

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION**

**ANTONIO MENDEZ-RAMOS,**

**Movant,**

**V.**

**UNITED STATES OF AMERICA,**

**Respondent.**

**Case No. 5:17-cr-13-MTT-CHW**

**Proceedings Under 28 U.S.C. § 2255  
Before the U.S. Magistrate Judge**

## REPORT AND RECOMMENDATION

Before the Court is Movant Antonio Mendez-Ramos’s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Doc. 616). For the following reasons, it is **RECOMMENDED** that the motion (Doc. 616) be **DENIED**. Movant’s motion for leave to file excess pages (Doc. 631) is **GRANTED**. Movant’s 45-page reply brief (Doc. 630) has been reviewed and considered. Movant’s motion for discovery (Doc. 620) is **DENIED** for reasons set forth below.

## PROCEDURAL BACKGROUND

On April 11, 2017, a grand jury in the United States District Court for the Middle District of Georgia entered an indictment charging Movant with one count of conspiracy to possess with intent to distribute methamphetamine, in excess of 50 grams, one count of conspiracy to possess with intent to distribute marijuana, and one count of possession with intent to distribute methamphetamine, in excess of 50 grams, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), and 841(b)(1)(D). (Doc. 1). Attorney Ashley Deadwyler

was appointed at the initial appearance to represent Movant and continued to represent Movant through sentencing and judgment.

Movant entered into a plea agreement with the United States on March 21, 2018, in which he agreed to plead guilty to a superseding information charging him with one count of conspiracy to possess methamphetamine with intent to distribute, without a specified drug amount, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). (Doc. 282). Movant's plea agreement did not provide a sentence recommendation. However, by eliminating the specified drug amount and charging the offense under Section 841(b)(1)(C), the superseding information reduced the possible sentencing range for conspiracy to possess methamphetamine with intent to distribute to a 20-year maximum with no mandatory minimum rather than a 10-year mandatory minimum to possible life sentence under Section 841(b)(1)(A)(viii) as charged in Count One of the original indictment.

The written agreement explicitly stated that "the Court is not bound by any estimate of the advisory sentencing range that [Movant] may have received from [Movant's] attorney, the Government, or the Probation Office." (Doc. 282, p. 3). Movant acknowledged as part of his plea agreement that he would not be allowed to withdraw his plea because of any estimated guideline range received from his attorney, the Government, or the Probation Office that differed from the advisory guideline range computed by the Probation Office and contained in the Presentence Investigation Report. (*Id.*)

The plea agreement also specified that Movant understood and had discussed with his attorney that the Court had the discretion to impose a sentence that is more or less severe than the advisory guideline range. (*Id.*) Movant waived his right to appeal his sentence as

part of his plea agreement, except in the event that the Court imposed a sentence that exceeds the advisory guideline range or in the event that the Court imposed a sentence in excess of the statutory maximum. (*Id.*, p. 4). Movant waived the right to attack his conviction and sentence collaterally under 28 U.S.C. § 2255 or through any other vehicle, except for such collateral attacks based on a claim of ineffective assistance of counsel. (*Id.*) Movant also agreed “to forfeit to the United States voluntarily and immediately all of Defendant’s right, title, and interest in any and all property which is subject to forfeiture,” including specifically \$49,589.00. (*Id.*, pp. 9-10). Movant initialed each page of his plea agreement and signed it on the final page beneath an acknowledgement that he had discussed the agreement with his attorney, fully understood the agreement, and agreed to its terms. (*Id.*)

The written plea agreement included a stipulation that the Government could prove the following facts.

Around April 2016, agents with the Drug Enforcement Administration (DEA), Georgia Bureau of Investigation (GBI), Peach County Sheriff’s Office (PCSO), and other local law enforcement agencies began investigating Walter Williams a/k/a “Bubba,” for distribution of methamphetamine. During the course of the investigation, agents learned that Williams was distributing large quantities of methamphetamine from his residence in Lizella, Crawford County, Georgia, which he shared with his live-in girlfriend, Ashlee Shaw. Agents were able to conduct several controlled purchases of methamphetamine with Williams at both his residence and elsewhere within the Middle District of Georgia. Agents also obtained search warrants for Williams’ text messages, which shed light on his distribution activities. Agents ultimately obtained a court Order to intercept the wire and electronic messages

taking place over the various and changing cellular phones utilized by Williams.

Agents intercepted these wire and electronic messages from September 23, 2016, through October 20, 2016. During this period, the messages and surveillance confirmed that Williams obtained large quantities of methamphetamine and marijuana from a source of supply in the Atlanta, Georgia area. Williams' source of supply was identified as Ruben Perez. Williams would contact Perez and would then send a courier to meet with a courier for Perez. Perez's courier was identified as Bobby Martinez. Williams' courier would pay Martinez and would then bring the methamphetamine and/or marijuana back to Williams' residence. Williams would then communicate with his customers who would later make arrangements to pick up various quantities of methamphetamine and/or marijuana for further distribution.

On October 4, 2016, Williams and Perez discussed Williams coming to the [*sic*] Atlanta with money that Williams owed. Perez directed Williams to an address in Forest Park, Georgia. Agents conducted surveillance and followed Williams to that address, which was a gas station. Shortly after Williams arrived, agents observed a silver BMW driven by a Hispanic male pull into a restaurant parking lot behind the gas station. Williams received a call from Perez and was directed to the nearby restaurant parking lot where the Hispanic male was seen popping the hood of his vehicle. Williams met with the male and placed a black plastic bag inside the silver BMW.

On October 20, 2016, intercepted communications revealed that Perez and Williams discussed Williams obtaining methamphetamine at his regular time. Williams then contacted Shana Walker to have her serve as the courier to meet with Perez's courier, Martinez. Agents then conducted surveillance and observed Walker meet with Martinez at a shopping center in Ellenwood, Georgia. Agents observed Martinez retrieve a blue Nautica shopping bag from

his vehicle and place it in Walker's vehicle. They then saw Martinez retrieve a black bag from Walker's vehicle and place it in his vehicle before they left.

