

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

<b>DELMA GODDARD,</b>	:	
	:	
<b>Movant,</b>	:	
	:	<b>Criminal No. 5:17-cr-00022-MTT-CHW-1</b>
<b>v.</b>	:	
	:	<b>Civil No. 5:21-cv-00316-MTT</b>
<b>UNITED STATES OF AMERICA,</b>	:	
	:	
<b>Respondent.</b>	:	
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**REPORT AND RECOMMENDATION**

Before the Court is a motion to vacate, set aside or correct sentence filed by Delma Goddard pursuant to 28 U.S.C. § 2255. (Doc. 732, 745, 753). For the reasons discussed below, it is **RECOMMENDED** that the motion be **DENIED**.

**BACKGROUND**

This criminal action arises from a 60-count indictment charging Movant and 15 other defendants with criminal wrongdoing relating to the distribution of scheduled narcotics — cocaine base, methamphetamine, and heroin — and the wrongful possession of firearms. (Doc. 249). A six-day jury trial was held in July 2018, and that trial concluded in a verdict finding Movant guilty on the following 23 counts:

- Count one, conspiracy to possess with intent to distribute 280 grams or more of cocaine base, 50 grams or more of methamphetamine, and 100 grams or more of heroin;
- Count two, distribution of cocaine base;
- Count three, distribution of 5 grams or more of methamphetamine;
- Count four, distribution of 50 grams or more of methamphetamine;
- Count five, distribution of cocaine base;

- Count six, possession of a firearm by a convicted felon;
- Count seven, possession of a firearm in furtherance of a drug-trafficking crime;
- Count eight, distribution of 5 grams or more of methamphetamine;
- Count nine, possession of a firearm by a convicted felon;
- Count ten, possession of a firearm in furtherance of a drug-trafficking crime;
- Count eleven, possession of a firearm by a convicted felon;
- Count twelve, distribution of 5 grams or more of methamphetamine;
- Count thirteen, distribution of cocaine base;
- Count fourteen, possession of a firearm in furtherance of a drug-trafficking crime;
- Count fifteen, distribution of 28 grams or more of cocaine base;
- Count nineteen, distribution of heroin;
- Count twenty, distribution of cocaine base;
- Count twenty-one, possession of a firearm by a convicted felon;
- Count twenty-two, possession of a firearm in furtherance of a drug-trafficking crime;
- Count twenty-three, distribution of cocaine base;
- Count twenty-four, possession of heroin with intent to distribute;
- Count twenty-five, possession of a firearm by a convicted felon; and
- Count twenty-six, possession of a firearm in furtherance of a drug-trafficking crime.

(Doc. 474)

Based on this verdict, the Court entered judgment in November 2018, sentencing Movant to serve, in total, a term of 145 years of imprisonment. (Doc. 587, p. 3).

Movant subsequently appealed, unsuccessfully, to the Eleventh Circuit Court of Appeals. That Court ruled that (i) Movant had failed to cite sufficient evidence of entrapment to warrant a

related jury charge, and that (ii) this Court did not err by finding, for sentencing purposes, that Goddard had participated in a disputed drug sale. (Doc. 708). The Eleventh Circuit did not reach Movant's additional arguments asserting ineffectiveness of defense counsel for failure to suppress Movant's incriminating statements and for failure to notice and impeach Movant's co-defendants based on their prior convictions. Movant now raises those arguments, and others, in this Section 2255 proceeding.

### **CLAIMS RAISED AND THE *STRICKLAND* STANDARD**

In his Section 2255 motion, as amended, Movant advances four claims of ineffective assistance of counsel. Movant argues that counsel erred by failing to: (1) notice and impeach Patrick Modican, a confidential informant, with his old, prior convictions, (2) request a contemporaneous limiting instruction relating to references to guilty pleas entered by Cynthia Smith and Everette Hill, co-defendants who testified at Movant's trial, (3) failing to request a felon-conviction charge relating to the testimony of Smith and Hill, and (4) failing to move to suppress Movant's incriminating statements.

Movant's claims of ineffective assistance of counsel are adjudged under the standard set by *Strickland v. Washington*, 466 U.S. 668 (1984). To show ineffectiveness, a Section 2255 movant must ordinarily demonstrate both deficient performance, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment," and prejudice, meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687. As discussed below, Movant has failed to satisfy the *Strickland* standard for all his Section 2255 arguments.

### **EVIDENTIARY HEARING**

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 below, “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’”).

### ANALYSIS

Movant raises four arguments, but for the reasons discussed below, those arguments fail to warrant relief. Accordingly, it is recommended that the Court deny Movant’s motion to vacate, side aside or correct sentence filed pursuant to 28 U.S.C. § 2255.

#### (1) **Failure to Notice and Impeach**

On the second day of Movant’s trial, the Government called as a witness Patrick Modican, a.k.a “Black,” who was paid one thousand dollars per transaction to participate in the controlled purchase of scheduled narcotics from Movant. (Doc. 533, p. 37). Movant argues that his trial counsel was ineffective for failing to impeach Modican with evidence of his own prior, drug-related convictions. The record shows that counsel attempted to question Modican about his priors, but that counsel withdrew the question upon objection from the Government:

Def. Counsel: Now, you have, in fact, been convicted of drugs; haven’t you?

