No.: A

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IN THE
SUPREME COURT OF THE UNITED STATES

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John W. Lebron,

petitioner,

versus

United States of America,

respondent.

****

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
ELEVENTH CIRCUIT APPEAL NUMBER 16-14774

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MOTION TO DIRECT THE SUPREME COURT CLERK TO FILE PETITION OUT-OF-TIME

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John W. Lebron
Reg. No. 42721-018 Unit B-3
Federal Correctional Complex
P.O. Box 1031 (Low custody)
Coleman, Florida 33521-1031

MOTION TO DIRECT THE CLERK TO FILE PETITION OUT-OF-TIME

John Lebron requests this court order its clerk to docket the out of time petition for certiorari.

Background Statement

On August 6, 2018, the Eleventh Circuit Court of Appeals denied Mr. Lebron's motion for reconsideration of its earlier denial of Mr. Lebron's application for a certificate of appealability.

On October 25, 2018——by prison mailbox rule——Mr. Lebron filed a motion to extend time until January 2, 2019 to petition this Court for a writ of certiorari.

On December 28, 2018, Mr. Lebron submitted his petition. In assembling his petition, he discovered that he had not heard from this Court regarding the enlargement of time. Nonetheless, Mr. Lebron completed his petition, and submitted with it a copy of the motion for the enlargement of time included. (Appendix "4")[1].

On January 17, 2019, this court returned the motion as having been submitted out-of-time. This court identified the appended "application for an extension of time submitted with the petition is also out-of-time." (Letter at Exhibit "1").

Mr. Lebron seeks an order directing this Court's clerk to file the out-of-time petition and also to allow for the allegedly out-of-time petition's consideration.

[1] For convenience, the original filing of the petition has been included with the hereto referenced appendices.

Reasons for Ordering the Clerk to Docket the Petition

Initially, pro se litigants are universally hampered by prison conditions, the very reason this Court created the mailbox rule. See **Houston v. Lack,** 486 U.S. 266 (1988); see also **Johnson v. United States,** 544 U.S. 295, 300 (2005). But in the last two years, the adverse prison conditions have multiplied exponentially and worsened. The prisons are overcrowded and under-resourced. The prison mail systems are affected because the prison, not the postal service, control a significant portion of the prison mail operations. And this ancillary postal function does not easily fit within the penal system's objectives, nor are the tasks well-received by most staff members.

The difficulties with Coleman prison complex have appeared prominently in several Eleventh Circuit cases. Recently, the Eleventh circuit bucked a trend and preserved the inmate-friendly standards of review after comprehensive briefing on the day-to-day realities of prison mailing system in the Coleman complex. See **Bullock v. United States,** 655 Fed. Appx. 739 (11th Cir. 2016).

Also, in September 2018, Christopher French's petition to this Court disappeared, despite a priority mail tracking number that has the package delivered to the institutional mailroom, but no report of the package having left the (4 prison) complex. **French v. United States,** No. 18A141 (2018).

In sum, the mail service is spotty at best, and the only valid evidence of when the petition was mailed is the prisoner's under-penalty-of-perjury declaration of service. And Mr. Lebron states under penalty of perjury that he timely delivered to the prison mailing authorities a motion to extend time on October 25, 2018.

With that summation, Mr. Lebron turns to the first reason why this Court should direct the clerk to docket the putatively out-of-time petition.

REASONS FOR GRANTING THE MOTION

Mr. Lebron recognizes that it appears his petition is untimely, but that appearance is deceptive for three reasons:

1. Under the prison mailbox rule, Mr. Lebron timely filed a motion to extend time on October 25, 2018. does the timely submission of a motion under Rule 13.3 suspend the limitation period until the motion is decided?

Under the prison mailbox rule, Mr. Lebron filed a timely motion to extend time to petition for certiorari. The rule provides that a pro se prisoner filing occurs when a person delivers the pleading to prison mail authorities. **Houston v. Lack,** 487 U.S. 266 (1988).

On October 25, 2018, Mr. Lebron delivered to the prison authorities his motion to extend time to petition for certiorari. (Appendix "4").