Later, a trooper with the Georgia State Patrol conducted a traffic stop on Martinez for speeding. The trooper asked Martinez for permission to search the vehicle and Martinez agreed. The trooper then located \$31,500.00 in U.S. currency inside a black bag. Following his traffic stop, a phone call was intercepted between Perez and Williams wherein they discussed that the police had seized the money from Martinez. Perez asked Williams how much money he sent with Walker and Williams told him it was \$31,500.00.

Agents surveilled Walker as she returned to Williams' residence after meeting with Martinez. Shortly after she arrived, agents executed a previously obtained search warrant and located Walker in a bedroom with a blue Nautica bag and five saran wrapped Tupperware containers with what was later confirmed to be 2,969.2 grams of d-Methamphetamine Hydrochloride with a purity of 99%. Later that evening, Williams was arrested.

Following his arrest, Williams agreed to tell agents about his drug distribution activities. Williams confirmed that Perez was his source of supply. Williams stated that he began obtaining one kilogram of methamphetamine at a time from Perez, but had increased to obtaining 3 kilograms at a time for \$10,000.00 to \$15,000.00 per kilogram. Williams estimated that he obtained a total of approximately 50 kilograms of methamphetamine from Perez over an approximate five-month period. Williams stated that he also purchased mid-grade and high-grade marijuana from Perez for \$750.00 to \$2,500.00 per pound. Williams confirmed that after making arrangements with Perez, Williams would send his courier to meet with the courier for Perez.

After speaking with Williams, agents approached Perez who also agreed to tell the agents about his drug distribution activities. Perez stated that when Williams would contact him to order methamphetamine, Perez would in turn contact who was later identified as Defendant. Perez stated that after he

contacted Defendant, Defendant would contact an unknown Hispanic male (UHM) who would provide the methamphetamine to Martinez, who would in turn serve as the courier to meet with Williams's courier. Perez stated that he, Defendant, Martinez, and the UHM would all make a profit per kilogram of methamphetamine that Williams purchased.

Perez stated that he knew Defendant to drive a silver BMW and confirmed that the person Williams met with on October 4, 2016, was Defendant. Williams later confirmed that he once met with a male in a silver BMW to deliver \$2,500.00 that was owed for several pounds of marijuana purchased from Perez. Williams was shown a picture of Defendant and confirmed that Defendant was the male he met with and provided the money to.

Perez stated that Defendant told Perez that the UHM held Perez and Defendant responsible for the \$31,500.00 that was seized from Martinez on October 20, 2016. On February 10, 2017, Defendant was heard in a recorded conversation with Perez discussing the money that was owed from the seizure.

Defendant now admits and agrees that from on or about May 1, 2016, through on or about October 21, 2016, he knowingly conspired with Walter Williams, Ruben Perez, Bobby Martinez, and others to possess with the intent to distribute methamphetamine in the Middle District of Georgia. The parties agree and stipulate for purposes of relevant conduct under the Sentencing Guidelines the amount of drugs attributable to Defendant is more than 4.5 kilograms of Ice.

*(Id., pp. 13-17)*

Movant entered his plea of guilty before the Court on March 21, 2018. At the plea colloquy, the Court explained that Movant would be waiving his right to a jury trial by entering a guilty plea, specifically explaining that at trial Movant "would be presumed innocent, and the Government would have to prove your guilt beyond a reasonable doubt."

(Doc. 494, p. 6). The Court further explained that Movant would not have to testify at trial unless he chose to do so, and that if he did not testify, the Government “could not use that against you.” (*Id.*, p. 7). Movant acknowledged that he understood those rights and intended to waive them. (*Id.*). The Court addressed the appeal waiver contained in the plea agreement, and Movant confirmed that he knowingly and voluntarily waived his right to appeal his sentence by pleading guilty. (*Id.*, p. 20). The Court asked Movant whether he had read the agreement completely, understood it, and discussed it with his attorney, and Movant confirmed that he had initialed every page and signed it and that it represented his complete agreement with the Government. (*Id.*, p. 13). After reviewing the superseding information and Movant’s waiver of his right to be charged in an indictment, the Court notified Movant that the plea agreement was just a recommendation to the Court and that Movant would not be able to withdraw his plea if the Court rejected any of its recommendations. (*Id.*, p. 14). Finally, the Government recited the stipulation of facts set forth in the written plea agreement, and Movant testified that he agreed to that stipulation. (*Id.*, p. 19). The Court accepted Movant’s guilty plea and found that it had been freely and voluntarily entered and was properly supported by a factual basis. (*Id.*, pp. 23-24).

The United States Probation Office prepared a presentence report with recommendations for sentencing. (Doc. 379). The report recommended a base offense level of 38, based on the stipulation of 4.5 kilograms or more of Ice, under USSG §§ 2D1.1(a)(5) and (c)(1), with a two-point adjustment for role as an organizer, leader, manager, or supervisor in the criminal activity under USSG § 3B1.1(c) and three level decrease for acceptance of responsibility, for a total offense level of 37. (Doc. 379, pp. 8-9). With zero

criminal history points resulting in a criminal history category of I, the offense level established a guidelines sentencing range of 210-262 months, capped at 240 months based on the maximum statutory sentence of 20 years. (*Id.*, p. 12).

At sentencing, Movant's counsel contested the two-point adjustment for role as an organizer, leader, manager, or supervisor, arguing that Movant's role in "recruiting" Bobby Martinez to participate in the conspiracy was based on a single interaction:

In Objection Number 1, Your Honor, you will begin to see that my client's story differs substantially from the story of Ruben Perez. In this case, the big question in regards to my client is his role in the offense, which relates to, of course, the most impactful objection that we have.

But my client's story has been that he and Ruben Perez were friends, they met at a horse racing track, began partying together, and Ruben is the one that asked him to find someone that could occasionally drive for Ruben.

He had a friend, Bobby Martinez, that was looking to – to do that, and so he connected the two. But he did not supervise or organize their interactions after that.

He also objects to the assertion that he is the one to contact El Vejo. El Vejo has been referred to in this whole case as "El Churro," but my client did testify in his dealings with Ruben he heard Ruben referring to him as El Vejo. He only came to know this El Vejo through Ruben, so this is a connection that Ruben Perez already had and just involved my client in their interactions so that it looked like he had a bigger part than he did.

