

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

ADRIAN HOWARD, <div style="text-align: center;">Movant,</div> <div style="text-align: center;">v.</div> UNITED STATES OF AMERICA, <div style="text-align: center;">Respondent.</div> <hr style="width: 40%; margin-left: 0;"/>	: : : : : : : : : : :	Case No. 5:21-cr-053-MTT-CHW-1 Case No. 5:24-cv-376-MTT-CHW 28 U.S.C. § 2255
--	---	---

ORDER AND RECOMMENDATION

Before the Court are Movant Adrian Howard’s Motions to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Docs. 90, 92). For the following reasons, it is **RECOMMENDED** that the motions be **DENIED**. It is further **RECOMMENDED** that a certificate of appealability be **DENIED**.

BACKGROUND

On September 15, 2021, Movant was indicted on two counts of Distribution of Methamphetamine, one count of Possession with Intent to Distribute Methamphetamine, one count of Possession with Intent to Distribute Heroin, one count of Possession with Intent to Distribute Cocaine, and one count of Possession of a Firearm in Furtherance of a Drug Trafficking Crime. (Doc. 1). With the assistance of counsel, Movant pleaded guilty to one count of Possession with Intent to Distribute Heroin under 21 U.S.C. §§ 841(a)(1) and (b)(1)(c). (Docs. 62, 63). The plea agreement explained that this count carried a maximum term of twenty years imprisonment, a maximum fine of \$1,000,000.00, and three years of supervised release. (Doc. 63, pp. 2–3).

In the written plea agreement, Movant stipulated to certain facts to support the charge of possession of heroin with intent to distribute, but Movant did not stipulate to facts related to two previous controlled purchases of methamphetamine and to the possession of a firearm. The stipulation of fact in Movant's plea agreement provides:

In early February 2021, the Drug Enforcement Administration (DEA) became aware through a confidential source (CS) that Defendant Adrian Howard was dealing methamphetamine in Macon, Georgia. The DEA arranged to conduct a controlled buy from Howard using a CS. The first buy occurred on February 19, 2021. Howard met with a CS at his residence at 1728 Eveline Avenue in Macon. This address was a rental home occupied by Howard and at least one other tenant. The CS paid Howard \$700 of government funds in exchange for two ounces of methamphetamine. Howard provided the methamphetamine to the CS, and the CS turned the narcotics over to DEA. The CS was searched by agents both before and after the buy for drugs, contraband, or money, with negative results. The narcotics were subjected to laboratory testing, which confirmed that it was 99% pure methamphetamine, weighing 55.85 grams. The amount of pure substance was 55.29 grams.

DEA conducted a second controlled buy from Howard on March 8, 2021. Once again, a CS went to Howard's residence at 1728 Eveline Avenue, and paid \$700 of government funds in exchange for 2 ounces of methamphetamine. Howard sold the CS two ounces of methamphetamine. Howard retrieved the narcotics from a small electronic safe located on a bed situated inside the living area. The CS observed multiple baggies of narcotics stored inside the electronic safe. The CS was searched by agents both before and after the buy for drugs, contraband, or money, with negative results. The narcotics were subjected to laboratory testing, which confirmed that it was 96% pure methamphetamine, weighing 56.53 grams. The amount of pure substance was 54.26 grams.

After the two controlled buys, DEA obtained and executed a search warrant at 1728 Eveline Avenue on March 18, 2021. At the time the search warrant was executed,

ten individuals were present at the address, located both inside and outside the residence. These individuals included Adrian Howard. The following items were located during the search of the residence. On the same bed from which Howard had conducted the March 8 transaction, officers found two black safes. Inside the smaller safe, there was a clear Sure Fresh plastic bag containing suspected heroin and a small plastic bag containing suspected methamphetamine. There were also empty plastic bags and drug related paraphernalia inside that safe, including razor blades, sifters, and dirty spoons. The larger black safe contained \$2,179.00 in U.S. currency. Underneath a black pillow on the bed, agents found a Taurus Model PT111G2A handgun, Serial Number TLM94687. This weapon was determined to have been stolen out of Houston County, Georgia.

Lying on the bed behind the two electronic safes, there was a clear plastic bag containing suspected heroin. There were also two small plastic bags of suspected heroin on a small TV tray-style table beside the bed. There was a small clear plastic bag containing suspected powder cocaine on top of the same small table, along with a set of green digital scales was located on top of the table as well. On the floor immediately beside the bed, there was a clear plastic bag containing various colored tablets.

DEA submitted the various suspected narcotics seized from 1728 Eveline Avenue to the Mid-Atlantic Laboratory for testing. Test results confirmed that: 1) The suspected heroin seized from the small safe and from on top of the bed behind the two safes was heroin, weighing 43.35 grams; 2) The suspected powder cocaine seized from on top of the small bedside table was indeed cocaine, weighing 3.15 grams; and 3) The tablets seized from the floor beside the bed were positive for the presence of methamphetamine, weighing 75.30 grams with a 2.1% purity.

Defendant Howard now admits and agrees that he did knowingly possess with intent to distribute heroin on March 18, 2021. Defendant Howard declines to stipulate that he possessed a firearm in conjunction with any felony offense, and he declines to stipulate that he possessed any other substances or items recovered during the execution of the search warrant at 1728 Eveline Avenue other than the

heroin as alleged in Count Four of Indictment. Defendant Howard declines to stipulate that he sold methamphetamine on two occasions to a confidential informant.

The Government agrees that at least the following items recovered during the execution of the search warrant did not belong to Defendant Howard: two small plastic bags of crystal methamphetamine, which DEA tested and confirmed had a combined weight of 11.92 grams and a purity of 94%, and which were recovered from a small walk-in shower in a bathroom situated by the residence's only formal bedroom; two handguns recovered from a bedroom identified as belonging to T. P., a tenant in the residence; ammunition recovered from a chest of drawers located in T. P.'s bedroom, digital scales located in T. P.'s bedroom, and a pill bottle containing several suspected MDMA pills located in T. P.'s bedroom. These items are not part of Defendant Howard's relevant conduct.

The Government agrees that Defendant Howard did not maintain a premises for the sole purpose of drug distribution.

(Id., pp. 9–11).

As part of the plea agreement, Movant waived his right to challenge his conviction and sentence under 28 U.S.C. § 2255, except for such collateral attacks based on a claim of ineffective assistance of counsel. (*Id.*, p. 4–5). 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. (Doc. 63).

At the change of plea hearing, the Court addressed the appeal waiver contained in the plea agreement, and Movant confirmed that he freely and voluntarily waived his rights to appeal and collaterally attack his sentence, except for limited circumstances, by pleading guilty. (Doc. 81, pp. 16–17). Movant stated that he understood that his sentence might be different than any estimate given to him by counsel, and that the Court could impose a harsher sentence than one in the

advisory guideline range. (*Id.*, p. 14, 17–18). The Court also asked whether Movant had discussed his guilty plea with counsel, and Movant responded that he had and was fully satisfied with the advice counsel had given him. (*Id.*, p. 19).

Although he faced a maximum prison sentence of 20 years or 240 months, the presentence investigation report (PSR) indicated that Movant’s guideline sentencing range was 135 to 168 months based upon a total offense level of 31 and a criminal history category of III. (Doc. 69, ¶¶ 90–91). Although the base offense level was 30, Movant received a two-level enhancement for possessing a dangerous weapon and a two-level enhancement for maintaining a premises for manufacturing or distributing controlled substances. (*Id.*, ¶¶ 22–24). Movant then received a two-level decrease for acceptance of responsibility and a one-level decrease for entering a plea in a timely manner—creating a total offense level of 31. (*Id.*, ¶¶ 30–32). Movant objected to the base offense level based on drug quantity, the firearm enhancement, and the enhancement for maintaining a drug-related premises. (Docs. 65; 69-1).

