[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14253

D.C. Docket No. 8:14-cr-00058-MSS-TBM-2

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JON CRAIG NELSON,
MICHAEL SKILLERN,

Defendants - Appellants.

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

(March 8, 2018)

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Before MARCUS and NEWSOM, Circuit Judges, and MOORE,* District Judge.

NEWSOM, Circuit Judge:

Defendants Michael Skillern and Jon Craig Nelson appeal their convictions for mail fraud, wire fraud, and associated conspiracies, all of which arose out of their efforts to peddle non-existent gold to the public through their company, Own Gold LLC. Although Skillern and Nelson have raised a number of issues on appeal, our focus in this opinion is on Skillern's contention that the district court deprived him of his Sixth Amendment right to the "Assistance of Counsel" when, just before an overnight recess that occurred while Skillern was on the stand, the court granted his lawyer's request to speak to him "about matters other than his testimony." Skillern now insists that the Constitution required the district court to go farther and to specify that he could speak to his attorney about *any* topic, including his testimony.

Because Skillern's attorney proposed the very limitation of which he now complains by asking to speak to Skillern "about matters other than his testimony," we are presented with several questions about the nature of and relationship among the various "error" doctrines that pervade federal criminal law—trial error, harmless error, structural error, plain error, and invited error. In the end, we needn't definitively resolve those questions, because Skillern's Sixth Amendment

* Honorable William T. Moore, United States District Judge for the Southern District of Georgia, sitting by designation.

argument fails for the separate and more basic reason that, in the circumstances of this case, the district court committed no constitutional error. Under this Court's en banc decision in *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986), because the record does not reflect that Skillern (or his lawyer) actually wanted or planned to discuss his testimony during the recess, he was not deprived of his Sixth Amendment right to the assistance of counsel.

I

In 2011, Skillern and Nelson started a company called Own Gold LLC for the purpose of mining, processing, and selling gold. Own Gold's website and marketing materials represented that it was a "gold producer" with mining claims worth some $81 billion. For the next two years Own Gold used a telemarketing firm to execute contracts with hundreds of people who believed that they were actually buying gold. Those contracts specified the amounts of gold purchased and prices, and represented that customers could retrieve their gold ore "at any time after the execution and payment of consideration" by "appear[ing] in person" at the mining site. Otherwise, Own Gold had 360 days to deliver the gold; if it failed to do so, it would refund the purchase price. All told, Own Gold accepted 441 orders and collected more than $7.3 million from customers.

As it turns out, Own Gold's representations about its gold production were, well, *mis*representations. From its inception in 2011 until it stopped executing

sales contracts with customers in 2014, Own Gold appears to have produced less than six ounces of gold from its own mining operations. In light of its near-total failure to produce any gold from its own mines, Own Gold resorted to trying to fulfill customers' orders by purchasing gold from third parties. Even so, despite taking orders for 5,912 ounces of gold and accepting more than $7.3 million from its 351 customers, Own Gold ultimately delivered a mere 150 ounces—valued at $241,000—to 20 customers. Own Gold refunded only $35,022 to four customers; none of the other orders was either fulfilled or refunded. Meanwhile, Skillern collected approximately $488,000, Nelson bagged about $300,000, and Own Gold's telemarketing firm netted a whopping $5.1 million over a two-year period.

In February 2014, Skillern and Nelson were indicted for mail fraud, wire fraud, conspiracy to commit mail and wire fraud, conspiracy to launder money, and illegal money transactions in connection with their operation of Own Gold. As particularly relevant here, Skillern testified in his own defense at trial, and his testimony spanned three days. At the end of his first day on the stand, after the jury was excused for the afternoon, his attorney asked the district court, "Your Honor, may I speak to Mr. Skillern about matters other than his testimony this evening?" The court granted the request, stating, "Yes, anything about the proceeding and so forth, who's coming, who is not coming, that's fine, but just not

his testimony or his impending testimony." Skillern's attorney responded, "Fine, Your Honor." Nothing more was said about the issue that day.[1]

The jury found both Skillern and Nelson guilty of four counts of mail fraud, four counts of wire fraud, one count of conspiracy to commit mail fraud, and one count of conspiracy to launder money. Skillern was sentenced to 120 months in prison, and Nelson was sentenced to 96 months.

On appeal, Skillern principally asserts that the district court deprived him of the assistance of counsel in violation of the Sixth Amendment. According to Skillern, the court should have responded to his attorney's request to speak to him about "matters other than his testimony" by stating, *sua sponte*, that Skillern and his attorney could discuss any subject—including his testimony—during the overnight break. We now turn to a careful consideration of that issue.

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court first considered the parameters of that right in the context of trial recesses that occur during a criminal defendant's

[1] At the end of the second day of Skillern's testimony, the district court noted that it had "somewhat of a dilemma" because Skillern was still on the stand but might need to discuss certain facts about another witness with his attorney. The court asked the parties whether they objected to Skillern speaking with his attorney during the overnight break, and they indicated that they did not. The court then instructed Skillern that he was "free to talk to [his] lawyer" about anything that evening. That ruling is not at issue in this appeal.

testimony in *Geders v. United States*, 425 U.S. 80 (1976). The Court held there that a defendant's Sixth Amendment rights were violated when he was precluded from consulting with his attorney "about anything" during an overnight recess between his direct- and cross-examination. *Id.* at 91. Similarly, in *United States v. Romano*, this Court found a Sixth Amendment violation when a district court allowed a defendant to speak with his lawyer about some topics, but not his testimony, during a five-day recess in the middle of his testimony. 736 F.2d 1432, 1434–38 (11th Cir. 1984), *vacated in part on other grounds*, 755 F.2d 1401 (11th Cir. 1985). More recently, though, the Supreme Court held in *Perry v. Leeke* that a district court did *not* violate the Sixth Amendment when it directed a defendant not to consult with his attorney during a 15-minute recess. 488 U.S. 272, 280–85 (1989).

Where, then, does this case fall along the spectrum marked out by *Geders*, *Romano*, and *Perry*? The limitation on lawyer-client communication here was "worse," so to speak, than in *Perry*, in which the Supreme Court found no Sixth Amendment violation, in that its duration was longer: there, the recess lasted only minutes; here, it spanned an entire night. In two respects, though, the limitation in this case was not as bad as in *Geders* and *Romano*, both of which found violations: the limitation here was more narrowly circumscribed than in *Geders*, in that Skillern was permitted to talk to his lawyer about issues other than his testimony;

and the limitation here persisted for only a fraction of the five days at issue in *Romano*. So we're somewhere in the middle: Does it violate the Sixth Amendment to prevent a criminal defendant from discussing his testimony, but not other topics, during a single overnight recess? Although no existing precedent resolves that precise question, even the Government seems to concede that the answer, at least as a general matter, is probably yes. *See* Br. of Appellee at 52 ("[T]he district court's limitation here impermissibly constrained Skillern's ability to consult with his attorney during the first overnight recess.").

But there's a wrinkle here—it was Skillern's attorney who actually proposed the limitation that Skillern now challenges. He specifically asked the district court for permission to speak to Skillern about "matters other than his testimony," and then, when the district court acceded to his request, he never expressed any regret, objection, or desire to clarify. The parties, naturally, have very different views about the consequences of the phrasing of Skillern's lawyer's request and his subsequent failure to alter it or otherwise object. For his part, Skillern asserts that a *Geders* violation is a "structural error"—for which "no objection is necessary" and which requires automatic reversal, no questions asked. The government, at the opposite pole, responds that the Court needn't even consider Skillern's Sixth Amendment argument because his own lawyer "invited" any error. At the very least, the government contends, we should review the issue only for "plain error"

because neither Skillern nor his attorney lodged an objection to the limitation. Though the parties' competing arguments raise a number of important and unsettled questions about the relationship between the various "error" doctrines, we needn't answer them today. As explained below, because the trial record doesn't indicate that either Skillern or his lawyer had any intention or desire to discuss his testimony during the recess, Skillern can't show that he was actually deprived of his right to counsel, as required by our en banc decision in *Crutchfield*.

A

First, a brief word about Skillern's assertion that a *Geders*-like violation of the sort alleged here is a "structural error." If it is, then it "def[ies] analysis by harmless error standards." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Structural errors are those (comparatively few) that "affect the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (internal quotation marks omitted). Most errors don't fall into the narrow structural-error category and are instead deemed "trial errors"; they don't require reversal if the government "can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (internal quotation marks omitted).

So is Skillern right that a *Geders*-type Sixth Amendment violation is necessarily a structural error? Tough to say. When in *Geders* itself the Supreme

Court held that a district court had violated the Sixth Amendment by flatly precluding a defendant from consulting with his lawyer (about any topic) during an overnight recess, and reversed on that basis, it did so without invoking the structural-error doctrine—but also, conspicuously, without pausing to examine whether or not the error might have been harmless. 425 U.S. at 91. So too, when a few years later the former Fifth Circuit reversed a conviction on the ground that the district court had violated a defendant's Sixth Amendment rights by preventing him from consulting with his attorney (again, at all) during a brief recess, it did so without calling the error structural—but again, without bothering to assess harmlessness. *See United States v. Conway*, 632 F.2d 641, 645 (5th Cir. 1980).[2] In the same way, when we held more recently that a district court violated a defendant's Sixth Amendment right to counsel by preventing him from conferring with his attorney during two overnight recesses, we did so without mentioning structural error, but also without considering harmlessness. *See United States v. Cavallo*, 790 F.3d 1202, 1213–18 (11th Cir. 2015).

The plurality opinion in *Crutchfield* arguably inched closest to actually addressing the structural-error issue when it said that "any deprivation of assistance

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Circ. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. We also note that the part of *Conway* holding that it is a Sixth Amendment violation to restrict communications during a brief recess is no longer good law in light of the Supreme Court's later decision in *Perry v. Leeke*, 488 U.S. 272 (1989).

of counsel constitutes reversible error and necessitates a new trial" and then went on to state that "[o]ur rule does not include a harmless error analysis." 803 F.2d at 1108. That, it seems to us, is pretty close to a recognition that a *Geders* violation, if proven, constitutes a structural error that is not susceptible to harmless-error analysis. The *Crutchfield* plurality's opinion doesn't bind us, of course, but we do note that its resolution of the issue comports with the decisions of other circuits. *See, e.g.*, *United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 131 (2d Cir. 2007) ("[I]n the *Geders* context, a violation of a defendant's Sixth Amendment right to counsel ... constitutes a structural defect which defies harmless error analysis ....") (internal quotation marks omitted); *United States v. Santos*, 201 F.3d 953, 966 (7th Cir. 2000) (same); *United States v. McLaughlin*, 164 F.3d 1, 4 (D.C. Cir. 1998) (same).

But that doesn't conclude the inquiry, because even if a *Geders* violation is proven, and even if such a violation is a structural error, the question remains: What happens if a structural error occurs, but, as happened here, no one complains about it? In the case of non-structural trial errors, the "plain error" rule severely restricts appellate review of unchallenged trial-court rulings. *See, e.g.*, *United States v. Dudley*, 463 F.3d 1221, 1227 (11th Cir. 2006). Under the plain-error standard, we have "discretion to correct an error" in a criminal trial, even absent a proper objection, "where (1) an error occurred, (2) the error was plain, (3) the error

affected substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Duncan*, 400 F.3d 1297, 1301 (11th Cir. 2005). Whether the structural-error doctrine modifies a defendant's burden to satisfy all four plain-error factors remains unsettled. *See, e.g.*, *United States v. Marcus*, 560 U.S. 258, 263 (2010) ("[W]e have noted the possibility that certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial."); *see also United States v. Watson*, 611 F. App'x 647, 661 (11th Cir. 2015) ("Whether structural error modifies a defendant's burden to satisfy all four plain-error factors remains an open question."). Even if we were to assume that the first two elements of the plain-error standard would be satisfied where a district court prevented a defendant from discussing his testimony with his attorney during an overnight recess, it's a much closer call whether the third and fourth factors would be met.

Finally, setting aside the plain-error doctrine, the government also argues here that we needn't even consider Skillern's argument because Skillern's lawyer "invited" any Sixth Amendment error that might have occurred. As a rule, a party "may not challenge as error a ruling or other trial proceeding invited by that party." *United States v. Silvestri*, 409 F.3d 1311, 1327 (11th Cir. 2005). While this Court has held that we "may not invoke the plain error rule to reverse the district court's judgment" if an error is invited, *United States v. Carpenter*, 803 F.3d 1224, 1236

(11th Cir. 2015), the relationship between structural errors and the invited-error doctrine is murky. *Cf. United States v. Gaya*, 647 F.3d 634, 640 (7th Cir. 2011) (holding that "there is no reason to exempt 'structural errors'" from the invited-error doctrine).

* * *

So as you see, this case raises several issues that have yet to be—but will eventually need to be—definitively settled in this Circuit. But as we've said, we can leave them for another day, because as explained below, we conclude that under the rule embraced in *Crutchfield*, Skillern was not actually deprived of his Sixth Amendment right to counsel.

B

In *Crutchfield*, a majority of the en banc Court held that in order to make out a *Geders*-type Sixth Amendment violation, a criminal defendant must demonstrate that he and his counsel actually intended to confer during the recess and would have done so if not prevented by the district court. As already explained, in that case, the district court directed a defendant's lawyers not to discuss his testimony with him during the course of a mid-trial break. On appeal, the six-judge plurality opinion concluded: "Because the trial record does not reflect—by objection, motion, or request—that [the defendant] and his counsel actually desired to confer during the recess, we find that [the defendant] was not deprived of the right to

assistance of counsel within the meaning of the sixth amendment." 803 F.2d at 1109. In his concurring opinion, Judge Edmondson agreed: "In this case, the trial record does not show that the defendant and defense counsel actually desired to confer during the pertinent recess and would have conferred but for a restriction placed upon them by the trial judge. Consequently, the trial record in this case shows no deprivation of defendant's right to counsel." *Id.* at 1118–19 (Edmondson, J., concurring).

Our en banc decision in *Crutchfield* therefore establishes the principle that a condition precedent to a *Geders*-like Sixth Amendment claim is a demonstration, from the trial record, that there was an actual "deprivation" of counsel—*i.e.*, a showing that the defendant and his lawyer desired to confer but were precluded from doing so by the district court. That actual-deprivation rule, the plurality explained, "satisfies our concerns for the important constitutional right of assistance of counsel, provides for the orderly conduct of trials, and makes sense." *Id.* It also, we note, squares with the decisions of two of our sister circuits. *See Stubbs v. Bordenkircher*, 689 F.2d 1205, 1207 (4th Cir. 1982) ("[I]n order to obtain relief a petitioner must show a 'deprivation' of his Sixth Amendment rights by demonstrating that he wanted to meet with his attorney but was prevented from doing so by the instruction of the trial judge."); *Bailey v. Redman*, 657 F.2d 21, 23–24 (3d Cir. 1981) (holding there was no Sixth Amendment violation where the

defendant "fail[ed] to demonstrate that he was actually 'deprived' of his right to consult with his attorney").