That motion appears to have been lost in the mail, since this court never docketed the pleading. (See, e.g., Exhibit "1")(January 17, 2019 letter from Supreme Court Clerk). Obviously, since the motion was lost, it was never ruled upon.

While awaiting the court's decision, Mr. Lebron proceeded to prepare and submit his petition. Mr. Lebron submitted his petition within the time period requested in his motion. And within the time period, this Court's rules permits for filing a petition for certiorari in a civil case.

The missing motion, however, creates a factual dispute that this Court is ill-suited to resolve. Thus, circumstances that suggest the most efficient resolution would be to docket the "last motion to extend time" and request Justice Thomas enlarge time until January 7, 2019, which is 59 days from the expiration of the 90 days authorized in 28 U.S.C. § 2101 and Supreme Court Rule 13.

2. As described in the certiorari petition, the Eleventh circuit effectively delegated to a non-judge the responsibility for deciding certificate-of-appealability applications. The delegation of judicial authority without statutory authorization violates due process of law. The Eleventh Circuit's due process violation nullifies its order, thereby resetting the limitations period for petitioning this Court.

A federal district court violates due process of law when its erroneous decisions prevents a party from receiving fair notice and meaningful opportunity to be heard. See **United Student Aid Funds, Inc. v. Espinosa,** 559 U.S. 260, 271 (2010). The Eleventh Circuit effectively delegated the decision making to its pro se staff attorney office. In an apparent faux pas the appellate court published the memorandum order prepared by that office.

> "Thus, it is recommended that this Court deny a COA as to this portion of Claim 1." (Appendix "2" at 12)
>
> "Therefore, it is recommended that this Court deny a COA on this ground." (Appendix "2" at 16).

In essence, the appellate panel never reviewed any of the pleadings or any of the record, the appellate judges simply accepted its staff's opinion of the filings. But the Constitution, Congress and the public do not expect that citizens' lives are effectively decides by non-judges who are insulated by life tenure and pay that cannot be diminished. See **Stern v. Marshal,** 131 S.Ct. 2594 (2011).

3. Although a § 2255 generally operates under the Federal Rules of Civil Procedure, a § 2255 proceeding actually is a further step in the criminal proceedings. Correspondingly, this Court may take jurisdiction of the petition under 28 U.S.C. § 1254. Unlike the civil version, 28 U.S.C. § 2241, the criminal provision is not jurisdictional, thus this Court may consider the petition even if untimely.

If this matter were civil rather than merely governed by civil procedures, then arguably untimeliness is a jurisdictional defect that is not subject to equitable relief. **Bowles v. Russell,** 551 U.S. 205, 210-213 (2007). On the other hand, if this proceeding is essentially a criminal proceeding, then the time

limitation is not jurisdictional, **id.**, and in the interest of justice this court may exercise its equitable powers to permit the out of time filing. See **Henderson v. Shinseki,** 562 U.S. 428, 435 (2011).

Mr. Lebron turns to the Advisory Notes of the Rules Governing Section 2255 Proceedings; these notes provide that a § 2255 was a further step in the criminal case in which the petitioner was sentenced. **Advisory Committee's Notes to § 2255 Rules 1, 3, 11, 12** (1976); see **United States v. Frady,** 456 U.S. 152, 182 (1982)(a § 2255 motion is a "further step in the criminal case"). Because the § 2255 motion to vacate is different than a traditional writ of habeas corpus, functionally, it is part of the criminal case, and as such the certiorari time bar is more in then nature of an inflexible claims processing rule than immovable jurisdictional barrier.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted on this 05 day of February, 2019 by:

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VERIFICATION

Under penalty of perjury as authorized by **28 U.S.C. §1746,** I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

John W. Lebron

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14774-D

JOHN W. LEBRON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: NEWSOM and JULIE CARNES, Circuit Judges.