At sentencing, the Court asked Movant if he had reviewed the PSR with his sentencing counsel, and he responded yes. (Doc. 82, p. 4). The Court then heard Movant’s objections to the PSR. Movant’s counsel objected first to the base offense level, arguing that Movant should only be held accountable for the conduct he admitted to related to the Possession with Intent to Distribute Heroin count. (*Id.*, p. 6–9); *see* (Doc. 65, p. 1). The Court overruled the objection, explaining that the instances giving rise to the base offense level were stipulated to in the plea agreement. (Doc. 82, pp. 8–9). Movant’s counsel objected next to the firearm enhancement, arguing that he was not found in the room with the firearm and that there were two other individuals located in the room at the time the firearm was discovered. (*Id.*, p. 9). The Court overruled the

objection because the location was Movant's residence. (*Id.*, pp. 9–10). The Court explained further that

[w]ith regard to the gun, which was discovered upon the execution of the search warrant, there was found on that bed from which Mr. Howard had conducted the March 8th transaction the two black safes along with drugs and drug paraphernalia; and then under the black pillow -- a black pillow on that bed, where the material was found, they found the firearm.

(*Id.*, p. 10).

Finally, Movant's counsel objected to the premises enhancement and argued that the Government and Movant had stipulated that the enhancement was not appropriate. (*Id.*, pp. 10–12). After questioning the primary case agent for the investigation, the Court overruled the objection. (*Id.*, pp. 13–21). The Court explained that the stipulated facts established by a preponderance that the enhancement was appropriate. (*Id.*, p. 21).

Movant's counsel requested a downward departure from the sentencing guidelines and a sentence of 108 months. (*Id.*, p. 23). Movant then made his allocution, after which the Government requested a term of imprisonment in the middle of the guideline range. (*Id.*, pp. 23–25). The Court determined that, based on Movant's total offense level and criminal history category, the advisory sentencing range was 135 to 168 months. (*Id.*, p. 26). The Court sentenced Movant to 145 months. (*Id.*, p. 27). Judgment was entered on February 14, 2023. (Doc. 72). Movant then filed a Notice of Appeal, through new counsel, which was subsequently dismissed pursuant to the appeal waiver in Movant's plea agreement. (Docs. 75, 84); *see* (Doc. 63, p. 4).

On October 9, 2024, Movant, *pro se*, filed this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Doc. 90). Following the Court's order to amend his motion, Movant filed an amendment. (Docs. 91, 92). The Government responded on April 4, 2025, arguing

that the Court should deny Movant's motions. (Doc. 93). As discussed below, Movant's Section 2255 motions should be denied.

DISCUSSION

Movant argues that his sentence should be vacated, set aside, or corrected pursuant to Section 2255 because he had ineffective assistance of counsel, because he was actually innocent of the crime charged, and because there was prosecutorial misconduct. As explained below, each of these arguments is without merit.

I. Movant Has Not Shown Ineffective Assistance of Counsel.

To prevail on a claim of ineffective assistance of counsel, Movant must establish by a preponderance of the evidence that (1) his attorney's performance was deficient, and (2) he was prejudiced by the inadequate performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Chandler v. United States*, 218 F.3d 1305, 1312–13 (11th Cir. 2000). Movant must prove that his counsel's performance “was unreasonable under prevailing professional norms and that the challenged action was not sound strategy” to establish deficient performance. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 384 (1986) (citing *Strickland*, 466 U.S. 688–89). To show that counsel's performance was unreasonable, Movant must establish that no competent counsel would have taken the action in question. *Van Poyck v. Fla. Dep't of Corrs.*, 290 F.3d 1318, 1322 (11th Cir. 2002) (per curiam); *Chandler*, 218 F.3d at 1315. There is a strong presumption that the challenged action constituted sound trial strategy. *Chateloin v. Singletary*, 89 F.3d 749, 752 (11th Cir. 1996). As for prejudice, Movant must show there is a reasonable probability that, but for counsel's inadequate representation, “the result of the proceeding would have been different.” *Meeks v. Moore*, 216 F.3d 951, 960 (11th Cir. 2000) (quoting *Strickland*, 466 U.S. at 694). If

Movant fails to establish that he was prejudiced by the alleged ineffective assistance, a court need not address the performance prong of the Strickland test. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

In challenging a guilty plea based on ineffective assistance of counsel, Petitioner must still satisfy the two-part *Strickland* test. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In doing so, Petitioner may only attack the “voluntary and intelligent character of the guilty plea.” *Id.* at 56–57 (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). Petitioner 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). Petitioner 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, Petitioner 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”).

A. Failure to inform about uncharged relevant conduct

Movant first alleges that counsel failed to inform him of “uncharged relevant conduct” in determining his base offense level (Doc. 90, p. 13). Movant’s contention, in substance, is that his counsel failed to communicate the consequences of pleading guilty.

Plea negotiations qualify as a “critical stage” of the criminal proceedings to which the Sixth Amendment right to effective assistance of counsel applies. *Missouri v. Frye*, 566 U.S. 134, 141

(2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010)). Under the first prong of the *Strickland* ineffective assistance of counsel analysis, “counsel owes a lesser duty to a client who pleads guilty than to one who goes to trial, although counsel still must ‘make an independent examination of the facts and circumstances and offer an informed opinion to the accused as to the best course to follow.’” *Cruz v. United States*, 188 F. App’x 908, 913 (11th Cir. 2006) (quoting *Agan v. Singletary*, 12 F.3d 1012, 1017–18 (11th Cir. 1994)). To satisfy the second prong of the *Strickland* test and show prejudice to his case, Movant “must show not only that counsel committed professional error, but also a reasonable probability that, but for counsel’s errors, [he] would not have pleaded guilty and would have insisted on going to trial.” *Cruz*, 188 F. App’x at 913 (citing *United States v. Pease*, 240 F.3d 938, 941 (11th Cir. 2001)). To be entitled to collateral relief under such circumstances, Movant “must ‘prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.’” *Downs-Morgan v. United States*, 765 F.2d 1534, 1539 (11th Cir. 1985) (quoting *McMann*, 397 U.S. at 774).

Movant’s allegation fails to meet the standard required to show ineffective assistance of counsel as to his plea agreement. Rather than demonstrating ineffectiveness, the record plainly reflects that Movant entered his plea knowingly and voluntarily. In determining whether a plea was entered knowingly and voluntarily, the Court must look to its plea colloquy and any written plea agreement. *Vanaman v. United States*, No. 16-15452-E, 2017 WL 11684637, at *4 (11th Cir. Sept. 1, 2017) (citing *United States v. Jones*, 143 F.3d 1417, 1420 (11th Cir. 1998)). There is a strong presumption that Movant’s statements during the plea colloquy were true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). Because Movant was under oath for the plea colloquy, “he bears a heavy burden to show his statements were false.” *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988).

In this case, Movant claims he was unaware that uncharged relevant conduct could be used to determine his base offense level and thought he was pleading to a charge that carried a 33–41-month term of imprisonment. This argument is contradicted by the record. The following exchange occurred during the change of plea hearing:

THE COURT: Do you understand that your agreement with the government on these facts is not binding on me until I accept the Plea Agreement?