The trial record here reflects no such "actual deprivation." At the end of the first day of Skillern's testimony, after the jury was excused, the following exchange occurred:

> [Attorney]: And, Your Honor, may I speak to Mr. Skillern about matters other than his testimony this evening –
>
> The Court: Yes.
>
> [Attorney]: – that may come up?
>
> The Court: You can talk about the weather. What do you mean, other than may come up? [sic] Not his testimony or his impending testimony.
>
> [Attorney]: Right, Your Honor, but maybe witness problems or things like that?
>
> The Court: Yes, anything about the proceeding and so forth, who's coming, who is not coming, that's fine, but just not his testimony or his impending testimony.
>
> [Attorney]: Fine, Your Honor.

Trial Tr., Doc. No. 431-9, at 208–09.

The issue here isn't just that Skillern's lawyer failed to object to the district court's limitation. Instead, the problem is that the record is entirely devoid of *any* indication—in *any* form—that Skillern or his attorney planned or wanted to confer

about his testimony during the recess.[3] To the contrary, Skillern got from the district court exactly what his lawyer asked for—namely, permission to speak "about matters other than his testimony." We therefore leave aside issues about trial error, harmless error, structural error, plain error, and invited error, and instead hold, under *Crutchfield*, that Skillern hasn't shown that he was actually deprived of his Sixth Amendment right to counsel.[4]

C

Skillern and Nelson have raised other issues on appeal. First, both contend that they should have been acquitted on all counts because the jury was required to accept their argument that they relied in good faith on the advice of an attorney. Second, they challenge the sufficiency of the evidence supporting the mail-fraud counts. Finally, Nelson argues that there was no legally sufficient evidence that he

[3] To be clear, we do not hold that there must always be a formal objection where a district court prevents attorney-client communication during an overnight recess. To the extent that unpublished decisions from this Court might be read to suggest a hard-and-fast requirement that a defendant formally object in order to preserve a *Geders*-type Sixth Amendment argument, or that the plain-error standard necessarily applies absent such an objection, *see, e.g.*, *United States v. Jubiel*, 377 F. App'x 925, 934–35 (11th Cir. 2010), we are not bound by them.

[4] In a supplemental brief, Skillern seems to suggest that the absence of any desire to confer is not dispositive. Instead, he argues, we must consider the "totality of the facts," including that the district court instructed *other* witnesses not to discuss their testimony with anyone. To the extent that Skillern means to say that the district court's instructions to other witnesses had some sort of "chilling effect" that caused his own lawyer to ask to speak only about "matters other than [Skillern's] testimony," we disagree. The mere fact that other, non-party witnesses were instructed not to discuss their testimony with anyone has no particular bearing on Skillern's rights as a defendant.

had an intent to defraud. All of these boil down to sufficiency-of-the-evidence challenges, and after careful review of the record, we reject them.

III

For all of the reasons explained above, we affirm Skillern's and Nelson's convictions.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL SKILLERN,

Petitioner,

Case No. 8:19-cv-896-T-35AEP

v.

Crim. Case No. 8:14-cr-58-T-35AEP

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This cause is before the Court on Petitioner Michael Skillern's *pro se* motion to vacate, filed under 28 U.S.C. § 2255 (Civ. Doc. 1), motion for summary judgment, motion for judgment on the pleading, and expedited motion for review and ruling (Civ. Docs. 16, 17, 19). Upon consideration of the motion to vacate, the United States' response in opposition (Civ. Doc. 13), and Skillern's reply (Civ. Doc. 15) and in accordance with the Rules Governing Section 2255 Proceedings in the United States District Courts, it is **ORDERED** that the motion to vacate is **DENIED** and the remaining motions are **DENIED as moot**.

PROCEDURAL HISTORY

Skillern and three co-defendants, Jon Craig Nelson, Naadir Cassim, and Adriana Maria Camargo, were indicted in case number 8:14-cr-58-T-35AEP. (Cr. Doc. 1) Skillern was convicted after a jury trial of one count of conspiracy to commit mail and wire fraud; one count of conspiracy to commit money laundering; four counts of mail fraud; and four counts of wire fraud. (Cr. Doc. 374) He was sentenced to 120 months in prison. (Cr. Doc. 374) Skillern filed a direct appeal, arguing that his right to counsel was violated because

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he was restricted from speaking to his lawyer about his testimony during an overnight recess; that the United States presented insufficient evidence of mail fraud; and that the United States presented insufficient evidence to rebut his defense of good faith reliance on the advice of counsel. The Eleventh Circuit Court of Appeals rejected Skillern's challenges and affirmed the convictions. *United States v. Nelson*, 884 F.3d 1103 (11th Cir. 2018).

FACTUAL BACKGROUND

Skillern was involved in a business called Own Gold. The Eleventh Circuit summarized the facts that led to the charges in this case as follows in *Nelson*, 884 F.3d at 1105 (emphasis in original):

> In 2011, Skillern and [co-defendant] Nelson started a company called Own Gold LLC for the purpose of mining, processing, and selling gold. Own Gold's website and marketing materials represented that it was a "gold producer" with mining claims worth some $81 billion. For the next two years Own Gold used a telemarketing firm to execute contracts with hundreds of people who believed that they were actually buying gold. Those contracts specified the amounts of gold purchased and prices, and represented that customers could retrieve their gold ore "at any time after the execution and payment of consideration" by "appear[ing] in person" at the mining site. Otherwise, Own Gold had 360 days to deliver the gold; if it failed to do so, it would refund the purchase price. All told, Own Gold accepted 441 orders and collected more than $7.3 million from customers.
>
> As it turns out, Own Gold's representations about its gold production were, well, *mis*representations. From its inception in 2011 until it stopped executing sales contracts with customers in 2014, Own Gold appears to have produced less than six ounces of gold from its own mining operations. In light of its near-total failure to produce any gold from its own mines, Own Gold resorted to trying to fulfill customers' orders by purchasing gold from third parties. Even so, despite taking orders for 5,912 ounces of gold and accepting more than $7.3 million from its 351 customers, Own Gold ultimately delivered a mere 150 ounces—valued at $241,000—to 20 customers. Own Gold refunded only $35,022 to four customers; none of the other orders was either fulfilled or refunded. Meanwhile, Skillern collected approximately $488,000, Nelson bagged about $300,000, and Own Gold's telemarketing firm netted a whopping $5.1 million over a two-year period.

STANDARDS OF REVIEW

I. Motion To Vacate Under § 2255

On collateral review the petitioner bears the burden of proof and persuasion on each and every aspect of his claim, *see In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016), which is "a significantly higher hurdle than would exist on direct appeal" under plain error review, *see United States v. Frady*, 456 U.S. 152, 164-66 (1982). Therefore, if the Court "cannot tell one way or the other" whether the claim is valid, then the petitioner has failed to carry his burden. *Moore*, 830 F.3d at 1273; *cf. United States v. Rodriguez*, 398 F.3d 1291, 1300 (11th Cir. 2005) (under plain error review, "the burden truly is on the defendant to show that the error actually did make a difference. . . . Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third prong of the plain error test, and the burden is on the defendant.").

II. Ineffective Assistance of Counsel

Skillern asserts ineffective assistance of counsel. To succeed on an ineffective assistance claim, a petitioner must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). However, a court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *see also White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) (stating that, in assessing counsel's performance, a court "ask[s] only whether some reasonable

lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.").

To show prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If the petitioner fails to establish either of *Strickland*'s two prongs, the claim fails. *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1319 (11th Cir. 2005).

DISCUSSION

Ground One[1]

Skillern claims that trial counsel was ineffective in not moving to dismiss the indictment on the basis that it charged crimes that occurred outside the territorial jurisdiction of the United States. He also asserts that counsel was ineffective in not requesting a voir dire question and jury instruction about the presumption against extraterritoriality and in not objecting to the inclusion of foreign losses at sentencing.

As the United States convincingly argues, counsel had no basis to make the objections proposed by Skillern. "Absent clearly expressed congressional intention to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090, 2100 (2016). In determining whether a statute has been applied extraterritorially, a court will first "ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative

[1] Due to the overlapping nature of several of Skillern's claims and the facts raised in support of those claims, for purposes of clarity, the Court has renumbered several of Skillern's claims in the order in which they were addressed in the Response.

indication that it applies extraterritorially." *Id.* at 2101. "If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

First, the money laundering statute under which Skillern was charged applies extraterritorially if "the conduct is by a United States citizen" and the transaction at issue exceeded $10,000.00 18 U.S.C. § 1956(f). There is no disagreement that Skillern is a United States citizen. Further, the transactions at issue in the indictment total well over $10,000. (Cr. Doc. 1 at 4, 22-23) Accordingly, under the first step of the *RJR Nabisco* test, the charge of conspiracy to commit money laundering was not susceptible to challenge on the basis proposed by Skillern.

As to the charges of mail and wire fraud, and conspiracy to commit mail and wire fraud, binding authority has not determined whether those statutes have extraterritorial application. However, an assessment under the second step of the *RJR Nabisco* test shows that the "conduct relevant to the statute[s'] focus occurred in the United States." *RJR Nabisco*, 136 S.Ct. at 2101.

The "focus" of the mail and wire fraud statutes "is upon the misuse of the instrumentality of communication." *United States v. Driver*, 692 F. App'x 448, 449 (9th Cir. 2017) (quoting *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001); *Bascunan v.*

Elsaca, 927 F.3d 108, 122 & nn. 18 & 19 (2d Cir. 2019). Skillern was charged with fraudulent domestic mailings through FedEx from Orlando, Florida, to other locations in Florida as well as internationally; fraudulent use of interstate wires to send funds to Orlando and a conspiracy that included numerous domestic mailings. (Cr. Doc. 1 at 10-21, 25, 27-28) Accordingly, the use of the instrumentalities of communication took place in the United States. Therefore, the charges were "domestic application[s]" of the mail and wire fraud statutes. *See RJR Nabisco*, 136 S.Ct. at 2101. Accordingly, Skillern fails to show that his counsel was deficient in not challenging the indictment on the basis alleged. Nor does he show a reasonable probability that the outcome would have been different had counsel moved to dismiss the charges.

Skillern contends that the rule of lenity should apply to limit the application of the relevant statutes to his conduct. (Civ. Doc. 1 at 22-23) Skillern's argument is misplaced. That rule "is reserved for cases where, after seizing everything from which aid can be derived, the court is left with an ambiguous statute." *United States v. Svete*, 556 F.3d 1157, 1169 (11th Cir. 2009). Skillern fails to demonstrate that the statutes in question fall under this limited category. Accordingly, Skillern is not entitled to relief on Ground One.

Ground Two

Skillern contends that trial counsel was ineffective during voir dire for failing to preserve a challenge to the Court's decision not to question the jury regarding the defense of good faith reliance on the advice of counsel. Skillern has not shown that his attorney was ineffective.

Counsel requested that the Court ask the prospective jurors about whether or not they agreed with legal concepts, including the defense of good faith reliance. Specifically, counsel requested that the Court ask the following question (Cr. Doc. 206 at 20):

> 3. The law says that good faith reliance on the advice of an attorney is a complete defense to the charges in the indictment. Evidence that a defendant in good faith followed the advice of counsel would be inconsistent with an unlawful intent to obtain money by fraudulent means as alleged in the indictment. The law requires before this rule applies a defendant must make a full and complete good faith report of all material facts to an attorney the defendant considers competent, the defendant received the attorney advice as to a specific course of conduct that was followed and the defendant reasonably relied upon that advice in good faith. Does anyone disagree with this law.

The United States objected to this question. (Cr. Doc. 206 at 24) After considering all of the proposed questions, the Court declined to pose the question during voir dire. However, the Court noted that the jurors would be instructed on the law and on their obligation to follow the law regardless of whether they agreed with the law and "whether anyone would not be able to meet that requirement." (Cr. Doc. 431 at 5-6) As the Court made clear that the jurors would be instructed on their obligation to follow the law regardless of their agreement with it, Skillern fails to show that counsel performed deficiently in failing to object to the Court's rejection of his proposed question concerning this very matter.

Nor has Skillern demonstrated that he was prejudiced by counsel's performance, as an objection would have been without merit. "[I]t is not an abuse of . . . discretion to refuse to allow inquiries of jurors as to whether they can accept certain propositions of law." *United States v. Miller*, 758 F.2d 570, 572 (11th Cir. 1985) (quotation omitted). Thus, an objection to the court's decision would have failed. "[O]verall voir dire questioning, coupled with the instructions given by the trial court at the close of the case, adequately

protect[ ] [a defendant's] right to be tried by a fair and impartial jury." *Id.* at 573. Further, a court has significant discretion in conducting voir dire, which extends to the decision whether or not to submit suggested questions to the jury. *United States v. Schlei*, 122 F.3d 944, 994 (11th Cir. 1997).

As promised, the Court instructed the jury on the defense of good faith reliance on advice of counsel and instructed the jury of their obligation to follow the law even if they did not agree with the law. (Cr. Doc. 274 at 3, 38) It is presumed that the jurors complied with the court's instructions. *United States v. Ramirez*, 426 F.3d 1344, 1352 (11th Cir. 2005) ("A jury is presumed to follow the instructions given to it by the district judge."); *Raulerson v. Wainwright*, 753 F.2d 869, 876 (11th Cir. 1985) ("Jurors are presumed to follow the law as they are instructed."). Accordingly, even though Skillern's proposed question was not presented during voir dire, the instructions that were given protected Skillern's right to a fair trial.

Skillern has not met his burden of showing deficient performance and resulting prejudice under *Strickland*. Accordingly, he fails to demonstrate entitlement to relief on Ground Two.

Ground Three

Skillern argues that counsel was ineffective in failing to object to testimony of Police Inspector Francisco Vazquez, an Officer of the Spanish National Police, regarding a foreign wiretap. Skillern contends that counsel should have objected because the United States did not show that the wiretap met the requirements of 18 U.S.C. § 2510 *et seq*. Vazquez testified that, in his capacity working for the Spanish National Police, he submitted an application to intercept telephone calls in Spain. (Cr. Doc. 431-2 at 24-26)

The application was approved. (Cr. Doc. 431-2 at 26) The United States subsequently introduced recordings of three intercepted calls. (Cr. Doc. 431-6 at 68-76, 90-94, 97-100) These calls were between other co-defendants.