And unfortunately, law enforcement interacted with Ruben first. And Ruben very quickly learned that he had an opportunity to cooperate and give information that would benefit him. My client didn't have that opportunity because he wasn't engaged until much later in the conspiracy when everyone was starting to be arrested.



So it is our assertion that Ruben has really attributed a much larger role than was actually played in this this entire conspiracy by my client. My client was just Ruben's friend. Ruben involved him and got him into this mess.

He doesn't dispute that he met with Walter Williams on one occasion to obtain – or exchange money related to a marijuana transaction. And Ruben asked him to do that. That is evidence that was clear. There was surveillance. He's never contested that.

There is also a video of Ruben Perez entering his vehicle, then Ruben calling El Vejo, who was called "an unidentified Hispanic male" for some of the investigation. But it was not my client and Ruben held responsible for monies that were owed to El Vejo. It was just Ruben.

And Ruben saw a way for him to get 5K and benefit himself that involved throwing my client under the bus. I have to relay that, of course, my client has maintained that version of events since my initial meeting, throughout the entirety of this case.

It was a difficult decision for us to enter the guilty plea we entered because, of course, we are agreeing to, you know, an offense and drug level that's much higher than probably what he – he should have gotten. But we recognized that Ruben Perez was going to testify, and the government was using him and trusting him at that point. So it made it a bit difficult for us to prepare arguing our defense. So that's why he did enter his plea.

But taking all of that into account, Your Honor, that is why we have objected to some of the factual allegations, but the primary objection being his role in the offense; that he did connect Bobby and Ruben, but he didn't oversee the transaction between them, he didn't pay Bobby as was alleged. He just connected the two as friends and let them engage in whatever transactions they wanted to engage in.

And it does make a substantial difference for him. Of course, we have a 20-year cap here, but it takes his guideline range down substantially because

his 3-level acceptance of responsibility would take him down to a 35, which would put him in a range that I think is appropriate for the role that he says he had in the offense. It would be about a 10-year range.<sup>1</sup> But because of all that, Your Honor, those are the objections to the presentence report.

(Doc. 496, pp. 3-6)

After hearing argument from the Government, the Court overruled Movant's objection and found that the evidence in the stipulation of fact was sufficient to support the two-level increase for Movant's role in the offense. (*Id.*, p. 9). The Court sentenced Movant to 210 months in prison, the bottom of the guidelines range as set out in the presentence report. (*Id.*, p. 13).

Although Movant did not initially file a direct appeal from his sentence, the judgment was later vacated under 28 U.S.C. § 2255 and re-entered to permit Movant to file an appeal, based on a finding that his counsel had failed to file an appeal at his request. The Federal Defender's Office was appointed to represent Movant on appeal. Movant's appeal was dismissed by the Court of Appeals based on the appeal waiver in the plea agreement. (Doc. 609).

### **MOVANT'S CLAIMS FOR RELIEF**

In his current motion to vacate, set aside, or correct his sentence, Movant raises four claims of ineffective assistance of trial counsel. First, he contends that his attorney failed "to use the skill and knowledge of the law to reasonably investigate and adequately communicate, inform, advice, pursue and litigate Petitioner's Miranda and Fourth

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<sup>1</sup> At an offense level of 35, with a criminal history category of I, the sentencing range would have been 168-210 months.

Amendment rights violations.” (Doc. 621, p. 5). Second, he argues that his attorney provided ineffective assistance “during the ‘critical stage’ of the plea negotiation bargaining process and offer discussion.” (*Id.*, p. 15). Third, he claims that his attorney provided ineffective assistance “during the change of plea proceedings.” (*Id.*, p. 23). Fourth, he complains that his attorney provided ineffective assistance at sentencing “for breaching her professional duties and failing to subject the sentencing proceedings to a meaningful adversarial testing.” (*Id.*, p. 31).

In a reply brief (Doc. 630), to which the Government has not responded, Movant raises an additional claim of ineffective assistance of appellate counsel, contending that his appellate counsel, Jonathan Dodson of the Federal Defenders’ Office, was ineffective in failing to raise on appeal his claim that the Court failed to follow the requirements of Rule 11 of the Federal Rules of Criminal Procedure in its plea colloquy. The reply brief also adds additional claims of ineffective assistance related to trial counsel’s plea negotiations. (*Id.*)

Although Movant’s motion is 40 pages long and weighted with case citations and erudite discussions of law, there is minimal factual basis for any of these claims, and all are clearly contradicted by the record. No evidentiary hearing is needed to resolve Movant’s Section 2255 motion. Movant makes no allegations that, if proved true, would entitle him to relief. Rather, for reasons discussed above, “the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. §2255(b). *See also Rosin v. United States*, 786 F.3d 873, 877–78 (11th Cir. 2015) (“an evidentiary hearing is unnecessary when the petitioner’s allegations are ‘affirmatively contradicted by the record’”).

For the same reasons, Movant's motion for discovery (Doc. 620) is **DENIED**. Movant specifically asks the Court to compel his trial counsel to produce copies of all correspondence and notes of any communications between her and the Government. "A habeas petitioner is not entitled to discovery as a matter of course," and may only be granted on a showing of good cause. *Prada v. United States*, 692 F.App'x 572, 574 (11th Cir. 2017). To establish such good cause, Movant "must provide the court with specific allegations that show a reason to believe that the petitioner could, with fully developed facts, demonstrate he is entitled to relief." *Id.* Movant's motion for discovery is devoid of any specific allegations to suggest that such communications might support his claim for relief, and the files and records of this case, as discussed in detail below, conclusively show that Movant is not entitled to relief.

*1. Ineffective Assistance of Counsel: Miranda and Fourth Amendment Rights Violations*

Movant's first claim is that his attorney rendered ineffective assistance of counsel by failing to pursue or litigate violations of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) or under the Fourth Amendment. Claims of ineffective assistance of counsel are governed generally by *Strickland v. Washington*, 466 U.S. 688 (1984). To obtain relief under *Strickland*, a Section 2255 movant must demonstrate both (1) deficient performance, meaning "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "Judicial scrutiny of counsel's

performance must be highly deferential,” and courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 690.