BY THE COURT:

John W. Lebron has filed an amended motion for reconsideration of this Court's order dated June 15, 2017, denying his motion for a certificate of appealability. He has also filed a motion for this Court to accept his late-filed amended motion, which was amended to include a Certificate of Compliance, in accordance with Fed. R. App. P. 32(g)(1). Lebron's motion to accept his late-filed amended motion is GRANTED. However, because Lebron has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion for a certificate of appealability, his motion for reconsideration is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14774-D

JOHN W. LEBRON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

John Lebron is a federal prisoner serving a total sentence of 300 months' imprisonment after a jury convicted him, in 2012, of 5 counts of loan and credit application fraud, 1 count of conspiracy to commit wire fraud, and 1 count of wire fraud affecting a financial institution. On October 15, 2015, Lebron filed the instant counseled 28 U.S.C § 2255 motion.

Lebron was represented by attorney Rick Jancha at trial. At sentencing, Lebron was represented by attorney John Fernandez. The pre-sentence investigation report ("PSI") included a three-level enhancement, under U.S.S.G.

§ 3C1.3, which calls for an enhancement if a statutory sentencing enhancement under 18 U.S.C. § 3147, for committing a crime while on release for another federal crime, applies.[1] Lebron's sentence also was enhanced for, among other things, obstruction of justice for lying when he testified at trial. In addition to concurrent sentences of 240 months' imprisonment for each count, the sentencing court imposed a consecutive sentence of 60 months' imprisonment, pursuant to 18 U.S.C. § 3147, as to the 5 counts of loan and credit application fraud. Lebron's sentencing counsel did not object to the application of the three-level enhancement under U.S.S.G. § 3C1.3 or the consecutive sentence. The court agreed at sentencing with the government's statement that the total sentence imposed by the court was an appropriate sentence for Lebron regardless of the Sentencing Guidelines. Lebron appealed his sentences, and this Court affirmed.

Lebron then filed the instant § 2255 motion, alleging, in relevant part, that:

(1) his trial counsel was ineffective because he grossly underestimated Lebron's sentencing exposure and told Lebron that he had a good chance of winning an acquittal at trial on all counts based on counsel's erroneous legal understanding of multiple versus single conspiracies;

(2) his sentencing counsel was ineffective for failing to object to the five-year consecutive sentence, under 18 U.S.C. § 3147, as double

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[1] The PSI is not electronically available in the district court record. However, the government did not dispute Lebron's assertions in his § 2255 motion that the PSI included, and the sentencing court applied, a three-level enhancement to his offense level under § 3C1.3.

counting because Lebron already had been sentenced to a guideline term of imprisonment that was enhanced for the same conduct;

(3) his sentencing counsel was ineffective for failing to object to the application of U.S.S.G. § 3C1.3 and 18 U.S.C. § 3147 on the basis that the statute, and the guideline based on the statute, as applied in his case, violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), because the facts relied on by the court were not presented to the jury or proven beyond a reasonable doubt.[2]

Following a response by the government, a reply by Lebron, and a sur-reply by the government, the district court denied the motion on the merits. The court also denied Lebron a COA and IFP status. Lebron then filed a motion to alter or amend the judgment, pursuant to Fed. R. Civ. P. 59(e), arguing that the court had clearly erred by misconstruing his argument in Claim 1, regarding his trial counsel's statement that he had a good chance of winning an acquittal, as applying only to the conspiracy count, not to all counts. Lebron also moved for an evidentiary hearing. After a response by the government, which the district court adopted and incorporated in its response, the court denied the motions and also denied Lebron a COA or IFP status. Lebron now moves this Court for a COA.

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[2] In his counseled motion for a COA before this Court, Lebron only presents arguments with respect to the district court's denial of these three claims. Accordingly, because this Court does not liberally construe counseled pleadings and "will not entertain the possibility of granting a certificate of appealability" on an issue as to which a litigant "does not provide facts, legal arguments, or citations of authority that explain why he is entitled to a certificate," this Court will not consider Lebron's remaining three claims for § 2255 relief. *See Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010).