Skillern has not shown that counsel was ineffective in failing to object. The foreign wiretap was not subject to statutory requirements of United States law. "When conducted in this country, wiretaps by federal officials are largely governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, *see* U.S.C. §§ 2510-2520, which does not apply outside the United States." *United States v. Maturo*, 982 F.2d 57, 60 (2d Cir. 1992); *see also United States v. Hawkins*, 661 F.2d 436, 455-56 (5th Cir. 1981) ("[T]he general rule is that the Fourth Amendment does not apply to arrests and searches made by foreign authorities in their own country and in enforcement of foreign law."); *United States v. Ramcharan*, 2008 WL 170377 at *6 (S.D. Fla. Jan. 14, 2008) ("Title III does not apply to electronic interceptions conducted by foreign authorities outside of the United States." (citing *Maturo*, 982 F.2d at 60 and *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987))).

Further, there is no evidence to support the finding of either of the two exceptions that apply to this rule. Those exceptions are present (1) if it is shown that United States law enforcement agents substantially participated in the challenged search or controlled the operation so that foreign law enforcement officials essentially acted as United States agents; or (2) if the foreign officers' conduct is so egregious that it "shocks the conscience" of the United States court. *See United States v. Rosenthal*, 793 F.2d 1214, 1230-31 (11th Cir. 1986); *Hawkins*, 661 F.2d at 456. To shock the conscience, "conduct must violate

"fundamental international norms of decency[.]" *United States v. Mitro*, 880 F.2d 1480, 1483-84 (1st Cir. 1989).

Based on the foregoing, the Court concludes that Skillern has failed to show either that his counsel performed deficiently or that he was prejudiced as a result of counsel's conduct. Skillern is not entitled to relief on Ground Three.

Ground Four

Skillern asserts that trial counsel was ineffective in failing to argue for acquittal on the mail fraud counts on the basis that the mailings were not were not inducements for the sales transactions and thus were not part of the execution of the fraud scheme as contemplated by the perpetrators. He further claims that his lawyer failed to preserve this issue for de novo review on direct appeal. Skillern's claim in this regard fails.

The Eleventh Circuit has held that "mailings are sufficiently a part of the execution of a fraudulent scheme if they are used to lull the scheme's victims into a false sense of security that they are not being defrauded, thereby allowing the scheme to go undetected." *United States v. Hill*, 643 F.3d 807, 859 (11th Cir. 2011). "The mailing can, therefore, follow the achievement of the object of the fraud, since it may be essential ... to avoid detection or lull the victim into complacency." *United States. v. Mills*, 138 F.3d 928, 941 (11th Cir. 1998). In this scheme, the mailings at issue operated in precisely this way as confirmed by the testimony of the exemplar victims. See Cr. Doc. 431-3 at 114 (Flynn: "I understood it to be a certificate in my benefit of ownership of 300 ounces of dore gold."); Doc. 431-4 at 172 (Sadler: "[Certificate indicated t]hat I was the owner of 56 ounces of troy gold."). Consequently, Skillern's counsel was not ineffective for not making a demand for a judgment of acquittal on this ground, and for failing to preserve this

meritless claim for de novo review on appeal. *See United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) (counsel is not ineffective in failing to argue or preserve a meritless issue). Accordingly, as Skillern has not met his burden under *Strickland* of showing deficient performance of counsel and resulting prejudice, he is not entitled to relief on Ground Four.

Ground Five

Skillern contends that counsel was ineffective in failing to argue for acquittal on the wire fraud counts on the basis that the wires were internal to Own Gold, LLC and Shukr and thus not part of the execution of the fraud scheme as against victims. Skillern ignores that the wire fraud scheme alleged against him included wire transfers to victims. Necessarily, the Government was required to introduce the end-of-the-line transfer to show the benefit received by the fraudster. A scheme to defraud is "not complete, or executed, until [the defendant] receive[s] his benefit from the transaction." *United States v. Lemons*, 941 F.2d 309, 315 (5th Cir. 1991). The wires to the victims were the antepenultimate transactions in the wire fraud scheme; the wires between the perpetrators, the penultimate transactions, with the withdrawal and dissipation of funds by the fraudsters being the ultimate transactions. All of these actions were alleged and proven at trial by the Government. Consequently, Skillern's counsel was not ineffective for not raising this issue and for declining to preserve it for appeal. *See Winfield*, 960 F.2d at 974. As Skillern has not met his burden under *Strickland*, he is not entitled to relief on Ground Five.

Ground Six

Skillern argues that trial counsel was ineffective in failing to argue that the jury instructions for the mail fraud and wire fraud charges lessened the United States' burden of proof. Skillern contends that the instructions erroneously required that the mailing or wire must be "meant to help carry out the fraud" rather than "for the purpose of executing the scheme to defraud." (Civ. Doc. 1 at 47)

The jury was instructed that the United States had to prove that Skillern used a private or commercial interstate carrier "by depositing or causing to be deposited with the carrier, something meant to help carry out the scheme to defraud." (Cr. Doc. 274 at 22) The jury was also instructed that the United States had to prove that Skillern "transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud." (Cr. Doc. 274 at 25) These instructions track the language contained in the Eleventh Circuit's Pattern Criminal Jury Instructions 50.1 and 51, respectively.

Skillern fails to show that the language "meant to help carry out" differs in a significant manner from the language "for the purpose of executing" or served to lessen the United States' burden. *Cf. United States v. Hasson*, 333 F.3d 1264, 1273 (11th Cir. 2003) ("An interstate wire transmission is 'for the purpose of executing' the scheme to defraud if it is 'incident to an essential part of the scheme' or 'a step in the plot.'" (quoting *Schmuck v. United States*, 489 U.S. 705, 715 (1989))). The instructions provided accurately informed the jury of the elements of the crimes that the United States was required to prove. As United States convincingly argues, the instructions' language merely states the law in simpler terms that may be easier for a juror to understand than

the statutory language. Accordingly, Skillern does not show that counsel performed deficiently in not objecting to the jury instructions.

Further, Skillern fails to show any prejudice as a result of counsel's performance because he fails to show that any error in the instruction contributed to the verdict. Under § 2255, a conviction should be upheld even if there was an error in the jury instructions if the defendant fails to show that the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002) (citation omitted). There is simply no indication that anything would have been different had the precise wording in the instructions been changed to track the language of the statute precisely. Skillern's claim is therefore purely speculative and fails to establish that counsel was ineffective. In fact, the Eleventh Circuit expressly held on direct appeal that the United States presented sufficient evidence to support the mail fraud convictions. *Nelson*, 884 F.3d at 1110. Accordingly, Skillern has not demonstrated that counsel was ineffective under *Strickland*. He is not entitled to relief on Ground Six.

Ground Seven

Skillern claims that trial counsel was ineffective in failing to properly argue or preserve issues related to his defense that he acted in good faith on the advice of counsel and the advice of an expert report concerning the gold allegedly found on the mining site. These claims likewise fail. Counsel spent a great deal of his defensive strategy pressing the claim that Skillern relied on the advice of counsel. He raised it in opening, closing and in his demand for acquittal and for new trial. He demanded and received an instruction on the defense both as to good faith generally and as to good faith reliance on counsel's

advice. (Doc. 274 at 37-38) Counsel also offered evidence that Skillern relied on the "Spooner Report", which he claimed showed that gold could be found in Nevada.

The problem was that the claims of the defense did not match the evidence. The Government offered persuasive evidence that Skillern was aware of the fraud and that he helped to perpetrate it. The Government secured evidence from Skillern that the Spooner Report, which was dated June 2010, related to a different mining site than Own Gold's site and that Skillern revised the report to make it appear to refer to Own Gold's site in January 2010. Specifically, during the United States' cross-examination of Skillern, the following exchange took place (Doc. 431-10 at 94-97):

> Q. And when you're speaking of the Spooner Report - - I'm going to show you Skillern's Exhibit 69. This is the report to International Humanitarian Federation; is that correct?
>
> A. Yes.
>
> Q. This is the version of the report that you first saw?
>
> A. I believe so.
>
> Q. And this is what first got you interested in the gold mining business you testified, correct?
>
> A. Yes.
>
> Q. The date on this report is June 12 of 2010; is that right?
>
> A. Yes.
>
> . . .
>
> Q. These could not have been claims that were associated with Own Gold, correct?
>
> A. Not in 2010.
>
> . . .

Q. So despite the fact that this report is written about two entirely different mining claims, you testified that you has this report altered to be headed with Own Gold information; is that correct?

A. Yes.

Q. Looking at Skillern's Exhibit 989, you, in fact, paid $264 for the editing of this report, the report that we looked at in Skillern's Exhibit 69-C; is that right?

A. Yes.

Q. And that resulted in the report that we see in Skillern's Exhibit 234-B; is that correct?

A. Yes.

Q. And it indicates that it was written for Own Gold, LLC., correct?

A. Yes.

Q. It wasn't written for Own Gold LLC, was it?

A. Not written for.

. . .

Q. Is this about Own Gold claims? Is any - - Scott Spooner did no new work to produce this document, did he?

A. No.

Q. There was no new analysis done on the Big Bud Claims in Nevada to produce this product, was there?

A. No.

Q. And yet, you put this out there as support for the idea that the Big Bud Claims contained seven ounces per ton of gold in ore; is that correct?

A. Yes.

The jury also had the benefit of considering Skillern's own testimony concerning his reliance on counsel and his reliance on the Spooner Report. The jury was able to assess his truthfulness. See *United States v. Woodard*, 459 F.3d 1078, 1087 (11th Cir.

2006) ("[A] defendant's testimony—if disbelieved by the jury—may be considered substantive evidence of guilt.").

Counsel did all that he could to assert this good faith defense: the evidence just did not bear it out, and the jury rejected it. Skillern has not established that counsel was ineffective or that he was prejudiced by counsel's performance, as he must under *Strickland* to obtain relief on a claim of ineffective assistance. Moreover, the Eleventh Circuit concluded that the evidence was sufficient to support the jury's verdict. Consequently, Skillern is not entitled to relief on Ground Seven.

Ground Eight

Skillern claims that counsel was ineffective in failing to preserve an objection to the Court's instruction that he not discuss his testimony with counsel during the overnight break following Skillern's first day of testimony. The record shows that after the first day of Skillern's testimony, counsel asked the Court whether he could "speak to Mr. Skillern about matters other than his testimony this evening . . . that may come up?" (Cr. Doc. 431-9 at 208) This restriction on Skillern's discussion with his lawyer took place overnight between Day 10 and 11 of trial. (Cr. Doc. 431-9 at 208–09) The Court granted this request, informing counsel that they could discuss "anything about the proceeding and so forth, who is coming, that's fine, but just not his testimony or his impending testimony." (Cr. Doc. 431-9 at 209) Skillern claims that if his counsel had objected to this limitation on discussing his testimony, the outcome of the trial would have been different.

Skillern argued on direct appeal that the limitation on his ability to consult with his attorney during the overnight break deprived him of his Sixth Amendment right to counsel. The Eleventh Circuit concluded that "because the trial record doesn't indicate that either

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Skillern or his lawyer had any intention or desire to discuss his testimony during the recess, Skillern can't show that he was actually deprived of his right to counsel[.]" *Nelson*, 884 F.3d at 1107. Concluding that "the record was entirely devoid of *any* indication—in *any* form—that Skillern or his attorney planned or wanted to confer about his testimony during the recess," the Eleventh Circuit determined that "Skillern hasn't shown that he was actually deprived of his Sixth Amendment right to counsel." *Id.* at 1110. (emphasis in original) The Eleventh Circuit therefore held that "in the circumstances of this case, the district court committed no constitutional error." *Id.* at 1104.

Skillern now argues he was prejudiced in several ways by this restriction. First, he argues he could not adequately respond to the government's arguments and he could not adequately present evidence of Nelson's responsibility for all criminal conduct. He alleges that he tried to speak to Schneider during the overnight recess about "Michael McDonnough's continuing mining efforts in Nevada ... but [his lawyer] felt that may encroach on the judge's order." (Civ. Doc. 1-2 at 1) Skillern also argues that he was not able to discuss his upcoming testimony with his attorney, specifically, evidence of Nelson's responsibility, and evidence of continued mining efforts in Nevada. Skillern ignores that he was still on the stand when the Court lifted the restriction and, thus, he was able to speak to his lawyer about any topic, including his testimony regarding Nelson. Skillern also ignores that he had months to prepare for his testimony before trial. Tellingly, Skillern never claims that he was unsure about a line of questioning during the period in which his consultation was restricted or that the absence of advice of counsel hindered his testimony in any way.

Rather, he principally complains that he could not discuss with his counsel the failure to call certain witnesses, namely, Michael and Margaret Clifton and Lawrence Wunderlich. But this contention is belied by the record. The Court specifically allowed discussion about witnesses that might be called, permitting discussion "anything about the proceeding and so forth, who is coming, that's fine...", and Skillern does not allege that his lawyer would not discuss these individuals with him. Moreover, Skillern's lawyer announced at the start of Day 12 that he did not intend to call the Cliftons to the stand. (Doc. 143-11 at 4) He similarly announced in the late afternoon on Day 12 that he did not intend to call Wunderlich to the stand. (Doc. 143-11 at 161) All of these decisions were made and announced long after the restriction on conferring with counsel had been lifted. Skillern does not explain why he did not make his concerns known to counsel at those opportunities.

In any event, the matter of limiting Skillern's discussions with this attorney has been visited by the Eleventh Circuit, which concluded that Skillern suffered no constitutional deprivation of his right to counsel in this case. As the Eleventh Circuit ultimately found that counsel's action led to no constitutional deprivation, Skillern cannot meet the *Strickland* prejudice prong by showing that he was prejudiced as a result of counsel's performance.

In light of the entirety of the evidence against Skillern, he simply has failed to demonstrate a reasonable probability that the outcome of the trial would have been different had he been permitted to speak with his counsel on one evening about the identified matters. Accordingly, Skillern fails to show that his counsel was deficient in not

objecting to the parameters placed on their discussions after the first day of Skillern's testimony, or that he was prejudiced as a result of counsel's performance.

Skillern also argues that his counsel did not object to the Court's asking Skillern to leave the courtroom for a period of time while he was testifying. Of course, he was not asked to leave the courtroom while he was testifying. He was asked to leave at the beginning of a lunchbreak while a legal issue was being discussed. He is correct that his lawyer never objected. There was no need to object, and no matter affecting his testimony was discussed during this approximate eight-minute sidebar outside the presence of the jury. The only topic discussed during Skillern's absence was a question raised by Mr. Sands, Co-defendant Cassim's counsel, concerning possible elicitation of impermissible hearsay testimony from Skillern's consulting lawyer, Mr. Lewis. Mr. Sands expressed concern that Mr. Schneider, Skillern's trial counsel, was going to ask Mr. Lewis to testify about allegations of fraud communicated by British investigators to Mr. Lewis. Sands believed those hearsay communications would unfairly prejudice Mr. Cassim. After limited discussion, Mr. Schneider advised that no British official would return Mr. Lewis's call when he attempted to reach out to them concerning allegations of Own Gold's foreign activities. Thus, no such hearsay testimony was going to be offered. No discussion was had concerning Mr. Skillern's testimony, and no exclusion decisions were made during that break. See Doc. 431-10 at 100–06. Thus, even if he should have remained in the courtroom, Skillern has not alleged and cannot show any prejudice related to his absence for this short period. *See United States v. Odoni*, 782 F.3d 1226, 1233 (11th Cir. 2015) (analyzing a similar claim under harmless-error analysis). Thus, Skillern has failed to show either ineffectiveness or prejudice as to these grounds.