[MOVANT]: You said they are not binding on you?

THE COURT: That the facts that you have agreed with from the government are not binding on me until I accept the Plea Agreement?

[MOVANT]: Yes, sir.

THE COURT: Do you understand that you are not being sentenced today?

[MOVANT]: Yes, sir.

THE COURT: Do you understand that the Probation Office will conduct an investigation and prepare a presentence report to assist you in your sentencing?

[MOVANT]: Yes, sir.

THE COURT: Do you understand that something could come out in that investigation that could affect the length of your sentence?

[MOVANT]: Yes, sir.

THE COURT: I will defer acceptance of the terms of the Plea Agreement until after the presentence report has been prepared. To be clear, Mr. Howard, I understand that there's a dispute -- that you dispute that some of the items can be -- are yours or that you are responsible for them; is that correct?

[MOVANT]: Yes, sir.

THE COURT: And that dispute is something that will likely be the subject of the presentence report and your sentencing hearing, and we will resolve it one way or the other. Do you understand that?

[MOVANT]: Yes, sir.

THE COURT: Okay. But you're -- it's true that you are not agreeing that those excluded items can be considered in your sentencing? Do you understand that?

[MOVANT]: Say it one more time.

THE COURT: I really want you to understand that you are taking the position that certain items that were excluded from the agreement you contend are not part -- or cannot be used in your sentencing; is that right?

[MOVANT]: Yes, sir.

THE COURT: But do you understand that ultimately I am the one who will have to make that decision?

[MOVANT]: Yes, sir.

* * *

THE COURT: When you are sentenced, Mr. Howard, we will be considering the advisory sentencing guidelines. Have you talked with Ms. Howard (sic) about the sentencing guidelines? Ms. Williams, pardon me. Have you talked with Ms. Williams about the sentencing guidelines?

[MOVANT]: Yes, sir.

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

[MOVANT]: Yes, sir.

THE COURT: Do you understand that based upon the finding of fact that I make, the sentence I give you could be different than any estimate somebody may have given you?

[MOVANT]: Yes, sir.

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

[MOVANT]: Say that one more time.

THE COURT: We were just discussing the fact that the sentence I give you could be different than any estimate somebody may have given you, and you said you understood that. The next question was, consequently, do you understand that you should not plead guilty based upon what somebody else told you they think your sentence might be?

MS. WILLIAMS: Do you understand what he's asking?

[MOVANT]: Yeah, I understand.

THE COURT: Okay. Yeah. The point, Mr. Howard, is that I have to determine what your sentence is. Ms. Williams may have given you her idea of what she thinks the range is, and she knows a lot about what we do here. But ultimately I'm the one that has to determine the sentence, and what I determine to be a sentence could be different than what Ms. Williams or anybody else has told you. Do you understand that?

[MOVANT]: I understand.

THE COURT: And consequently, you shouldn't plead guilty just based upon the estimate that somebody else might have given you. Do you understand that?

[MOVANT]: Yes, sir.

THE COURT: Do you also understand that once I have determined what your guideline range is, I have the authority to give you a sentence that is longer or shorter than the guideline range?

[MOVANT]: Yes, sir

(Doc. 81, pp. 14–15, 17–19).

Movant's statements during the plea colloquy constitute "a formidable barrier" that he has not overcome because he has not pointed to any evidence that those statements were false. *See Vanaman*, 2017 WL 11684637, at *4 (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). He has failed to meet the burden required to rebut his own sworn statements that he had discussed the case with counsel, was satisfied with representation, understood the plea agreement, the consequences of pleading guilty, and that the Court may impose a sentence greater than any he expected. Movant has not shown that counsel failed to communicate with him when he has acknowledged previously under oath that counsel did in fact communicate with him. *See* (Doc. 81, pp. 8, 19). Therefore, Movant has failed to show deficient performance.

Movant likewise has failed to show that he was prejudiced, because he has not demonstrated "a reasonable probability that, but for counsel's errors, he would have pleaded not guilty and would have insisted on going to trial." *Lee v. United States*, 582 U.S. 357, 364–65 (2017); *see Pease*, 240 F.3d at 941. Movant's post-sentencing representation that he was expecting a lighter sentence, or even that his counsel told him that he would receive a lighter sentence, are not enough to show such a reasonable probability, where the record reflects plainly that the Court informed Movant of the maximum possible sentence *and* that he should not rely on *any* sentencing estimates given by anyone. (Doc. 81, pp. 17–19). As such, there is no basis for relief on this ground.

B. *Failure to demand a presentence interview*

In his second ground for relief, Movant claims that his counsel was ineffective for allowing him to be sentenced without first being interviewed by a probation officer. In support of this argument, Movant directs the Court to Federal Rule of Criminal Procedure 32(c)(1)(A). Movant asserts that F.R.C.P 32(c)(1)(A) requires that a criminal defendant be interviewed by a probation

officer in the course of that officer's investigation. (Doc. 92, p. 31). This argument does not warrant relief.

Rule 32(c) provides in relevant part that “[t]he presentence officer must conduct a presentence investigation and submit a report to the court before it imposes sentence,” and “[t]he probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant’s attorney notice and a reasonable opportunity to attend the interview.” FED. R. CRIM. P. 32(c)(1)(A) and (c)(2). This language does not require that a criminal defendant be interviewed. The rule requires only that a probation officer conduct an investigation, and, *if* that officer decides to interview a defendant, then the officer must give the defendant’s attorney notice upon request. Contrary to his assertion, Movant does not have an absolute right to be interviewed by the probation officer prior to completion of the PSR. *See, e.g., United States v. Martinez*, 322 F. App’x 684, 686 (11th Cir. 2009) (explaining there was no case law in the Supreme Court of the United States or the Court of Appeals for the Eleventh Circuit “supporting the proposition that a defendant has an absolute right to be interviewed by a probation officer prior to completion of the PSI”) (citation omitted).

Because there is no absolute right for Movant to have been interviewed by a probation officer prior to completion of the PSR, his counsel cannot have been deficient for failing to demand such an interview. Movant has also not shown that he was prejudiced by a lack of interview. He asserts that “he could have cleared many things up for the P.O. [such as] the 2-point enhancements for maintaining of premises and the gun.” (Doc. 92, p. 33).

Movant, through his counsel, did file several objections to the PSR, including to the premises and firearm enhancements. (Doc. 65). Movant cannot show he was prejudiced by a lack

of interview when he was able to file multiple objections to the PSR. As such, Movant's claim that his counsel was ineffective for failing to demand a pre-sentencing interview fails.

C. Advice to plead guilty to unlawful charges

Next, Movant asserts that his counsel was ineffective for advising him to plead guilty to unlawful charges.¹ (Doc. 90, p. 7). Specifically, Movant argues that there were chain of custody issues, he never resided at the residence in question, and that certain drugs found in the residence were not his.

As an initial matter, Movant's argument that counsel should have filed a motion to dismiss the indictment for insufficient evidence is, as discussed below, both waived and without merit. (Doc. 90, p. 22). Next, his argument that the charge was unlawful because the Government could not prove his residency at 1728 Eveline Avenue is also meritless. (*Id.*, p. 21). Movant's argument that he did not reside at that residence relates to the enhancement for maintaining a premises and is not an element to the specific charge to which he pleaded guilty, Possession with Intent to Distribute Heroin. The enhancement was a post-conviction sentencing factor and is inapplicable to this ground for relief. Further, his arguments as to who possessed the drugs and alleged chain of custody issues are challenges to the evidence and do not relate to whether a charge was unlawful.