In the specific case of Fourth Amendment issues, based on trial counsel’s failure to file a motion to suppress, “a petitioner must prove (1) that counsel’s representation fell below an objective standard of reasonableness, (2) that the [underlying] Fourth Amendment claim is meritorious, and (3) that there is a reasonable probability that the verdict would have been different absent the excludable evidence.” *Zakrzewski v. McDonough*, 455 F.3d 1254, 1260 (11th Cir. 2006). In cases challenging a conviction pursuant to a guilty plea, the petitioner must show that he “would have pleaded not guilty but for the ineffective assistance.” *Davidson v. United States*, 138 F. App’x 238, 240 (11th Cir. 2005).

In his initial brief, Movant did not identify any specific *Miranda* or Fourth Amendment issue related to his prosecution, and the record of this case does not indicate that any such issue exists. There is nothing in the record to suggest that Movant ever gave a custodial statement, with or without *Miranda* warnings, and nothing to suggest that any evidence was seized from Movant or that Movant was subject to any search. To the contrary, the record clearly shows that the evidence against Movant was based primarily on the anticipated testimony of co-defendants Perez and Williams, who had previously entered guilty pleas, and that this testimony was corroborated by surveillance, evidence seized from co-defendants, and wiretaps of co-defendants. Movant would not have had standing to object to the seizure of 2,969.2 grams of methamphetamine and two firearms during the execution of a search warrant at Williams’ home or to the seizure of \$31,500.00 during the traffic stop

of Martinez's vehicle on October 20, 2016. *See, e.g., United States v. King*, 509 F.3d 1338, 1341 (11th Cir. 2007) ("only individuals who actually enjoy the reasonable expectation of privacy have standing to challenge the validity of a government search"). Movant also had no basis to suppress evidence of Movant's statements during a recorded telephone call with co-defendant Perez on February 10, 2017, discussing their responsibility to the unidentified source of supply for the \$31,500.00 seized in the stop of Martinez. "The admission into evidence of recorded conversations between a defendant and a consenting government informant does not violate the Fourth Amendment right of the accused." *United States v. Smith*, 918 F.2d 1551, 1558 (11th Cir. 1990). Where there is nothing to indicate that Movant had any meritorious defense under the Fourth Amendment or *Miranda*, Movant cannot show that counsel's actions fell below an objective standard of reasonableness or that he was prejudiced in any way by his counsel's not pursuing a motion to suppress.

In his reply brief, Movant indicates that he believes his attorney should have filed a motion to suppress related to the seizure of \$49,589.00, which he contends was seized from his apartment by agents of the Georgia Bureau of Investigation during a warrantless search. There is nothing in the record to contradict Movant's claim, as neither the plea agreement nor the pre-sentence investigation report states the source of this specific sum. In the plea agreement, Movant agreed to forfeit the specific sum of \$49,589.00, but the factual stipulation in the plea agreement refers only to \$31,500.00 seized from co-defendant Martinez during a traffic stop on October 20, 2016. (Doc. 282, p. 15). The Government did not file a response to Movant's reply brief to address this question.

Even if there were a meritorious basis for suppression of the seizure, the failure to file a motion to suppress would not warrant Section 2255 relief because the evidence was not relevant to Movant's guilt or innocence and therefore does not go to the knowing and voluntary nature of Movant's plea. "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." *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992) (citation omitted). The record, including the stipulation of facts in the plea agreement, makes clear that the Government's evidence against Movant was based on the testimony of co-defendants, wiretap evidence, surveillance by law enforcement, and narcotics and funds seized from co-defendants. Nothing indicates that the suppression of the \$49,489.00 subject to forfeiture would have made an acquittal more likely had Movant gone to trial. The plea agreement, which Movant testified he reviewed and signed, makes plain that forfeiture of the funds was a condition of the plea agreement, and the record is insufficient to indicate that counsel was ineffective for advising Movant to agree to disclaim any interest in the funds in consideration of the lesser sentencing exposure negotiated in the agreement. Moreover, the record is insufficient to show that Movant was prejudiced by any failure to file a motion to suppress, as nothing in the record or Movant's arguments indicates that a successful motion to suppress would have made him more or less likely to enter a guilty plea or proceed to trial.

## *2. Ineffective Assistance of Counsel: Plea Negotiations*

Movant's second claim relates to dissatisfaction with his attorney's efforts in plea negotiations. In his original brief, Movant complains about paragraphs 3(H) and 4(B) of the

written plea agreement, standard provisions that concern the defendant's agreement to provide complete, candid, and truthful statements or testimony regarding the charges and to the Government's agreement to consider whether such cooperation constitutes "substantial assistance" under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1. Movant also complains about his attorney's failure to negotiate a "safety valve" sentence reduction under U.S.S.G. § 5C1.2(a). Movant has provided no indication of a factual basis to suggest that his counsel's performance was deficient in this regard or that he was prejudiced as a result of counsel's actions.

When challenging guilty pleas based on ineffective assistance of counsel, a movant must still satisfy the two-part Strickland test. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In doing so, a movant may only attack the "voluntary and intelligent character of the guilty plea." *Id.* at 56-57. A movant may establish deficient performance by demonstrating that counsel's advice was not within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). A movant must satisfy the prejudice prong by demonstrating "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; *see also Martin v. United States*, 949 F.3d 662, 667 (11th Cir. 2020). Further, a movant must also "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *see Diveroli v. United States*, 803 F.3d 1258, 1265 (11th Cir. 2015) (affirming denial of motion to vacate because "it would not have been rational for [the petitioner] to reject his plea bargain").