Ground Nine

Skillern asserts that counsel was ineffective in not calling Margaret Clifton, Michael Clifton, and Lawrence Wunderlich to testify at trial. In support, Skillern attaches affidavits of these three individuals. (Civ. Docs. 1-5, 1-6 and 1-7) Margaret Clifton stated that Skillern demonstrated strong ethics and character and relied on counsel's advice, and that it was Nelson who committed fraud. (Civ. Doc. 1-5). Michael Clifton similarly stated that Skillern relied on Nelson and on the advice of counsel, and Skillern was of good character. (Civ. Doc. 1-6) Wunderlich stated that Nelson made misrepresentations and was responsible for fraud, and that Skillern had integrity and a good character. (Civ. Doc. 1-7)

However, counsel's decision whether to call a witness is a strategic one. *See Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." (quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995))). Skillern has not shown that the decision not to call the identified witnesses was "patently unreasonable." *Dingle v. Sec'y, Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (stating that counsel's strategic decision "will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it.") (citation omitted); *see also Chandler v. United States*, 218 F.3d 1305, 1314-15 (11th Cir. 2000) ("[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy. . . . [B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent

counsel would have taken the action that his counsel did take.") (internal quotation marks and citation omitted).

Finally, Skillern cannot show prejudice because the testimony of these witnesses would have been cumulative to testimonies of Edward Lewis and Skillern. It is also unclear that a third-party witness is competent to testify as the mental decision by another to rely on the advice of his counsel. Accordingly, having shown neither deficient performance by counsel nor resulting prejudice as he must to prevail under *Strickland*, Skillern is not entitled to relief on Ground Nine.

Ground Ten

Skillern claims that trial counsel was ineffective in failing to call an expert witness to rebut the United States' witness regarding assays of the Nevada mining claims. The United States called Mark Randall Chatterton, a Bureau of Land Management employee. Chatterton testified about mining claims and mining activities on federal public land. Chatterton personally participated in collecting samples from the claim sites in Nevada. Chatterton testified about the report received from an assayer and opined that none of the levels of metals found in the samples could support an economically feasible mine. (Cr. Doc. 431-4 at 52-53, 59-65)

Skillern claims that a defense witness could have rebutted Chatterton's testimony concerning the assay of the Nevada claims and shown that the assay methodology used did not comport with Bureau of Land Management standards. However, Skillern's claim is too vague to show entitlement to relief. He does not identify any such witness or present evidence showing that a prospective witness would have testified as he suggests.

Accordingly, Skillern fails to show that his counsel performed deficiently, or that he was prejudiced as a result. He is not entitled to relief on Ground Ten.

Ground Eleven

Skillern contends that trial counsel was ineffective in failing to adequately prepare Edward Lewis for testimony. Skillern contends that counsel's alleged failure to prepare Lewis's testimony resulted in Lewis's not recalling during trial that he had known about negative assay results. This is relevant in this regard because the Government argued persuasively that reliance on Lewis's advice was unwarranted since Lewis was not as fully informed as Skillern. One such indicator of that was Lewis's testimony that he was unaware of negative assay results from Nevada. (Cr. Doc. 431-11 at 96-97) Lewis now says that he was in fact aware of these results. (Civ. Doc. 1-4 at 12) Even accepting this to be true, however, it would not change the outcome of the case, because Lewis maintains, as he did throughout his trial testimony, that Nevada was of no importance to him and he only focused on Montana. (Civ. Doc. 1-4 at 12)

Further, there were other key pieces of information that Lewis did not have, and Skillern has not been able, post trial, to rehabilitate his testimony in these important respects. For example, Lewis testified that he received the "Spooner Report" from Skillern but he did not know that Skillern had modified the report. (Cr. Doc. 431-11 at 44-45, 100) Further, Lewis was not told that the prior owner had held a mining lease since 1991, but no gold had ever been produced at the site. (Cr. Doc. 431-11 at 105-07) Lewis agreed that this information, if true, would have been material to his legal assessment. (Cr. Doc. 431-11 at 106) Furthermore, Lewis testified to his belief that the Montana site would "be able to produce gold" just as soon as the company "[wa]s able to get the big dredge

working." (Cr. Doc. 431-11 at 32) But when confronted with information that Own Gold lacked a permit to operate the big dredge, Lewis stated that no one relayed that information. (Cr. Doc. 431-11 at 108)

Lewis also admitted that he was unaware of the total production numbers. Neither Skillern nor Nelson told him that Own Gold had recovered only six gold ounces from the Montana site—a fact that, Lewis conceded, would have been material to his legal advice. (Cr. Doc. 431-11 at 117) Thus, even without Lewis' testimony that he was unaware of negative assay results which he now recants, the jury had ample grounds to conclude that Lewis was not fully informed. Even if the jury were inclined to accept the good faith defense as applicable, it could have rejected the defense because by his own admissions, Lewis's advice was not fully or adequately informed. As such, Skillern could not have relied in good faith on his advice. Skillern therefore cannot show that he was prejudiced by his trial counsel's performance in preparing Lewis for testimony. Skillern has not established that trial counsel was ineffective under *Strickland*. He is not entitled to relief on Ground Eleven.

Ground Twelve

Skillern argues that trial counsel was ineffective in his presentation of facts concerning co-defendant Nelson's operation of Own Gold. More specifically, Skillern alleges that "from the date of the first meeting and up until the day before trial," his lawyer led him to believe that part of the defense "would be based on disclosing complete facts regarding [Nelson's] failures, lies, frauds, and responsibilities for [ ] Own Gold, LLC." (Civ. Doc. 1 at 1–2) He elaborates, "My defense was that I tried, within the limits set by my attorneys and by corporate law, to contain and control Nelson despite his obstructions for

the good of the company and all its customers and shareholders but ultimately could not." (Civ. Doc. 1-2 at 2) He goes on to allege that the day before trial, his counsel "unilaterally" decided not to present key information about Nelson. (Civ. Doc. 1 at 2) Skillern further states that he learned his lawyer made this decision based on "a joint defense agreement." (Civ. Doc. 1 at 2, 17, 56–57) This asserted Ground is fully undermined by counsel's through affidavit and by the facts as developed at trial.

Considering the last challenge and working backward, the Court concludes that there was never was a joint defense agreement between Skillern and Nelson's defense teams. Counsel attests that the joint defense agreement included only Cassim and Camargo, not Nelson, because Schneider did not trust Nelson to go to trial rather than plead guilty and Schneider wanted to have the option of blaming Nelson for the failure of the company. Skillern offers no evidence to the contrary.

Second, Skillern's lawyer strategically determined that a defense that Skillern was an unwitting shareholder was easily assailable for two primary reasons: (1) "While Skillern was labeled a consultant, he was paid a great deal of money on each sale of gold."; and (2) "He was involved in almost every decision made by the company as evidenced by the emails introduced at trial." (Civ. Doc. 13-1 at 4–5, ¶ 9) He strategically concluded that the most valuable evidence for the defense at trial, the emails, were "double edged": "While they told the story of Nelson's mismanagement and incompetence, [they] also told the story of Skillern's involvement in the decisions that the company [was] making." (Civ. Doc. 13-1 at 14, ¶ 22) This well-reasoned choice of defense strategy is entitled to deference. Strategic decisions, other than those that no reasonable competent lawyer would deploy,

are not vulnerable to attack on collateral review. *See, e.g, Dingle*, 480 F.3d at 1099; *Chandler v. United States*, 218 F.3d at 1314-15.

Third, Skillern is impeached in his assertion that his lawyer was ill-prepared and he, Skillern was ill-informed. As explained in Schneider's affidavit, Schneider and Skillern "had a standing meeting at 9:30 on Saturday morning" and spent "spent countless hours reviewing emails, discussing witnesses and strategies." (Doc. 13-1 at 4, ¶ 8) The two regularly and repeatedly discussed the evidence in the case, including the voluminous email evidence spanning multiple years. (Doc. 13-1 at 4, ¶ 8) Based on these meetings, Skillern, at Schneider's instruction, prepared a timeline that was based heavily on emails and other communications, and Schneider then prepared an extensive exhibit list based on those same emails and communications. Nothing about counsel's presentation and mastery of the record in this document-intensive case suggested that he was not prepared and committed to this defense. The evidence against Skillern was just overwhelming. For this reason, too the claim alleged in Ground Twelve fails. Skillern simply cannot show prejudice as a result of his counsel's performance. He is not entitled to relief on Ground Twelve.

Ground Thirteen

Skillern contends that counsel was ineffective in not moving to sever his trial from Nelson's trial. First, he contends that Nelson would have exculpated Skillern had their trials been separate, but that Nelson would not testify at a joint trial. Skillern further argues that the jury may have been affected by the "spill over" effect of Nelson's inculpatory conduct and not "make an individual determination as to [Skillern's] guilt." (Civ. Doc. 1 at

12) Skillern also claims that counsel told him that "to bring up Nelson's malfeasance in the trial would violate Nelson's constitutional rights." (Civ. Doc. 1 at 17)

This Court would not have granted such a motion. There exists a "well-settled principle that it is preferred that persons who are charged together should also be tried together, particularly in conspiracy cases." *United States v. Smith*, 918 F.2d 1551, 1559 (11th Cir. 1990); *see also United States v. Cassano*, 132 F.3d 646, 651 (11th Cir. 1998) (noting that the rule of jointly trying persons charged together "is particularly applicable to conspiracy cases."). Severance is appropriate only "where there is a serious risk that a joint trial (1) would compromise a specific trial right of one of the defendants, or (2) would prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Browne*, 505 F.3d 1229, 1269 (11th Cir. 2007) (internal quotation marks and citations omitted); *see* Fed. R. Crim. P. 14(a).

When considering a motion for severance, a court must weigh the prejudice inherent in a joint trial against the interests of judicial economy. *United States v. Eyster*, 948 F.2d 1196, 1213 (11th Cir. 1991). "A defendant does not suffer compelling prejudice, sufficient to mandate a severance, simply because much of the evidence at trial is applicable only to co-defendants." *Schlei*, 122 F.3d at 984; *see also Hill*, 643 F.3d at 829 (stating even if there had been an "enormous disparity" in the amount of evidence that related to each defendant, that alone would not show compelling prejudice).

Moreover, Skillern cannot show prejudice, as the Court instructed the jury to consider each offense and defendant separately. *See United States v. Francis*, 131 F.3d 1452, 1459 (11th Cir. 1997) ("[C]autionary instructions to the jury to consider the evidence separately are presumed to guard adequately against prejudice" in a case in which

persons charged as co-conspirators are tried together); *see also United States v. Blankenship*, 382 F.3d 1110, 1123 (11th Cir. 2004) ("[T]he strong presumption is that jurors are able to compartmentalize evidence by respecting limiting instructions specifying the defendants against whom the evidence may be considered.").

Skillern's attorney did not perform deficiently in deciding not to pursue a severance in light of the circumstances this case presented. Counsel is not ineffective in deciding to forgo a motion likely to fail. Accordingly, he is not entitled to relief on Ground Thirteen.

Ground Fourteen

Finally, Skillern argues that his appellate counsel was ineffective in failing to raise alleged sentencing errors on direct appeal. Specifically, he contends that the Court erred in determining that he was a leader and organizer; and second, that the Court erred in determining that Skillern had not accepted responsibility. Skillern provides no argument or support for why these enhancements were not correctly applied to him. Thus, he has waived these insufficiently developed claims. *See In re Moore*, 830 F.3d at 1272.

Even if the Court were inclined to consider them they would, nonetheless be denied. Skillern qualified for the leader/organizer enhancement. To qualify, "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." USSG §3B1.1, comment. (n.2). *See United States v. Holland*, 22 F.3d 1040, 1045 (11th Cir. 1994). The evidence demonstrated that Skillern orchestrated an extensive fraud scheme that involved multiple coconspirators, as well as multiple sales people, who may or may not have been aware of the fraud. He directed others to fraudulently sell gold over a period of two-and-a-half years, totaling $7.36 million in sales. Thus, he cannot show prejudice from his lawyer's failure to raise this objection.

Skillern also did not qualify for acceptance of responsibility. (Cr. Doc. 320 at 25, ¶ 126) Pursuant to USSG § 3E1.1(a), a defendant is entitled to a two-level reduction in his offense level if he "clearly demonstrates acceptance of responsibility for his offense." The adjustment is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt" except where "a defendant goes to trial to assert and preserve issues that do not relate to factual guilt." USSG § 3E1.1 App. Note 2. As is his right, Skillern persists in his innocence even today. But, he cannot not simultaneously qualify as one who clearly demonstrates acceptance of responsibility for his offense. Thus, Skillern has suffered no prejudice related to the calculation of his guidelines range.

Nor can Skillern show that his appellate counsel was ineffective in not raising The standard set out in *Strickland* applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991). To establish a claim, Skillern must show that appellate counsel's performance was objectively unreasonable, and that there is a reasonable probability that, but for this performance, he would have prevailed on his appeal. *Robbins*, 528 U.S. at 285-86. Skillern cannot meet this burden because, as addressed above, he fails to show a reasonable probability that this claim would have succeeded on appeal. Skillern's challenge on this final Ground Fourteen fails.

Need for an Evidentiary Hearing

Skillern is not entitled to an evidentiary hearing. Skillern has the burden of establishing the need for an evidentiary hearing, see *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984) (en banc), and he would be entitled to a hearing only if his allegations;

if proved, would establish a right to collateral relief. Where, as here, the record plainly establishes that a section 2255 claim lacks merit or that it is defaulted, no such hearing is warranted. *United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

CONCLUSION

Accordingly, it is **ORDERED** that Skillern's motion to vacate (Doc. 1) is **DENIED**. Skillern's motion for summary judgment, motion for judgment on the pleading, and expedited motion for review and ruling (Civ. Docs. 16, 17, 19), which reiterate the merits of his claims, are **DENIED AS MOOT**. The **CLERK** is directed to enter judgment against Skillern, to terminate all pending motions in the civil action, to **CLOSE** the civil action, and to enter a copy of this Order in the criminal action.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

Skillern is not entitled to a certificate of appealability ("COA"). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a court must first issue a COA. Section 2253(c)(2) permits issuing a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Skillern must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000): *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Because he fails to make the requisite showing, Skillern is not entitled to a COA.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Skillern must obtain permission from the circuit court to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, on this 25th day of August, 2020.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13380-H

MICHAEL SKILLERN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Michael Skillern is a federal prisoner serving a total term of 120 months' imprisonment after a jury found him guilty of conspiracy to commit mail fraud and wire fraud ("Count 1"), in violation of 18 U.S.C. § 371, conspiracy to commit money laundering ("Count 2"), in violation of 18 U.S.C. § 1956(h), mail fraud ("Counts 3-6"), in violation of 18 U.S.C. § 1341, and wire fraud ("Counts 7-10"), in violation of 18 U.S.C. § 1343, in relation to his role as the majority shareholder of Own Gold, LLC ("Own Gold"). After an unsuccessful direct appeal, Skillern filed the present 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, raising 14 claims for relief[1]:

(1) Trial counsel, Stanley G. Schneider, was ineffective for failing to raise several arguments and objections based on the contention that the crimes

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[1] For clarity, we list Skillern's claims as organized and restated by the district court.

