IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14149-A

LAVONT FLANDERS, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Lavont Flanders, Jr., has filed a motion for reconsideration of this Court's January 16, 2019, order denying his construed motion for a certificate of appealability to review the denial of his motion to vacate, 28 U.S.C. § 2255. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

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LAVONT FLANDERS, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Lavont Flanders, Jr., moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Flanders has failed to satisfy the *Slack* test for his claims, his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:16-cv-20296-KMM

Lavont Flanders, Jr.,

Petitioner,

v.

United States of America

Respondent.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Petitioner Lavont Flanders' Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 12) and Flanders' Motion for Evidentiary Hearing (ECF No. 24). THIS MATTER was referred to the Honorable Chris M. McAliley, United States Magistrate Judge, who issued a Report (ECF No. 27), recommending that Petitioner's motions should be denied and a certificate of appealability should not be issued. Petitioner has timely[1] filed Objections (ECF No. 38) to the Report. The Government has filed a Response (ECF No. 47) to the Objections. Petitioner has filed an unauthorized Reply (ECF No. 48).

[1] Under the prison mailbox rule, a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); *see* Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. *See Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001). Petitioner signed his Objections before the August 4, 2017 deadline (on July 25, 2017). *See* Objections at 18.

On December 7, 2011, a jury found Petitioner guilty as to eighteen counts relating to engaging in sex trafficking, conspiring to engage in sex trafficking, and distributing a controlled substance. *See* CR DE 132 (Jury Verdict); *see also* CR DE 131 (Jury Instructions).[2] The Court sentenced Petitioner to thirteen consecutive life sentences, to commence after Petitioner served five concurrent 60-month sentences. *See* CR DE 170 (Judgment). Petitioner appealed, and on May 27, 2014, the Eleventh Circuit Court of Appeals affirmed Petitioner's conviction and sentence. *See United States v. Flanders*, 752 F.3d 1317 (11th Cir. 2014). The United States Supreme Court denied his petition for writ of certiorari on January 27, 2015 (CR DE 302), and Petitioner filed a timely motion to vacate pursuant to 28 U.S.C. § 2255 on January 25, 2016. *See* Original Motion to Vacate (ECF No. 1). Petitioner filed an amended motion on April 21, 2016 ("Motion to Vacate") (ECF No. 12).

In the Motion to Vacate, Petitioner challenged his conviction and sentence on the following grounds: (1) ineffective assistance of counsel; (2) his Fifth Amendment rights were violated by the Court's docketing important documents under seal or on "other secret dockets"; (3) his Sixth Amendment rights were violated when he appeared at his initial appearance without an attorney; (4) his prosecution under 18 U.S.C. § 1591 violated his due process rights because the statute is unconstitutionally vague and violates the First Amendment criminalizing protected speech; and (5) Petitioner is actually innocent. *See* Motion to Vacate (ECF No. 12) at 4–20.

Petitioner also impermissibly raised a series of claims for the first time in his Reply (ECF No. 23), which Judge McAliley concluded are not "properly before a reviewing court," and correctly declined to consider. *See* Report at 7 (quoting *Herring v. Sect., Dept. of Corrections*, 397 F.3d 1338, 1342 (11th Cir. 2005)). For the reasons set forth in Magistrate Judge McAliley's

[2] Citations to the docket of the criminal case, Case No. 1:11-cr-20557., are to "CR DE __."

Report and Recommendation, Petitioner's attacks on his conviction and sentence fail. *See* Report and Recommendation (hereinafter, "Report") (ECF No. 27) at 5–26.

Petitioner has filed Objections (ECF No. 38),[3] lodging the following four arguments. **First**, Petitioner argues Judge McAliley failed to consider three of his counsel's alleged failures in support of his ineffective assistance of counsel claim. *See* Objections (ECF No. 38) at 2–13.[4]

In support of this argument, Plaintiff first points to his trial counsel's alleged failure to suppress evidence seized pursuant to search warrants issued in 2007 and 2011 without sufficient probable cause. *See* id. at 2–4. Petitioner asserts Judge McAliley improperly declined to address this claim because his initial motion adequately raised this claim. *See* Objections at 3. In his Motion to Vacate, Petitioner argued that his trial counsel failed to move to suppress certain evidence because the 2007 and 2011 warrants were issued without probable cause. However, Petitioner's argument very specifically focuses on "the seizure of a prescription bottle containing 'benzodiazepines'" because the medicine cabinet was shared by several adults, and on the alleged "false information" forming the basis of the 2011 warrant. *See* Motion to Vacate (ECF No. 12) at 17. As a result, Judge McAliley correctly found that Petitioner's new distinct arguments concerning those warrants were improperly raised for the first time on reply. *See* Report at 6–7 (declining to consider the argument that 2007 warrant omitted exculpatory evidence and lacked probable cause, or the argument that the 2011 warrant relied on evidence

[3] Petitioner has filed two other Objections (ECF Nos. 35, 36), but upon Petitioner's Motions to Strike (ECF Nos. 40, 41), the Court has stricken those filings. *See* Order (ECF No. 45).

[4] Unless otherwise noted, all page numbers in this Order refer to the ECF page number at the top of each page, not the internal page numbers (if any).

unlawfully seized pursuant to the 2007 search warrant).[5] In any case, these arguments are meritless because the search warrants and supporting affidavits make clear that probable cause existed,[6] and because counsel would have had no basis to exclude evidence obtained by agents acting in good faith pursuant to a search warranted issued by a detached neutral magistrate, *see United States v. Leon*, 468 U.S. 897 (1984). Therefore, trial counsel was not ineffective for failing to raise these meritless claims regarding the search warrants. *See Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (counsel's decision not to file a meritless motion is cannot support a claim for ineffective assistance of counsel).

To further support his ineffective assistance of counsel claim, Petitioner points to his trial counsel's failure to move to dismiss the indictment and the superceding indictment based on the fact that Petitioner was not represented by counsel at his initial appearance and a rescheduled detention hearing. *See* Objections at 4–10. However, Judge McAliley correctly concluded that counsel's failure to move to dismiss on this ground did not render counsel ineffective. *See* Report at 16–18. Although the Sixth Amendment right of an accused to be represented attaches at the initial appearance, the presence of counsel is only required during a "critical stage." *See Rothgery v. Gillespie County Texas*, 554 U.S 191, 211–212 (2008). While Petitioner was not represented at his initial hearing or at a detention hearing that was rescheduled, Petitioner lacked counsel on these dates because the Court was attempting to honor Petitioner's request to have his counsel of choice and because that counsel was absent. *See* Report at 16–18. Judge McAliley correctly found that trial counsel's absence at these hearings did not amount to a Sixth

[5] The Court notes that Judge McAliley did address Petitioner's claims pertaining to those warrants that were properly before the Court. *See* Report at 9–11.

