Appendix "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12842-E

MARKENTZ BLANC,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Markentz Blanc moves for certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence and the denial of his motion for reconsideration. To merit a certificate of appealability, Blanc must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Blanc's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Appendix "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12842-E

MARKENTZ BLANC,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and LUCK, Circuit Judges.

BY THE COURT:

Markentz Blanc has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's order dated February 10, 2022, denying his motion for a certificate of appealability, in his appeal from the district court's order dismissing his *pro se* 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Because Blanc has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED. Blanc's motion for leave to file the motion for reconsideration out of time is GRANTED to the extent that the motion for reconsideration was considered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-CV-22725-GRAHAM
Case No. 14-CR-20104-ROSENBERG (GRAHAM)

MARKENTZ BLANC,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THE CAUSE came before the Court on Movant Markentz Blanc's ("Movant") *pro se* Amended Motion to Vacate, pursuant to 28 U.S.C. § 2255 ("Amended § 2255 Motion"), attacking the constitutionality of his convictions and sentences for conspiracy to possess with intent to distribute 280 grams or more of cocaine base, three counts of possession with intent to distribute a detectable amount of cocaine base, possession of a firearm in furtherance of a drug trafficking crime, felon in possession of a firearm, possession of fifteen or more unauthorized access devices, two counts of aggravated identity theft, and conspiracy to commit wire fraud, entered following a jury a verdict in Case No. 14-CR-20104-GRAHAM.

THE COURT has considered the record, Movant's final Amended § 2255 Motion [CV ECF No. 18], the Government's Response to the Court's show cause order with numerous supporting exhibits thereto [CV ECF No. 22],[1] Movant's Reply [CV ECF No. 26], and the relevant

[1] Rather than respond to the operative, final amended § 2255 Motion [CV ECF No. 18] as ordered, the Government's response addressed the claims raised in Movant's initial filing. [CV ECF No. 22]. The Response is woefully inadequate, commingling in conclusory fashion multiple claims, and then completely failing to address Movant's *Rehaif* and *Davis* claims, grounds 10 and 11 of Movant's operative Amended

pleadings filed in the underlying criminal case, of which the Court takes judicial notice pursuant to Fed. R. Evid. 201 and *Nguyen v. United States,* 556 F.3d 1244, 1259 n.7 (11th Cir. 2009) (citing *United States v. Glover,* 179 F.3d 1300, 1302 n.5 (111th Cir. 1999), and is otherwise fully advised in the premises. For the reasons set forth below, Movant's Amended § 2255 Motion is DENIED.

I. BACKGROUND

Criminal Case No. 14-CR-20104-ROSENBERG (GRAHAM)

Movant was charged by Indictment with conspiracy to possess with intent to distribute 280 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 (Count 1), five counts of possession with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 18 U.S.C. § 2 (Counts 7-11), possession of a firearm in furtherance of a drug trafficking crime, as charged in Count 11, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 12), two counts of felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g) (Counts 14, 16), five counts of possession of fifteen or more unauthorized access devices, in violation of 18 U.S.C. § 1028A(a)(1) (Counts 18-21, 25), and conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 (Count 24), entered in *United States v. Blanc,* No. 14-CR-20104-ROSENBERG (GRAHAM) (S.D. Fla. 2014).[2] [CR ECF No. 32]. Prior to trial, Movant engaged in motion practice, filing a motion to suppress the wiretapped phone calls from Movant's device. [CR ECF No. 185]. Following an evidentiary

§ 2255 Motion. Thus, this Court has only considered those arguments that are relevant to the claims raised by Movant in his operative Amended § 2255 Motion [CV ECF No. 18].