APPENDIX B
page 1-39

with which Skillern was charged did not cover his international transactions;

(2) Schneider was ineffective for failing to object to the trial court's failure to question the prospective jury members regarding the defense of good faith reliance on the advice of counsel;

(3) Schneider was ineffective for failing to object to the testimony of Spanish Police Inspector Francisco Vazquez regarding a foreign wiretap;

(4) Schneider was ineffective for failing to argue for acquittal on Counts 3-6 on the basis that the Certificates of Ownership, the only mailings identified in the indictment, were not inducements for the sales transactions and failing to raise the issue on direct appeal;

(5) Schneider was ineffective for failing to argue for acquittal on Counts 7-10 on the basis that the wires were internal to Own Gold and SHUKR Holdings, LLC ("SHUKR") and, thus, not part of any scheme to defraud;

(6) Schneider was ineffective for failing to argue that the jury instructions for the mail fraud and wire fraud charges lessened the government's burden of proof;

(7) Schneider was ineffective for failing to properly argue (during trial and motion for acquittal) or preserve issues related to his defense that he acted in good faith on the advice of counsel and the advice of an expert report;

(8) Schneider was ineffective for failing to object to (a) the trial court's instruction limiting Skillern's ability to discuss his testimony with Schneider during an overnight recesses during his testimony and (2) an occasion on which the trial court asked Skillern to leave the courtroom while attorneys had side bar;

(9) Schneider was ineffective for failing to call Margaret Clifton, Michael Clifton, and Lawrence Wunderlich to testify at trial;

(10) Schneider was ineffective for failing to call an expert witness to rebut the government's witness regarding assays of Own Gold's Nevada mining claims;

(11) Schneider was ineffective for failing to adequately prepare Skillern's personal counsel for business matters, Edward Lewis, for his testimony;

(12) Schneider was ineffective for entering a joint defense agreement ("JDA") without Skillern's consent and, consequently, also was ineffective in arguing his chosen defense that codefendant Jon Craig Nelson, the CEO of

Own Gold, was solely responsible for the operation of, and offenses committed through, Own Gold;

(13) Schneider was ineffective for failing to move to sever Skillern's trial from Nelson's trial; and

(14) Schneider was ineffective for failing to raise sentencing errors on direct appeal.

BACKGROUND:

In 2014, a federal grand jury indicted Skillern and three other codefendants—Nelson, Naadir Cassim, and Adriana Camargo—on Counts 1-10.[2] The indictment charged that Skillern was a United States citizen and resident of Texas and that he, along with his codefendants, conspired to and did facilitate the sale to victims of nonexistent gold ore from mines owned by his codefendants in Montana and Nevada. It charged that Skillern produced and caused the production of false and fraudulent documentation and information to create the illusion that Own Gold was mining and processing gold to be sold, and he received funds paid by the victims, both inside and outside the United States, who purchased the nonexistent gold. "[I]t was further part of the conspiracy that conspirators would and did send . . . via wire transfer, victims' funds to accounts . . . in order to perpetuate the fraud scheme . . . [and] to the accounts of conspirators . . . for conspirators' personal enrichment." In relevant part, the indictment charged that Skillern, "in the Middle District of Florida and elsewhere," caused several victims in the United Kingdom and the Middle District of Florida to wire payments totaling several hundred thousand dollars to Own Gold's bank account in Texas. In return, Skillern, from Orlando, Florida, mailed those victims Certificates of Ownership, purportedly evidencing that they had purchased gold from the mines owned by Own Gold. Skillern also laundered money by wiring $201,230.00 from Own Gold's

[2] Skillern was also indicted on three counts of committing illegal monetary transactions, but the district court later granted his motion for a judgment of acquittal on those counts.

bank account in Texas to an account in St. Vincent and the Grenadines. Finally, the indictment also charged that Skillern, in the Middle District of Florida, committed wire fraud by wiring funds from Own Gold's bank account to the bank account held by Cassim for SHUKR, an Orlando, Florida, company owned by Nelson.

Skillern and his codefendants pled not guilty to the charges, and their case proceeded to a joint trial, where Schneider represented Skillern. Prior to trial, Skillern submitted a trial brief, indicating that his defense theories would be that (1) Own Gold was a "horribly mismanaged but well intended business," and (2) he acted in good faith in reliance on advice from counsel. He also submitted proposed *voir dire* questions and proposed jury instructions. As relevant here, he proposed that the court ask the prospective jurors the following question:

> The law says that good faith reliance on the advice of an attorney is a complete defense to the charges in the indictment. Evidence that a defendant in good faith followed the advice of counsel would be inconsistent with an unlawful intent to obtain money by fraudulent means as alleged in the indictment. The law requires before this rule applies a defendant must make a full and complete good faith report of all material facts to an attorney the defendant considers competent, the defendant received the attorney advice as to a specific course of conduct that was followed and the defendant reasonably relied upon that advice in good faith. Does anyone disagree with this law?

The trial judge rejected Skillern's proposed question, stating that the court would advise the prospective jury members on the law and instruct them that they would be "duty bound to follow the law whether they agree with it or disagree with it, and I'll inquire whether anyone would not be able to meet that requirement."

Skillern's trial lasted 15 days. During opening statements, Schneider noted that Skillern relied on "Lewis, his advice and counsel, every step of the way . . . . as a stockholder and not of management . . . His hands were tied at times by what [Nelson] wanted to do."

Following opening statements, the evidence generally established that Skillern and Nelson started Own Gold in 2011 for the purpose of mining, processing, and selling gold. Own Gold's website and marketing materials represented that it was a "gold producer" with mining claims in Nevada and Montana worth $81 billion. For two years, Own Gold used a telemarketing firm to execute contracts with hundreds of people who believed that they were buying gold. Those contracts specified the amounts of gold purchased and the prices and represented that customers could retrieve their gold ore "at any time after the execution and payment of consideration" by "appear[ing] in person" at the mining site. Otherwise, Own Gold had 360 days to deliver the gold. If it failed to do so, it would refund the purchase price. All told, Own Gold accepted 441 orders and collected more than $7.3 million from customers.

However, from its inception until it stopped executing sales contracts with customers in 2014, Own Gold produced less than six ounces of gold from its own mining operations. In light of its near-total failure to produce any gold from its own mines, Own Gold resorted to trying to fulfill customers' orders by purchasing gold from third parties. Even so, Own Gold ultimately delivered only 150 ounces of gold—valued at $241,000—to 20 customers. Own Gold refunded only $35,022 to 4 customers, and none of the other orders were fulfilled or refunded. Meanwhile, Skillern profited approximately $488,000, Nelson collected about $300,000, and Own Gold's telemarketing firm netted $5.1 million over a two-year period.

As to the relevant, specific evidence presented, the government offered the testimony of Inspector Vazquez, a police officer for the Spanish Government. Inspector Vazquez testified that he had been the case agent for an investigation on Cassim and Camargo in Spain. He testified that, in the course of his investigation, he filed an application to intercept Cassim's and Camargo's phone calls in Spain, and the application was approved. The government then

introduced three of those phone calls—one call between Cassin and Nelson and two calls between Cassin and Camargo—through the testimony of Special Agent Alexander Hagedorn, an assistant attaché, in London, England, for Homeland Security Investigations. The phone calls revealed discussions among the codefendants about: (1) obtaining missing gold to complete orders; (2) obtaining gold that resembled the samples used in selling gold to customers; (3) answering an important client's phone calls to "buy [Own Gold] two months or three months or six months" to produce missing gold; (4) the consequences of not having "deliverable gold" for a particular buyer; (5) the fact that Nelson and Skillern were "not using the money on what they're supposed to"; (6) the fact that sales slowed down because the company could not deliver gold to its existing customers; and (7) the fact that Nelson insisted on obtaining new customers when he knew that Own Gold could not deliver gold to its existing customers.

Mark Randall Chatterton, a review mineral examiner and a branch chief for the Department of Interior's Bureau of Land Management, testified that he personally participated in collecting samples from Own Gold's mining claim sites in Nevada. He testified that there was no evidence of available electricity, water, or mining equipment at the sites. Chatterton sent the samples obtained from the sites to an assayer, who tested the samples. Chatterton testified concerning the assayer's report and opined that none of the levels of metals found in the samples of the sites could have supported an economically feasible mine.

Several victims testified concerning the manner in which they were defrauded by Own Gold. The victims noted that, after they paid Own Gold for the advertised gold, they received a Certificate of Ownership by mail, indicating their ownership of the purchased amount of gold. The victims testified that they understood their receipt of the Certificates of Ownership to be proof that they, in fact, owned the gold they had purchased from Own Gold. Each Certificate of

Ownership displayed the quantity of gold purchased, Nelson's signature, and Own Gold's company seal. The government also submitted evidence demonstrating that, after the victims wired the funds for the purchased gold to Own Gold, those funds would then be wired to salespeople and telemarketers to fund Own Gold's continued scheme and to the codefendants for their own personal enrichment.

Skillern testified on the tenth and eleventh days of the trial. He generally testified that he agreed to begin Own Gold after reviewing a report created by Scott Spooner ("the Spooner Report"), which ostensibly showed that the land that would be Own Gold's had enough gold and other minerals to support mining endeavors. Skillern also testified that he was the majority shareholder for Own Gold, that he did not make decisions for Own Gold, and that Nelson was the individual who ran Own Gold. He testified that he sought and followed Lewis's advice concerning the Spooner Report prior to beginning Own Gold. He also sought and followed Lewis's advice concerning all of his Own Gold dealings and problems, including whether Own Gold possibly was subject to criminal or civil liability throughout its lifespan. Skillern noted that Lewis eventually joined the Board of Directors for Own Gold. Skillern also testified that "everybody that was involved with the company" complained about the manner in which Nelson was running Own Gold. During his cross-examination, Skillern revealed that the Spooner Report actually related to a different mining site than Own Gold's site and that Skillern paid $264 to have the report altered to appear to refer to Own Gold's site.

The court took a brief recess in the middle of Skillern's testimony on the tenth day of the trial. Prior to the recess, Skillern asked the court if he was "allowed to have conversation as long as [he didn't] discuss the testimony or the company or anything?" The court responded, "Yes." Later, when the court concluded its proceedings for the tenth day, Schneider asked the court

whether he could "speak to Mr. Skillern about matters other than his testimony . . . maybe witness problems or things like that," that evening. The court responded, "Yes, anything about the proceeding and so forth, who's coming, who is not coming, that's fine, but just not his testimony or his impending testimony."

During the lunch break on the eleventh day of trial, the court told Skillern, "You should probably step out, Mr. Skillern, just for now until I see if there are any issues that might come up in the next little bit concerning your testimony." Once Skillern left the courtroom, the attorneys for the government and Skillern's codefendants raised a concern about the possible admission of hearsay testimony from a United Kingdom investigator that would be elicited through Lewis's impending testimony. However, Schneider eventually revealed that Lewis's testimony could not involve any such hearsay testimony because the investigator had not spoken to Lewis. Thereafter, Skillern retook the stand and completed his testimony.

Lewis, in turn, testified that he received the Spooner Report from Skillern and reviewed it in order to provide legal advice, but that he did not know that Skillern had modified the report ahead of time. Lewis also testified that he was unaware of any negative assay results from Own Gold's Nevada site and that he had not known that the prior owner of Own Gold's mining lease had been unable to produce any gold from the site since 1991. He agreed that that information, if true, would have been material to his legal assessment. However, Lewis also testified that he was not concerned with Own Gold's Nevada site because he preferred to focus on the productive Montana mining site. He testified that the Montana site would have been able to produce gold as soon as the company was "able to get the big dredge working." However, when confronted with the information that Own Gold lacked a permit to operate a big dredge, Lewis testified that no one had told him that information. He also conceded that neither Nelson nor Skillern had

informed him of the total ounces of gold actually produced by Own Gold and that that information would have been material to his legal advice.

During closing arguments, Schneider extensively argued that Lewis continuously advised Skillern that Own Gold should continue making sales, that Own Gold was a *bona fide* company, and that Skillern was not subject to criminal liability for his role in Own Gold's business. He argued that Skillern acted at all times relying on Lewis's advice. Schneider also argued that Skillern made full and complete disclosure to Lewis when requesting legal business advice concerning Own Gold. He also argued that Skillern "rightly" relied on the Spooner report in believing that Own Gold's mining operation would be successful. Schneider emphasized that "[t]he law is clear. There is no intent to defraud when you seek advice from a lawyer and the lawyer knows the facts, and the lawyer relies on you and you rely on what the lawyer tells you."

Following closing arguments, the district court instructed the jury concerning the charges against Skillern and his codefendants. As relevant here, the court instructed the jury that Skillern could be found guilty of mail fraud only if the government proved that Skillern used a private or commercial interstate carrier "by depositing or causing to be deposited with the carrier, something meant to help carry out the scheme to defraud." As to the charge of wire fraud, the court instructed the jury that the government had to prove that Skillern "transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud." At Skillern's request, the court also instructed the jury on the defenses of good faith and good faith reliance upon advice of counsel. Finally, the court cautioned the jurors: "You must consider each crime and the evidence relating to it separately. And you must consider the case of each Defendant separately and individually. If you find a Defendant guilty of one crime, that must not affect your verdict for any other crime or any other Defendant."

Following deliberations, the jury found Skillern guilty of Counts 1-10. Prior to sentencing, Skillern, through Schneider, filed a joint Fed. R. Crim. P. 29 motion for judgment of acquittal and Fed. R. Crim. P. 33 motion for a new trial, arguing that he was entitled to the relief requested because the government did not present any evidence to rebut his defense that he relied in good faith on the advice of counsel in all his dealings with Own Gold. The district court denied the motions.

A probation officer prepared a presentencing investigation report ("PSI"), which assigned Skillern a guideline range of 210 to 262 months' imprisonment. The PSI's calculations noted that, because it did not "appear that his testimony was materially untruthful[, and] . . . his testimony was inculpatory and indicated his guilt," Skillern was not subject to a sentence enhancement for obstruction of justice. The calculations also refused to apply a sentence reduction for acceptance of responsibility because Skillern "entered a not guilty plea [and] put the government to its burden of proof at trial." Finally, the calculations included an enhancement for his role as the leader or organizer of a conspiracy that "was otherwise extensive."

