APPENDIX A

Opinion of United States Court of Appeals

for the Eleventh Circuit

"Appendix A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11653-J

HERVE WILMORE, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Herve Wilmore, Jr. is a federal prisoner serving a 240-month sentence after a jury convicted him in 2014 of conspiracy, 2 counts of wire fraud, and 2 counts of aggravated identity theft. Wilmore and one of his codefendants directly appealed their convictions and sentences in a joint appeal. This Court affirmed and then denied Wilmore's codefendant's motion for rehearing on November 10, 2015. Wilmore did not file a petition for a writ of *certiorari* from the United States Supreme Court.

On January 31, 2017, Wilmore filed the instant 28 U.S.C. § 2255 motion to vacate his sentence, arguing that his trial and appellate counsel were ineffective because they failed to raise the issue of constructive amendment because his indictment charged him with registering specifically addressed post office boxes that did not exist. On February 20, 2018, Wilmore sought to add a second claim to his § 2255 motion. Wilmore asserted that his trial and appellate

The Court of Appeals did not provide Mr. Wilmore a De novo Review on his Objections in the District Court, Also the Court of Appeals used facts that Mr. Wilmore Objected to, in order to deny the Appeal. See Underlined 8-28-18 Order p. 2-3.

counsel had been ineffective because they failed to raise the issue of constructive amendment based on the fact that there was insufficient evidence to convict him of wire fraud.

The district court determined that Wilmore had not shown that his counsel was ineffective for his first claim and denied his § 2255 motion. The district court also denied Wilmore's motion to add a claim because the amendment would be futile, as the claim was time-barred. The district court denied Wilmore a certificate of appealability ("COA"), and he now seeks a COA from this Court on appeal.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

In this case, reasonable jurists would not debate the district court's denial of Wilmore's § 2255 motion and his motion to amend. Wilmore's argument that his counsel was ineffective for failing to argue constructive amendment based on post office box numbers is meritless. To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellate counsel is not ineffective for failing to raise nonmeritorious issues. *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000). A constructive amendment occurs "when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." *United States v. Narog*, 372 F.3d 1243, 1247 (11th Cir. 2004) (citation omitted). A review of the superseding indictment in Wilmore's case shows

that no specific post office box numbers were mentioned. Even if they were, the numbers are not an essential element of the offense of wire fraud. *See id.* Accordingly, the constructive-amendment issue was meritless. Therefore, Wilmore cannot make the requisite showing of deficient performance and prejudice because an argument at trial would not have succeeded and appellate counsel was not deficient in failing to raise a non-meritorious issue. *See Strickland*, 466 U.S. at 687, 694, 697; *Nyhuis*, 211 F.3d at 1344.

Reasonable jurists also would not debate the denial of Wilmore's motion to amend as futile because it was time-barred. Pursuant to 28 U.S.C. § 2244(d)(1), a § 2255 motion is governed by a one-year statute of limitations period that typically begins to run on the date on which the petitioner's conviction became final. 28 U.S.C. § 2244(d)(1)(A). Where a criminal defendant files a direct appeal, his conviction becomes final when the Supreme Court issues a decision on the merits or denies *certiorari*, or when the period for filing a petition for *certiorari* expires. *See Drury v. United States*, 507 F.3d 1295, 1296 (11th Cir. 2007). A petition for a writ of *certiorari* must be filed within 90 days of the appellate court's entry of judgment on the appeal or, if a motion for rehearing is timely filed, within 90 days of the appellate court's denial of that motion. *Close v. United States*, 336 F.3d 1283, 1285 (11th Cir. 2003); *see also* Sup. Ct. R. 13(3). Wilmore's codefendant/co-appellant's motion for rehearing was denied on November 10, 2015. The statute of limitations for filing a § 2255 motion began to run 90 days later, on February 8, 2016, when his conviction became final. *See Drury*, 507 F.3d at 1296; *Close*, 336 F.3d at 1285. The statute of limitations lapsed one year later, on February 8, 2017. *See* 28 U.S.C. § 2255(f)(1). While Wilmore's original § 2255 motion was timely, his motion to amend—which he mailed on February 20, 2018—was not.