Following a response by the government, a reply by Lebron, and a sur-reply by the government, the district court denied the motion on the merits. The court also denied Lebron a COA and IFP status. Lebron then filed a motion to alter or amend the judgment, pursuant to Fed. R. Civ. P. 59(e), arguing that the court had clearly erred by misconstruing his argument in Claim 1, regarding his trial counsel's statement that he had a good chance of winning an acquittal, as applying only to the conspiracy count, not to all counts. Lebron also moved for an evidentiary hearing. After a response by the government, which the district court adopted and incorporated in its response, the court denied the motions and also denied Lebron a COA or IFP status. Lebron now moves this Court for a COA.

Denial of § 2255 Motion

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) (quotations omitted).

The Supreme Court decision applicable to ineffective-assistance-of-counsel claims is *Strickland v. Washington*, 466 U.S. 668 (1984). *See Premo v. Moore*, 562 U.S. 115, 121 (2011). 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*, 466 U.S. at 687. Review of counsel's conduct is to be highly deferential; there is a strong presumption that counsel's performance falls within the wide range of professional competence. *Id.* at 689. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotation omitted). Prejudice occurs when 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. Failure to establish either prong is fatal and makes it unnecessary to consider the other. *Id.* at 697. In light of the general principles and "strong presumption in favor of competence" applicable to a claim of ineffective assistance of counsel, the cases in which a petitioner can prevail are "few and far between." *Chandler v. United States*, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (*en banc*) (quotation omitted).

Procedurally, the district court is required to hold an evidentiary hearing on a motion to vacate "unless the motion and the files and records of the case

conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see Anderson v. United States*, 948 F.2d 704, 706 (11th Cir. 1991). Thus, if a movant "alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing." *Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002) (quotation omitted). However, such a hearing is not required where a movant's claims are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record. *See id.*; *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989).

Therefore, if the movant makes "sufficient allegations so that it cannot be conclusively stated that he is entitled to no relief," an evidentiary hearing is appropriate. *United States v. Yizar*, 956 F.2d 230, 234 (11th Cir. 1992). Moreover, contested factual issues in a § 2255 proceeding should not be determined based solely on representations in an affidavit. *Owens v. United States*, 551 F.2d 1053, 1054 (5th Cir. 1977). However, courts are permitted to rely on affidavits if they are supported by other evidence in the record. *Id.*

Claim 1: Ineffective Assistance of Trial Counsel

Underestimation of Lebron's Sentencing Exposure

In the first part of Claim 1, Lebron argued that his trial counsel was ineffective because he grossly underestimated Lebron's sentencing exposure, estimating that he would face 78 to 97 months if he pled guilty, or 108 to 135

months if he proceeded to trial, when he ultimately received a total sentence of 300 months.

Lebron submitted his own affidavit in support of this claim, stating in part that he had instructed his trial counsel to pursue the best deal he could get from the government, as his intention was to plead guilty. He stated that his intention changed when trial counsel informed him that there was not a significant difference in pleading guilty or going to trial and that he had a "good chance" of an acquittal on all counts. He also attached handwritten notes, calculating the underestimation of his sentencing exposure, which he contended were in the handwriting of both himself and trial counsel.

The government submitted an affidavit from Lebron's trial counsel in its response. Trial counsel did not recall the specific guideline calculations that he gave to Lebron, but he stated that any discussion he had with Lebron would have included the disclaimer that his Sentencing Guideline calculations were only an estimate. He stated that, early in his representation of Lebron, Lebron had declined to hold a "proffer" meeting with the government to discuss a resolution of the case and had rejected the idea of pleading guilty to any plea that contained a significant period of incarceration. The government also submitted an affidavit from Lebron's initial trial counsel, who had represented him at his initial appearance and stated

that Lebron had advised her that he was not interested in resolving the case, as he did not feel he had committed any crime.

The district court concluded that Lebron's claim that trial counsel was ineffective because his pretrial guideline calculations were inaccurate failed because the Guidelines are advisory, and the trial court had determined that the sentence it imposed was appropriate regardless of the Guidelines. It found that Lebron could not show prejudice as to this portion of his claim because he had indicated a desire to his initial trial counsel to fight the charges against him, and the court ultimately varied downward from a Guidelines sentence.