At sentencing, Schneider objected to the PSI's omission of a two-level reduction to Skillern's guideline sentence calculation for acceptance of responsibility. In doing so, he pointed to the PSI's statement that Skillern had testified truthfully and in an inculpatory manner and to the fact that Skillern consistently had indicated that his intent was to make the victims whole. Schneider also objected to the PSI's inclusion of an enhancement for Skillern's alleged leadership role, and he objected to the PSI's omission of a downward variance based upon an incomplete defense of reliance on the advice of counsel as a mitigating factor. The court, however, overruled every objection and adopted the PSI's calculations. After Schneider argued

in mitigation and the government argued for a guideline sentence, the sentencing court varied downward and sentenced Skillern to a total sentence of 120 months' imprisonment. Schneider did not raise any new objections after the imposition of the sentence.

Skillern, through Schneider, directly appealed and raised the following issues: (1) the district court's instruction for Skillern to have no communication with his lawyer concerning substantive issues pertaining to his defense during the overnight recesses from Skillern's three-day testimony ("recess instruction") abrogated Skillern's right to counsel; (2) the evidence was insufficient to convict Skillern of Counts 3-6 because the mailings identified in the indictment—the Certificates of Ownership—were receipts reflecting that a purchase had occurred and not inducements for sales transactions; and (3) the evidence was insufficient to convict Skillern because the government failed to rebut his defense that he relied in good faith on Lewis's advice in all his Own Gold dealings.

We ultimately affirmed Skillern's convictions and total sentence. In doing so, we summarily denied his sufficiency of the evidence arguments. As to his argument that he had been denied counsel by the district court's recess instruction, we held that, under our *en banc* decision in *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986), Skillern had not shown that he was actually deprived of his Sixth Amendment right to counsel because, notwithstanding the district court's recess instruction, the record was "entirely devoid of *any* indication—in *any* form—that Skillern or his attorney planned or wanted to confer about his testimony during the recess." To the contrary, we noted that "Skillern got from the district court exactly what his lawyer asked for—namely, permission to speak 'about matters other than his testimony.'"

The present § 2255 motion followed. After considering the government's response and Skillern's reply, the district court issued an order denying Skillern's § 2255 motion because

Skillern had failed to make the requisite showing of deficiency and prejudice for each of his ineffective-assistance-of-counsel claims. The district court also denied Skillern a certificate of appealability ("COA"). Thereafter, Skillern appealed, and he now moves for a COA.

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). When reviewing a district court's denial of a § 2255 motion, we review findings of fact for clear error and questions of law *de novo*. *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). Absent evidence of clear error, this Court usually considers itself bound by a district court's findings of fact and credibility determinations. *McGriff v. Dep't of Corr.*, 338 F.3d 1231, 1238 (11th Cir. 2003).

To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). 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.* To establish prejudice, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Failure to establish either prong is fatal and makes it unnecessary to consider the other. *Id.* at 697.

2nd Cir Trump Case

Wrong Standard

No ~~discuss~~ consideration of structural error 11th's addt'l argument and denial of structl

A petitioner's conclusory statements, unsupported by specific facts or by the record, are insufficient to state a claim for ineffective assistance of counsel in a collateral proceeding. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Moreover, we have held that "it is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance." *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994).

Claim 1

In his Claim 1, Skillern argued that Schneider was ineffective for failing to move to dismiss the indictment on the basis that it charged crimes that occurred outside the territorial jurisdiction of the United States. He also argued that Schneider, consequently, was ineffective for failing to request a *voir dire* question and jury instruction about the presumption against extraterritoriality and in not objecting to the inclusion of foreign losses at sentencing. Further, Skillern argued that, to the extent that there was an ambiguity regarding the presumption against extraterritoriality's application to the applicable wire fraud and mail fraud statutes, the rule of lenity provided him a "defense" against the charges.

The district court denied Claim 1. It found that Schneider was not deficient in failing to raise the objections and arguments identified by Skillern because: (1) the money laundering statute under which Skillern was charged applied extraterritorially in his case; (2) the conduct relevant to the charges of mail and wire fraud's focus occurred in the United States; and (3) Skillern's argument concerning the rule of lenity was misplaced as the statutes in question were not ambiguous.

The presumption against extraterritoriality holds that, absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). The question

is whether Congress has affirmatively and unmistakably instructed that the statute will apply to foreign conduct. *Id.* "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

The U.S. Supreme Court has pronounced a two-step framework for analyzing extraterritoriality issues. *RJR Nabisco, Inc.*, 136 S. Ct. at 2101. The first step asks whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. *Id.* If the statute is not extraterritorial, then the second step asks whether the case involves a domestic application of the statute by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad. However, if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory. *Id.*

The money laundering statute relevant to this case applies extraterritorially if the conduct prohibited by the statute was "by a United States citizen . . . and the transaction or series of related transactions involve[d] funds or monetary instruments of a value exceeding or monetary instruments of a value exceeding $10,000." 18 U.S.C. § 1956(f). An individual commits mail fraud when he, "having devised or intending to devise any scheme or artifice to defraud . . . deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." 18 U.S.C. § 1341. Similarly, 18 U.S.C. § 1343 provides that an individual commits wire fraud when he, "having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire . . . any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or

artifice." 18 U.S.C. § 1343. Both 18 U.S.C. §§ 1341 and 1343 are silent as to their extraterritorial application.

Here, reasonable jurists would not debate the district court's denial of Skillern's Claim 1. *See Slack*, 529 U.S. at 484. First, the indictment's money laundering charges applied extraterritorially because the indictment charged that Skillern was a citizen of the United States who laundered "funds ... of a value exceeding $10,000." *See* 18 U.S.C. § 1956(f). Accordingly, any argument by Schneider to the contrary in a motion to dismiss the indictment, request for *voir dire* questions, request for jury instructions, or objection at sentencing would have been meritless, and Schneider, thus, was not ineffective in failing to raise such an argument. *See Bolender*, 16 F.3d at 1573.

Second, as to the mail and wire fraud charges, although the relevant statutes are silent as to their extraterritorial application and, thus, are not extraterritorial, Skillern's case involves a permissible domestic application of the statutes. *See RJR Nabisco, Inc.*, 136 S. Ct. at 2101. Specifically, the language of the mail fraud statute criminalizes the depositing of a matter or thing to be sent or delivered by a private carrier for the purposes of executing a scheme to defraud, and the language of the wire fraud statute criminalizes the transmitting by means of wire for the purpose of executing a scheme to defraud. 18 U.S.C. §§ 1341 and 1343. Accordingly, the focuses of the mail and wire fraud statutes are the acts of "depositing" and "transmitting," respectively. *See RJR Nabisco, Inc.*, 136 S. Ct. at 2101. Because the indictment charged that Skillern, to execute a scheme to defraud, deposited Certificates of Ownership for mailing from Orlando, Florida, the conduct relevant to the mail fraud statute in this case occurred in the United States. *Id.* Similarly, the indictment charged that Skillern, in the Middle District of Florida, transmitted funds to execute a scheme to defraud, and, thus, the conduct relevant to the wire

fraud statute in this case also occurred in the United States. *Id.* Accordingly, Skillern's case involved a permissible domestic application of the mail and wire fraud statutes, even if his offenses also involved conduct that occurred abroad, and any extraterritoriality argument in that respect by Schneider in a motion to dismiss the indictment, request for *voir dire* questions, request for jury instructions, or objection at sentencing would have been meritless. *Id.* As such, Schneider was not ineffective in failing to raise such an argument. *See Bolender*, 16 F.3d at 1573.

Finally, Skillern's rule-of-lenity argument was misplaced, as his case did not involve any ambiguous statute. *See United States v. Wright*, 607 F.3d 708, 716 (11th Cir. 2010) (noting that the "rule of lenity" is a "canon of statutory construction that requires courts to construe ambiguous criminal statutes narrowly in favor of the accused."). Accordingly, no COA will issue as to Claim 1.

Claim 2

In his Claim 2, Skillern argued that Schneider had been ineffective for failing to preserve a challenge to the trial court's decision not to question the jury regarding their agreement with the law concerning the defense of good faith reliance on the advice of counsel. The district court denied Claim 2, finding that Skillern failed to establish that Schneider had been deficient because the trial court made clear that the jurors would be instructed on their obligation to follow the law regardless of their agreement with it. The district court also noted that Skillern had failed to establish that his case had been prejudiced by Schneider's performance, as an objection to the trial court's refusal to question the jurors on their agreement with the law would have been meritless.

The purpose of *voir dire* examination is to allow the government and the defendant to evaluate and select an impartial jury capable of fairly deciding the issues presented by applying the law as instructed by the court to the facts as produced during the trial. *United States v. Shavers*, 615 F.2d 266, 268 (5th Cir.1980). The method of conducting the *voir dire* is left to the sound discretion of the trial court and will be upheld unless an abuse of discretion is found. *United States v. Butera*, 677 F.2d 1376, 1383 (11th Cir. 1982). The *voir dire* conducted by the trial court need only provide "reasonable assurance that prejudice will be discovered if present." *United States v. Holman*, 680 F.2d 1340, 1344 (11th Cir. 1982). "It is not an abuse of . . . discretion to refuse to allow inquiries of jurors as to whether they can accept certain propositions of law." *United States v. Ledee*, 549 F.2d 990, 992 (5th Cir. 1977).

Reasonable jurists would not debate the denial of Skillern's Claim 2, as it is foreclosed by binding precedent. *See Slack*, 529 U.S. at 484. Skillern argues that Schneider should have objected to the trial court's refusal to ask the prospective jurors: "The law says that good faith reliance on the advice of an attorney is a complete defense to the charges in the indictment . . . . Does anyone disagree with this law?" However, binding precedent dictates that the trial court's refusal to allow inquiries, such as Skillern's proposed inquiry, of jurors as to whether they can accept certain propositions of law is not an abuse of discretion. *See Ledee*, 549 F.2d at 992. Accordingly, Schneider was not ineffective in failing to challenge the trial court's refusal to ask the prospective jurors whether they agreed with the law concerning the defense of good faith reliance on the advice of counsel because any such objection would have been meritless. *See Bolender*, 16 F.3d at 1573. Thus, no COA will issue as to Claim 2.

Claim 3

In his Claim 3, Skillern argued that Schneider was ineffective for failing to object to the testimony of Inspector Vazquez regarding the foreign wiretaps he conducted in relation to his investigation of Cassim and Camargo. He argued that Schneider should have objected because the government failed to show that the foreign wiretaps met the requirements of 18 U.S.C. § 2510 *et seq.*

The district court denied Claim 3, finding that the wiretaps to which Inspector Vazquez testified were not subject to the statutory requirements of United States law. The court also found that neither of the two exceptions to the rule exempting foreign wiretaps from the statutory requirements of United States law were present in Skillern's case.

Evidence obtained by foreign police officers from searches carried out in their own countries is generally admissible in United States courts regardless of whether the search complied with United States legal requirements. *See United States v. Rosenthal*, 793 F.2d 1214, 1230 (11th Cir. 1986) (holding that wiretaps obtained by Colombian law enforcement officials in Colombia were admissible evidence regardless of whether the wiretaps complied with the Fourth Amendment). Two exceptions exist to this general rule. *Id.* at 1230-31. The first exception provides for the exclusion of evidence obtained by foreign police officers if the conduct of the foreign officers shocks the conscience of the American court. *Id.* The second exception provides for the exclusion of the evidence where American law enforcement officials substantially participate in the foreign search, or, if the foreign authorities conducting the search were acting as agents for their American counterparts. *Id.* at 1231.

Reasonable jurists would not debate the district court's denial of Claim 3 because any objection Schneider would have raised to the introduction of any evidence obtained through the

foreign wiretaps would have been meritless. *See Slack*, 529 U.S. at 484; *Bolender*, 16 F.3d at 1573. The wiretaps that Inspector Vazquez conducted in Spain were not subject to the requirements of 18 U.S.C. § 2510. *See Rosenthal*, 793 F.2d at 1230. Moreover, the circumstances of this case do not give rise to either of the exceptions to the general rule that evidence obtained from foreign searches is admissible in United States courts regardless of the search's compliance with American legal requirements. *See id.* at 1230-31. First, the manner in which Inspector Vazquez obtained the foreign evidence admitted at trial does not shock the conscious of this Court, as he testified that he filed an application to conduct the wiretaps with the appropriate Spanish authority before intercepting the calls in question. *Id.* Second, no American law enforcement officers participated in the foreign wiretaps. *See id.* at 1231. Thus, Schenieder was not ineffective in failing to challenge Inspector Vazquez's testimony concerning the foreign wiretaps, and no COA will issue as to Claim 3.

Claim 4

In his Claim 4, Skillern argued that Schneider was ineffective for failing to argue for acquittal on Counts 3-6 on the basis that the Certificates of Ownership that Own Gold mailed to its clients, the only mailings identified in support of Counts 3-6 in the indictment, were not inducements for sales transactions and, thus, were not part of the execution of the fraud scheme. He also argues that Schneider was ineffective for failing to raise the issue on direct appeal. The district court denied Claim 4, finding that the Certificates of Ownership were part of the execution of the fraudulent scheme attributed to Own Gold because they were used to lull the victims into complacency and thereby avoid detection.

"Mail fraud consists of the following elements: (1) an intentional participation in a scheme to defraud a person of money or property, and (2) the use of the mails in furtherance of

the scheme." *United States v. Sharpe,* 438 F.3d 1257, 1263 (11th Cir.2006) (quotations omitted). In order to fall within the scope of 18 U.S.C. § 1341, a mailing must constitute part of the execution of the fraud. *United States v. Evans,* 473 F.3d 1115, 1118–19 (11th Cir.2006). "To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the scheme or a step in [the] plot." *Schmuck v. United States,* 489 U.S. 705, 710-11 (1989) (citations and quotations omitted).

However, after a scheme has reached fruition, mailings generally cannot have been "for the purpose of executing" the scheme, as 18 U.S.C. § 1341 requires. *United States v. Hill*, 643 F.3d 807, 858 (11th Cir. 2011). Under the "lulling exception" to that rule, mailings are sufficiently a part of the execution of a fraudulent scheme if they are used to lull the scheme's victims into a false sense of security that they are not being defrauded, thereby allowing the scheme to go undetected. *Hill*, 643 F.3d at 859. A lulling mailing may be "incident to an essential part of the scheme" even after the fraud has been successfully perpetrated if the mailing is critical to conceal the scheme. *Id.* When "the scheme includes not only obtaining the benefit of the fraud but also delaying detection of the fraud by lulling the victim after the benefit has been obtained, the scheme is not fully consummated, and does not reach fruition, until the lulling portion of the scheme concludes." *United States v. Evans*, 473 F.3d 1115, 1120 (11th Cir. 2006).