[6] *See generally* Ex. A to Government's Response in Opposition (ECF No. 13-1); Ex. B to Government's Response in Opposition (ECF No. 13-2).

Amendment violation because neither of these instances were a "critical stage" and because the Court scrupulously protected Petitioner's Sixth Amendment right to counsel. *See* Report at 16–18.[7] Thus, Petitioner's counsel was not ineffective for failing to bring a meritless motion to dismiss the indictments based on this non-existent Sixth Amendment violation. *See Lancaster*, 880 F.2d at 375.

Finally, in support of his ineffective assistance of counsel claim, Petitioner points to the fact his trial counsel "allowed Movant to be convicted for the benefitting counts" despite the supposed lack of evidence of receipt of financial benefit. *See* Objections at 11–13. Petitioner admits that Judge McAliley was correct in noting that the Eleventh Circuit Court of Appeals addressed and rejected Petitioner's contention that the government did not prove that he personally benefited from participation in the criminal venture. *See* Objections at 11; *see also* Report at 9 (citing *United States v. Flanders*, 752 F.3d 1317 (11th Cir. 2014)). Plaintiff has not explained how trial counsel's failure to raise an argument that has already been rejected by the Eleventh Circuit constitutes ineffective assistance of counsel. *See Lancaster*, 880 F.2d at 375; *cf. Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1331 (11th Cir. 2005) (Generally, "findings of fact and conclusions of law by an appellate court are binding in all subsequent proceedings in the same case in the trial court or on a later appeal . . . .").

[7] The Court is not persuaded by the argument in Petitioner's Objection (and conclusorily echoed in Petitioner's unauthorized Reply (ECF No. 38)) that these hearings were critical because they lead to the "loss of additional rights." *See* Objections at 8. Petitioner alleges he was detained for several days during the period between his originally scheduled detention hearing and his rescheduled detention hearing. *Id.* However, as stated above, the rescheduling was due to the absence of Petitioner's chosen counsel at those hearings. *See* August 22, 2011 Hearing Proceedings (ECF No. 23-1) at 22–25. Petitioner makes no meritorious argument that these hearings were a "critical stage" under the framework set out in *United States v. Cronic*, 466 U.S. 648 (1984) and further expounded in *United States v. Roy*, 855 F.3d 1133, 1144 (11th Cir. 2017).

Accordingly, Judge McAliley correctly concluded that Petitioner was not denied effective assistance of counsel. *See* Report at 8–9.

Second, Petitioner renews his argument that he is actually innocent of the "benefitting" counts. *See* Objections at 12–14.Specifically, Petitioner objects to Judge McAliley's expressed doubts regarding whether "actual innocence" is a stand-alone basis for relief in a § 2255 action. *See* Objections at 13–15. However, Petitioner does not object to Judge McAliley's finding that Petitioner has not shown "actual innocence" in light of the Eleventh Circuit's decision in *United States v. Flanders*, 752 F.3d 1317 (11th Cir. 2014). *See* Report at 25. The Court need not address Petitioner's legal theory because even if "actual innocence" were an independent basis for a § 2255 motion, Petitioner cannot make such a showing here in light of the Eleventh Circuit's decision, which held that there was "sufficient evidence to affirm Flanders's conviction" to support the benefitting charges (Counts 3, 6, 9, 11, 15, and 18). *See Flanders*, 752 F.3d at 1332. Accordingly, Judge McAliley correctly rejected Petitioner's actual innocence claim.

Third, Petitioner renews his argument that he was deprived of his right to effective assistance of counsel on appeal because his appellate lawyer failed to raise an alleged *Cronic* error.[8] *See* Objections at 15–16; *see* Motion to Vacate at 19. Judge McAliley rejected the Petitioner's *Cronic* argument (along with two other constitutional arguments) on the grounds that it was procedurally barred because Petitioner could have raised the claim on appeal but chose not to do so. *See* Report 4–5. Although, Judge McAliley explicitly noted that the Report would nevertheless address the constitutional claims (including the *Cronic* argument) to the extent they implicated an effective assistance of counsel claim, *id.* at 5 n.4, it does not appear that Judge

[8] In *United States v. Cronic*, the Supreme Court held that a criminal defendant is denied counsel if the accused is denied counsel at a "critical stage of his trial." 466 U.S. 648, 659 (1984).

McAliley addressed Petitioner's claim that *appellate* counsel's failure to raise Petitioner's *Cronic* argument was itself ineffective assistance of counsel. Such a claim would not be procedurally barred in a § 2255 proceeding. *See Massaro v. United States*, 538 U.S. 500, 509 (2003) (The "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255.").

However, Petitioner's ineffective assistance of appellate counsel claim fails because the *Cronic* claim fails on the merits. As noted above, Petitioner claims that he was deprived of his Sixth Amendement rights because Petitioner was not represented by counsel at his initial appearance and at a rescheduled detention hearing. *See* Objections at 4–10. Judge McAliley correctly found that trial counsel's absence at these hearings did not amount to a Sixth Amendment violation because neither of these instances were a "critical stage" and because the Court scrupulously protected Petitioner's Sixth Amendment right to counsel. *See* Report at 16–18. Accordingly, Petitioner's appellate counsel (like his trial counsel) was not ineffective for failing to act on Petitioner's meritless *Cronic* claim. *See Brown v. United States*, 720 F.3d 1316, 1335 (11th Cir. 2013) ("[T]here can be no showing of actual prejudice from an appellate attorney's failure to raise a meritless claim.").

Fourth, Petitioner renews his argument that he was deprived of his right to access to the criminal proceedings because of the Court's docketing system. *See* Objections at 16–19; *see also* Motion to Vacate at 18–20. Judge McAliley found that this claim was procedurally barred because Petitioner could have raised the claim on direct appeal but chose not to do so. *See* Report 4–5. In his Objections, Petitioner contends that he overcomes this procedural bar because he was unaware of the "dual-docket" until after his direct appeal was over. *See* Objections at 17.