The district court also found that Lebron's assertion that he would have pled guilty if not for his counsel's low calculation of his sentencing exposure and indication that "he might have a defense on one count" was self-serving and not supported by objective evidence that he would have accepted a plea offer or that a plea would have resulted in a lesser charge or a lower sentence.

Here, reasonable jurists would not debate the district court's decision to deny relief as to the first part of this claim because Lebron cannot show prejudice. It is unclear from the record whether trial counsel's performance was deficient due to his significant underestimation of the sentence that Lebron would receive if he were convicted at trial. Lebron claimed that trial counsel advised him that he would face a sentence of 108 to 135 months' imprisonment if he went to trial.

Given that Lebron's guideline range was ultimately determined at sentencing to be 360 to 2,280 months' imprisonment, an estimate of 108 to 135 months would have been significantly off base, and could have had a substantial impact on Lebron's decision-making. Lebron also contends that he intended to plead guilty and instructed his counsel to seek the best deal possible.

However, even assuming that Lebron's trial counsel significantly underestimated Lebron's sentencing exposure, Lebron cannot establish prejudice due to the error. The trial court agreed at sentencing that its total sentence was the appropriate sentence for Lebron, regardless of the Sentencing Guidelines. Accordingly, Lebron's allegations that his trial counsel provided ineffective assistance were affirmatively contradicted by the record, and Lebron cannot establish that, but for his counsel's failure to accurately estimate his sentencing exposure, there is a reasonable probability that the result of his sentencing would have been different. *See Strickland*, 466 U.S. at 694; *Aron*, 291 F.3d at 715.

Statement that Lebron Had a Good Chance of an Acquittal on All Counts

Lebron also argued in Claim 1 that his trial counsel was ineffective for telling him that he had a good chance of winning a total acquittal at trial based on counsel's erroneous legal understanding of multiple versus single conspiracies.

Lebron stated in his affidavit that his intention to plead guilty changed when trial counsel informed him that there was not a significant difference in pleading

guilty or going to trial and that he had a "good chance" of an acquittal on all counts. Trial counsel stated in his affidavit that he never advised Lebron not to plead guilty or told him that he would be acquitted at trial. Trial counsel did not specifically state in his affidavit whether or not he had told Lebron that the defense based on multiple versus single conspiracies had a good chance in resulting in an acquittal on all counts.

In its order, the district court construed the last part of Lebron's claim as an assertion that Lebron would have pled guilty if his trial counsel had not "told him that he might have a good defense to the conspiracy count," and found that Lebron could not show that a potential defense to one count impacted his decision on the remaining counts or prejudice because his sentence would have been the same even if he had been acquitted of the conspiracy count. In his Rule 59(e) motion, Lebron argued that the court had clearly erred by misconstruing his argument as applying only to the conspiracy count, not to all counts. In its order denying Lebron's motion, the court adopted and incorporated the government's response, which stated that this portion of Lebron's first claim was not credible and "facially absurd," as "[n]o experienced criminal defense lawyer would suggest that a defense to one count is necessarily a defense to all counts."

As to this portion of Claim 1, it appears that the district court may have violated *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (*en banc*). Under *Clisby*,

the district court must resolve all claims for relief raised in a habeas petition, regardless of whether relief is granted or denied on the claims. *Id.* at 936. If the district court fails to do so, this Court "will vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims." *Id.* at 938. Here, the district court appears to have misconstrued Lebron's assertion that his trial counsel was ineffective for informing Lebron that he had a "good chance" of winning an acquittal at trial on all counts as a claim that Lebron's trial counsel had mistakenly informed him that he had a good chance of acquittal only as to the conspiracy count, although it adopted the arguments put forth by the government as to this point in its order denying Lebron's Rule 59(e) motion.