Further, the district court did not abuse its discretion in determining that the amendment did not relate back to Wilmore's original § 2255 motion because the proposed amendment did not arise out of the conduct or occurrence in the original pleading, as it dealt primarily with an assertion of insufficient evidence at trial, while the original § 2255 motion dealt with the indictment. *See* Fed. R. Civ. P. 15(c)(1)(B); *Davenport v. United States*, 217 F.3d 1341, 1343-44 & n.4 (11th Cir. 2000). Finally, Wilmore did not show that he was entitled to any sort of equitable tolling for the amendment. Wilmore failed to explain why more than a year passed between the filing of his original § 2255 motion and his proposed amendment, and, thus, he cannot show that he pursued his rights diligently, as required for equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). Wilmore argued that he should be entitled to tolling because he was actually innocent, based on the assertion that he did not sign for two of the post office boxes at issue. However, he would have known that at trial, and, therefore, failed to show that, in light of new evidence, no reasonable juror would have found him guilty beyond a reasonable doubt. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013).

Because reasonable jurists would not debate the denial of Wilmore's § 2255 motion and his motion to amend, his motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

APPENDIX B

Report of Magistrate Judge Opinion

in the District Court

"Appendix B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CIV-60278-SCOLA
(13-CR-60029-SCOLA)
MAGISTRATE JUDGE P.A. WHITE

HERVE WILMORE, :

Movant, :

v. : REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA, :

Respondent. :

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 13-CR-60029-SCOLA.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the motion (CV-DE#1), Movant's amended brief and supplemental brief in support thereof (CV-DE#28 & 29),[1] Petitioner's notices of filing in support of his equitable tolling argument (CV-DE#8, 10), Movant's second supplemental brief (CV-DE#11), Movant's notice of filing Eleventh Circuit documents (CV-DE#12), the government's response to the order to show cause (CV-DE#15), Movant's amended reply (CV-DE#30),[2] Movant's

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[1]These amended pleadings were accepted in lieu of the originals (CV-DE#4, 5) based on Movant's representation that the amended pleadings repeat the originals verbatim, except that they contain citations to the record. (See CV-DE#31).

[2]Also amended on the same basis. (See CV-DE#31).

supplemental replies on the issue of timeliness (CV-DE#17, 18; see also CV-DE#19, 20), Movant's amendment containing additional citations (CV-DE#32), Movant's reply brief continuation (CV-DE#35), the government's supplemental response (CV-DE#37), and all pertinent portions of the underlying criminal file.

The Court also has before it Movant's most recent motion to amend (CV-DE#41) to add an additional ground for relief.

Claims

Despite all his piecemeal amended filings, Movant's sole claim in this proceeding is that trial and appellate counsel were ineffective in failing to raise a constructive amendment to the superseding indictment.

Procedural History

Movant was charged in a forty-one-count superseding indictment with one count of conspiring to defraud the Internal Revenue Service ("IRS"), commit wire fraud, and commit aggravated identity theft, all in violation of 18 U.S.C. § 371 (Count 1); two counts of wire fraud, in violation of 18 U.S.C., §§ 1343 and 2 (Counts 4-5); and two counts of aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and 2 (Counts 24-25). (CR-DE#246). Following a eight-day trial, the jury returned verdicts finding Movant guilty on one count of conspiracy, two counts of wire fraud, and two counts of aggravated identity theft. (CR-DE#442).