[2] Co-conspirators Wisvelt Voltaire ("Voltaire"), Kervens Lalanne ("Lalanne"), Alex Bermudez ("A. Bermudez"), Sanders Bermudez (S. Bermudez"), Meluin Jermaine Braynen ("Braynen"), and Espere Desmond Pierre ("Pierre") all pleaded guilty prior to Movant's trial. *See* [CR ECF Nos. 113, 136, 137, 145, 159, 180, 182, 250, 294, 333, 367, 411]. Only Movant and coconspirator Willis Maxi ("Maxi") proceeded to trial.

hearing, a Report recommending that the suppression motion be denied was adopted by Order entered on April 13, 2015. [CR ECF Nos. 201, 259]. Movant proceeded to trial where he was found not guilty as to Count 10, and guilty of all remaining charges (Counts 1, 7-9, 11-12, 14, 16-21, 24-25), following a jury verdict. [CR ECF No. 277].

Before sentencing, a Presentence Investigation Report ("PSI") was prepared which revealed that certain offenses were grouped for guideline calculation purposes based on the quantity of drugs involved (Counts 1, 7-9, 11, 14, 16) and the monetary loss amounts (17, 24), while other offenses (Counts 12, 18-21, 25) were exempt from grouping, requiring a mandatory consecutive sentence. (PSI ¶¶ 37-39). Movant's base offense level was set at 38 based on the violations of 21 U.S.C. § 846 pursuant to U.S. Sentencing Guidelines Manual ("USSG") § 2D1.1(a)(5) (U.S. Comm'n 2014). (PSI ¶¶ 40-46, 55). An additional one-level increase was added to the base offense level for multiple count adjustments resulting in a total adjusted offense level 39 (PSI ¶¶ 54, 56, 60). It was determined that Movant had a total of three criminal history points resulting in a criminal history category II. (PSI ¶ 64).

As a result, his advisory guideline range, based on a total offense level 39 and a criminal history category II, was set at 292 months to 365 months of imprisonment. (PSI ¶ 97). Regarding Count 11, it was determined that a term of five years of imprisonment under § 924(c)(1)(A) should run consecutive to any other term of imprisonment. (*Id.*). Count 18 required a two-year term of imprisonment to run consecutive to any other term of imprisonment under USSG § 2B1.6 cmt. [n1(A)]. (*Id.*). Under USSG 2B1.6 cmt [n.1(B)], Counts 19 through 21 and 25 also required a mandatory two-year term of imprisonment, to run consecutive to any other term of imprisonment, except that they may, in the Court's discretion, run concurrent with, in whole or in part, to any additional violation of 18 U.S.C. § 1028A. (*Id.*).

Statutorily, as to Count 1, Movant faced a minimum of ten years and a maximum lifetime term of imprisonment for violation of 21 U.S.C. § 841(b)(1)(A). (PSI ¶ 96). As to Counts 7 through 9, Movant faced a maximum of twenty years of imprisonment under 21 U.S.C. § 841(b)(1)(C) for each offense. (*Id.*). Movant faced a minimum of five and a maximum of forty years of imprisonment as to Count 11 under 21 U.S.C. § 841(b)(1)(B). (*Id.*). Count 12 required a minimum of five and a maximum lifetime term of imprisonment for violation of 18 U.S.C. § 924(c), to be imposed consecutive to any other counts. (*Id.*). Counts 14 and 16 each carried a maximum of ten years of imprisonment for violation of 18 U.S.C. § 922(g). (*Id.*). Count 17 carried a maximum term of ten years imprisonment for violation of 18 U.S.C. § 1029(a). (*Id.*). Count 18 required a mandatory two-year term of imprisonment for violation of 18 U.S.C. § 1028A, to run consecutive to any other term of imprisonment. (*Id.*). Counts 19 through 21 and 25 required a mandatory two-year term of imprisonment to run consecutive to any other term of imprisonment, except that the Court could impose that the sentences run concurrent with, in whole or in part, any additional violation of 18 U.S.C. § 1028A. (*Id.*). Count 24 carried a maximum twenty-year term of imprisonment for violation of 18 U.S.C. § 1349. (*Id.*).

Movant filed objections to the PSI, challenging the quantity of drugs involved in the offenses, including those attributable to defendants who pleaded guilty, as opposed to those, like Movant, who proceeded to trial. [CR ECF No. 309 at 1-4]. Movant also requested a downward variance from the applicable guideline range, claiming it produces a sentence far greater than necessary for punishment under 18 U.S.C. § 3553(a). [*Id.* at 5-7].