The charge to which Movant pleaded guilty to was not "unlawful." Although he was indicted on several different grounds, Movant pleaded guilty only to Count Four of the indictment, which reads as follows:

That on or about March 18, 2021, in the Macon Division of the Middle District of Georgia, ADRIAN HOWARD Defendant herein, did knowingly and intentionally

¹ This claim contains similar allegations as to other grounds in his Section 2255 motion, specifically his challenge to the sufficiency of the indictment.

possess with the intent to distribute a Schedule I controlled substance, to wit: heroin; all in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

(Docs. 1, p. 2; 62).

The law, at 21 U.S.C. § 841(a)(1), makes it “unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”

Movant has not shown that his counsel was ineffective for advising him to plead guilty to this charge. Movant testified at his change of plea hearing that he agreed to and understood the stipulation of facts set forth in the plea agreement. (Doc. 81, p. 13). The stipulation included facts to establish the elements of the offense, possession of heroin with intent to distribute. Although certain facts were not stipulated, as to the possession of a firearm or possession of other substances found at the residence or distributed during the controlled purchases, the record established that Movant was aware it was up to the Court to determine Movant’s sentence based on the PSR and the sentencing guidelines. (*Id.*, p. 14). The Court was careful to confirm Movant’s understanding of this at the plea colloquy:

THE COURT: To be clear, Mr. Howard, I understand that there's a dispute -- that you dispute that some of the items can be -- are yours or that you are responsible for them; is that correct?

[MOVANT]: Yes, sir.

THE COURT: And that dispute is something that will likely be the subject of the presentence report and your sentencing hearing, and we will resolve it one way or the other. Do you understand that?

[MOVANT]: Yes, sir.

THE COURT: Okay. But you're -- it's true that you are not agreeing that those excluded items can be considered in your sentencing? Do you understand that?

[MOVANT]: Say it one more time.

THE COURT: I really want you to understand that you are taking the position that certain items that were excluded from the agreement you contend are not part -- or cannot be used in your sentencing; is that right?

[MOVANT]: Yes, sir.

THE COURT: But do you understand that ultimately I am the one who will have to make that decision?

[MOVANT]: Yes, sir.

(*Id.*, pp. 14–15).

Rather than demonstrating ineffectiveness, the record reflects that Movant entered his plea agreement knowingly and voluntarily. Although Movant may now seek to argue that his counsel was deficient in advising him to plead guilty, “[t]here is a strong presumption that the statements made during the colloquy are true,” and Movant has not made adequate allegations to overcome that presumption. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994) (citation omitted); *see, e.g., Blackledge*, 431 U.S. at 73–74. Therefore, there is no basis to find that Movant’s counsel was ineffective in advising Movant to plead guilty.

D. Failing to challenge sufficiency of indictment

In his fourth ground for relief, Movant asserts that his counsel was ineffective for failing to challenge the sufficiency of the indictment. Specifically, he alleges that the indictment charged a different “Adrian Howard.” (Doc. 90, pp. 22–23).

As an initial matter, Movant’s ground is waived because “a § 2255 movant who entered a valid guilty plea waives any pre-plea ineffective assistance claims that do not concern his decision to enter the plea.” *Baird v. United States*, 445 F. App’x 252, 254 (11th Cir. 2011) (citing *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992)); *see also United States v. Bonilla*, 579 F.3d 1233, 1240 (11th Cir. 2009) (“Generally, entering a guilty plea waives a defendant’s right to all non-jurisdictional challenges to a conviction.”) (citations omitted).

First, to the extent that Movant argues the indictment contained a jurisdictional argument that was not waived because the indictment charged the wrong person, such an argument is meritless.² Movant’s argument that the Government charged the wrong person is an evidentiary matter that was resolved in his plea agreement. *See United States v. Barber*, No. 1:13-CR-343-WBH, 2015 WL 5316793, at *11 (N.D. Ga. Sept. 10, 2015) (adopting Magistrate Judge’s R&R that a defendant’s pre-trial motion to dismiss due to the indictment allegedly charging the wrong person should be denied because it was an evidentiary challenge). Movant’s challenge to the identity of the defendant named in the indictment is a non-jurisdictional challenge to the indictment.

Second, nowhere in Ground Four does Movant allege that his counsel’s failure to challenge the indictment impacted his guilty plea. Because Movant does not contend that his plea was involuntary due to his counsel’s failure to challenge the identity in the indictment, this ineffective assistance claim is waived by the guilty plea. *See Shell v. United States*, No. 22-10973, 2023 WL 3338631, at *1 (11th Cir. May 10, 2023) (“[A]n ineffective assistance of counsel claim raised in a

² Movant asserts in his Section 2255 motion that “[t]he way it stands today, the government doesn’t even have venue or jurisdiction to hold Mr. Adrian Q. Howard, in Federal Custody, because the Court technically sentenced Adrian Montez Howard, to 145 months and not Adrian Q. Howard.” (Doc. 90, p. 24).

§ 2255 motion is waived by a guilty plea where the movant’s ‘claim of ineffective assistance is not about his decision to plead guilty.’”) (quoting *Wilson*, 962 F.2d at 997).

Even if Movant’s ground was not waived by his guilty plea, Movant’s claim could not succeed because he has not met his burden of showing ineffective assistance of counsel on the basis of failing to challenge the sufficiency of the indictment. Movant has not shown that there was any constitutional violation at any step of the criminal proceeding. “An indictment is sufficient if it: (1) presents the essential elements of the offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.” *United States v. Steele*, 178 F.3d 1230, 1233–34 (11th Cir. 1999) (internal quotations and citations omitted). Movant asserts only that the indictment was insufficient because the indictment charged an “Adrian M. Howard” and not the Movant—Adrian Q. Howard. This argument is baseless, however, because the indictment simply charges “Adrian Howard.” (Doc. 1). Any confusion due to the Government’s use of a different Adrian Howard was later clarified in Movant’s plea agreement, in which he stipulated to certain facts, and at the change of plea hearing.

The Court cannot conclude that a reasonable attorney would have filed a motion to dismiss the indictment based on the above facts—especially considering the indictment named only an “Adrian Howard.” Further, since any arguable deficiency could have been cured through a superseding indictment if counsel did file a motion to dismiss, there is no prejudice from counsel’s

failure to challenge the sufficiency of the indictment.³ Therefore, there is no basis for relief on this ground.

E. *Failure to prepare an adequate defense*

In his next ground for relief, Movant alleges that his counsel was ineffective for failing to prepare an adequate defense due to the Government's withholding of body camera video. (Doc. 92, p. 9). Movant argues that the Government failed to turn over body camera footage which would have shown that the confidential source "got caught on video with U.S. currency other than the denominations that Agent Cole gave him to make the recorded drug buy," that Movant's girlfriend was not present during the search, and that Movant did not reside at 1728 Eveline Avenue. (*Id.*, pp. 13, 15).

"The burden to show a *Brady* violation lies with the defendant, not the government." *United States v. Stein*, 846 F.3d 1135, 1145 (11th Cir. 2017) (cleaned up). To establish a *Brady* violation, Movant must show that:

- (1) the government possessed favorable evidence to the defendant; (2) the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different.

Id. at 1146 (quoting *United States v. Vallejo*, 297 F.3d 1154, 1164 (11th Cir. 2002)).