The District Court sentenced Movant to 240 months' imprisonment, followed by three years' supervised release, and ordered him to pay a special assessment of $500. The District Court also ordered Movant to pay restitution of $20,246,577. (CR-DE#572). The judgment was entered and filed on July 7, 2014. (CR-DE#574). Movant and one of his co-defendants, Delvin John Baptiste, appealed. On August 18, 2015, the Eleventh Circuit Court of

Appeals affirmed Movant's conviction and sentence. United States v. Herve Wilmore, Jr., et al., 625 Fed. Appx. 366 (11th Cir. 2015) (per curiam) (unpublished). Baptiste then filed a letter in the district court which was construed as a motion for extension of time to file a motion for rehearing relating to the appeal, and a petition for rehearing in the Eleventh Circuit which was denied on November 10, 2015. Thereafter, on January 31, 2016, Movant filed the instant motion to vacate.[3] The government concedes that the instant motion is timely. (CV-DE#37, p.2).[4]

Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." Id. To obtain this relief on collateral review, however, a habeas petitioner must "clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166, 102 S.Ct. 1584, 71 L.Ed.2d 816

[3]Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison mailbox rule").

[4]The government initially took the position that the motion was untimely (CV-DE#15), but has since conceded that Movant is entitled to the benefit of the later trigger date resulting from Baptiste's motion for rehearing (CV-DE#37).

(1982)(rejecting the plain error standard as not sufficiently deferential to a final judgment).

Under §2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. §2255; see also Smith v. Singletary, 170 F.3d 1051, 1053 (11th Cir. 1999)("[a] habeas corpus petitioner is entitled to an evidentiary hearing on his claim 'if he alleges facts which, if proven, would entitle him to relief.'")(internal citations and quotations omitted)). However, the movant in a §2255 proceeding must allege reasonably specific, non-conclusory facts that, if true, would entitle him to relief. Aron v. United States, 291 F.3d 708, 715, n. 6 (11th Cir. 2002). Otherwise, no evidentiary hearing is warranted. Id, 291 F.3d at 714-715 (explaining that no evidentiary hearing is needed when claims are "affirmatively contradicted by the record" or "patently frivolous"); Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989)(noting that a hearing is not required on claims which are based upon unsupported generalizations or affirmatively contradicted by the record). Moreover, a court need not conduct an evidentiary hearing where the issues can be conclusively decided on the basis of the evidence already in the record, and where the petitioner's version of the facts have already been accepted as true. See, e.g., Chavez v. Sec'y Fla. Dep't of Corr., 647 F.3d 1057, 1070 (11th Cir. 2011); Turner v. Crosby, 339 F.3d 1247, 1274-75 (11th Cir. 2003); Smith, 170 F.3d at 1054; Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983); Roberts v. Marshall, 627 F.3d 768, 773 (9th Cir. 2010).

The pleading requirements for a motion to vacate under §2255 apply equally with regard to claims of ineffective assistance of counsel. Conclusory allegations of ineffective assistance of counsel are insufficient to state a claim. Wilson v. United

States, 962 F.2d 996, 998 (11th Cir. 1992); see also Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)(conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue). A movant's claims of ineffective assistance of counsel are thus subject to dismissal without a hearing when they "are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible.'" Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991)(citations omitted). The movant in a §2255 proceeding alleging ineffective assistance of counsel must set forth specific facts supported by competent evidence, raising detailed and controverted issues of fact which, if proved at a hearing, would entitle him to relief. United States v. Aiello, 900 F.2d 528, 534 (2nd Cir. 1990). Bare and conclusory allegations of ineffective assistance of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability are insufficient to require a hearing or further consideration. See United States v. Robinson, 64 F.3d 403, 405 (8th Cir. 1995); see also Diaz v. United States, 930 F.2d 832, 834-35 (11th Cir. 2009)(affirming denial of ineffective assistance claim without evidentiary hearing where movant's allegations were refuted by the record).

Discussion

Movant's sole claim in this proceeding is that trial and appellate counsel were ineffective in failing to raise a constructive amendment to the indictment. In support of this claim, Movant alleges that the indictment alleged that Movant caused to be registered five different P.O. Boxes at 4747 Hollywood Blvd. with specific numbers, but that Movant's "charges" contained only three P.O. Boxes at the 4747 Hollywood Blvd. address, and that those had different box numbers.