Before addressing Movant's specific claims, it is appropriate to consider the general provisions of the plea agreement Movant's counsel did negotiate. The record suggests that the agreement was reasonable in the circumstances. As charged in the indictment, Defendant faced a mandatory minimum of 10 years up to a possible life sentence on count one, conspiracy to possess with intent to distribute methamphetamine, and on count fourteen, possession with intent to distribute methamphetamine, as both counts alleged a drug amount in excess of 50 grams, pursuant to 21 U.S.C. § 841(b)(1)(A)(viii). On count two, conspiracy to possess with intent to distribute marijuana, Movant faced a sentence of up to five years under 21 U.S.C. § 841(b)(1)(D). Counsel negotiated a plea agreement pursuant to which Movant agreed to plead to a superseding information alleging a single count of conspiracy to possess methamphetamine with intent to distribute under Section 841(b)(1)(C), with no specified drug amount. By omitting the drug amount from the information, this plea agreement eliminated the mandatory minimum and reduced the maximum possible sentence from life to 20 years, a significant benefit. In addition, Movant received a three-point guidelines reduction for acceptance of responsibility and the possibility of a § 5K1.1 reduction for substantial assistance.

Movant's counsel explained at the sentencing hearing that she felt the plea agreement was reasonable because the Government had the evidence to make its case at trial. (Doc. 496, p. 5). This evidence was based largely on the testimony of co-defendants Perez and Williams, who had previously entered guilty pleas and agreed to testify against Movant. The co-conspirator testimony was corroborated by other evidence, which included surveillance of Movant during a transaction with Williams on October 4, 2016, the seizure of 2969.2

grams of methamphetamine from co-defendant Williams and \$31,500.00 in cash from co-defendant Martinez following a transaction on October 20, 2016, and a recorded telephone call between Movant and co-defendant Perez on February 10, 2017, during which the two discussed the October 20 seizure and their responsibility to reimburse a source of supply for the lost proceeds. Given this evidence, it was reasonable for counsel to recommend a plea agreement that substantially reduced the sentencing exposure and gave credit for acceptance of responsibility, then to focus at sentencing on minimizing Movant's role in the conspiracy.

Movant's contention that his attorney rendered ineffective assistance in "negotiating" the provisions of paragraph 3(H) and 4(B) of the plea agreement is without merit. These are standard provisions in plea agreements offered by the Government and do not ordinarily involve negotiation. The first relates to a defendant's agreement, on pleading guilty, to provide law enforcement with a "complete, candid, and truthful" debrief and to testify truthfully regarding the offense in any court proceedings against co-defendants. The Government does not contest that Movant did so in this case. The second provision relates to the Government's agreement to consider whether such information qualifies as "substantial assistance" for purposes of the Government's recommending a downward departure under U.S.S.G. § 5K1.1 or 18 U.S.C. § 3553(e).

The decision to seek a downward departure for substantial assistance under § 5K1.1 is left to the discretion of the Government, and courts may not grant such a downward departure or compel the Government to seek such a downward departure unless the Government's decision was based on an unconstitutional motive such as race or religion. *United States v. Dorsey*, 554 F.3d 958, 960-61 (11th Cir. 2009) (quoting *Wade v. United*

*States*, 504 U.S. 181, 185-86 (1992)). In its sentencing memorandum (Doc. 357), the Government conceded that Movant’s proffer had been truthful and complete, but noted that Movant merely provided information about other defendants who had already agreed to plead guilty or that he “provided information about other persons and locations that were involved in the distribution of narcotics [but] was not able to provide any specific details that agents could act on” or that agents “could use to advance any investigations.” *Id.*, p. 2. In such a circumstance, there was nothing that a reasonable attorney could have done to compel the Government to do otherwise or to obtain more favorable treatment.

The “safety valve” of 18 U.S.C. § 3553(e) has no relevance to this case. The “safety valve” gives the Government discretion to move for the Court to depart below a statutory minimum sentence based on substantial assistance. Because Movant’s counsel negotiated a plea to a charge that carried no mandatory minimum, the safety valve does not apply in this case. U.S.S.G. § 5C1.2 also concerns limitations on the applicability of statutory minimum sentences and likewise has no application to a case where no statutory minimum sentence was involved.

In his reply brief, Movant raises four additional claims of ineffective assistance in plea negotiations, contending “that trial counsel deficiently failed to negotiate: (1) ‘conditional plea’ under Fed.R.Crim.P. Rule 11(a)(2); (2) ‘binding plea’ agreement under Fed.R.Crim.P. 11(c)(1)(C); (3) Amount of drugs reasonably foreseeable and attributable to the petitioner in the conspiracy; (4) Mitigating date of participation; and (5) Counsel’s ‘gross’ ‘misrepresentation’ of the petitioner’s sentencing exposure....” (Doc. 630, pp. 14-

15). The Government has not responded to these new grounds, and Movant has made no specific argument as to the first four of them.

The first four of these newly-raised grounds raise claims that counsel was ineffective for failing to negotiate a better plea deal with the Government, but nothing in Movant's argument or in the records indicates that a better deal was available. In this case, as noted above, counsel did negotiate a plea deal that substantially reduced Movant's sentencing exposure – from a mandatory minimum ten years to life to a maximum of 20 years with no mandatory minimum – and allowed for a three-point downward adjustment for acceptance of responsibility and a possibility of further reduction for substantial assistance. The record shows that Movant's risk of conviction at trial was great, where several co-defendants had entered guilty pleas and agreed to testify against Movant and where their testimony would be corroborated by wiretap evidence, surveillance evidence, and seizures of large amounts of narcotics and cash proceeds. Movant's arguments suggest that his primary defense was to minimize the extent of his participation at sentencing, a tactic more relevant to sentencing than to guilt or innocence and one that was vigorously pursued, however unsuccessfully, by his attorney at sentencing.

In an evidentiary hearing related to his prior Section 2255 motion, Movant's counsel testified at length about her thinking as to the plea agreement. She expressed her concern that co-defendants Perez and Martinez had made proffers indicating that Movant "had a much larger role" in the conspiracy than Movant maintained he had. (Doc. 516, p. 6). Perez was prepared to testify that Movant "was the link between him and the Mexican connection for bringing the methamphetamine . . . from Mexico." (*Id.*, p. 7). She testified that Movant

“[u]ltimately elected to go to trial because he knew these codefendants were pointing the finger at him and it was going to be difficult,” and noted that Movant was concerned because “another defendant at the jail, . . . on a separate case, had received a very harsh sentence after going to trial.” (*Id.*, p. 8).