As Judge McAliley noted, issues which could have been raised on direct appeal are generally not actionable in a § 2255 motion and will be considered procedurally barred. *See Lynn v. United States*, 365 F.3d 1225, 1234–35 (11th Cir. 2004). "Nevertheless, a petitioner can overcome a procedural default by showing cause for and prejudice from the default." *Madkins v. United States*, No. 3:08-CR-343-J-34MCR, 2014 WL 4417849, at *7 (M.D. Fla. Sept. 8, 2014). In order to establish "cause" for a procedural default, a habeas petitioner must point to an "objective factor, not attributable to the petitioner, that prevented him from raising the claim earlier." *Id.* Demonstrating "prejudice" requires a petitioner to "show a reasonable probability of a different outcome absent the alleged error." *Id.*

Assuming without deciding that Petitioner has established "cause," Petitioner's argument fails because he has not shown prejudice. Petitioner explains that he has now received the 2011 search warrant which was allegedly "withheld . . . for years," and conclusorily contends that "[h]ad this warrant been available" at trial, "evidence would have been excluded and the outcome of the trial would have been different." *See* Objections at 19. However, Petitioner fails to explain how the warrant would have led to the exclusion of any evidence or otherwise impacted the outcome of the trial. Moreover, to the extent Petitioner's arguments rest on the arguments found elsewhere in the Motion to Vacate regarding his counsel's failure to suppress evidence stemming from this warrant, the Court has already rejected those arguments.

UPON CONSIDERATION of the Motion to Vacate (ECF No. 12), the Report (ECF No. 27), the Objections (ECF No. 38), the Response (ECF No. 47), and the Reply (ECF No. 48), after a *de novo* review of the record, and being otherwise fully advised in the premises it is hereby ORDERED AND ADJUDGED that the conclusions in Magistrate Judge McAliley's Report

(ECF No. 27) are ADOPTED, consistent with the reasons set forth in this Order.[9] It is further ORDERED AND ADJUDGED that Petitioner's Motion to Vacate (ECF No. 12) is DENIED and that a certificate of appealability is DENIED.[10] It is further ORDERED AN ADJUDGED that an evidentiary hearing is not necessary, and thus Petitioner's request for such a hearing is DENIED.

The Clerk of the Court is instructed to CLOSE this case. All pending motions are denied as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of December, 2017.

Kevin Michael Moore

Digitally signed by Kevin Michael Moore
DN: cn=Administrative Office of the US Courts, email=k_michael_moore@flsd.uscourts.gov, cn=Kevin Michael Moore
Date: 2017.12.03 15:06:03 -05'00'

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

cc: All counsel of record

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[9] The Report is adopted with the following exceptions: the second sentence of the second paragraph on page one should read "It alleged that on multiple occasions between 2006 and 2007 . . . ."; and the second to last line of the second full paragraph on page two should read "vacate pursuant to 28 U.S.C. § 2255 on January 25, 2016 . . . ."

[10] Although the Report neglects to include a ruling on a certificate of Appealability, the Court finds that one is not warranted here. A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Upon consideration of the record as a whole, this Court declines to issue a certificate of appealability.

LAVONT FLANDERS, JR., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2017 U.S. Dist. LEXIS 91518
CASE NO. 16-CIV-20296-MOORE/MCALILEY,(11-CR-20557-MOORE)
June 13, 2017, Decided
June 13, 2017, Filed

Editorial Information: Subsequent History

Adopted by, Post-conviction relief denied at, Certificate of appealability denied, Request denied by Flanders v. United States, 2017 U.S. Dist. LEXIS 199851 (S.D. Fla., Dec. 1, 2017)

Editorial Information: Prior History

United States v. Flanders, 752 F.3d 1317, 2014 U.S. App. LEXIS 9726 (11th Cir. Fla., May 27, 2014)

Counsel For **Lavont** Flanders, Jr., 97156-004, Plaintiff: Daniel Robert Aaronson, LEAD ATTORNEY, Benjamin & Aaronson, Fort Lauderdale, FL; H. Louis Sirkin, LEAD ATTORNEY, PRO HAC VICE, Santen & Hughes, LPA, Cincinnati, OH.

For United States of America, Defendant: Barbara A. Martinez, LEAD ATTORNEY, United States Attorney's Office, Miami, FL; Noticing 2255 US Attorney.

Judges: CHRIS McALILEY, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: CHRIS McALILEY

Opinion

REPORT AND RECOMMENDATION AND ORDER

Pending before the Court is the Plaintiff, **Lavont** Flanders' Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [DE 12], and Flanders' Motion for Evidentiary Hearing. [DE 24]. These motions were referred to me by the Honorable K. Michael Moore and are fully briefed. [DE 5, 13, 23]. For the reasons set forth below, I deny the motion for evidentiary hearing, and recommend that the motion to vacate be denied.1

I. Background

On October 18, 2011, Flanders and a co-defendant were charged by superseding indictment [CR DE 71]. It alleged that on multiple occasions between 2006 and 2001, Flanders, posing as a modelling scout, lured adult women to Miami, where he drugged them without their knowledge and then filmed them engaging in sex acts with his co-defendant. These films were later sold to the public and posted on the Internet. [*Id.*]. The superseding indictment charged Flanders with multiple counts of inducing women to engage in sex trafficking through fraud and of benefitting from that scheme, in violation of 18 U.S.C. § 1591 (a)(1) and (2), along with aiding and abetting and conspiracy and attempt to do the same, in violation of 18 U.S.C. § 1594(a) and (c), and 18 U.S.C. §§ 2 and 371. Flanders was also charged with distributing a controlled substance, specifically the drugs he used to impair the victims

such that they would participate in the pornographic films.

Flanders went to trial with his co-defendant and was found guilty of eighteen of the twenty counts.2 [CR DE 123-133]. The Court sentenced Flanders to thirteen consecutive life sentences, to commence after Flanders served five concurrent 60-month sentences. [CR DE 170]. Flanders appealed and on May 27, 2014, the Eleventh Circuit Court of Appeals affirmed Flanders' conviction and sentence. *United States v. Flanders*, 752 F.3d 1317 (11th Cir. 2014). The United States Supreme Court denied his petition for writ of certiorari on January 27, 2015 [CR DE 302], and Flanders filed a timely motion to vacate pursuant to 28 U.S.C. § 2255 on January 25, 2106. [DE 1]. Flanders filed an amended motion on April 21, 2016 [DE 12], and I address that motion.

II. Analysis

A. The Claims

Flanders raises a laundry list of claims in his motion to vacate, a number of which are duplicative or overlapping. [DE 12, pp. 17-20]. The claims are cryptic, stated in a sentence or two, without citation to legal authority (other than provisions of the Constitution) and very little analysis. Improperly, in his reply Flanders for the first time adds some arguments, analysis and legal authority. Needless to say, it is very difficult to make sense of claims presented in this manner.