Under the Fifth Amendment, a defendant has the right to be tried on felony charges returned by a grand jury indictment. See Stirone v. United States, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed.2d 252 (1960); United States v. Behety, 32 F.3d 503, 508 (11th Cir.1994). Only the grand jury may broaden the charges in the indictment once it has been returned, and the district court may not do so by constructive amendment. Id. at 215-16, 80 S.Ct. at 272. The Eleventh Circuit has stated that "[a] constructive amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." United States v. Castro, 89 F.3d 1443, 1452-53 (11th Cir. 1996); see also United States v. Madden, 733 F.3d 1314, 1318 (11th Cir. 2013) (same) (*citing* United States v. Keller, 916 F.2d 628, 634 (11th Cir.1990).

When considering claims of constructive amendment, it is important to not loose sight of the fact that constructive amendment occurs only when an *element* of the offense is altered to broaden the possible bases for conviction beyond what is contained in the indictment. So, for example, it is well settled that, in drug cases, the drug quantity is not an element of the offense. See United States v. Clay, 376 F.3d 1296, 1301 (11th Cir.2004) (noting that "the specific quantity of drugs for which [the defendant] was accountable is not an element of the crime charged"). Therefore, in cases where there is a discrepancy between the drug quantity charged in the indictment and the amount actually proved of which the defendant is ultimately convicted, no constructive amendment occurs. See United States v. Lee, 223 F. App'x 905, 908 (11th Cir. 2007).

Here, review of the superseding indictment reveals that, contrary to Movant's assertion, it did not specify that any particular boxes were used. (CR-DE#246). Rather, it simply 31

alleged that Movant used boxes at 4747 Hollywood Blvd. (Id.). Thus, Movant's claim is arguably subject to summary denial on this basis alone. Aron, 291 F.3d at 714-715 (no evidentiary hearing is needed when claims are patently frivolous or affirmatively contradicted by the record); Holmes, 876 F.2d at 1553 (no hearing required on claims which are based upon unsupported generalizations or affirmatively contradicted by the record).

But even assuming that the superseding indictment had alleged which mailboxes were used, and that the evidence adduced at trial established that the correspondence Movant received from the IRS in furtherance of the conspiracy was addressed to different box or "apartment" numbers, this would do nothing to advance Movant's claim. Specifically, review of the record reveals that the evidence adduced at trial established that the 4747 Hollywood Boulevard address was merely a private postal center with approximately 240 mailboxes. Katon Patel was the owner of the business, and testified that he rented five mailboxes to Movant. Patel testified that Movant told him he was an accountant, and that his mail would contain mostly IRS correspondence. Patel testified that he thus placed all correspondence that came to Movant in the boxes that Movant had rented, regardless of the specific box number that may have been listed. Patel further testified that, when the mailboxes Movant rented began to overflow with correspondence, Patel gathered the mail into two white U.S. Postal Service tote bins. In so doing, Patel noticed that many of the letters had different addresses, specifically a variety of different "apartment" numbers, purportedly located at the 4747 Hollywood Blvd. address. Patel testified that he told Movant that he wasn't allowed to use apartment numbers when renting the private mailboxes. Rather, he was required to use mailbox numbers.

Here, not only is Movant's allegation that the superseding indictment charged specific mailbox numbers belied by the record,

any discrepancy between the mailbox numbers that Movant actually rented and what the evidence may have established regarding the addresses that the correspondence addressed to Movant bore is of no consequence. The specific box number that Movant rented does not even come close to being an element of any offense with which Movant was charged. Therefore, even if the superseding indictment had listed the box numbers that Movant rented, convicting Movant based on evidence that he received correspondence addressed to different box or "apartment" numbers simply would not amount to a constructive amendment to the indictment. See Madden, 733 F.3d at 1318 (constructive amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment); Castro, 89 F.3d at 1452-53 (same); Keller, 916 F.2d at 634 (same).

To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both (1) that his counsel's performance was deficient, and (2) that he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place." Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1356 (11th Cir. 2009). Reasonableness is assessed objectively, measured under prevailing professional norms as seen from counsel's perspective at the time. Strickland, 466 U.S. at 689. Reviewing courts will thus not second-guess an attorney's strategic decisions, and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Prejudice is thus established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). A defendant must satisfy both the deficiency and prejudice prongs set forth in Strickland to obtain relief on a claim of ineffective assistance of counsel. Strickland 466 U.S. at 697. Failure to establish either prong of the Strickland analysis is fatal, and makes it unnecessary to consider the other. Id.