In this case, Movant fails at step one. The Government denies that any body camera footage from the execution of the search warrant exists, and Movant does not offer any proof to the contrary

³ Movant seemingly acknowledges this point in his Section 2255 motion. "The only way to cure this defect would be to dismiss the indictment against Mr. Adrian M. Howard, and then indict Mr. Adrian Q. Howard." (Doc. 90, p. 24).

other than his pure conjecture. (Docs. 93, pp. 11, 18; 92, pp. 13, 15). As such, Movant’s counsel cannot have been deficient for failing to prepare an adequate defense based on footage that does not exist. Further, none of the facts that Movant contends the non-existing video would have shown contradicts the charges to which he pleaded guilty.⁴ As noted throughout this report and recommendation, Movant stipulated in his plea agreement that he was present during the execution of the search warrant, and that a firearm was found in the residence. (Doc. 63, pp. 9–10). Movant has not shown that body camera footage exists, and he has not shown that his counsel was ineffective for failing to prepare an adequate defense based on that footage. Therefore, this ground for relief fails.

F. *Failure to argue chain of custody violation*

In his Sixth ground for relief, Movant argues that his counsel was ineffective for failing to file motions to suppress certain evidence due “to the broken chain of custody during the recorded drug buy.” (Doc. 92, p. 9). Specifically, Movant asserts that Special Agent Cole gave the confidential source \$700.00 to use to buy drugs from Movant, but a video of the controlled buy shows the confidential source buying the drugs from Movant with different denominations. (*Id.*,

⁴ Movant asserts that the non-existent body camera footage would have shown that he was not present during the execution of the search warrant. (Doc. 92, p. 19). This assertion is contradicted not only by Movant in the stipulated facts of his plea agreement (Doc. 63, p. 10), but also by a photograph of the list of names of persons present during the search that Movant has attached to his Section 2255 motion. (Doc. 92-2, p. 2). He also asserts that a photo of an envelope taken during the search warrant gives credibility to his assertion that he did not reside at 1728 Eveline Avenue. (Doc. 92, p. 15). Movant attached a photo of a portion of the envelope to his Section 2255 motion, and the relevant part reads “Adrian How” and “4815 BROOK MACON GA.” (Doc. 92-3, p. 2). Again, this photo is irrelevant to whether body camera footage existed or whether Movant is guilty of the crime to which he pleaded guilty, and the Court fails to see how the existence of mail seemingly addressed to Movant at another address supports his assertion that he did not reside at 1728 Eveline Avenue or that he was not present during the search, *when the mail was photographed during the execution of the search warrant at 1728 Eveline Avenue*. If anything, the existence of Movant’s mail at 1728 Eveline Avenue is consistent with Movant’s residing there. In any event, this dispute is irrelevant to Movant’s conviction for possession of heroin with intent to distribute.

p. 13). The Government responds that Movant has mixed up a photo from one buy with a video from another and that there is no chain of custody issue. (Doc. 93, p. 16). Even if there was a chain of custody issue as to the currency, “challenges to the chain of custody generally go to the weight rather than the admissibility of evidence.” *United States v Varazo*, 118 F.4th 1346, 1354 (11th Cir. 2024) (citations omitted). As such, his counsel’s decision not to file a motion to suppress is within the “wide range of reasonable professional assistance” recognized by *Strickland*. 466 U.S. at 689. Moreover, issues as to the currency used during the controlled buy are irrelevant to this motion, as Movant did not plead guilty to charges stemming from the two controlled purchases of methamphetamine, but only to the possession, with intent to distribute, of the heroin seized during the execution of the search warrant. Movant is not entitled to relief on this ground.

G. *Failure to conduct a pretrial investigation*

Movant’s final claim of ineffective assistance of counsel alleges that his counsel failed to conduct a pretrial investigation. Specifically, Movant asserts that had his counsel “investigated who owned 1728 Eveline Avenue[,] . . . counsel would have discovered that [Movant] was not the owner of that house and neither did [Movant] rent out a room there.” (Doc. 92, p. 27).

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. But the reality reflects “that lawyers do not enjoy the benefit of endless time, energy or financial resources.” *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994) (citation omitted). “The question is whether . . . ending an investigation short of exhaustion[] was a reasonable tactical decision. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end.” *Mills v. Singletary*, 63 F.3d 999, 1024 (11th Cir. 1995) (quotations citation omitted).

Movant’s allegations as to what his counsel would have discovered, “even if assumed true, fail to show that any further investigation by [his] counsel would have led [her] to change [her] recommendation as to whether [Movant] should enter the Plea Agreement or would have led [Movant] to decide to go to trial.” *Odrick v. United States*, 7:19-cr-30-LSC-LEO-1, 2023 WL 3868382, *7 (N.D. Ala. June 7, 2023) (cleaned up). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland*, 466 us at 691.

Critically, the reasonableness of counsel’s investigation depends heavily on information provided by Movant. *Newland v. Hall*, 527 F.3d 1162, 1202 (11th Cir. 2008) (citing *Strickland*, 466 U.S. at 691). Movant’s only evidence in support of his claim that he was not a resident of 1728 Eveline Avenue is his contention that his girlfriend contacted his counsel to explain that she “had moved out of that room in 1728 Eveline Avenue, so there was no reason for [Movant] to be at that residence.” (Doc. 92, p. 27). This post-hoc assertion ignores one crucial point: Movant stipulated in his plea agreement twice that he resided at that address.⁵ (Doc. 63, p. 9). His statements that he lied because he thought he would get a light sentence (Doc. 92, p. 23) and wanted to get home to his ailing mother (*Id.*, p. 21) are not evidence of his counsel’s deficient performance.

Even if these statements were evidence, his counsel cannot be deemed deficient, because it appears that she did in fact investigate Movant’s claim that he did not reside at 1728 Eveline Avenue. Movant’s counsel objected to the maintaining a drug premises enhancement, arguing that Movant did not rent that residence and instead lived elsewhere. (Doc. 65, p. 2). Further, Movant’s assertion that had he gone to trial, “[t]here would have been absolutely no way that the government

⁵ Movant’s statement that he had “no connection what so ever to that residence” is nonsensical considering his stipulated plea agreement, that his mail was found at the address (Doc. 92-3, p. 2), and his name was on the purported list of individuals at the scene during the search warrant. (Doc. 92-2, p. 2).

could prove beyond a reasonable doubt that [he] possessed the firearm or drugs found inside the house in in question” is purely speculative. *E.g., Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985) (“Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.”). Movant has not shown deficient performance on this ground, and Movant’s claim of ineffective assistance of counsel for failure to investigate is without merit.

H. *Cumulative effect*

To the extent Movant argues “cumulative” errors by counsel at sentencing deprived him of his Sixth Amendment right to the effective assistance of counsel (Doc. 90, p. 19), his argument is not supported by the record or the law. The Eleventh Circuit has stated that “[w]ithout harmful errors, there can be no cumulative effect compelling reversal.” *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *see Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004) (“[The court] must consider the cumulative effect of [the alleged errors] and determine whether, viewing the trial as a whole, [Movant] received a fair trial as is [his] due under our Constitution.”) (citations omitted). Because each individual claim of error lacks merit, Movant can show no “cumulative” prejudicial effect. *See also Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (“Mullen cites no authority in support of his assertion, which, if adopted, would encourage habeas petitioners to multiply claims endlessly in the hope that, by advancing a sufficient number of claims, they could obtain relief even if none of these had any merit. We receive enough meritless habeas claims as it is; we decline to adopt a rule that would have the effect of soliciting more and has nothing else to recommend it. Twenty times zero equals zero.”). For all the reasons enumerated above, Movant is not entitled to relief based on cumulative error.