Most of Flanders' claims are that his trial counsel did not provide him the effective assistance of counsel required by the Sixth Amendment. [DE 12, at pp. 17-19]. Specifically, he claims his lawyer failed to do the following:

1. Move to dismiss the indictment and superseding indictment on the grounds that Flanders appeared without counsel at his initial appearance;

2. File a motion to dismiss the indictment and superseding indictment, and for bill of particulars, because the government misrepresented to the grand jury that Flanders was accused of crimes that involved minors;

3. Move to suppress the prescription bottle seized during the execution of a 2007 search warrant of his home because that warrant did not authorize its seizure;

4. Move to suppress the evidence seized pursuant to a 2011 search warrant of a different residence because the affidavit in support of the application for that warrant had false information designed to deceive the issuing court into believing that Flanders was involved in child pornography;

5. Move to compel the government to disclose evidence favorable to Flanders;

6. Investigate the charges; specifically, by failing to retain a pharmacology expert, a computer expert, and an adult film expert, and by failing to call Flanders's girlfriend (or her sister) to testify that the prescription medication seized in the 2011 search belonged the girlfriend's sister;

7. Move to dismiss the indictment and superseding indictment because 18 U.S.C. § 1591 violates the Fifth Amendment due process clause because it is vague, facially and as applied to Flanders, and it also violates the First Amendment because it criminalizes protected speech;

8. Raise the affirmative defense that 18 U.S.C. § 1591 only applies to the sex trafficking of minors, and that the government failed to prove that Flanders received a financial benefit or engaged in the criminal venture;

9. Ask that the jury see the full video productions of the victims;

10. Present mitigating evidence at sentencing.

11. Negotiate a guilty plea agreement.

12. Object to an impermissible variance at trial caused by the government's introduction of evidence that Flanders or Defendants used force.

Flanders also asserts these additional Constitutional claims:3

13. His Fifth Amendment rights were violated by this Court's alleged dual docketing system, which he claims caused numerous important documents and exculpatory information to be sealed or placed on secret dockets.

14. Flanders was denied his Sixth Amendment rights when he appeared at his initial appearance without an attorney.

15. Flanders's prosecution under 18 U.S.C. § 1591 violated his due process rights because the statute is unconstitutionally vague and violates the First Amendment by criminalizing protected speech.

Last, Flanders makes a catch-all claim that he is actually innocent, referencing some of the claims in his Petition. [*Id.* at p. 5].

The three constitutional claims numbered 13, 14 and 15 above, are not properly before this Court because Flanders could have raised them on direct appeal but choose not to do so. The law is clear that "[i]ssues that a petitioner could have raised on direct appeal, but failed to raise, are procedurally barred from review in a § 2255 motion." *Madkins v. United States*, Nos. 3:ll-cv-949-J-34MCR, 3:08-cr-343-J-34MCR, 2014 U.S. Dist. LEXIS 125103, 2014 WL 4417849, * 7, (M.D. Fla. Sept. 8 2014) (citing *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004)). A claim can be raised on direct appeal when no additional factual development is needed, such that it is ready for review on the merits. *Lynn*, 365 F.3d at 1232, n. 14.

Courts will excuse a petitioner's failure to timely raise a claim on direct appeal when the petitioner shows cause for and prejudice for his failure to do so. *Madkins, id.* Flanders has not done this. Therefore, his claims are procedurally barred and will not be reviewed here.4

In addition to the claims listed above, in his reply Flanders impermissibly raises a series of claims for the first time:

1. Regarding the 2007 search warrant, trial counsel was ineffective for failing to move to suppress evidence seized pursuant to that warrant because the affidavit in support of the application for the warrant omitted exculpatory evidence [DE 23, at pp. 7-8];

2. Again regarding the 2007 search warrant, trial counsel was ineffective for not moving to suppress evidence seized pursuant to that warrant because the warrant application lacked probable cause that the residence that was searched would have evidence of the alleged crimes [*Id.*, at p. 8];

3. Regarding the 2011 search warrant, trial counsel was ineffective for not challenging that warrant because the affidavit in support of the warrant application relied on evidence unlawfully seized pursuant to the 2007 search warrant [*Id.*, at p. 9];

4. Trial counsel was ineffective for not arguing that the transcription of Flanders's statements to the police should be excluded from evidence because Flanders made those statements after the police improperly questioned him after he had invoked his right to counsel [*Id.*, at p. 10];

5. Trial counsel was ineffective for failing to move to dismiss the indictment and superseding indictment because § 1591 was only intended to criminalize involuntary prostitution, [*Id.*, at p. 10-11];

and

6. Flanders was denied due process when the prosecutor in his closing argument described Flanders' actions as rape. [*Id.* at p. 14].

Flanders' made none of these arguments in his Petition. "Arguments raised for the first time in a reply brief are not properly before a reviewing court." *Herring v. Sect, Dept. of Corrections*, 397 F.3d 1338, 1342 (11th Cir. 2005); Rules Governing Habeas Corpus Cases Under Section 2255, Rule 2(b)(1) (2016) ("The motion must specify all the grounds for relief available to the moving party").5 I therefore do not consider these claims for relief.

Turning to Flanders's claims that are properly before this Court, I start with his various claims that he was denied the effective assistance of counsel.

B. Standard for ineffective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-6, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This Court may find that a defendant's conviction and sentence were the product of a violation of that Constitutional guarantee upon proof that his attorney's performance was deficient and that this caused the defendant actual prejudice. *Id.* at 687. In short, to prevail on these claims Flanders must establish that he was actually prejudiced by his attorney's deficient performance. *Id.*

i. Performance

Regarding Flanders' attorney's performance, it must be evaluated from the attorney's perspective at the time of the alleged error and in light of all the circumstances. This standard of review is highly deferential. *Huynh v. King*, 95 F.3d 1052, 1056 (11th Cir. 1996). That is, "[c]ounsel's performance is deficient only if it is objectively unreasonable and falls below the wide range of competence demanded of attorneys in criminal cases." *Michael v. Crosby*, 430 F.3d 1310, 1320 (11th Cir. 2005) (citation and quotation marks omitted). This court must recognize a strong presumption that counsel's performance was reasonable. *Id.* In other words, the reviewing court:

> should be highly deferential to those choices that are arguably dictated by a reasonable trial strategy. Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that *no reasonable lawyer, in the circumstances, would have done so.* This burden, which is petitioner's to bear, is and is supposed to be a heavy one. And, we are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial worked adequately. Therefore, the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.*Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (citations and quotation marks omitted, emphasis supplied).

ii. Prejudice

To satisfy the prejudice requirement, Flanders must show a reasonable probability that, but for counsel's inadequate performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694.