In assessing a claim of ineffective assistance of counsel based on failure to raise an issue or objection, the relative merit of the waived issue is critical to any analysis of counsel's performance or potential prejudice. Specifically, there is no duty to pursue issues which have little or no chance of success, and a lawyer's failure to raise a meritless issues cannot prejudice a client. See Chandler v. Moore, 240 F.3d 907, 917 (11 Cir. 2001)(counsel is not ineffective for failing to raise a non-meritorious objection); Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994)("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance" of counsel); United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 1992)(failure to raise meritless issues cannot prejudice a client); Card v. Dugger, 911 F.2d 1494, 1520 (11 Cir. 1990)(counsel is not required to raise meritless issues); see also Knowles v. Mirzayance, 129 S.Ct. 1411, 1422 (2009)(the law does not require counsel to raise every available non-frivolous defense); James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994)(counsel's failure to make futile motions does not constitute ineffective assistance); United States v. Hart, 933 F.2d 80, 83 (1st Cir. 1991)(counsel is not

required to waste the court's time with futile or frivolous motions).

Similarly, the Sixth Amendment does not require attorneys to press every non-frivolous issue that might be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. Jones v. Barnes, 463 U.S. 745, 753-54 (1983). The Supreme Court has recognized that "a brief that raises every colorable issue runs the risk of burying good arguments - those that . . . 'go for the jugular.'" Id. at 753. To be effective, therefore, appellate counsel may select among competing non-frivolous arguments in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756, 781-82 (2000). Indeed, the practice of "winnowing out" weaker arguments on appeal, so to focus on those that are more likely to prevail, is the "hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986). In considering the reasonableness of an appellate attorney's decision not to raise a particular claim, therefore, this Court must consider "all the circumstances, applying a heavy measure of deference to counsel's judgments." Eagle v. Linahan, 279 F.3d 926, 940 (11th Cir. 2001), quoting, Strickland, 466 U.S. at 691. In the context of an ineffective assistance of appellate counsel claim, "prejudice" refers to the reasonable probability that the outcome of the appeal would have been different. Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001); Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990); see also Robbins, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere v. Sec'y Fla. Dep't of Corr., 537 F.3d 1304, 1310 (11th Cir. 2008)(same). Thus, in determining whether the failure

to raise a claim on appeal resulted in prejudice, the courts must review the merits of the omitted claim and, only if it is concluded that it would have had a reasonable probability of success, then can counsel's performance be deemed necessarily prejudicial because it affected the outcome of the appeal. Eagle, 279 F.3d at 943; see also Card v. Dugger, 911 F.2d 1494, 1520 (11 Cir. 1990)(holding that appellate counsel is not required to raise meritless issues).

Here, as set forth above, Movant's claim that the alleged discrepancy (which doesn't even exist in fact) between the specific P.O. Boxes listed in the superseding indictment and the evidence adduced at trial is totally meritless. Therefore, neither trial nor appellate counsel can be deemed ineffective in having failed to raise it. See Bolender, 16 F.3d at 1573 ("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance" of counsel); Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues).

Movant's Motion to Amend (CV-DE#)

On February 20, 2018,[5] Movant filed a motion to amend (CV-DE#41) his § 2255 motion to add a second ground for relief. Specifically, Movant seeks to add a second ground claiming that trial and appellate counsel were ineffective in failing to raise the issue of constructive amendment to the superseding indictment. In support of this proposed claim, Movant would allege that the superseding indictment charged that Movant caused fraudulent electronic tax returns to be filed in the names of "M.M." and "C.A.," and that the government never presented any evidence regarding who prepared or filed these two returns, or that Movant used, or caused the use of interstate wire transmissions for the purpose of executing the scheme or artifice to defraud. Movant

[5]Again, pursuant to the mailbox rule.

states that he didn't raise this issue earlier because he is unskilled in the law.