Here, reasonable jurists would not debate the district court's denial of Claim 4 because the Certificates of Ownership identified in the indictment were lulling mailings and, consequently, sufficiently part of the execution of Own Gold's fraudulent scheme. *See Slack*, 529 U.S. at 484; *Hill*, 643 F.3d at 859. Specifically, the government presented evidence at trial that the victims of Own Gold's schemes believed that their receipt of the Certificates of

Ownership meant that they were entitled to the gold they had purchased from Own Gold, as each Certificate displayed the quantity of gold purchased, Nelson's signature, and Own Gold's company seal. Thus, the mailed Certificates of Ownership advanced Own Gold's fraud scheme because they lulled customers into a false sense of security that their gold ownership was safe and that Own Gold's operations were legitimate. *See Hill*, 643 F.3d at 859. As such, any motion for acquittal or challenge on direct appeal by Schneider on the grounds that the Certificates of Ownership were not mailed in furtherance of the scheme to defraud would have been meritless, and Schneider was not ineffective for failing to raise such a motion or challenge. *See Bolender*, 16 F.3d at 1573. No COA will issue as to Claim 4.

Claim 5

In his Claim 5, Skillern argued that Schneider had been ineffective for failing to argue for acquittal on Counts 7-10 in his Rule 29 motion on the basis that "the internal transactions between Own Gold, LLC and Shukr were insufficient to constitute wire fraud" because "the scheme to defraud if any was complete on the wire transfer from the purchaser." The district court denied Claim 5, finding that "[t]he wires to the victims were the antepenultimate transactions in the wire fraud scheme; the wires between the perpetrators, the penultimate transactions, with the withdrawal and dissipation of funds by the fraudsters being the ultimate transactions." The court found that, because the government proved those actions at trial, Schneider was not ineffective for declining to move for acquittal on Counts 7-10 or to preserve the issue for appeal.

To prove the crime of wire fraud under 18 U.S.C. § 1343, the government must establish that defendant "(1) intentionally participated in a scheme to defraud; and (2) used wire communications to further that scheme." *United States v. Ross*, 131 F.3d 970, 984 (11th

Cir. 1997) (quotations omitted). In that regard, "[t]he relevant question at all times is whether the [wire] is part of the execution of the scheme as conceived by the perpetrator at the time." *Schmuck v. United States*, 489 U.S. 705, 715 (1989). The wire transmission itself "need not be essential to the success of the scheme to defraud." *United States v. Hasson*, 333 F.3d 1264, 1273 (11th Cir. 2003). Rather, the wire transmission is "for the purpose of executing the scheme to defraud if it is incident to an essential part of the scheme or a step in the plot." *Id.* (quotations omitted).

Reasonable jurists would not debate the district court's denial of Claim 5. *See Slack*, 529 U.S. at 484. The indictment charged and the government presented evidence at trial that the wires sent by Skillern, including those he sent from Own Gold to Shukr, were for the purpose of (1) paying employees and the telemarketing agency and (2) enriching the codefendants. As such, the wires in question were, at least, incidental to the essential parts of the scheme of keeping Own Gold's operation active—the perpetuation of the fraud scheme—and paying out the codefendants—the ultimate objective of the fraud scheme. *See Hasson*, 333 F.3d at 1273. Thus, contrary to Skillern's argument, the wire transfers from Own Gold to Shukr were for the purpose of executing the scheme to defraud in this case, and Schneider was not ineffective for failing to raise an argument to the contrary in his Rule 29 motion for judgment of acquittal. *See id.*; *Bolender*, 16 F.3d at 1573. Accordingly, no COA will issue as to Claim 5.

Claim 6

In his Claim 6, Skillern argued that Schneider had been ineffective for failing to argue that the jury instructions given for the mail fraud and wire fraud charges lessened the government's burden of proof. Specifically, he argued that the instructions wrongly required

only that the mailing or wire must be "meant to help carry out the fraud," rather than "for the purpose of executing the scheme to defraud."

The district court denied the claim, finding that Skillern failed to show that the language of the instructions given by the trial court differed in a significant manner from the language he identified. It also found that Skillern failed to establish that Schneider was deficient in failing to object to the jury instructions because they accurately informed the jury of the elements of the crimes that the government was required to prove. Further, the court noted that Skillern failed to show any prejudice, as he did not show that any error in the instruction contributed to the jury's verdict.

A jury instruction which omits an element of the charged offense is generally subject to a harmless error analysis. *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002). Under that analysis, a defendant is entitled to habeas relief when an error results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 682. "If, when all is said and done, the [court's] conviction is sure that the error did not influence, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 683 (quotations omitted). The relevant statutes for both mail fraud and wire fraud provide that the prohibited acts violate the statute if they are committed "for the purpose of executing" a scheme or artifice to defraud. 18 U.S.C. §§ 1341 and 1343.

Reasonable jurists would not debate the district court's denial of Skillern's Claim 6. *See Slack*, 529 U.S. at 484. First, Schneider was not deficient in objecting to the given mail and wire fraud jury instructions because the instructions given by the trial court tracked the language of the relevant statutes, albeit in a simpler manner. *See* 18 U.S.C. §§ 1341 and 1343; *United States v. Hurn*, 368 F.3d 1359, 1362 (11th Cir.2004) ("[A]n instruction that tracks the statute's text will

almost always convey the statute's requirements."). Nevertheless, notwithstanding any deficient performance by Schneider, Skillern failed to establish that he was prejudiced by the mail and wire fraud jury instructions, as he did not show that any error in the instructions had a substantial and injurious influence in the jury's verdict. *See Ross*, 289 F.3d at 681. Specifically, the government introduced evidence to support a finding that the mailings and wires by Skillern were "meant to help carry out the fraud" that he and his codefendants had planned. Given the similarity in substance between the given instructions and the statutory language, absent new evidence of the jury members' deliberations, any argument by Skillern that the jury would have acquitted him of the mail and wire fraud charges but for the language of the given instructions is purely speculative. Because Skillern, consequently, has failed to establish that he was prejudiced by any error on Schneider's behalf, no COA will issue as to Claim 6. *See Strickland*, 466 U.S. at 694, 697; *Tejada*, 941 F.2d at 1559.

Claim 7

In his Claim 7, Skillern argued that Schneider had been ineffective for failing to properly argue or preserve issues related to his chosen defense that he acted in good faith on the advice of counsel and the advice of the Spooner Report. The district court denied this claim because, contrary to Skillern's arguments, "counsel spend a great deal of his defensive strategy pressing the claim that Skillern relied on the advice of counsel."

Here, reasonable jurists would not debate the district court's denial of Claim 7 because the claim is directly refuted by the record. *See Slack*, 529 U.S. at 484; *Tejada*, 941 F.2d at 1559. Schneider presented Skillern's chosen defense of good faith reliance on advice of counsel during his opening statement, closing argument, and motion for acquittal. Moreover, Schneider also requested and received a jury instruction on the defenses of both good faith generally and good

faith reliance on counsel's advice. Finally, Schneider also presented evidence that Skillern relied on the "Spooner Report," which he claimed showed that gold could be found in Nevada. Accordingly, the district court correctly denied Claim 7 because it was directly refuted by the record, and no COA will issue as to the claim. *See Tejada*, 941 F.2d at 1559.

Claim 8

Claim 8(a)

In his Claim 8(a), Skillern argued that Schneider had been ineffective for failing to object to the district court's recess instruction. He argued that this deficiency on Schneider's behalf prejudiced his case because: (1) he could not prepare to adequately respond to the government's arguments; (2) he could not adequately present evidence of Nelson's responsibility for all criminal conduct; (3) he could not discuss with Schneider his upcoming testimony about Nelson's responsibility and evidence of continued mining efforts in Nevada; and (4) he could not discuss with Schneider the failure to call Margaret Clifton, Michael Clifton, and Wunderlich as witnesses.

The district court denied Skillern's Claim 8(a), noting that this Court already had visited the matter of limiting Skillern's discussions with Schneider and had concluded that Skillern suffered no constitutional deprivation of his right to counsel. Accordingly, "[a]s the Eleventh Circuit ultimately found that counsel's action led to no constitutional deprivation, Skillern cannot meet the *Strickland* prejudice prong by showing that he was prejudiced as a result of counsel's performance."

Here, reasonable jurists would not debate the district court's denial of Claim 8(a). *See Slack*, 529 U.S. at 484. Skillern argued that Schneider was ineffective for failing to object to the court's recess instruction, as it deprived him of his Sixth Amendment right to counsel. However,

as we previously concluded in Skillern's direct appeal, the recess instruction did not violate Skillern's Sixth Amendment right. Thus, any objection by Schneider to the contrary would have been meritless, and Schneider, consequently, was not ineffective for failing to raise such an objection. *See Bolender*, 16 F.3d at 1573. Accordingly, no COA will issue as to Claim 8(a).

Claim 8(b)

In his Claim 8(b), Skillern argued that Schneider had been ineffective for failing to object to the district court's request that Skillern leave the courtroom for a period of time during the lunch break on the eleventh day of his trial. The district court denied the claim, finding that, even if Skillern should have remained in the courtroom, he had not alleged and could not show any prejudice related to his absence from the courtroom for the short period in question.

Generally, "the defendant must be present at . . . every trial stage." Fed. R. Crim. P. 43(a)(2). However, "[n]ot every violation of Rule 43(a) requires reversal." *United States v. Odoni*, 782 F.3d 1226, 1233 (11th Cir. 2015) (citation omitted). Violations of Rule 43(a) are reviewed for harmless error, looking to whether the defendant was prejudiced by the violation. *Id.*; *Rogers v. United States*, 422 U.S. 35, 40 (1975) ("[A] violation of Rule 43 may in some circumstances be harmless error[.]"

Reasonable jurists would not debate the district court's denial of Claim 8(b) because Skillern failed to allege how any error by Schneider in failing to object to the district court's request that Skillern leave the courtroom during the lunch break on the eleventh day of trial prejudiced his case. *See Slack*, 529 U.S. at 484; *Strickland*, 466 U.S. at 697. As such, the district court did not err in denying the conclusory claim. *See Tejada*, 941 F.2d at 1559. Moreover, to the extent that Skillern attempted to attribute the prejudice raised in his Claim 8(a) to this claim, he still failed to establish that his case had been prejudiced by the discussion the attorneys and

the trial court had during the lunch break, as it did not concern or affect his testimony or Scheider's decision not to call Margaret Clifton, Michael Clifton, or Wunderlich as witnesses. Further, the conversation the attorneys and the trial court had during the lunch break in Skillern's absence did not affect any testimony presented at trial, because it merely served to clarify that Lewis would not be testifying about any conversation with United Kingdom investigators, as such a conversation did not occur. Any Rule 43(a) error in Skillern's case was harmless, and Schneider was not ineffective in failing to argue to the contrary. *See Odoni*, 782 F.3d at 1233; *Boldender*, 16 F.3d at 1573. Thus, no COA will issue as to Claim 8(b).

Claim 9

In his Claim 9, Skillern argued that Schneider was ineffective for failing to call Margaret Clifton, Michael Clifton, and Wunderlich as witnesses during his trial. He argued that the witnesses' testimonies would have spoken to Nelson's lies, frauds, and misrepresentations and to the fact that Skillern made complete disclosures to and at all times acted on the advice of Lewis. In support of Claim 9, Skillern attached affidavits from each of the proposed witnesses to his § 2255 motion. Margaret Clifton, Skillern's ex-wife and an employee of Own Gold, stated that Skillern demonstrated sound ethics and character, that he relied on his "fully informed" counsel's advice, and that Nelson was the only individual who committed fraud through Own Gold. Michael Clifton, a Director of Own Gold, similarly stated that Skillern relied on Nelson to operate Own Gold, on the Spooner Report for the valuation of Own Gold's mining properties and claims, and on Lewis's legal advice that Skillern was not responsible for Own Gold because he was not an Officer, Director, or Manager of the company. Michael Clifton also stated that he knew Skillern to be ethical, fair, honest, and of good character. Finally, Wunderlich, a Director and the President of Own Gold, stated that Nelson made misrepresentations and was responsible

for the Own Gold fraud and that Skillern had integrity and a good character. All three individuals also indicated that they were at the courthouse and prepared to testify on Skillern's behalf during the trial, but that Schneider did not call them as witnesses.

The district court denied the claim, noting that counsel's decision whether to call a witness is a strategic one, and that Skillern had not shown that the decision not to call the identified witnesses was patently unreasonable. The court also found that Skillern's trial was not prejudiced by Schneider's failure to call the witnesses because their testimony would have been cumulative to the testimonies provided by Lewis and Skillern.

"Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004). Therefore, "[e]ven if counsel's decision [to not call a certain witness] appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quotations omitted).

Here, reasonable jurists would not debate the district court's denial of Claim 9. *See Slack*, 529 U.S. at 484. Schneider's decision not to call Margaret Clifton, Michael Clifton, and Wunderlich as witnesses during Skillern's trial is the type of strategic decision that we will seldom second guess. *See Conklin*, 366 F.3d at 1204. Moreover, although Skillern asserts that these proposed witnesses could have aided his defense, he has failed to demonstrate that Schneider's strategy was patently unreasonable, especially considering that their proposed testimonies would have been cumulative to the testimony already submitted to the jury. Specifically, Skillern and Lewis testified to the fact that Nelson was the individual responsible

for the management of and, consequently, fraud by Own Gold, and that Skillern had been acting based on Lewis's advice at all times. The jury considered this information and still found Skillern guilty on Counts 1-10. Thus, Skillern failed to establish that his case was prejudiced by Schneider's decision not to present that same testimonial evidence through Margaret Clifton, Michael Clifton, and Wunderlich. *See Strickland*, 466 U.S. at 694. As such, no COA will issue as to Claim 9.

Claim 10

In his Claim 10, Skillern argued that Schneider had been ineffective for failing to call an expert witness "who could have rebutted the government's witness Chatterton with regard to the methodology of Chatterton's assay of the Nevada claims." In support, he argued only that the government's assay evidence was flawed and that "[t]his evidence was available to Atty. Schneider but unused." The district court denied Claim 10 as "too vague to show entitlement to relief," because Skillern failed to identify any expert witness that could have rebutted Chatterton's testimony or to present evidence showing that a prospective witness would have testified in his favor.

Here, reasonable jurists would not debate the district court's denial of Skillern's Claim 10 because the claim was conclusory and unsupported by specific facts or arguments. *See Tejada*, 941 F.2d at 1559. Notably, Skillern did not identify any expert witness that Schneider should have called as a witness, and he did not specify how Chatterton's methodology or opinion was "flawed." Moreover, as previously noted, "which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision" that we will seldom second guess. *See Conklin*, 366 F.3d at 1204. Accordingly, Skillern failed to establish that Schneider acted deficiently or that any deficiency prejudiced his case, and no COA will issue as to Claim 10.