However, even if the district court erred under *Clisby* by failing to recognize the argument being made by Lebron, a COA is not warranted as to this portion of Claim 1 because the claim lacks merit. *See Slack*, 529 U.S. at 484. Lebron's claim that his trial counsel erroneously believed, and advised him, that the "multiple conspiracies" defense applied to all of the counts of the indictment, not just the conspiracy count, is not credible and is affirmatively contradicted by the record. At trial, Lebron's counsel, after moving for a general judgment of acquittal on all counts due to insufficient evidence, clearly indicated that the "multiple conspiracies" defense applied only to one count, stating:

> Specifically . . . then as to Count VI [the conspiracy charge] we would move for judgment of acquittal because the United States . . . has we

> would submit proved multiple conspiracies. . . . And as the Court's aware, the law is it is not sufficient for the United States to prove multiple conspiracies. It must prove the one overarching conspiracy charged in the Indictment. . . . [A]t best the government has shown multiple conspiracies. As much as that proof is or may not be, that does not prove Count VI as charged in the Indictment and that case should in fact be dismissed.

Thus, it is recommended that this Court deny a COA as to this portion of Claim 1.

Claim 2: Sentencing Counsel's Failure to Object to the Five-Year Consecutive Sentence as Double Counting

In Claim 2, Lebron argued that his sentencing counsel was ineffective for failing to object to the consecutive five-year sentence imposed pursuant to 18 U.S.C. § 3147. He contended that the consecutive sentence was double counting because he already had been sentenced to a guideline term of imprisonment that included a three-level enhancement under U.S.S.G. § 3C1.3, which implements the requirements of § 3147.

The district court concluded that Lebron could not show deficient performance, as double-counting is permitted if the Guidelines intended that result. The court also found that Lebron could not show prejudice from the application of the three-level enhancement because the trial court did not sentence Lebron to a Guidelines sentence and determined that the sentence it imposed was the right one, regardless of the Guidelines.

When a person commits a felony while released on bond, the person's sentence shall be enhanced by up to ten years, which must be entered as a separate, additional sentence to run consecutively to all other sentences imposed. 18 U.S.C. § 3147(1). Section 3C1.3 of the Sentencing Guidelines states that, if an enhancement under § 3147 applies, the offense level should be increased by three. U.S.S.G. § 3C1.3. The Sentencing Guidelines commentary states that a district court should divide the total sentence it is imposing, in accordance with the "**adjusted** guideline range," between "the sentence attributable to the underlying offense and the sentence attributable to the enhancement," with the latter running consecutively. U.S.S.G. § 3C1.3 comment. (n.1) (emphasis added). Double counting during sentencing is permissible if: (1) the result was intended by the Sentencing Commission, and (2) "each section concerns conceptually separate notions related to sentencing." *United States v. Adeleke*, 968 F.2d 1159, 1161 (11th Cir. 1992) (quotation omitted).

Reasonable jurists would not find the district court's denial of Claim 2 debatable. In accordance with the Sentencing Guidelines commentary, the trial court increased the offense level by three because § 3147 applied. The court divided its 300-month total sentence, imposed as a downward variance to the adjusted guideline range of 360 to 2,280 months, between the sentences for Lebron's underlying offenses (240 months as to each count) and the consecutive

sentence attributable to the enhancement (60 months). Thus, there was no double counting in this case, and Lebron's sentencing counsel was not deficient for failing to object on this basis. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance.").

Claim 3: Sentencing Counsel's Failure to Object to the Application of U.S.S.G. § 3C1.3 and 18 U.S.C. § 3147 as violating Apprendi and Alleyne

In Claim 3, Lebron argued that his sentencing counsel was ineffective for failing to object to the application of U.S.S.G. § 3C1.3 and 18 U.S.C. § 3147. He argues that applying § 3147 violates *Apprendi* and *Alleyne* in this case, as the facts relied on by the trial court were not presented to the jury or proven beyond a reasonable doubt.

The district court concluded that Lebron could not show prejudice, as § 3147 was applied as a sentence enhancement statute, and the sentence was merely apportioned in accordance with the Guidelines without applying a minimum-mandatory sentence or increasing the statutory maximum sentences for the underlying convictions. Further, the district court found that the trial court did not sentence him to more than the statutory maximum. Thus, the court found that Lebron's sentencing counsel was not ineffective for failing to object to the sentences on this basis.