Government: Objection, Your Honor ... I think Counsel’s in violation of the Court’s Motion in Limine Order. He’s not filed any notice or request to get involved in any [prior convictions]. He does have prior convictions. But counsel has not noticed the government or the Court.

Def. Counsel: You know what, he is right, Judge, and I will withdraw the question. He’s right. I didn’t – I didn’t – but he’s right.

(Doc. 533, pp. 118–19)

Movant argues that counsel should have used Modican's prior convictions for impeachment purposes, which in turn would have required counsel to have noticed Modican's priors under Rule 609(b) of the Federal Rules of Evidence, which applies "if more than 10 years have passed since the witness's conviction." FED. R. EVID. 609(b). This argument by Movant fails to satisfy both the performance and the prejudice prongs of the *Strickland* standard for ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984).

Regarding performance, Movant argues that counsel's aborted attempt to question Movant about his prior convictions "completely erodes the presumption that his failure to impeach Modican was strategic." (Doc. 753, p. 11). This argument misapprehends the *Strickland* standard, which accounts for "limitations on investigation." *Strickland*, 466 U.S. at 691. Defense counsel clearly performed a thorough investigation because he was aware of Modican's prior drug convictions. Counsel's investigatory efforts in this regard militate in favor of more, not less, judicial deference. *Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts ... are virtually unchallengeable"). Defense counsel's overall strategy was to assert an entrapment or inducement defense, and as part of that effort, it was reasonable of counsel primarily to attack Modican's financial incentive to incriminate Movant. *See* (Doc. 535, p. 136) ("a thousand dollars means a lot to some people and what they will do to get it varies from person to person"). That is, it was reasonable of counsel to forego Modican's distant past and to focus instead on his more immediate, possible financial incentive to lie. Under *Strickland*, the Court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Because Movant has not overcome this presumption, Movant fails on *Strickland*'s performance prong.

Movant also fails on *Strickland*'s prejudice prong. The evidence against Movant was overwhelming. That evidence consisted of video and audio recordings of drug purchases or efforts to schedule drug purchases, physical evidence of drugs obtained from confidential informants, and the testimony of both confidential informants and law enforcement agents responsible for supervising the controlled purchase of scheduled narcotics. Given this heavy weight of evidence, there is no reasonable basis to conclude that "the result of the proceeding would have been different" if counsel had questioned Modican regarding his priors. *Strickland*, 466 U.S. at 694.

**(2) Failure to Request a Contemporaneous Limiting Instruction**

During Movant's trial, his former co-defendants, Cynthia Smith and Everette Hill, offered testimony. The Government elicited from these witnesses the fact that they had pleaded guilty (Doc. 533, pp. 131, 153). Movant now argues that his trial counsel was ineffective for failing to request a contemporaneous limiting instruction regarding the proper use of this testimony for credibility purposes only, rather than for imputing Movant's guilt.

Movant's argument fails both on prongs of the *Strickland* standard for ineffective assistance of counsel. Regarding performance, the questioning of witnesses is an art, and the Court must presume that defense counsel strategically chose to let Smith and Hill testify to their drug use, criminality, and incentive to give testimony in exchange for favorable sentencing consequences without any interruption that might serve to highlight his client's own, potential guilt. Movant has failed to show that counsel's failure to request a contemporaneous limiting instruction, as opposed to a later jury charge, was "so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Strickland*, 466 U.S. at 687. For that reason, Movant has failed to demonstrate deficient performance.

Regarding prejudice, the record shows that the Court gave a limiting instruction during the jury-charge phase of Movant's trial by explaining that "the fact that a witness has pleaded guilty to an offense is not evidence of guilt of any other person," (Doc. 535, p. 155). The Court also explained that while "paid informants, witnesses with plea agreements, or witnesses who are using addictive drugs may be entirely truthful when testifying, you should consider their testimony with more caution than the testimony of other witnesses." (*Id.*). The Court also explained that "paid informants and co-defendants with plea agreements who hope to gain more favorable treatment may have a reason to make a false statement in order to strike a good ... bargain with the government." (*Id.*). Even if counsel erred by failing to request a contemporaneous limiting instruction, these subsequent charges were sufficient to ensure that no prejudice ensued. *See United States v. DeLucca*, 630 F.2d 294, 299 (5th Cir. 1980) (explaining that the omission of a contemporaneous curative instruction is ordinarily not grounds for reversal).

**(3) Failure to Request a Felon–Conviction Impeachment Charge**

During the charge conference at Movant's trial, the Court, the Government, and defense counsel all agreed that Movant's co-defendants, Cynthia Smith and Everette Hill, were not convicted felons, with the result that the jury did not receive a felony–conviction charge. (Doc. 535, pp. 100–101). By that point, Smith and Hill both had entered pleas of guilty to charges in this criminal action, so arguably, they were both convicted felons. Movant argues that defense counsel was ineffective for not pressing this point and thereby securing a felony–conviction charge.