C. Ineffectiveness claims based on substantive arguments decided on direct appeal

Flanders argues that his counsel was ineffective for: (1) failing to move to compel the government to disclose favorable evidence; and (2) not raising an affirmative defense6 that the government had not proven the elements of financial benefit or that Flanders engaged in the criminal venture. [DE 12, p.

18]. The Eleventh Circuit denied both these substantive claims in Flanders' direct appeal. Flanders resurrects these arguments here by recasting them as ineffective assistance of counsel claims.

The Eleventh Circuit found that Flanders' argument that the government withheld favorable evidence was "wholly without merit" because Flanders provided no evidence to that Court that supports the claim. *Flanders*, 752 F.3d at 1333. He also has not done so here. The Eleventh Circuit also addressed, and rejected, Flanders' contention the government did not prove that he personally benefitted from participation in the criminal venture, as required for conviction under § 1591. *Id.* at 1331.

Because the Eleventh Circuit found that these arguments have no merit, there is no merit to Flanders's claim here that his lawyer was ineffective for not advocating these positions.

D. The Fourth Amendment claims

Flanders asserts that his trial counsel was ineffective in failing to raise two Fourth Amendment claims: (1) moving to suppress the prescription bottle seized during the execution of the 2007 search warrant because the warrant did not authorize its seizure [DE 12, p. 17, P 3(a)], and (2) moving to suppress the evidence seized pursuant to the 2011 search warrant because the affidavit in support of the warrant was misleading. In particular, Flanders contends that the agent misled the court into believing that minors were victims of the suspected crimes because the affiant stated that her law enforcement experience included investigations of crimes against children. [*Id.* at P 3(b)].

"To succeed on a claim that an attorney failed to provide effective assistance with regard to a Fourth Amendment motion to suppress, a petitioner must show that the underlying Fourth Amendment claim had merit." *Madkins*, 2014 U.S. Dist. LEXIS 125103, 2014 WL 4417849, * 10. Flanders's Fourth Amendment challenges are patently meritless. First, his claim regarding the 2007 search warrant is directly contradicted by the plain language of the warrant, which specifically authorized the seizure of "Narcotics (Benzodiazepines, Xanax)", without any limitation. [DE 13-1, p. 7].

Second, when the affidavit filed in support of the 2011 search warrant is read as a whole, it is clear that Flanders' second Fourth Amendment claim has no merit. As background information about her qualifications, the affiant wrote that she was assigned at the time to a squad investigating cases involving crimes against children. The evidence she identified in her affidavit about Flanders however, only concerned his victimization of adult women. [DE 13-2]. The affidavit in no way suggested that Flanders was being investigated for crimes against children.7

Because neither of the Fourth Amendment arguments have merit, trial counsel's failure to move to suppress this evidence did not constitute ineffective assistance. *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (counsel's decision not to file a meritless motion is cannot support a claim for ineffective assistance of counsel).

E. Motions to dismiss

Flanders asserts that his trial counsel was ineffective for failing to move to dismiss the indictment and superseding indictment on the grounds that: (1) the government misled the grand jury into believing that Flanders had been involved in crimes against minors, (2) 18 U.S.C. § 1591 is unconstitutionally vague, facially and as applied, and violates the First Amendment, and (3) Flanders appeared without counsel at his initial appearance in violation of the Sixth Amendment. [DE 12, pp. 17-8].

i. Grand jury

Throughout his prosecution, Flanders has argued that the grand jury process was compromised and

that he was denied due process, because the government misled the grand jury into believing that he had been involved in crimes against minors.8 *See e.g.*, [CR-DE 148, 261, 265]. In fact, the indictment and superseding indictment allege that Flanders and his codefendant had only adult victims. [CR DE 3, 71]. Nonetheless, Flanders claims the government engaged in misconduct by representing to the grand jury that Flanders sexually victimized minors. [DE 12, p. 18]. Flanders offers no proof that this is true.

Instead, he tries to build an argument by pointing to occurrences outside the grand jury. First, he notes that the title of 18 U.S.C. § 1591, the statute under which he was prosecuted, is "Sex trafficking of children or by fraud, force or coercion." That statute is complex, and includes provisions that criminalize sexual victimization of adults. In fact, the indictment and superseding indictment explicitly charge Flanders with crimes under only those provisions of § 1591.

Next, Flanders points out that his pretrial services report and certain booking documents generated by the U.S. Marshals Service erroneously identified the crime Flanders had been accused of, as sexual trafficking of a minor. [DE 23-1, pp. 4-5, 7].9 Perhaps relying on that error in the pretrial services report or the title of the statute, the Magistrate Judge at Flanders' initial appearance made the same mistake when he first advised Flanders of the nature of the charges against him. The prosecutor immediately corrected the judge and advised that "there is no allegation that there were any minors involved." [*Id* at p. 13].

Flanders' then speculates that the grand jury must have been told that he had committed crimes against children. Importantly, Flanders addressed his concern with the trial court: he asked it to order the government to produce transcripts of the grand jury proceedings so that Flanders might confirm his suspicions. [CR DE 261]. Relying on grand jury secrecy rules the government lawyer opposed this disclosure; however he took the step of reviewing the grand jury transcripts and then reported that they show the grand jury had not been presented any evidence that Flanders was involved with minors. [CR DE 264, p. 3]. Flanders has offered no reason to discredit that statement of government counsel, and otherwise has presented no evidence that would have supported the motion to dismiss the indictment that he claims his lawyer was ineffective for not filing. This claim is without merit.

ii. Unconstitutionality of 18 USC § 1591

Flanders asserts that his counsel was ineffective for failing to move to dismiss the charges against him on the grounds that § 1591: (1) is unconstitutionally vague, both facially and as applied to him, and (2) violates the First Amendment. [DE 12, p. 18-9].

The Supreme Court has explained that a statute is void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Section 1591(a) provides, in pertinent part:

> (a) Whoever knowingly-
>
> (1) . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or ... in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . . will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished. . .18 U.S.C. § 1591(a) (emphasis added).

Flanders' first argues is that the statute is facially vague because it has been interpreted to apply only to minors. [DE 12, pp. 18-20]. Flanders relies on this incorrect and unsupported view of § 1591 to also argue that his counsel was ineffective for failing to raise the "affirmative defense" that the statute only applies to sex trafficking of minors. [DE 12, p. 18].