Counsel cannot force the Government to make a better plea deal, and counsel cannot make the Government’s evidence go away or create evidence that does not exist. Ultimately a defendant must decide whether to accept the deal on offer or proceed to trial on the evidence available. Given the risks of going to trial, it was certainly within the “wide range of professional assistance” for counsel to advise Movant to accept the deal on offer, and Movant testified under oath at his plea hearing that he knowingly and voluntarily agreed to accept the offer and waive his right to trial.

The fifth claim raised in Movant’s reply brief argues that his counsel provided ineffective assistance when she “affirmatively guaranteed” that he would receive a ten year sentence. The record does not support this argument. At the evidentiary hearing, Movant’s counsel testified that she expressed her hope that she could get the sentence down to the ten-year range, but nothing indicates that she ever “guaranteed” a ten-year sentence:

My best case scenario was that we would get a 5K and that’s what I was hoping for. We did do a proffer and then we came back to the government – very shortly before sentencing – with some additional information following up on that proffer.

I thought the information was substantial enough it would have been able to assist the DEA and we would get a 5K because he had put himself in a position to give information on people that were very dangerous and that would help

the government to know who they were, especially in this case since that person was never located.

So my hope was that we would get down in the 10 year range. I knew because of the purity of the meth and the role that they were ascribing to him, you know, he was going to grid out somewhere in the 20-ish range. I think ultimately he got 17. But I had hoped with a 5K I could talk Judge Treadwell – because he had no criminal history really to speak of – I had hoped I could get Treadwell down to around 10.

(*Id.*, p. 9).

Counsel’s testimony is credible, but in any event the Court expressly warned Movant at his change of plea hearing that the sentence in the case “could be different than any estimate somebody may have given you as to what they think your sentence might be” and that he “should not plead guilty based on any such estimate.” (Doc. 494, p. 21). Movant acknowledged under oath that he understood this.

### *3. Ineffective Assistance of Counsel: Change of Plea Hearing*

In his third claim, Movant contends that the Court’s plea colloquy was inadequate under Rule 11 of the Federal Rules of Criminal Procedure and that his attorney “failed to object to, advocate and litigate these asserted violations of Rule 11, so as to ensure and secure the court’s compliance with Rule 11 judicial admonition guilty plea colloquy advisement and consequences warning rules.” (Doc. 621, p. 27). Because the record shows that the Court’s plea colloquy was sufficient to ensure that Movant’s plea was knowing and voluntary, this claim is without merit.

Rule 11 requires that, before accepting a guilty plea, a court must advise and question the defendant to ensure that the defendant understands the consequences of the plea and is entering the plea voluntarily. The Rule provides:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and 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 following:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (J) any applicable forfeiture;

- (K) the court's authority to order restitution;
- (L) the court's obligation to impose a special assessment;
- (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);
- (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and
- (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Fed.R.Crim.P. 11(b)

Courts have identified three “core concerns” in the Rule 11 inquiry: “that 1) the guilty plea is free from coercion; 2) the defendant understands the nature of the charge; and 3) the defendant understands the consequences of his plea.” *United States v. James*, 210 F.3d 1342, 1344 (11th Cir. 2000). “The court has wide latitude in satisfying these core concerns.” *United States v. Brown*, 526 F.3d 691, 704 (11th Cir. 2008), *vacated on other grounds*, *Brown v. U.S.*, 556 U.S. 1150 (2009).

Movant specifically contends that the Court failed to comply with Rule 11 because “The guilty plea nowhere specify or explain that the petitioner waived his right against self-incrimination, warned the petitioner of the government’s right to prosecute for false



statement made under oath, the court's authority to 'order restitution,' 'forfeiture' and consider any departure and 18 U.S.C. § 3553(a) factors." (Doc. 621, p. 28).

The first two of these alleged deficiencies are contradicted by the record. In reviewing Movant's trial rights, the Court advised Movant,

You have a right to plead not guilty to any offense that you've been charged with.

You would then have a right to a jury trial. At that trial you would be presumed innocent, and the government would have to prove your guilt beyond a reasonable doubt.

You would not have to testify at that trial unless you chose to do so. And if you did not testify or put up any evidence at trial, the government could not use that against you.

(Doc. 494, p. 7)

Although the Court did not use the term "self-incrimination," this statement was sufficient to advise Movant of his Fifth Amendment right to be protected from compelled self-incrimination. The record shows that the Court also informed Movant that any false statement made under oath could be used in a perjury prosecution. After Movant was sworn in, the Court advised, "Keep in mind, sir, that you are now under oath, and if you were to answer any of my questions falsely, you could be prosecuted for perjury." (*Id.*, p. 4). This statement is sufficient to meet the requirements of Rule 11(b)(1)(A).

As to sentencing, the record shows that Movant was advised of the sentencing range he faced as a result of the plea, of the applicability of the sentencing guidelines, and of the Court's discretion in entering the sentence. The Government's attorney informed Movant that the maximum sentence was up to 20 years imprisonment, a \$1 million fine, three years

of supervised release, and a \$100 mandatory assessment. (Doc. 494, p. 12). As to sentencing, the Court engaged in the following colloquy with Movant:

THE COURT: There are advisory sentencing guidelines that will apply when you are sentenced. Have you talked with Ms. Deadwyler about the sentencing guidelines?

THE DEFENDANT: Yes.

THE COURT: Do you understand that I will not be able to determine what your guideline range is until after the presentence report has been prepared?

THE DEFENDANT: Yes.

THE COURT: Do you understand that, based upon the findings of fact that I make, that the sentence I impose could be different than any estimate somebody may have given you as to what they think your sentence might be?

THE DEFENDANT: Yes.

THE COURT: Consequently, do you understand that you should not plead guilty based on any such estimate?

THE DEFENDANT: Yes.

THE COURT: You should also understand that after your guideline range has been determined, I have the authority to impose a sentence that is longer or shorter than the guideline range. Do you understand that?

THE DEFENDANT: Yes.