Pursuant to § 2255(f), a one-year period of limitation applies to motions under that section. The limitations period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255(f).

In this case, there is no dispute that the statute of limitations runs from the date that Movant's judgment of conviction became final. Where, as here, a defendant appeals, but does not seek certiorari review in the Supreme Court, his conviction becomes "final" when the 90-day period for seeking certiorari review expires. See Clay v. United States, 537 U.S. 522, 525 (2003)("For purposes of starting the clock on § 2255's one-year limitation period, ... a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction."); see also Close v. United States, 336 F.3d 1283, 1285 (11th Cir. 2003)(same); Kaufman v. United States, 282 F.3d 1336, 1339 (11th Cir. 2002)(same). Under Supreme Court Rule 13(3), "the date of the issuance of the mandate is irrelevant for determining when a

certiorari petition can be filed, and, therefore, irrelevant for determining finality under § 2255." Close, 336 F.3d at 1285. "[T]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." Clay, 537 U.S. at 527 (rejecting the idea that, when a federal prisoner does not seek certiorari, a conviction becomes "final" for purposes of § 2255 upon issuance of the mandate by the appellate court).

Here, Movant's judgment became final on February 10, 2016, which is 90 days from the date that the Eleventh Circuit denied Movant's co-defendant's motion for rehearing (i.e., the judgment or order sought to be reviewed). Movant's motion to amend, however, was not filed until February 20, 2018 pursuant to the prison mailbox rule, more than two years after his judgment of conviction became final. The claim Movant seeks to raise in his proposed second ground for relief is thus time barred. As such, granting Movant leave to amend to add it would be futile. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (factors counseling against include, *inter alia*, and futility of amendment).[6]

Movant asserts that his motion is timely, and cites to the government's concession in its supplemental response. (CV-DE#41, attached proposed amended § 2255 motion, ¶18). What Movant fails

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[6]The Court is cognizant that Movant appears to have first attempted to interject this issue in a previous motion to amend (CV-DE#32), filed November 28, 2017 pursuant to the prison mailbox rule. Specifically, despite representing to the Court in the motion that the appended pleadings were "identical" to his previous filings and had only "additional citations," closer review of that pleading reveals that what Movant appears in reality to have been attempting to do is to back-door his new claim regarding the sufficiency of the evidence on the "M.M." and "C.A." returns by alleging new facts under the guise of additional record citations. Similarly, Movant then appears to have attempted to interject this issue in his reply brief continuation (CV-DE#35) filed December 7, 2017 pursuant to the mailbox rule. A reply brief if of course not the place to raise a claim for the first time. But regardless, neither Movant's November 28, 2017 disguised amendment (CV-DE#32) nor his December 7, 2017 reply brief continuation (CV-DE#35) were filed within the AEDPA's one-year limitations period. Therefore, this claim remains time barred.

to appreciate is that the government only conceded that his original motion was timely. However, the AEDPA's limitations period runs on a claim-by-claim basis. Zack v. Tucker, 704 F.3d 917, 920 (11th Cir. 2013). Therefore, Movant's proposed second ground for relief is timely only if it relates back to the date of the original filing.

Federal Rule of Civil Procedure 15(c)(2) provides in pertinent part that "[a]n amendment to a pleading relates back to the date of the original pleading when ... the amendment asserts a claim ... that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the original pleading." In Mayle v. Felix, the Supreme Court held that an amendment to a habeas petition may relate back "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts." 545 U.S. 644, 664, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005). A new claim does not meet that standard and, thus, does not relate back "when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650. The terms "conduct, transaction, or occurrence" are to be narrowly construed and are not synonymous with "trial, conviction, or sentence." Id. at 664 (rejecting the expansive view that Rule 15(c)(2) permits relation back "so long as the new claim stems from the habeas petitioner's trial, conviction, or sentence"). In other words, the fact that a claim relates back to a habeas petitioner's trial, conviction, or sentence is not determinative of whether the relation back doctrine is satisfied. Davenport v. United States, 217 F.3d 1341, 1344 (11th Cir.2000). Rather, the test for determining whether a new claim relates back to an original claim is whether the claim is "tied to a common core of operative facts." Mayle, 544 U.S. at 644. This is consistent with the factual specificity requirements for habeas petitions. Mayle, 544 U.S. at 661.