Flanders does not say who interpreted the statute to limit its application to minors nor does he cite any legal authority that supports that claim. In fact, the statute plainly criminalizes multiple activities: (1) the use of force, fraud or coercion to cause an adult to engage a commercial sex act, and (2) causing a minor to engage in a commercial sex act. Thus, it clearly applies to adults.10 Moreover, courts that have examined this language have found that § 1591 is not unconstitutionally vague. *See United States v. Cook*, 782 F.3d 983, 989 (8th Cir. 2015); *United States v. Williams*, 564 Fed.Appx. 568, 571 (11th Cir. 2014).

Second, Flanders raises an "as applied" vagueness challenge. [DE 12, pp. 18-20]. Flanders does not clearly explain this claim. It appears he is arguing that § 1591 does not provide fair notice that it prohibits his particular conduct: involuntarily drugging women in order to secure their participation in filmed sex acts, and selling those films to the public. This argument has no merit because Flanders' conduct without doubt was widely understood by the public to be criminal. The Fifth Amendment does not require that Flanders have notice that his actions violated a particular statute. Rather, it is satisfied if Flanders knew that what he did was probably or certainly criminal. *Cook*, 782 F.3d at 989. Surely he did.

Finally, Flanders argues that § 1591 is unconstitutionally overbroad under the First Amendment because the phrase "commercial sex act" implicates constitutionally protected free speech in the form of adult pornography. [DE 12, p. 19]. "A law is unconstitutionally overbroad if it punishes a substantial amount of protected free speech, judged in relation to its plainly legitimate sweep." *United States v. Estrada-Tepal*, 57 F.Supp.3d 164, 166-7 (E.D.N.Y. 2014).

Here, § 1591 criminalizes the use of force, fraud or coercion to cause a person to engage in a commercial sex act such as adult pornography; it does not criminalize consensual adult pornography. Once again this argument is without merit. *See, e.g., United States v. Thompson*, 141 F.Supp.3d 188, 199 (E.D. N.Y. 2015) (rejecting argument that § 1591 violates the First Amendment overbreadth doctrine because the words "harbors, transports, ... or maintains" may criminalize intimate and expressive associations protected by the First Amendment).

Because none of Flanders' challenges to the constitutionality of § 1591 have merit, his counsel did not act ineffectively when he chose not to file a motion to dismiss the indictment and superseding indictment on these grounds. *Lancaster*, 880 F.2d at 375 (counsel's decision not to file a meritless motion is cannot support a claim for ineffective assistance of counsel).

iii. failure to have counsel at initial appearance

Flanders argues that his counsel was ineffective for failing to move to dismiss the indictment and superseding indictment because, in violation of the Sixth Amendment, he was not represented by counsel at his initial appearance. [DE 12, p. 17].

The Sixth Amendment right of an accused to be represented by counsel attaches at the initiation of criminal proceedings, which includes an accused's first appearance before a judicial officer. *Brewer v. Williams*, 430 U.S. 387, 398-399, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). The Supreme Court later addressed the distinction between the "attachment" of that right (at the initial appearance or any other time when formal judicial proceedings begin), and when counsel must be present. On that point, the Court wrote that "the accused at least is entitled to the presence of []counsel during any

'critical stage' of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 211-212, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008). The Court emphasized that "[w]e do not here purport to set out the scope of an individual's posattachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis." *Id.* 554 U.S. at 212, n.15. The Court observed that it has previously found that critical stages "amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." *Id.* at n. 16 (citations and quotation marks omitted).

Flanders' initial appearance took place on August 17, 2011. [DE 23-1]. The Court advised Flanders of the charges against him, of his right to be represented by counsel and to have counsel appointed if he could not afford to retain his own lawyer. Flanders told the judge that he had an attorney, Joshua Fisher, who he wanted to represent him but who was not in court that day. [*Id.* at p.p. 13-15]. The government advised that it would ask the Court to detain Flanders pending trial and asked for three days to prepare for that detention hearing, as was its statutory right. [*Id.* at p. 16; *see also* 18 U.S.C. § 3142(f)(2) (government is entitled to three days to prepare for detention hearing; defense may request more time for preparation]. The Court scheduled the detention hearing for the following Monday, and explained to Flanders that if Mr. Fisher could not represent Flanders at that time, Flanders could have more time to retain his counsel of choice, or he could ask the Court to appoint counsel to represent him. Flanders said he understood. [*Id.* at p. 17].

On Monday August 22, 2011, Mr. Fisher was not present and the Court was informed that Flanders was making arrangements to retain a different attorney. To accommodate Flanders' efforts to retain counsel of choice, the Court again postponed the detention hearing for two days. [*Id.* at p. 24-25]. On Wednesday, August 24, 2011, Flanders appeared with his chosen attorney Kenny Kuhl, who entered a notice of appearance, and with his counsel present, Flanders stipulated to his pretrial detention. [CR DE 19, 21].

The Court scrupulously protected Flanders' Sixth Amendment right to counsel throughout this process. It made certain Flanders understood his right to counsel, and right to appointed counsel if he could not afford to hire an attorney, and it protected Flanders' stated preference for counsel of his choice. Importantly, it made no decision about Flanders' release until he had his chosen attorney with him in Court. Without doubt that detention hearing was a point of "trial-like confrontation" when Flanders had to be represented by counsel, and he was.

Flanders has not shown that his Sixth Amendment right to counsel was violated at his initial appearance and it follows that his counsel was not ineffective for failing to bring a motion to dismiss the indictments for this alleged Sixth Amendment violation. As noted many times, trial counsel is not ineffective for failing to make a meritless motion.

F. Strategic decisions

Flanders asserts that several of his counsel's strategic decisions at trial and sentencing amount to the ineffective assistance of counsel.

In the context of a claim for ineffective assistance, trial counsel's strategic choices, "'are virtually unchallengable.' Moreover, the fact that a chosen strategy or defense was ultimately unsuccessful does not mean that counsel's performance was ineffective." *Dexter v. Sec'y, Dep't of Corr.*, No. 8:07-CV-1452-T-24TBM, 2008 U.S. Dist. LEXIS 36142, 2008 WL 1956029, * 4 (M.D. Fla. May 2, 2008) (quoting *Strickland*).