(*Id.*, p. 21)

This exchange was sufficient to meet “the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)” as required by Rule 11(b)(1)(M). The Court need not specifically cite to 18 U.S.C. § 3553(a) in explaining to a defendant that the sentence may differ from the guidelines range or from any estimate provided. *See United States v. Gillette*, 441 F. App’x. 755, 757 (11th Cir. 2011)

(plea colloquy “more than met the minimum requirements of Rule 11” where the court specifically discussed the fact that the court was not yet able to determine the advisory guideline range, explained that the probation office would prepare a presentence investigation report prior to sentencing that would contain a recommendation regarding the guideline range, advised that the court would consider that advisory guideline range but had the authority to impose a sentence that was above or below the guideline range, and notified the defendant of the statutory sentencing range.).

To the extent that the Court’s plea colloquy did not comply with the letter of Rule 11, Movant cannot show that his attorney’s conduct fell below the objective standard of reasonableness required by the Sixth Amendment under *Strickland*. Little would have been accomplished by his attorney’s insistence that the Court recite the rather abstract sentencing factors of 18 U.S.C. § 3553(a), where the key concern is that the defendant understands that the Court’s sentence could take into account matters besides the sentencing guidelines and could differ from the guidelines range or any estimate provided to the defendant by his attorney or anyone else. The Court’s plea colloquy was adequate to address these core concerns.

The record does indicate that the Court did not address the possibility of restitution or forfeiture during the plea colloquy. Even if counsel’s failure to object to this omission could be construed as constitutionally deficient, Movant cannot show that he was prejudiced by the omission. There was no issue as to restitution, and no restitution was imposed. As to forfeiture, the written plea agreement specifically provided that Movant agreed to forfeit any interest in the \$49,589.00 that had been seized by the Government during the investigation.

(Doc. 282, pp. 9-10). Movant signed and initialed the plea agreement and testified during the colloquy that he had thoroughly reviewed the plea agreement with his attorney, had initialed each page, and had signed the agreement.

#### 4. *Ineffective Assistance of Counsel: Sentencing Proceedings*

Movant's fourth ground asserts that his attorney was ineffective at sentencing for failing to object to or "litigate" alleged breaches of the plea agreement by the Government and errors by the Court. He contends that the Government breached the plea agreement in three ways: (a) by failing to seek a sentence reduction under U.S.S.G. 5K1.1; (2) using evidence provided in plea proffer against him; and (3) straying from its "neutrality agreement" by making a sentencing argument to the Court. He contends that the Court erred at sentencing by applying a "relaxed evidentiary standard" and by violating the requirements of Rule 11 during the plea colloquy.<sup>2</sup> Because the record shows that the Government did not breach the plea agreement and the Court did not err at sentencing, Movant cannot show that his attorney was ineffective for failing to raise meritless objections.

The Government did not breach the plea agreement by failing to seek a downward departure under U.S.S.G. § 5K1.1 for providing "substantial assistance." Paragraph 4(B) of the Plea Agreement, using standard language, provides:

That [the United States Attorney] further agrees, if the Defendant cooperates truthfully and completely with the Government, including being debriefed and providing truthful testimony, at any proceeding resulting from or related to

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<sup>2</sup> This second alleged error by the Court is duplicative of the claims raised in Ground Three of his motion.

Defendant's cooperation, to make the extent of the Defendant's cooperation known to the sentencing court. If the Defendant is not completely truthful and candid in his cooperation with the Government, he may be subject to prosecution for perjury, false statements, obstruction of justice, and/or any other applicable charge. If the cooperation is completed prior to sentencing, the Government agrees to consider whether such cooperation qualifies as "substantial assistance" pursuant to 18 U.S.C. Section 3553(e) and/or Section 5K1.1 of the Sentencing Guidelines warranting the filing of a motion at the time of sentencing recommending a downward departure from the applicable guideline range. If the cooperation is completed subsequent to sentencing, the Government agrees to consider whether such cooperation qualifies as "substantial assistance" pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure warranting the filing of a motion for reduction of sentence within one year of the imposition of sentence. **In either case, the Defendant understands that the determination as to whether the Defendant has provided "substantial assistance" rests solely with the Government. Any good faith efforts on the part of the Defendant that do not substantially assist in the investigation or prosecution of another person who has committed a crime will not result in either a motion for downward departure or a Rule 35 motion.** In addition, should the Defendant fail to cooperate truthfully and completely with the Government, or if the Defendant engages in any additional criminal conduct, the Defendant shall not be entitled to consideration pursuant to this paragraph.

(Doc. 282, pp. 7-8) (emphasis added)

As the highlighted language of the provision makes clear, the decision to seek a downward departure based on substantial assistance is in the sole discretion of the Government, and the Government's exercise of that discretion is based on whether any information provided assists in the investigation or prosecution of another person who has committed a crime.

Prior to sentencing, the Government submitted a sentencing memorandum (Doc. 357) in which it conceded that Movant had been truthful in his proffer, but explained that none of the information provided proved useful to the Government in identifying or prosecution anyone else. Because Movant was the last to plead guilty in the case, he could not offer any testimony at trial as to any co-defendants. Movant “also provided information about other persons and locations that were involved in the distribution of narcotics, however, he was not able to provide any specific details that agents could act, thus there was no information that was provided that law enforcement could use to advance any investigations.” (*Id.*, p. 2). Movant has offered nothing to contradict this statement or to show that he provided any information that would have advanced any investigation or prosecution.

Even if Movant had evidence to contest the Government’s conclusion, any objection by counsel at sentencing would have been futile, as courts have no authority to compel the Government to file a motion for downward departure based on substantial assistance. Section 5K1.1 “gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted,” and courts may only review the prosecutor’s discretion in exercising this discretion “if they find that the refusal was based on an unconstitutional motive” such as “the defendant’s race or religion.” *Wade v. United States*, 504 U.S. 181, 185-86 (1992). Movant cannot show that his counsel was ineffective for failing to raise a meritless objection. *See Hollis v. United States*, 958 F.3d 1120 (11th Cir. 2020); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001).

Movant next contends that his counsel was ineffective at sentencing in failing to object to the Government’s use of evidence from his proffer against him. The plea

agreement, again using standard language, provided at paragraph 4(C) that “any self-incriminating information which was previously unknown to the Government and is provided to the Government by the Defendant in connection with the Defendant’s cooperation and as a result of the Defendant’s plea agreement to cooperate will not be used in determining the applicable guideline range.” (Doc. 282, p. 8). Movant contends that his attorney should have argued that the Government breached this agreement when it argued for the two-point enhancement based on Movant’s role in the offense.