Claim 11

In his Claim 11, Skillern argued that "Schneider failed to prepare witness Edward Lewis, resulting in Lewis not recalling a critical part of testimony regarding a negative assay." In support, Skillern attached an email from Lewis, sent three years after Skillern's trial, in which Lewis contradicts his testimony and states that he remembered a "discussion of [] an assay report that on its face was unfavorable as it related to Nevada." However, Lewis's email also emphasized that he "continually insisted that Nevada was irrelevant to the company's current activities and my entire focus was on Montana."

The district court denied Claim 11 because Skillern could not show that he was prejudiced by Schneider's performance in preparing Lewis for testimony because Lewis maintained, as he did throughout his trial testimony, that Nevada was of no importance to him and he only focused on Own Gold's Montana mining operation. Further, the court found that there were other key pieces of information that Lewis did not have that demonstrated that he had not been informed fully in advising Skillern concerning Own Gold's operations. The court also noted in detail that Skillern had not be able, post-trial, to rehabilitate Lewis's testimony in those important respects.

Reasonable jurists would not debate the district court's denial of Claim 11. *See Slack*, 529 U.S. at 484. Notwithstanding any prejudice determination by the district court, Skillern made no specific allegation concerning how Schneider prepared Lewis or how he should have prepared Lewis. Rather, the entirety of his Claim 11 consists of the assertion that "Schneider failed to prepare witness Edward Lewis, resulting in Lewis not recalling a critical part of testimony regarding a negative assay." Thus, the claim is conclusory and fails to establish that

Schneider was deficient or offered ineffective assistance of counsel. *See Tejada*, 941 F.2d at 1559.

Even so, reasonable jurists also would not debate the district court's determination that Skillern failed to establish that his case had been prejudiced by Schneider's alleged deficiency. Even if Schneider had prepared Lewis to testify that he remembered discussing a negative assay concerning the Nevada mine, Lewis maintains now, as he did during Skillern's trial, that the Nevada mine did not matter. Thus, Skillern failed to establish that the proposed change in Lewis's testimony would have changed the outcome of his trial. *See Strickland*, 466 U.S. at 694. Accordingly, no COA will issue as to Claim 11.

Claim 12

In his Claim 12, Skillern argued that Schneider was ineffective for entering into a JDA with Nelson's defense team on his behalf without permission and, consequently, for failing to properly present his chosen defense that Nelson was the responsible party for Own Gold's mismanagement and offenses. In support, Skillern alleged that "from the date of the first meeting and up until the day before trial," Schneider led him to believe that his defense "would be based on disclosing complete facts regarding [Nelson's] failures, lies, frauds, and responsibilities for [] Own Gold." He stated that his defense was that he "tried, within the limits set by [his] attorneys and by corporate law, to contain and control Nelson despite his obstructions for the good of the company and all its customers and shareholders but ultimately could not."

Skillern further alleged that the day before his trial, Schneider "unilaterally" decided not to present key information about Nelson to the jury. He further stated that he learned that Schneider decided this based on the JDA he entered with Nelson's defense team without Skillern's approval. Skillern argued that Schneider also told him that Schneider had to "put

[Skillern] in the middle of this things," and that "to bring up Nelson's malfeasance in trial would violate Nelson's constitutional rights under the parties' [JDA]."

The government responded to Skillern's Claim 12 with an affidavit from Schneider. Therein, Schneider attested that he met with Skillern almost every Sunday morning and spent "countless hours reviewing emails, discussing witnesses and strategies" after Skillern was charged. He stated that a problem in Skillern's chosen defense was that, although Skillern was labeled a consultant, he was "paid a great deal of money on each sale of gold" and was involved in almost every decision made by the company. Schneider also attested that he told Skillern "from the outset . . . that his only possible defense was that he relied in good faith on the advice of his attorney." He stated that Skillern's direct examination necessarily had to bring Skillern into the business—rather than distance him from it—because, in order to present a defense of good faith reliance on the advice of counsel, "we had to show [] Lewis's knowledge of the events, Lewis's advice, and Skillern's response and reliance on that advice." Schneider also noted that the evidence presented at trial for the defense was "double edged" because, although it "told the story of Nelson's mismanagement and incompetence, it also told the story of Skillern's involvement in the decisions that the company were making." Finally, Schneider explained that, although he did not believe that any JDA was ever executed, the only JDA discussed included only Cassim and Camargo, not Nelson, because Schneider did not trust Nelson to go to trial rather than plead guilty and Schneider wanted to have the option of blaming Nelson at trial for the failure of the company.

The district court denied Claim 12. In doing so, it made the factual finding that "there was never a [JDA] between Skillern and Nelson's defense teams." It also found that Schneider's well-reasoned choice of defense strategy was entitled to deference. The court also determined

that nothing about Schneider's presentation and mastery of the record in Skillern's case suggested that he was not prepared and committed to Skillern's defense.

Reasonable jurists would not debate the district court's denial of Claim 12. *See Slack*, 529 U.S. at 484. We are bound by the district court's factual determination that Schneider did not enter into a JDA with Nelson's defense team because Skillern has not refuted the finding and the record otherwise does not contain any indication that the finding was clearly erroneous. *See McGriff*, 338 F.3d at 1238. As such, because Skillern's Claim 12 was dependent on his argument that Schneider improperly entered into a JDA with Nelson's defense team, the claim is meritless. *See Tejada*, 941 F.2d at 1559. Nevertheless, the district court did not err in its determination that Schneider was not deficient in his decision to avoid focusing Skillern's defense on Nelson's behavior, as the record indicates that Schneider thoroughly prepared for Skillern's defense and considered the "double edged" nature of focusing on Nelson's mismanagement and incompetence. Accordingly, Schneider's defense strategy was not so seriously erroneous that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and no COA will issue as to Claim 12. *See Strickland*, 466 U.S. at 687.

Claim 13

In his Claim 13, Skillern argued that Schneider had been ineffective for failing to move for a severance of his trial from Nelson's trial. He argued that: (1) the joint trial prejudiced his ability to present a complete defense to the charges in the indictment; (2) Nelson would have exculpated him in a separate trial but would not testify in a joint trial; and (3) "the 'spill over' effect of Nelson's inculpatory conduct may have prevented the jury from sifting through the evidence to make an individual determination as to [Skillern's] guilt."

The district court denied Claim 13, finding that it would not have granted a motion to sever Skillern's trial from Nelson's trial, and "counsel is not ineffective in deciding to forgo a motion likely to fail." The court also found that Skillern had failed show prejudice, as the trial court instructed the jury to consider each offense and defendant separately and juries are presumed to be able to compartmentalize evidence.

It is preferable for persons who are charged together to also be tried together, particularly in conspiracy cases. *United States v. Francis*, 131 F.3d 1452, 1459 (11th Cir. 1997). In considering a motion to sever, the district court must determine whether the prejudice inherent in a joint trial outweighs the public's interest in judicial economy. *Id.* To prevail on such a claim, a defendant carries the heavy burden of showing that the joint trial prejudiced his defense to the extent that the jury was unable to make an individualized determination of guilt as to each defendant. The defendant must show that the prejudice was specific and compelling. *Id.*

"A defendant does not suffer compelling prejudice, sufficient to mandate a severance, simply because much of the evidence at trial is applicable only to co-defendants." *United States v. Schlei*, 122 F.3d 944, 984 (11th Cir. 1997). A defendant satisfies the compelling prejudice requirement by showing that the jury "was unable to sift through the evidence and make an individualized determination as to each defendant." *Id.* (quotations omitted). However, a court guards against any such potential prejudice by instructing the jury that "[e]ach offense, and the evidence pertaining to it, should be considered separately" and that "each defendant should be considered separately and individually." *Id.* Moreover, "the strong presumption is that jurors are able to compartmentalize evidence by respecting limiting instructions specifying the defendants against whom the evidence may be considered." *United States v. Blankenship*, 382 F.3d 1110, 1123 (11th Cir. 2004).

The assertion of mutually antagonistic defenses may satisfy the test for compelling prejudice. *United States v. Perez-Garcia*, 904 F.2d 1534, 1547 (11th Cir. 1990). However, to warrant severance, defenses must be "antagonistic to the point of being irreconcilable or mutually exclusive." *Id.*

Here, reasonable jurists would not debate the district court's denial of Claim 13 because Skillern failed to establish that he had been prejudiced by Schneider's failure to move for a severance from Nelson's trial. *See Slack*, 529 U.S. at 484; *Strickland*, 466 U.S. at 697. In giving its instructions to the jury in Skillern's case, the trial court cautioned the jury to (1) consider each crime and the evidence relating to it separately, and (2) consider the case of each codefendant separately and individually. That precaution served to guard against any potential compelling prejudice that would have warranted a severance from Nelson's trial. *See Schlei*, 122 F.3d at 984. For that reason, and because Skillern has not presented any argument to rebut the strong presumption that the jurors in his case were able to compartmentalize evidence by respecting the trial court's limiting instruction, Skillern failed to establish that he would have been entitled to a severance of his trial from Nelson's. *See Blankenship*, 382 F.3d at 1123. Moreover, Skillern's argument that he suffered compelling prejudice sufficient to warrant a severance due to his inability to present a complete defense to the charges in the indictment also fails because he has not demonstrated that any defense he wished to raise was irreconcilable with or mutually exclusive to Nelson's chosen defense. *See Perez-Garcia*, 904 F.2d at 1547. Thus, because Skillern would not have been entitled to a severance, Schneider was not ineffective for failing to argue to the contrary, and no COA will issue as to Claim 13. *See Bolender*, 16 F.3d at 1573.

Claim 14

In his Claim 14, Skillern argued that Schneider had been ineffective for failing to argue on appeal that the district court erroneously applied an organizer or leader enhancement and erroneously refused to apply an acceptance-of-responsibility reduction to his guideline sentence calculations. The district court found that Skillern had waived his Claim 14 because he provided no argument or support for why the adjustments were not correctly applied to him. Nonetheless, the court alternatively found that Skillern had failed to show that he was prejudiced by any ineffective assistance on Schneider's behalf because (1) the evidence at trial demonstrated that Skillern qualified for the organizer or leader enhancement to his sentence, and (2) Skillern was not entitled to a reduction for acceptance of responsibility because he had put the government to its burden of proof at trial and persisted in his innocence past the trial.

"A district court's enhancement of a defendant's offense level based on his role as an organizer or leader is a finding of fact reviewed for clear error." *United States v. Rendon*, 354 F.3d 1320, 1331 (11th Cir. 2003). Similarly, we review the district court's denial of an acceptance-of-responsibility reduction under U.S.S.G. § 3E1.1 for clear error. *United States v. Tejas*, 868 F.3d 1242, 1247 (11th Cir. 2017). A factual finding at sentencing is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Barrington*, 648 F.3d 1178, 1195 (11th Cir. 2011) (quotations omitted).

The Sentencing Guidelines provide that a four-level enhancement may be applied if "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). In light of the use of the disjunctive in § 3B1.1(a), we have held that the four-level enhancement may be applied even if the defendant's

criminal activity did not involve five or more people, so long as it was "otherwise extensive." *United States v. Hall*, 996 F.2d 284, 287 (11th Cir. 1993). In *Hall*, this Court upheld a § 3B1.1(a) enhancement based on the district court's alternative finding that the fraudulent scheme, which brought in over $200,000, was "otherwise extensive." *Id.*

In determining whether a § 3B1.1(a) enhancement applies, the district court should consider: "(1) exercise of decision-making authority, (2) nature of participation in the commission of the offense, (3) recruitment of accomplices, (4) claimed right to a larger share of the fruits of the crime, (5) degree of participation in planning or organizing the offense, (6) nature and scope of the illegal activity, and (7) degree of control and authority exercised over others." *United States v. Rendon*, 354 F.3d 1320, 1331-32 (11th Cir. 2003) (quotations omitted). The defendant does not have to be the "sole leader or kingpin of the conspiracy in order to be considered an organizer or leader within the meaning of the Guidelines." *Id.* at 1332.

A two-level reduction applies if the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). The Guidelines commentary provides that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1(a), comment. (n.2). It further states that, if a defendant proceeds to trial, acceptance-of-responsibility reductions should only occur in "rare situations," such as "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt." *Id.* The district court is in an unique position to evaluate whether a defendant has accepted responsibility for his acts, and we will not set aside such a determination "unless the facts in the record clearly establish that the defendant has accepted responsibility." *United States v. Moriarty*, 429 F.3d 1012, 1022-23 (11th Cir. 2005).

As an initial matter, Skillern's Claim 14 is arguably conclusory, and due to be denied on that basis, because Skillern failed to support the claim in his § 2255 motion with specific facts or arguments. *See Tejada*, 941 F.2d at 1559. However, because a review of the record clearly reveals the basis for the claim, and because Skillern is entitled to a liberal interpretation of his pleadings as a *pro se* appellant, we will address the merits of the claim. *See id.*; *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003) ("*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed.") (quotations omitted). However, even turning to the merits of Claim 14, reasonable jurists would not debate the district court's denial of the claim because Skillern failed to establish that any alleged error by Schneider in failing to raise the sentencing errors on direct appeal prejudiced his case. *See Slack*, 529 U.S. at 484; *Strickland*, 466 U.S. at 694.

First, a review of the record evidence does not compel a definite and firm conviction that the trial court erred in finding that Skillern was entitled to a leader or organizer enhancement to his guideline sentencing calculations. *See Barrington*, 648 F.3d at 1195. The evidence presented at trial established that Skillern and Nelson ran Own Gold and directed its employees and marketing partners to fraudulently sell gold over a period of more than two years, making $7.3 million in fraudulent sales. Thus, the evidence supported the sentencing court's finding that Skillern had a leadership role in a criminal activity that was "otherwise extensive." *See Hall*, 996 F.2d at 287. As such, any argument to the contrary on direct appeal would have been meritless, and Skillern's appeal was not prejudiced by Schneider's failure to raise the meritless argument. *See Bolender*, 16 F.3d at 1573.

Second, Skillern was not entitled to a sentence reduction for acceptance of responsibility because (1) he put the government to its burden of proof at trial by denying the essential factual

elements of guilt, was convicted, and still maintained his innocence, and (2) the facts in the record do not clearly establish that he accepted responsibility. *See* U.S.S.G. § 3E1.1(a), comment. (n.2); *Moriarty*, 429 F.3d at 1022-23. Thus, any argument to the contrary would have been meritless, and Schneider's failure to raise the argument did not constitute ineffective assistance. *See Bolender*, 16 F.3d at 1573. Accordingly, because Skillern failed to establish that Schneider was ineffective in failing to raise the identified sentencing issues on direct appeal, no COA will issue as to Claim 14.

As such, Skillern's motions for a COA are DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

UNITED STATES CIRCUIT JUDGE