Flanders argues that his trial counsel was ineffective for failing to call his girlfriend or her sister to testify that the prescription medication seized pursuant to the 2011 search warrant belonged to his

girlfriend's sister, and was only used by her. Flanders also asserts that trial counsel was ineffective for failing to publish to the jury the entire videos of the victims engaging in sexual activity with Flanders' codefendant, and failing to present mitigating evidence at sentencing. [DE 12, pp. 18, 19].

i. Girlfriend or her sister as witness

As for his first complaint, Flanders bears the burden of "showing counsel's failure to call witnesses rendered his trial fundamentally unfair." *Glinton v. United States*, Nos. 8:11-CV-717-T-23MAP, 8:04-CR-186-T-23MAP, 8:11-CV-718-T-30TGW, 8:07-CR-361-T-30TGW, 2012 U.S. Dist. LEXIS 27294 , 2012 WL 695675, * 3 (M.D. Fla. March 1, 2012). This burden is heavy because "the presentation of testimonial evidence is a matter of trial strategy and often allegations of what a witness would have testified are largely speculative." *Id.* (citations omitted). Counsel's decision regarding which witnesses to call is one that the Court will "seldom, if ever, second guess." *Id.*

To meet his burden, Flanders must provide: "(1) the identity of the prospective witnesses; (2) the substance of the witnesses' testimony; and (3) an explanation as to how the omission of this evidence prejudiced the outcome of the trial." *Wright v. Sec'y, Dep't of Corr.*, No. 8:10-cv-770-33TGW, 2011 U.S. Dist. LEXIS 75462, 2011 WL 2731079, * 11 (M.D. Fla. July 13, 2011). Flanders has satisfied the first requirement, the identity of the prospective witness, but he has completely failed meet the other two requirements.

Flanders asserts that either of the proposed witnesses would have testified the medicine seized was used only by his girlfriend's sister, but he does not provide any support for this speculation. [DE 12, p. 18]. Specifically, neither the girlfriend nor her sister has come forward to say that they would have testified to these facts at trial, and nothing in the record indicates what their testimony would be.

Moreover, Flanders does not explain how failing to call these witnesses prejudiced the outcome of the trial. The jury heard evidence that the bottle of pills seized in 2011 was in the name of Flanders' girlfriend, and his counsel pointed out in closing that the government had no proof that Flanders had used pill from that bottle to drug his victims. [CR DE 212, pp. 189-91; 214, pp. 36-37]. Testimony from his girlfriend or her sister regarding the ownership of the pill bottle would have been cumulative.

ii. Publishing the pornographic videos to the jury

Flanders' claim that his counsel was ineffective for failing to play for the jury the entire pornographic videos filmed by Flanders of each victim engaging in sexual acts with his co-defendant also fails. This was a strategic decision that is "virtually unchallengable." *Dexter*, 2008 U.S. Dist. LEXIS 36142, 2008 WL 1956029 *4. Flanders asserts that the "publication of the entirety of the production was essential to establishing that activities filmed were not acts of prosecution but were in fact the production of First Amendment protected expressive conduct." [DE 12, p. 19].

This argument has no merit. The government never charged Flanders with "acts of prostitution." Flanders was charged with drugging unsuspecting women and then filming them having sex with his co-defendant. Flanders does not explain how showing the unpublished portions of the pornographic videos he made of his victims would have aided his defense.

To the contrary, a reasonable lawyer could conclude that the jury would react very negatively to having to watch the entire video of each victim, having just heard the victims' tearful testimony about how they were tricked and drugged into engaging in the filmed sex acts. Flanders has wholly failed to establish that counsel's strategic decision to not publish the entire videos to the jury constituted ineffective performance.

Flanders also cannot establish the necessary prejudice. As noted above, Flanders does not explain

how or why publishing the videos to the jury would have aided his defense. Because Flanders has not established a reasonable probability that, but for counsel's failure to publish the videos, the result of the proceedings would have been different, Flanders' claim must fail. *Strickland*, 466 U.S. at 694.

iii. Evidence at sentencing

Flanders' argument that trial counsel was ineffective for failing to present mitigating evidence at sentencing is even weaker. [DE 12, p. 19]. He does not identify this mitigating evidence, much less establish a reasonable probability that its introduction would have led to a different sentence. Thus, Flanders cannot show that his counsel's performance at sentencing was ineffective or that this performance prejudiced him at sentencing.

G. Impermissible variance

Flanders argues that his counsel was ineffective for failing to object to an impermissible variance between the allegations in the superseding indictment and the evidence at trial when the government introduced "evidence of force (i.e. rape)." [DE 12, p. 19]. The "evidence of force" at issue was the testimony of the victims that Flanders' co-defendant engaged in sexual acts with them when they were drugged and unable to consent, which the government characterized as "rape" in closing. [CR DE 214, pp. 7, 30].

The requirement that the allegations in the superseding indictment correspond with the proof at trial serves two purposes: "(1) the defendant is properly notified of the charges so that he may present a defense; and (2) the defendant is protected against the possibility of another prosecution for the same offense." *United States v. Reed*, 887 F.2d 1398, 1403 (11th Cir. 1989). Here, the superseding indictment alleges that Flanders drugged the victims followed by his co-defendant engaged in sexual acts with them. [CR DE 71, pp. 5, 6, 7]. The evidence at trial was consistent with these allegations. No impermissible variance existed between the superseding indictment and the facts presented at trial. As result, Flanders' counsel was not ineffective when he failed to object to the evidence at trial on that ground.

H. Failure to investigate

Flanders asserts that his counsel was ineffective for failing to investigate the charges against him because he did not retain a pharmacology expert, a computer expert, and an adult film expert. [DE 12, p. 18]. "In evaluating claims of ineffective assistance of counsel premised on an alleged failure to investigate particular issues or defenses ... 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 judgment." *Phillips v. United States*, Nos. CV 310-072, CR 306-016, 2011 U.S. Dist. LEXIS 79949, 2011 WL 3022557, *9 (S.D. Ga. June 29, 2011) (citation and quotation marks omitted).

Regarding the pharmacology expert, Flanders complains that his counsel failed to retain an expert to provide testimony on the effects of alcohol and benzodiazepines. [DE 12, p. 18]. Contrary to this claim, Flanders also asserts that counsel did not share the expert's opinion with him. [*Id.*]. The Court is left to guess at the exact nature of Flanders' claim of ineffectiveness. Under either scenario, however, Flanders has not offered any support for his claim.