This argument is contradicted by the record. The record shows that the Government argued for the two-level enhancement based on facts stipulated in the plea agreement, not on any facts proffered by Movant following entry of the plea agreement. At sentencing, the Government argued that the enhancement for his role as leader or organizer was warranted based on the stipulation that Movant had recruited co-defendant Bobby Martinez to serve as a courier for co-defendant Williams and that Movant directed Martinez about “when he needed to pick up narcotics and then where to go to deliver them.” (Doc 496, p. 7). The stipulation shows that these facts were already known to the Government at the time it made the plea offer, based on proffers previously made by co-defendant Perez, and constituted facts that the Government was prepared to prove at trial. As such, the Government’s argument did not constitute a breach of the plea agreement, and Movant’s counsel was not ineffective for failing to raise a meritless argument. Counsel chose, instead, to focus on the argument that did have merit – that these stipulated facts were insufficient to establish a leadership or organizing role in the offense.

Movant's third contention is that counsel was ineffective at sentencing for failing to object to the Government's breach of a "neutrality agreement" in the plea agreement. Movant contends that the Government agreed to remain neutral at sentencing and not to make any remarks or arguments about the sentence the Government should receive. There is no such provision in the plea agreement. As Movant correctly observes, the plea agreement contained a provision that the Government and Movant "understand and agree that the Court should consider its sentence in light of the advisory Federal Sentencing Guidelines." (Doc. 282, p. 2). The plea agreement goes on to provide that Movant agreed "that at sentencing the Court may determine any pertinent fact by a preponderance of the evidence and the Court may consider any reliable information, including hearsay." (*Id.*). Nothing in the agreement can be construed as an agreement that the Government would remain neutral and take no position at sentencing. The terms of the plea agreement simply acknowledged the parties' understanding that nothing in the plea agreement would limit or be binding on the Court's discretion in determining a sentence. Once again, Movant's counsel was not ineffective in failing to raise an objection that had no merit.

As to alleged errors by the Court, Movant contends that his counsel was ineffective for failing to object to the Court's application of a "relaxed evidentiary standard" in determining that Movant played a leadership or organizing role in the conspiracy. "When a challenge to the veracity of the facts in a PSI is brought by a defendant, the burden of proving those facts by a preponderance of the evidence lies with the government." *United States v. Rodriguez*, 34 F.4th 961, 969 (11th Cir. 2022). In this case, the Court's decision was based



on the stipulation in the plea agreement, which itself was based on the proffered testimony of co-defendant Perez:

THE COURT: Well, I understand, Ms. Deadwyler, that your client disagrees with Mr. Perez's version of the facts. But as the factual stipulation in the Plea Agreement makes clear, the government has Mr. Perez's evidence to that effect.

MS. DEADWYLER: Right.

THE COURT: Your client may disagree and think Mr. Perez is not being truthful, but that's his story. So there is clearly evidence to support – from the stipulation of facts in the Plea Agreement, clearly evidence in support of the facts to which you object.

(Doc. 496, p. 9)

As part of the plea agreement, Movant stipulated that the Government had evidence, including the testimony of Perez, to prove at trial the facts stated in the stipulation of facts, including the facts that formed the basis of the Court's two-level enhancement for role in the offense. In doing so, the Court applied the proper burden of proof, and Movant's counsel was not ineffective for failing to make a meritless objection.

Finally, Movant contends that his counsel was ineffective for failing to contest at sentencing errors in the Court's plea colloquy, a claim addressed above as to Movant's third ground. As the record shows that the Court substantially complied with the requirements of Rule 11 and that Movant was not prejudiced by any specific omissions, Movant cannot show that his counsel was ineffective in failing to raise this issue at sentencing.

##### *5. Ineffective Assistance of Appellate Counsel: Objections to Plea Colloquy*

Movant's final claim, raised for the first time in his reply brief, is that his appellate counsel was ineffective for failing to raise a claim of error as to the Court's failure to review

the forfeiture provision of the plea agreement in conformity with Rule 11(b)(1)(J). On appeal, Movant's counsel argued that the Court erred in finding that Movant was subject to the two-point enhancement for his role in the conspiracy based on the parties' stipulation that a co-defendant accused Movant of having a leadership role, without requiring corroborating evidence. The Court of Appeals ultimately dismissed Movant's appeal based upon the appeal waiver in the plea agreement, finding that Movant "knowingly and voluntarily agreed to the appeal waive and that this appeal does not fall under any of the waiver's exceptions." (Doc. 609, p. 2).

On appeal, counsel has broad discretion in choosing which arguments to highlight on appeal. "Appellate counsel has no duty to raise every non-frivolous issue and may reasonably weed out weaker (albeit meritorious) arguments." *Overstreet v. Warden*, 811 F.3d 1283, 1287 (11th Cir. 2016). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Smith v. Robbins*, 528 U.S. 259 (2000)). Movant cannot show that counsel was constitutionally deficient for failing to raise this argument on appeal, because the argument was not likely to succeed. As explained above, the Court's failure to address the forfeiture explicitly during the plea colloquy was at most a procedural error, as the plea colloquy addressed the core concerns of confirming that the plea was free from coercion and that Movant understood the nature of the charge and the consequences of the plea. The forfeiture was clearly set forth in the written plea agreement, and Movant testified that he had reviewed and understood the written agreement.

### **CONCLUSION**

For the reasons discussed herein, it is **RECOMMENDED** that Movant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 616) be **DENIED**. Movant's motion for leave to file excess pages (Doc. 631) is **GRANTED**, and his motion for discovery (Doc. 620) is **DENIED**.

### **OBJECTIONS**

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, **WITHIN FOURTEEN (14) DAYS** after being served with a copy thereof. Any objection is limited in length to **TWENTY (20) PAGES**. *See* M.D. Ga. L.R. 7.4. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

**SO RECOMMENDED**, this 3rd day of May, 2024.

s/ Charles H. Weigle  
Charles H. Weigle  
United States Magistrate Judge