"Congress did not intend Rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts." Pruitt v. United States, 274 F.3d 1315, 1317 (11th Cir. 2001). Instead, Rule 15(c)(2) is "to be used for a relatively narrow purpose" and is not intended "to be so broad to allow an amended pleading to add an entirely new claim based on a different set of facts." Farris v. United States. 333 F.3d 1211, 1215 (11th Cir.2003). Thus, relation back is only appropriate "when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes." Mayle, 544 U.S. at 658 (*quoting* United States v. Craycraft, 167 F.3d 451, 457 (8th Cir.1999); accord Davenport v. United States, 217 F.3d at 1344 (rejecting a generalized application of the relation back doctrine and expressly adopting the factually specific test set forth in Craycraft).

Here, Movant's proposed additional claim is that there was no evidence presented linking him to the allegedly fraudulent returns prepared for "M.M." or "C.A." As an initial matter, despite Movant's attempt to couch this claim in terms of an alleged constructive amendment to the superseding indictment, it is in legal effect a claim that counsel was ineffective in failing to challenge the sufficiency of the evidence. See Castro v. United States, 540 U.S. 375, 381-82 (2003)(liberal approach to pro se submissions authorizes the district courts to recast a pro se litigant's claim so that its substance corresponds to a proper legal theory)(*citing* Hughes v. Rowe, 449 U.S. 5, 10 (1980)(per curiam)).

Moreover, even if Movant's claim could be fairly read to be a claim regarding an alleged constructive amendment, this claim is predicated upon totally different facts than the one raised in Movant's original claim. But simply raising the same type of legal

claim is not sufficient to make a claim relate back. Indeed, claims of ineffective assistance of counsel, despite being the same "type" of claim, do not relate back to other claims of ineffective assistance of counsel if they are not predicated upon the same core facts. See, e.g., Espinosa v. United States, 330 Fed. Appx. 889, 892 (11th Cir.2009) (newly raised claims of ineffective assistance of counsel relating to pre-trial conduct did not relate back to the original claims of ineffective assistance of counsel which were based on counsel's performance during specific moments of the trial and sentencing proceedings); Davenport, 217 F.3d at 1346 (holding the petitioner's newly asserted claims of ineffective assistance of counsel did not relate back to the original petition when the original petition did not mention the activity alleged in the new ineffective assistance of counsel claims).

Here, the facts alleged in support of Movant's proposed second claim for relief (i.e., whether there was sufficient evidence to prove that he had anything to do with the "M.M." and "C.A." returns) have nothing to do with the facts alleged in support of his original claim (i.e., that there was a discrepancy regarding the specific box numbers that he rented and the evidence regarding the addresses to which correspondence was mailed to him). As such, even if the proposed supplemental claim was a claim regarding an alleged constructive amendment to the superseding indictment, which it is not, it still would not relate back because it is factually dissimilar from Movant's original claim. See Davenport, 217 F.3d at 1344 (rejecting a generalized application of the relation back doctrine and expressly adopting the factually specific test).

Finally, as set forth above, Movant also states that he is unskilled in the law. This statement could be liberally construed as an attempt to claim that Movant is entitled to equitable

