in the negotiated plea agreement, Petitioner expressly "reserve[d] the right to contest in an appeal or postconviction proceeding the following: . . . Ineffective assistance of counsel." (4:11-cr-0470-VEH-HGD, Doc. 97 at p. 15). However, as set out above, Petitioner has failed to show ineffective assistance of counsel. All of his other claims, accordingly, were waived in his plea agreement.[15]

---

[14] As set out above, Petitioner does not seek to withdraw his guilty plea. He only seeks resentencing.

[15] Petitioner does not argue that any of his claims fall within the rights of appeal and/or collateral attack reserved to him by the plea agreement from his waiver. The Government similarly does not discuss such reserved rights. However, the court recognizes that such rights were so reserved insofar as Petitioner's arguments are couched in terms of ineffective assistance

PROCEDURAL DEFAULT

As set out above, the Petitioner did not appeal his conviction or sentence. This failure to appeal has consequences here.

Courts have long and consistently affirmed that a collateral challenge, such as a § 2255 motion, may not be a surrogate for a direct appeal. *See, e.g.*, *Frady*, 456 U.S. at 165 (collecting cases). Because collateral review is not a substitute for a direct appeal, the general rules have developed that: (1) a defendant must assert all available claims on direct appeal, *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994); and (2) "[r]elief under 28 U.S.C.A. § 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." *Richards v. United States*, 837 F.2d 965, 966 (11th Cir. 1988) (quoting *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. Unit A Sep.1981)) (emphasis supplied). Accordingly, a non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment, *Frady*, 456 U.S. at 165, unless the error (1) could not have been raised on direct appeal and (2) would, if condoned, result in a complete miscarriage of justice. *Stone v. Powell*, 428 U.S. 465, 477 n.10, 96 S. Ct. 3037,

---

of counsel.

3044 n. 10, 49 L. Ed. 2d 1067 (1976).

All of Petitioner's alleged sentencing errors, other than ineffective assistance of counsel, are non-constitutional in nature and thus are procedurally defaulted unless Petitioner can first demonstrate either "cause" and "actual prejudice," or a miscarriage of justice, i.e., that he is "actually innocent." *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).

Here, Petitioner has not even alleged "cause" other than ineffective assistance of counsel, which allegation the court has found lacks merit. Further, as explained in the court's analysis rejecting Petitioner's ineffective assistance at sentencing claims, Petitioner cannot show "actual prejudice," nor does he allege that he is "actually innocent" of the two prior felony drug convictions that resulted in his § 851 enhancement. Indeed, at sentencing, he expressly agreed that he had been so convicted. (*See* Doc. 198 at pp. 2-4).

Rather, Petitioner has made a "legally innocent" argument relating to the "finality" of such convictions for purposes of the enhancement. In a case analytically indistinguishable from the present argument, the Eleventh Circuit recently held that a claim that a defendant was "innocent" of being a career offender because a predicate offense had been held to no longer serve as a qualifying predicate failed to meet the actual innocence exception because

"innocence" must be factual, not legal, innocence. *McKay v. United States*, 657 F.3d 1190 (11th Cir. 2011). In *McKay*, the Eleventh Circuit said:

> Just like the movant in *Pettiford*, McKay makes the purely *legal* argument that he is actually innocent of his career offender sentence because his prior conviction for carrying a concealed weapon should not have been classified as a "crime of violence" under the Guidelines. McKay does not even suggest, because he cannot, that he did not actually commit the crime of carrying a concealed weapon. In other words, he makes no claim of *factual* innocence of the predicate offense. No circuit court has held that the actual innocence exception is available for claims of purely legal innocence, like McKay's, and we refuse to do so as well.

Id. at 1199 (emphasis in original). In accord with *McKay*, Petitioner's "legal innocence" claims, even if they were correct (and this court has found that they are not), do not arise to the level of a miscarriage of justice.

The court has rejected Petitioner's claims of ineffective assistance of counsel claims. All of his other sentencing claims are thus procedurally defaulted.[16,17]

EVIDENTIARY HEARING

No evidentiary hearing is needed because Petitioner's claims are due to be

---

[16] Petitioner makes no claim of ineffective assistance based on failure to take an appeal of his conviction and/or sentence.

[17] Claims of ineffective assistance of counsel generally may not be raised for the first time on direct appeal, but rather through a § 2255 Petition. *See Lynn v. United States*, 365 F.3d 1225, 1234 n. 17 (11th Cir. 2004) (ineffective assistance claims should be decided in section 2255 proceedings). Further, the procedural default rule does not apply to Sixth Amendment claims of ineffective assistance of counsel that are brought for the first time in § 2255 proceedings. *Massaro*, 538 U.S. at 509.

denied as a matter of law and are affirmatively contradicted by the record. *Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002). Petitioner's claims are also otherwise capable of resolution based on the existing record, without reference to the Affidavit of his trial counsel. *Schultz v. Wainwright*, 701 F.2d 900, 901 (11th Cir. 1983). An evidentiary hearing is also unnecessary because Petitioner's claims are "merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible." *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir.1991); *see also Lynn*, 365 F.3d at 1239; *Chandler v. McDonough*, 471 F.3d 1360, 1363 (11th Cir. 2006) (§ 2254 case citing "clear precedent" that conclusory allegations "are not enough to warrant an evidentiary hearing in the absence of any specific factual proffer or evidentiary support."). "[I]f the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous, a district court is not required to hold an evidentiary hearing." *United States v. Bejacmar*, 217 F. App'x 919, 921 (11th Cir. 2007) (unpublished) (citing *Aron*, 291 F.3d at 715).

CERTIFICATE OF APPEALABLITY

Pursuant to Rule 11(a) of the Rules Governing 2255 Proceedings, the court finds that a certificate of appealability ("COA") in this case is not well-founded, and any application for one is due to be denied. 28 U.S.C. foll. 2255, Rule 11(a)

("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2243(c)(2); *Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997). This standard is "materially identical" to that governing certificates of probable cause under the former 28 U.S.C. § 2253. *Hardwick*, 126 F.3d at 1313. In the context of certificates of probable cause, the Supreme Court defined the requirement of "a substantial showing of the denial of a federal right" to mean that the applicant must raise an issue that is debatable among jurists of reason. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).

"In requiring a 'question of some substance,' or a 'substantial showing of the denial of [a] federal right,' obviously the petitioner need not show that he should prevail on the merits . . . Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement

to proceed further.'" *Id*. (citations omitted). More recently, the Supreme Court echoed this interpretation in the context of a COA, opining that § 2253's "substantial showing" requirement means that a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (adopting and applying *Slack* standard). Where a district judge rejects 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." *Miller-El*, 537 U.S. at 338.

The undersigned finds that Petitioner's arguments do not meet the standards outlined in § 2253(c)(2) and *Slack* for issuance of a COA. It is the conclusion of this court that reasonable jurists could not debate whether Petitioner's § 2255 petition should have been resolved in a different manner. Petitioner has not shown ineffective assistance of counsel at the plea or sentencing stages. All of his other claims are waived and alternatively are procedurally defaulted. Accordingly, Petitioner's asserted grounds for relief are

wholly inadequate to deserve encouragement to proceed further, and cannot merit issuance of a COA.

Therefore, Petitioner may not take an appeal *in forma pauperis*, nor will he be granted a certificate of appealability in connection with same.

DONE this the 9th day of July, 2014.

VIRGINIA EMERSON HOPKINS
United States District Judge