II. Movants Claim of Actual Innocence Fails.

In his next ground for relief, Movant argues that he is actually innocent of the possession of heroin with intent to distribute. (Doc. 92, p. 7). In substance, Movant is again challenging the sufficiency of the evidence, as he does throughout his Section 2255 motion. To the extent that he is making a claim of actual innocence, such a challenge fails for two reasons. First, “actual innocence” as a stand-alone claim has never been recognized by the Supreme Court as a cognizable ground for relief in a Section 2255 motion. *See., Herrera v. Collins*, 506 U.S. 390, 404 (1993) (“[O]ur habeas jurisprudence makes clear that a claim of ‘actual innocence’ is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”); *see also Quiroga v. United States*, 2023 WL 9054447, at *1 (11th Cir. 2023) (denying certificate of appealability to federal prisoner on claim of actual innocence “because actual innocence by itself cannot provide a basis for habeas relief”). Actual innocence is a manner in which to open an otherwise barred claim—a standard which is not met here.

Construed as a challenge to the evidence, rather than a proper “gateway” claim of actual innocence, Movant’s claim is waived, procedurally defaulted, and meritless.

A. *Movant’s challenge to the sufficiency of the evidence is barred by the valid collateral attack waiver in his plea agreement.*

Movant’s plea agreement provides in relevant part that Movant “waives any right to collaterally attack [his] conviction and sentence under Title 28, United States Code, Section 2255, or to bring any other collateral attack, except that [Movant] shall retain the right to bring a claim of ineffective assistance of counsel.” (Doc. 63, p. 4). Movant initialed each page of the plea agreement and signed his understanding of the plea agreement on the last page. The question for

the Court then is whether Movant made the collateral attack waiver knowingly and voluntarily. *United States v. Hardman*, 778 F.3d 896, 899 (11th Cir. 2014). For the waiver to be enforced, “the government must show either that (1) the district court specifically questioned the defendant about the provision during the plea colloquy, or (2) it is manifestly clear from the record that the defendant fully understood the significance of the waiver.” *Id.* (internal quotations and citation omitted).

In this case, the Court specifically questioned Movant about the collateral attack waiver provision in the plea agreement. The Court asked first whether Movant understood that the plea agreement contained a collateral attack waiver and that Movant was giving up his right to “‘habeas corpus review’ or ‘collateral review,’ . . . subject to one exception, and that exception is ineffective assistance of counsel.” (Doc. 81, p. 16). Movant responded that he understood and did not have any questions. (*Id.*, pp. 16–17). The Court asked next whether, having understood that, Movant agreed to give up his right to appeal his sentence or to seek review of his sentence except as stated in the Plea Agreement. (*Id.*, p. 17). Movant responded affirmatively. (*Id.*). Movant makes no allegation that he did not fully understand that he was waiving his right to collateral attack or that he in any way did not understand the waiver. Therefore, the collateral attack waiver in Movant’s plea agreement is valid and precludes Movant’s challenge to the sufficiency of the evidence. *See Demello v. United States*, 623 F. App’x 969, 972 (11th Cir. 2015) (“When a valid sentence-appeal waiver is entered into knowingly and voluntary and contains express language waiving the right to collateral review, it is enforceable and precludes the defendant from collaterally attacking a sentence . . .”).

B. Movant’s sufficiency of the evidence challenge is subject to procedural default.

Movant's claim is also procedurally defaulted, because he did not raise this ground on appeal to the Eleventh Circuit. *See* Brief of Defendant-Appellant, *United States v. Howard*, No. 23-10764, 2023 WL 5954585 (11th Cir. Sep. 7, 2023). "Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (collecting cases). The procedural default rule "generally applies to all cases, including constitutional claims." *Id.* (emphasis added). Procedural default may be excused, however, if Movant shows either: (1) cause and prejudice, or (2) actual innocence. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (citing *Lynn*, 265 F.3d at 1234). Cause and prejudice "requires a showing of some external impediment preventing counsel from constructing or raising the claim," and "the errors . . . worked to [Movant's] actual and substantial disadvantage." *Murray v. Carrier*, 477 U.S. 478, 492 (1986); *United States v. Frady*, 456 U.S. 152, 170 (1982).

Movant does not provide any cause for his failure to raise this ground on appeal. In fact, Movant's only assertion of cause to excuse procedural default is that his sentencing counsel was ineffective.⁶ (Doc. 92, p. 29). Movant ignores that his sentencing counsel and appellate counsel

⁶ Movant asserts that his

actual innocence claim pertaining to the heroin and gun charge and every other drug charge that [Movant] was charged with that came from the search conducted at 1728 Eveline Avenue, was derailed because Ms. Williams, ineffective Assistance of counsel. Ms. Williams advised [Movant] to lie when he stipulated that 1728 Eveline Avenue was his residence. Ms. Williams ineffective assistance of counsel is the cause for [Movant's] procedural defaults, the prejudice is clear. Had [Movant] gone to trial, [Movant] would have only been facing the two recorded drug buys that the CS screwed up. There would have been absolutely no way that the government could prove beyond a reasonable doubt that [Movant] possessed the firearm or drugs found inside the house in question. [Movant] would not have been enhanced for any of the drugs and weapon found inside that house in question.

(Doc. 92, p. 29).

are different attorneys. Because Movant has failed to establish cause for failure to raise his claim earlier, the Court need not consider whether he suffered any prejudice, although Movant has failed in this showing as well.

Movant has also failed to show factual innocence. The actual innocence exception can be used as a “gateway” to excuse a procedural default, where a movant “can show that he is actually innocent of . . . the crime of conviction” *McKay*, 657 F.3d at 1196. “The actual innocence exception to the procedural bar is not meant to remedy ordinary errors in criminal judgments but is narrowly reserved for only ‘fundamental miscarriages of justice.’” *Rozzelle v. Sec’y, Fla. Dep’t of Corr.*, 672 F.3d 1000, 1011 (11th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 315 (1995)). Actual innocence, in the context of this exception, “means *factual* innocence, not mere legal insufficiency.” *McKay*, 657 F.3d at 1197 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). To make a credible showing of actual innocence, “a movant ‘must show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt’ in light of the new evidence of innocence.” *McKay*, 657 F.3d at 1196 (quoting *Schlup*, 513 U.S. at 327); *see also Rozzelle v. Sec’y, Fla. Dep’t of Corr.*, 672 F.3d 1000, 1011 (11th Cir. 2012).

Movant presents no new evidence to meet the actual innocence exception, and his argument is further undermined by the fact that his conviction was the result of a negotiated plea agreement that involved the dismissal of other charges. With Movant pleading guilty to one count of possession with intent to distribute heroin, the Government dropped two counts of distribution of methamphetamine, one count of possession with intent to distribute methamphetamine, one count of possession with intent to distribute cocaine, and one count of possession of a firearm in furtherance of a drug trafficking crime. (Docs. 1, pp. 1–3; 63, p. 2). “In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner’s

showing of actual innocence must also extend to those charges.” *Bousley v. United States*, 523 U.S. 614, 624 (1998). In this case, each count of the distribution of methamphetamine and the possession with intent to distribute methamphetamine carried a mandatory minimum sentence of five years and a maximum of forty years. 21 U.S.C. § 841(b)(1)(A)(viii). The possession of a firearm charge likewise carried a mandatory minimum sentence of five years. 18 U.S.C. § 924(c)(1)(A). Movant pleaded guilty to only one count of possession with intent to distribute heroin which does not carry a mandatory minimum and has a maximum of only twenty years comparatively. 21 U.S.C. § (b)(1)(C); (Doc. 63, p. 2). Because many of the charges that the Government dismissed for the negotiated plea agreement carried a mandatory minimum, Movant necessarily avoided “more serious charges” when he pleaded guilty to a charge that did not carry a mandatory minimum. Movant has likewise failed to show that he is actually innocent of the forgone charges. *See Rudolph v. United States*, 92 F.4th 1038, 1049 (11th Cir. 2024).