The government presented an expert at trial who testified about the effect of alcohol and benzodiazepines, and counsel for both Flanders and his co-defendant cross-examined the expert at length, and relied on the expert's testimony in closing. [CR DE 211, pp. 117-49; DE 214, pp. 34-39]. Notably, Flanders does not claim that the cross-examination was ineffective. Nor does he explain what additional, or different, information his expert would have provided during trial preparation or at trial. Thus, he has failed to establish that no reasonable attorney would have made the strategic

decision to address the pharmacology issues through cross-examination of the government's witness. *Rogers*, 13 F.3d at 386.

Flanders has also failed to show prejudice, because he has not shown that had his counsel hired a pharmacology expert, that expert would have provided information that had a reasonable probability of changing the results of his trial. *Strickland*, 466 U.S. at 694 (to establish prejudice, Flanders must show that, absent counsel's ineffective performance, there would be a reasonable probability that the result of the proceedings would have been different).

Flanders' argument that his counsel was ineffective for failing to hire a computer expert and adult film expert to support his defense that the videos were protected First Amendment materials, particularly given the victims' signed releases, is also meritless. Trial counsel raised this defense through cross-examination of the government witnesses, and in closing. *See, e.g.*, [CR DE 209, pp. 112-5; CR DE 210, pp. 40, 60-1, 147-8, 164, 270-2; CR DE 211, pp. 34, 56, 202; CR DE 212, pp. 77, 112-13, 133; CR DE 213, pp. 23, 160-1, 170-1; CR DE 214, pp. 42, 44, 46, 49-50, 54-5]. Flanders does not identify any additional evidence that these experts would have supplied to support his First Amendment defense; nor does he provide any basis for concluding that this expert evidence would have had a reasonable probability of changing the results of his trial.

Because Flanders cannot carry his burden of showing that counsel's decision not to retain these experts was unreasonable under the circumstances, and because he has shown no prejudice, Flanders has not established that his counsel was ineffective.

I. Plea negotiations

Flanders makes the conclusory assertion that his counsel was ineffective for failing to negotiate an agreement to plead guilty and to communicate with him about such an agreement. [DE 12, p. 19]. Because Flanders does not provide any evidence concerning plea negotiations or his discussions with his lawyer about a plea, he has wholly failed to establish that his counsel's advice regarding a guilty plea was constitutionally deficient.

Additionally, he has not established prejudice. In order to establish the prejudice prong under *Strickland* "[i]n the context of pleas a defendant must show that the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012). Specifically, the Supreme Court explained that a defendant would have to show:

> but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e. that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed*Id.* at 1385.

Flanders has not met this burden. He has not shown that the government offered him, or was prepared to offer him, a plea agreement; much less that he rejected the plea agreement on advice of counsel. In fact, Flanders has consistently insisted, up to and including in that § 2255 petition, that he is actually innocent of the charges against him. [*See, e.g.*, CR DE 217, p. 29 , CR DE 232; DE 12, p. 5].

Flanders also has not met any of the *Lafler* requirements for establishing prejudice. That is, he has not shown that the court would have accepted a theoretical plea agreement or that its terms would have been less severe than the sentence ultimately imposed. This claim for relief fails.

J. Actual innocence

Finally, Flanders claims he is actually innocent, based on virtually all the other claims asserted in his motion. [DE 12, p. 5]. I do not address whether a claim of actual innocence can constitute a separate basis for relief in a § 2255 action, because it is clear that Flanders has not established that he is actually innocent of the charges brought in the superseding indictment. As discussed above, all of his claims for collateral relief are meritless, and a review of the transcript of the trial makes clear that the government presented ample evidence supporting the charges against him.11

K. Evidentiary Hearing

Flanders requests an evidentiary hearing on his motion. [DE 23, p. 15; DE 24]. Because, as demonstrated above, the motion and the record before this Court conclusively show that Flanders is not entitled to relief, no evidentiary hearing is necessary. *See United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984) ("In cases where the files and records make manifest the lack of merit of a Section 2255 claim, the trial court is not required to hold an evidentiary hearing.").

III. Recommendation and Order

Based on the foregoing, I respectfully recommend that Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, of Correct Sentence by a Person in Federal Custody [DE 12], be **DENIED**. I also **ORDER** that the Motion for Evidentiary Hearing [DE 24] is **DENIED**.

IV. Objections

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable K. Michael Moore, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Am*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), *Henley v.* Johnson, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in chambers in Miami, Florida, this 13th day of June, 2017.

/s/ Chris McAliley

CHRIS McALILEY

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

Citations to the docket of that criminal case, Case No. 11-20557, are to "CR DE __."

2

The Court dismissed two counts. [CR DE 170, p. 1].

3

See [DE 12, pp. 18-9].

4

To the extent that Flanders raises some of these Constitutional arguments in the context of his claims that he was denied the effective assistance of counsel under the Sixth Amendment, I address them here. *See Flanders*, 752 F.3d at 1343 (declining to consider Flanders' claims of ineffective assistance of counsel on direct appeal, deferring any review for a collateral proceeding).
5

The last argument, asserting prosecutorial misconduct, is also procedurally barred because it was raised on direct appeal, and rejected by the Eleventh Circuit. *Thomas v. United States*, 572 F.3d 1300, 1304 (11th Cir. 2009).
6

It is unclear why Flanders characterizes this as an affirmative defense. Had the government not carried its burden of proof as to an element of the offense, Flanders would have been found not guilty. It is the government's obligation to prove the elements of each offense, not Flanders' burden to establish that the government did not.
7

Flanders' persistence in claiming he was wrongly accused of crimes against children is mystifying. In his Petition, he claims that the superseding indictment charged him with multiple charges of sex trafficking with children. [DE 12, at p. 14]. This is patently false.
8

The government argues that the Eleventh Circuit considered and rejected this claim. [DE 13, p. 9]. In fact, the Eleventh Circuit did not address the proceedings before the grand jury, finding that the verdict by the petit jury mooted any claim of improper proceedings before the grand jury. *Flanders*, 752 F.3d at 1333. This holding leaves open the question, raised here, whether Flanders' counsel was ineffective for not moving to dismiss the superseding indictment pretrial based on alleged improprieties before the grand jury.
9

The Pretrial Services report also incorrectly states that Flanders was charged under 18 U.S.C. § 2252, rather than § 1591. [DE23-1, p. 1].
10

Counsel's failure to raise the meritless argument that § 1591 does not apply to adults is not ineffective assistance of counsel. *Lancaster*, 880 F.2d at 375 (counsel's decision to not file a meritless motion is cannot support a claim for ineffective assistance of counsel).
11

On appeal, the Eleventh Circuit rejected Flanders' challenge to the sufficiency of the evidence supporting his conviction. *Flanders*, 752 F.3d at 1329-32.