In *Apprendi*, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. This Court has held that there is no *Apprendi* error where a defendant's actual sentence falls at or below the applicable statutory maximum penalty. *See United States v. Sanchez,* 269 F.3d 1250, 1265, 1268 (11th Cir. 2001) (*en banc*) (holding such in the context of drug offenses under 21 U.S.C. § 841), *abrogated in part on other grounds, United States v. Duncan,* 400 F.3d 1297, 1308 (11th Cir. 2005). The Supreme Court concluded in *Alleyne* that any fact that increases a mandatory-minimum sentence for a crime is an "element" of the crime that must be found by a jury. *Alleyne*, 133 S. Ct. at 2158. This Court has held that *Alleyne* does not apply retroactively on collateral review. *See Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014).

Reasonable jurists would not debate the district court's decision to deny relief on this claim. Even if it is assumed that *Apprendi* would apply to the application of § 3147 through § 3C1.3 to Lebron, his sentencing counsel nevertheless was not ineffective for failing to object on that basis, as Lebron was not sentenced above the statutory maximum for Counts 1 through 5, the loan and credit application fraud counts under 18 U.S.C. § 1014. The statutory maximum for those counts is 30 years. *See* 18 U.S.C. § 1014. Lebron's total sentence for

those counts, including the consecutive § 3147 sentence, was 300 months, or 25 years. Contrary to Lebron's assertions, the judgment clearly states that the consecutive § 3147 sentence was imposed only as to Counts 1 through 5, not as to all of the counts.

Further, Lebron's sentencing counsel was not ineffective for failing to object at sentencing to the application of § 3C1.3 and § 3147 based on *Alleyne*, as Lebron was sentenced on April 19, 2013, and *Alleyne* was not decided until June 17, 2013. *See United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (holding that counsel is not ineffective for failing to anticipate a subsequent change in the law, even if a claim based on anticipated changes in the law was reasonably available at the time). Therefore, it is recommended that this Court deny a COA on this ground.

Denial of Rule 59(e) Motion

A COA is required to appeal the denial of a Rule 59(e) motion. *See Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013). This Court reviews a district court's denial of a Rule 59(e) motion to alter or amend a judgment for an abuse of discretion. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). A Rule 59(e) motion may only be granted on the grounds of newly-discovered evidence or manifest errors of law or fact. *Id.* However, a Rule 59(e) motion may not be used to "relitigate old matters, raise argument or present

evidence that could have been raised prior to the entry of judgment." *Id.* (quotation omitted).

In his Rule 59(e) motion, Lebron argued that the district court had clearly erred by misconstruing his argument in Claim 1 that his trial counsel had stated that he had a good chance of winning an acquittal based on the "multiple conspiracies" defense as applying only to the conspiracy count, not to all counts. The district court ordered the government to respond, and the government argued that this portion of Lebron's first claim was not credible and "facially absurd," as "[n]o experienced criminal defense lawyer would suggest that a defense to one count is necessarily a defense to all counts." The district court denied Lebron's Rule 59(e) motion, adopting and incorporating the government's response in its denial.

Here, the district court did not abuse its discretion by denying Lebron's Rule 59(e) motion, and a COA is not warranted, because Lebron's underlying argument lacked merit. *See Mincey v. Head*, 206 F.3d 1106, 1137 (11th Cir. 2000) (determining that the district court acting within its discretion in denying Rule 59(e) relief where the underlying claim lacked merit).

As discussed above, Lebron's claim that his trial counsel erroneously believed, and advised him, that the "multiple conspiracies" defense applied to all of the counts of the indictment, not just the conspiracy count, is not credible and is

affirmatively contradicted by the record. At trial, Lebron's counsel, after moving for a general judgment of acquittal on all counts due to insufficient evidence, clearly indicated that the "multiple conspiracies" defense applied only to one count, and sought a judgment of acquittal on that basis solely as to the one conspiracy count. Thus, because the underlying claim was meritless, there were no grounds for the district court to alter or amend its judgment denying the § 2255 motion.

Accordingly, Lebron's motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

UNITED STATES CIRCUIT JUDGE

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