Movant’s argument is based on evidence already in the record and centers around the contention that that evidence is insufficient to support his conviction. Courts have repeatedly stated that an actual innocence gateway claim requires new evidence. In *Schlup*, the Supreme Court noted that, to excuse a procedural default, a claim of actual innocence “requires petitioner to support his allegations of constitutional error with *new* reliable evidence . . . that was not presented at trial.” *Schlup*, 513 U.S. at 324 (emphasis added). The necessity that the evidence be new is consistent with the Court’s reasoning that “the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.” *Id.* In *Johnson v. Alabama*, the Eleventh Circuit rejected an actual innocence claim where the petitioner based his procedurally-defaulted claim “on a new theory of defense, not newly-discovered evidence.” 256 F.3d 1156, 1172

(11th Cir. 2001). In *Rozelle*, the court found that the petitioner's actual innocence claim “fails because his ‘new’ evidence is largely cumulative of what the jury heard.” *Rozelle*, 672 F.3d at 1017.

The court in *Rozelle* noted, however, that there is a circuit split over whether “new” evidence means evidence that was not available at the time of trial or includes evidence that “was available at trial but was simply not presented.” *Id.* at 1018 n.21. At least two district courts in the Eleventh Circuit have held, in unreported cases, that evidence is new for purposes of the actual innocence gateway only if the evidence was not available at the time of trial, and their reasoning is persuasive. In *Gray v. Daniels*, No. 7:14-cv-271-RDP-TMP, 2015 WL 4641512 (N.D. Ala. Aug. 4, 2015), a court in the United States District Court for the Northern District of Alabama reviewed cases from various circuits and concluded that “‘new’ evidence must be evidence that petitioner did not possess or know about at trial and could not have known about with the exercise of diligence.” *Id.* at *6. The court reasoned

The language of the limitation period itself suggests such a standard by setting as one of the triggering dates for the running of the limitation period, the date on which “the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). Likewise, the doctrine of finality requires some diligence on the part of the petitioner in locating this new evidence. Allowing a petitioner to raise a claim based on evidence he actually knew about (but did not use) during trial undermines the finality of the trial judgment and makes the trial itself nothing more than a preview of warm-up for the real litigation over the newly discovered facts. Thus, to be “new evidence,” petitioner must show not only that he was not aware of the evidence at the time of his trial, but that he could not have been aware of it even with due diligence.

Id.

A court in the United States District Court for the Southern District of Georgia has followed *Gray* in a death penalty case to conclude that the actual innocence gateway exception to AEDPA's statute of limitations requires the presentation of evidence that was not available at the time of trial and could not have been discovered with due diligence. *Rivera v. Humphrey*, No. CV 113-161, 2017 WL 6035017 (S.D. Ga. Dec. 6, 2017). As that court reasoned:

The Court concludes that the restricted definition of “new” is superior for two reasons. First, the restricted definition best fits within the Supreme Court's textual demand. Although the Supreme Court did not specifically address whether the evidence must not have been presented and not available to be presented, it did say that the “reviewing tribunal [may] consider the probative force of relevant evidence that was either excluded or unavailable at trial.” *Schlup*, 513 U.S. at 327-28. The use of “unavailable or excluded” indicates that the Court was referring to evidence that was not available at trial rather than evidence that was not presented at trial. Had the Court desired to include within its definition of “new evidence” evidence that was merely not presented at trial, it would not have used such exclusionary language.

Second, the Court defines “new” narrowly because it assures that actual-innocence gateway exceptions will continue to be exceedingly “rare” and difficult to prove. Were the Court to side with Petitioner, it would open the door for endless challenges to trial strategy and attorney error that would continuously call on courts to speculate about what a reasonable juror would have done had he heard certain pieces of evidence that could have been presented but were not. The result would be lengthy and protracted litigation in every capital habeas case, because the petitioner could essentially force the state to retry his case in every instance that he failed to raise a constitutional claim. Even if the petitioner failed, he would still succeed. The time, effort, and energy needed to wade through such factually complex and intricate issues would significantly slow the process and delay the imposition of justice. *See Martinez [v. Ryan]*, 566 U.S. [1,] 23 [(2102)] (Scalia, J., dissenting)(“[I]n capital cases, [lengthening federal habeas review] will effectively

reduce the sentence, giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume.”).

Id. at *11.

The *Rivera* court’s concerns about finality and strategic behavior are particularly relevant in this case, which concerns not a trial but a guilty plea. In pleading guilty, a defendant opts to waive trial and forego possible factual or legal defenses in exchange for some favorable treatment from the state. In this case, the treatment was favorable indeed, as the Government agreed to dismiss five counts—four of which carried mandatory minimums. The plea agreement shows that Movant stipulated to possessing heroin with intent to distribute (Doc. 63, p. 11), and he has presented no evidence to show that he did not possess heroin, much less sufficient evidence to make it more likely than not that no reasonable juror would have found him guilty. Therefore, the actual innocence exception does not save Movant’s procedurally defaulted sufficiency of the evidence claim.

It is undisputed that Movant did not raise the sufficiency of the evidence on appeal, and no exception to the procedural default rule applies. This ground could have been addressed on direct appeal, but Movant failed to do so. “The fact that Movant voluntarily waived his appellate rights is not cause to overcome the procedural defect.” *Troup v. United States*, No. 1:21-CR-0215-SCJ, 2024 WL 4182921, at *3 (N.D. Ga. Sept. 13, 2024) (citing *Lynn*, 365 F.3d at 1235); *see, e.g., Ware v. United States*, No. 09-60185-CIV, 2009 WL 2567023, at *5 (S.D. Fla. May 14, 2009) (explaining that the movant was procedurally barred from raising for first time in a Section 2255 motion grounds that he did not raise on direct appeal because “he cannot utilize [S]ection 2255 as a vehicle

through which to evade the consequences of the appeal waiver”). Because Movant failed to raise it on direct appeal, and no exception applies, Petitioner's claim is subject to procedural default.

C. Movant's sufficiency of the evidence challenge fails on the merits.

Even if this ground was not waived or procedurally defaulted, Movant's challenge that there was insufficient evidence also fails on the merits. The undisputed facts stipulated to in the plea agreement establish that Movant was present at 1728 Eveline Avenue during the execution of the search warrant, and two plastic bags found at that address contained a total of 43.35 grams of heroin which were attributed to Movant.⁷ (*Id.*, pp. 10–11). As noted throughout this report and recommendation, Movant signed the plea agreement, admitted under oath at the change of plea hearing that he was guilty of the relevant offense charged, and Movant has offered no evidence to refute these statements.⁸ As such, Movant's challenge to the sufficiency of the evidence fails.