tolling.[7] See Haines v. Kerner, 404 U.S. 519, 520-521 (1972)(pro se filings should be liberally construed, and are subject to less stringent pleading requirements); see also Graham v. Henderson, 89 F.3d 75, 79 (2nd Cir. 1996)(when read liberally, a pro se habeas petition "should be interpreted 'to raise the strongest arguments that [it] suggest[s].'")(*quoting* Burgos v. Hopkins, 14 F.3d 787, 790 (2nd Cir. 1994). However, as Movant is likely well aware, it is well settled that ignorance of the law alone is not sufficient to warrant equitable tolling." Rose v. Dole, 945 F.2d 1331, 1335 (6th Cir. 1991); see also United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004)(pro se status and ignorance of the law do not justify equitable tolling); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000), *cert. denied*, 534 U.S. 863, 122 S.Ct. 145, 151 L.Ed.2d 97 (2001)(lack of legal knowledge or legal resources, even in a case involving a pro se inmate, does not warrant equitable tolling); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194, 121 S.Ct. 1195, 149 L.Ed.2d 110 (2001)(a petitioner's pro se status and ignorance of the law are insufficient to support equitable tolling of the statute of limitations); Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 1999), *cert. denied*, 531 U.S. 1035, 121 S.Ct. 622, 148 L.Ed.2d 532 (2000)(ignorance of the law and pro se status do not constitute "rare and exceptional" circumstances justifying equitable tolling); Smith v. McGinnis, 208 F.3d 13, 17 (2nd Cir.), *cert. denied*, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 63 (2000)(petitioner's pro se status throughout most of the period of limitation does not merit equitable tolling); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir.), *cert. denied*, 528 U.S. 1007, 120 S .Ct. 504, 145 L.Ed.2d 389 (1999)(unfamiliarity with the legal process during the applicable

[7]It bears noting that this is giving Movant a huge pass, since it is clear from Movant's previous, extensive arguments claiming that he was entitled to equitable tolling, complete with citations to pertinent caselaw, that Movant knows exactly what the doctrine provides.

filing period did not merit equitable tolling); Wakefield v. Railroad Retirement Board, 131 F.3d 967, 969 (11th Cir. 1997)(ignorance of the law "is not a factor that can warrant equitable tolling.").

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its

procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that some of Movant's claims are barred on procedural grounds[8] and that Movant's remaining claims fail on the merits, the court considers whether Movant is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find debatable the correctness of the court's procedural rulings. The court further concludes that reasonable jurists would not find the court's treatment of any of Movant's remaining claims debatable and that none of the issues are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84; see also Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); Rose, 252 F.3d at 684.

Conclusion

Based upon the foregoing, it is recommended that the motion to vacate (CV-DE#1) be DENIED, and that the motion to amend (CV-DE#41) be denied as futile because the claim Movant seeks to raise therein

[8]That is, that Movant's proposed second ground for relief is time barred, and that his motion to amend to add that claim should therefore be denied as futile.

is barred by the statute of limitations. It is further recommended that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 12th day of March, 2018.

UNITED STATES MAGISTRATE JUDGE

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United States District Court
for the
Southern District of Florida

Hervé Wilmore, Movant,	)	
	)	
v.	)	Civil Action No. 17-60278-Civ-Scola
	)	
United States of America,	)	
Respondent.	)	

Order Adopting Magistrate Judge's Report And Recommendation

This case was referred to United States Magistrate Judge Patrick A. White, consistent with Administrative Order 2003-19 of this Court, for a ruling on all pre-trial, nondispositive matters and for a report and recommendation on any dispositive matters. On March 12, 2018, Judge White issued a report, recommending that Wilmore's motion to vacate be denied on the merits, and that the Court deny the motion to amend (ECF No. 41) as futile because the proposed additional claim is time barred. (Report of Magistrate, ECF No. 42.) Wilmore filed objections to the report (ECF Nos. 43, 44).

The Court has considered Judge White's report, Wilmore's objections, the record, and the relevant legal authorities. The Court finds Judge White's report and recommendation cogent and compelling. The Court **affirms and adopts** Judge White's report and recommendation (ECF No. 41). The Court therefore **denies** the motion to vacate (**ECF No. 1**) and the motion to amend (**ECF No. 41**). The Court does not issue a certificate of appealability. Finally, the Court directs the Clerk to **close** this case. Any pending motions are denied as moot.

Done and ordered at Miami, Florida, on April 12, 2018.

Robert N. Scola, Jr.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11653-J

HERVE WILMORE, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Herve Wilmore, Jr. has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated August 28, 2018, denying his motion for a certificate of appealability in the appeal of the district court's denial of his 28 U.S.C. § 2255 motion to vacate sentence. Because Wilmore has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

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