Movant's charge argument fails for reasons already addressed in relation to his argument about a contemporaneous limiting instruction pertaining to the entry of guilty pleas by Smith and Hill. Here again, defense counsel may have strategically chosen not to highlight the entry of guilty pleas by Smith and Hill due to the possible implication for his own client's potential guilt. That is,

counsel may have strategically declined to draw further attention to the fact that Movant's co-defendants, who were co-indicted on joint drug charges, had admitted their wrongdoing. Instead, counsel may have preferred to impeach Smith and Hill based on their drug use and incentive to give testimony in exchange for favorable sentencing consequences. Under *Strickland*, the court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Because Movant has failed to overcome this presumption, he has failed to demonstrate deficient performance.

Movant has also failed to show prejudice. As set out above, the Court gave instructions to the jury regarding the weight that they might assign to the testimony of persons such as Smith and Hill, who were themselves involved in criminal conduct, and who had self-serving incentive to provide testimony favorable to the Government's prosecutorial efforts against Movant. *See* (Doc. 535, p. 155). In light of the charges that the Court did provide, Movant cannot show that the inclusion of a further felony-conviction charge would have resulted in any changed outcome. Accordingly, Movant's felon-conviction charge argument fails on both of *Strickland*'s prongs.

**(4) Failure to Suppress**

During the testimony of DEA agent Harold Hurley Jr., the jury watched a video interview conducted on May 23, 2017, in which Movant, after being informed of his *Miranda* rights,<sup>1</sup> made incriminating custodial statements. (Doc. 534, pp. 138–142). Earlier that same day, Hurley and other law enforcement officers followed Movant to the site of an arranged drug deal, "pinning [Movant's] vehicle" in with law enforcement vehicles. (Doc. 534, p. 61). Without providing a *Miranda* warning, Hurley asked, "where was it," and Movant eventually directed Hurley to nine ounces of heroin found in the front passenger floorboard of Movant's vehicle. (Doc. 534, p. 62).

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).



Movant argues that defense counsel was ineffective by failing to suppress Movant's initial unwarned statement regarding the heroin's location and also by failing to argue that the unwarned statement tainted Movant's subsequent interview statements. This argument by Movant fails on both prongs of the *Strickland* standard for ineffective assistance of counsel.

Regarding *Strickland*'s performance prong, the record shows that defense counsel made the strategic decision to focus his suppression efforts on information obtained through a wiretap on the ground that the Government had not adequately demonstrated necessity. *See* (Doc. 306). Although counsel's efforts were not successful, the Court may not adjudge counsel's conduct as unreasonable merely on that basis. *See Strickland*, 466 U.S. at 689 ("it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable"). Given the technical rules associated with wiretaps, *see* 28 U.S.C. § 2518(1)(c), along with the highly incriminating nature of the wiretap evidence gathered in this case, counsel's chosen line of suppression defense was reasonable.

Moreover, even if counsel had performed deficiently in his suppression efforts, no prejudice ensued. Agent Hurley pursued Movant on May 23, 2017, with knowledge, gained through the monitoring of electronic communications and through discussions with confidential informants, that Movant possessed a small amount of heroin that he intended to distribute. Hurley inevitably would have discovered that heroin upon a search of Movant's vehicle, so Movant's unwarned statement indicating the heroin's location was of little probative value. *See Nix v. Williams*, 467 U.S. 431, 446 (1984) ("Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial"). Even if Movant's unwarned statement had been excluded, in other words, other weighty evidence —

electronic communications, along with physical drug evidence — clearly associated Movant with the heroin.

Additionally, Movant's unwarned statement regarding the heroin's location bears insufficient relation to Movant's larger, overall narcotic distribution efforts to create any taint upon Movant's subsequent, warned statements. Hurley's initial, unwarned questioning was intended quickly to secure unsupervised narcotics, rather than to circumvent the dictates of the *Miranda* line of cases. There is no indication that Hurley engaged in impermissible, question-first tactics, *see Missouri v. Seibert*, 542 U.S. 600, 619–20 (2004) (Kennedy, J.), so any effort by defense counsel to suppress Movant's warned statements based on Movant's earlier, unwarned statement would not have succeeded.

To summarize, counsel's chosen line of wiretap-focused suppression defense was reasonable, and a different line focusing on Movant's statements would not have resulted in any changed outcome. Accordingly, regarding his suppression argument, Movant fails to satisfy both prongs of the *Strickland* standard for ineffective assistance of counsel.

### **CONCLUSION**

For the reasons discussed herein, it is **RECOMMENDED** that Movant's motion to vacate, set aside or correct sentence (Doc. 732, 745, 753) filed pursuant to 28 U.S.C. § 2255 be **DENIED**. Additionally, pursuant to the requirements of Rule 11 of the Rules Governing Section 2255 Cases, it does not appear that Movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is further **RECOMMENDED** that the Court deny a certificate of appealability in its final order.

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. The District Judge will 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 18th day of May, 2023.

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