III. Movant's Claims of Prosecutorial Misconduct Fail.

In his final grounds for relief, Movant alleges three claims of prosecutorial misconduct. He alleges that the Government knowingly and intentionally (1) permitted Special Agent Cole's

⁷ In arguing that Movant's sufficiency of the evidence challenge fails on the merits, the Government alleges that:

[t]he undisputed facts in the record show that law enforcement officers conducted two controlled buys using a confidential source to purchase methamphetamine from [Movant], and that [Movant] chose the location to be his own address at Eveline Avenue. Doc. 63 at 10. [Movant] sold two ounces of methamphetamine during each of those buys. Doc. 63 at 9–10.

(Doc. 93, p. 8).

A review of the plea agreement, however, notes that Movant “decline[d] to stipulate that he sold methamphetamine on two occasions to a confidential informant.” (*Id.*, p. 11). Regardless, disputes as to the controlled purchases of methamphetamine are irrelevant to Movant's conviction for possession with intent to distribute heroin.

⁸ Further, Movant, through new appellate counsel, noted on appeal that “the evidence was ‘easily sufficient’ to show that [Movant] conducted drug transactions at [1728 Eveline Avenue] on several occasions.” Brief of Defendant-Appellant, *United States v. Howard*, No. 23-10764, 2023 WL 5954585, at *21–22 (11th Cir. Sep. 7, 2023).

testimony to go uncorrected, (2) committed a *Brady* violation, and (3) “charged [Movant] unlawful with a firearm and drugs found inside the apartment of 1728 Eveline Avenue.” (Doc. 92, pp. 7, 9).

As discussed below, these grounds fail.

A. Movant’s claims of prosecutorial misconduct are barred by the valid appeal waiver in his plea agreement.

Similar to the collateral attack waiver, Movant’s plea agreement contains an appeal waiver, which provides that Movant waives any right to appeal his sentence except in the event that the Court imposes a sentence that (1) exceeds the advisory guideline range or (2) exceeds the statutory maximum. (Doc. 63, p. 4). As discussed above in Section II-A, Movant initialed this page of the plea agreement and responded affirmatively when asked at the change of plea hearing if he understood and was giving up his right to appeal. As such, Movant’s claims of prosecutorial misconduct are barred by his valid appeal waiver.

B. Movant’s claims of prosecutorial misconduct are procedurally defaulted.

Movant’s claims of prosecutorial misconduct are also procedurally defaulted because he did not raise these arguments on direct appeal. *See* Brief of Defendant-Appellant, *United States v. Howard*, No. 23-10764, 2023 WL 5954585, at *12–26 (11th Cir. Sep. 7, 2023). Movant makes no attempt to establish cause or prejudice for procedurally defaulting these three claims. And any claims of actual innocence fail for the same reasons mentioned previously. As such, Movant’s claims of prosecutorial misconduct are procedurally barred.

C. Movant is not entitled to relief on grounds of prosecutorial misconduct.

Each of Movant’s three grounds of prosecutorial misconduct, addressed below, also fail on the merits.

1. Body Camera Footage

Taking Movant's grounds out of order, this recommendation addresses first Movant's argument that the Government knowingly and intentionally committed a *Brady* violation by not turning over body camera footage from the search warrant execution. Under *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To prove that the Government committed a *Brady* violation, Movant must show that: (1) the Government possessed evidence favorable to him that he did not possess and could not obtain with any reasonable diligence; (2) the Government suppressed that evidence; and (3) there is a reasonable probability that the outcome of the proceedings would have been different had the Government disclosed the evidence. *Stein*, 846 F.3d at 1146 (quotations and citation omitted).

As noted above in Section I-E, Movant's claim fails at step one. The Government denies that any footage exists, and Movant offers only conjecture, not evidence, to refute this. *See United States v. Brown*, 598 F. App'x 689, 692 ("Mere speculation that the evidence was in the government's possession is not enough."). Accordingly, Movant has not satisfied *Brady*'s first prong. Therefore, Movant is not entitled to relief on this ground.

2. Special Agent Cole's Testimony

Movant argues also that the Government did not correct Special Agent Cole when he lied about Movant's girlfriend being present during the execution of the search warrant. (Doc. 82, p. 17). In support of this argument, Movant points the Court in two directions: (1) the list of individuals present during the search warrant and (2) the non-existent body camera footage. (Doc.

92, p. 15). As an exhibit to his Section 2255 motion, Movant attached a partial photograph which purportedly contains the list of individuals present during the execution of the search warrant and their birthdays. (Doc. 92-2, p. 2). The list includes Movant, but his girlfriend is not listed. (*Id.*). Movant argues also that the non-existent body camera footage contradicts Special Agent Cole's testimony.

A prosecutor violates a defendant's due process rights when he or she knowingly allows a government witness to testify falsely and allows that testimony "to go uncorrected when it appears." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959); *see Sargent v. Sec'y Fla. Dep't of Corr.*, 480 F. App'x 523, 528 (11th Cir. 2012). "To establish prosecutorial misconduct for the use of false testimony, a defendant must show the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was *material*." *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010) (emphasis added) (citations omitted).

Movant has not provided any evidence that the purported list is exhaustive of the individuals present at the scene or that Special Agent Cole wrote or even saw the list, and Movant has failed to show that the purported falsehood was material or to show how he was harmed by the testimony or the Government's failure to correct. As the Government notes, this line of questioning concerned whether the two-level enhancement for maintaining a drug-involved premises was appropriate, and Special Agent Cole's testimony about whether or not Movant's girlfriend was present during the search is irrelevant to the enhancement and Movant's conviction. Therefore, there is no basis for relief on this ground.

3. Unlawful Charges

Movant argues last that the Government unlawfully charged him with a firearm and drugs found inside 1728 Eveline Avenue. In support of this argument, Movant reasserts his repeated allegations that he did not reside at that address and that the chain of custody regarding currency used for the two video-recorded drug buys was broken.

As indicated previously, that the Government ultimately dropped the remaining charges against Movant in consideration for his pleading guilty to one count of possession with intent to distribute heroin does not equate to the Government having brought unlawful charges against him. The Government purports to have video evidence of two recorded drug buys. This is certainly enough to have charged Movant based on the record before the Court. That the Government ultimately dismissed the firearm charge does not mean the charge was unlawful. At sentencing, the Court found that the firearm enhancement applied by a preponderance—a standard higher than the probable cause required for a grand jury to bring an indictment. *See Davis v. City of Apopka*, 78 F.4th 1326, 1334 (11th Cir. 2023) (“Because probable cause requires less than a preponderance of the evidence, it necessarily follows that probable cause does not require that it be more likely than not the person arrested for a crime is actually guilty of it.”). Therefore, this ground for relief fails.

IV. Movant is Not Entitled to an Evidentiary Hearing.

No evidentiary hearing is needed to resolve Movant’s Section 2255 motion. Movant has the burden to establish the need for an evidentiary hearing, and the Court is not required to hold an evidentiary hearing where the record makes “manifest the lack of merit of a Section 2255 claim.” *United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984) (citation omitted). As 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) (“[A]n evidentiary hearing is unnecessary when the petitioner's allegations are affirmatively contradicted by the record.”) (internal quotations and citations omitted). Therefore, no evidentiary hearing is necessary.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability may issue only if the applicant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

If a court denies a collateral motion on the merits, this standard requires a petitioner to “demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Movant has not met this standard, and, therefore, a certificate of appealability in this case should be denied.

CONCLUSION

For the reason discussed herein, it is **RECOMMENDED** that Movant’s Motions to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Docs. 90, 92) be **DENIED**. It is further **RECOMMENDED** that a certificate of appealability be **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 17th day of October, 2025.

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