At sentencing, counsel renewed Movant's objection to the methodology used to determine the quantity of drugs. [CR ECF No. 361 at 1-14]. After hearing argument from the parties, the Court found the case involved at least 840 grams of crack cocaine, determining that it was a "very,

very conservative estimate," especially as the Court did not consider "all of the operations," and considered an amount "even less than what was calculated by the probation officer." [*Id. at* 13-14]. Movant also argued for a downward variance because the guidelines called for "more punishment than is necessary to have a fair sentence and to promote respect for the law." [*Id.* at 29-32]. After hearing from the Movant, the Court indicated it had considered the statements of all parties, the PSI containing the advisory guidelines, and the statutory factors. [*Id.* at 43]. The Court found a guideline term of 365 months of imprisonment to be excessive and unnecessary, and that a sentence below the guideline range appropriate to reflect the seriousness of the offenses and provide just and reasonable punishment. [*Id.* at 43-44]. Movant was then sentenced to a total term of 300 months of imprisonment, consisting of: (1) 216 months as to Count 1; (2) 240 months as to Counts 7 through9 and 11 and 24; (3) three concurrent terms of 120 months as to Counts 14, 16, and 17; (4) a consecutive sixty months of imprisonment as to Count 12; and, (5) concurrent terms of two years of imprisonment as to Counts 18 through 21, and 25, to run consecutive to Count 12. [*Id.* at 44]. The written Judgment was entered on July 15, 2015. [CR ECF No. 337].

Movant appealed, raising two claims of trial court error in: (1) allowing the admission of wiretap evidence which he claims was the product of an illegal search; and, (2) instructing the jury as to Movant's purported flight. *See United States v. Maxi, et al.,* 886 F.3d 1318, 1322 (11th Cir. 2018). Specifically, as to the wiretap evidence, Movant argued on appeal that the Court erred in denying the suppression motion where the "necessity requirement was not met and the affidavits and the affiants made intentionally or recklessly false statements or omitted material facts in demonstrating the necessity of the wiretaps." *See United States v. Blanc,* No. 15-13182-GG, 2016 WL 344957, *18 -*23 (11th Cir. 2016). On April 5, 2018, the Eleventh Circuit Court of Appeals affirmed Movant's judgment in a published opinion. *See Maxi, et al.,* 886 F.3d at 1332; [CR ECF

No. 548]. Certiorari review was denied on October 1, 2018. *See Blanc v. United States,* 139 S.Ct. 235 (2018).

Thus, the judgment of conviction in the underlying criminal case became final on **October 1, 2018,** when the Supreme Court denied certiorari review. *See Gonzalez v. Thaler,* 565 U.S. 134, 149-50 (2012); *Phillips v. Warden,* 908 F.3d 667, 672 (11th Cir. 2018). At the latest, Movant was required to file this motion to vacate within one year from the time his conviction became final, or no later than October 1, 2019. See 28 U.S.C. § 2255(f)(1); *Griffith v. Kentucky,* 479 U.S. 314, 321 n.6 (1986); *Downs v. McNeil,* 520 F.3d 1311, 1318 (11th Cir. 2008).

§ 2255 Motions

Movant returned to this Court, filing his initial § 2255 Motion, in accordance with the mailbox rule, on June 26, 2019, when he signed and handed it to prison officials for mailing.[3] [ECF No. 1].

Several orders were entered striking Movant's amended § 2255 Motions because his filings did not comply with Fed. R. Civ. P. 8's requirement that an initial filing present all claims in a "plain and short" manner, citing Rule 12 of the Rules Governing 2255 Cases in the United States District Courts, and requiring the filing of a final Amended § 2255 Motion. [CV ECF Nos. 7, 10, 16]. In fact, before expiration of the one-year limitations period, Movant filed an August 20, 2019 Amended § 2255 Motion [CV ECF No. 13], raising the same eleven grounds for relief as those raised in his operative Amended § 2255 Motion. *See* [CV ECF No. 18].

[3] Under the prison mailbox rule, absent evidence to the contrary, like prison logs or other records, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. *See* Fed. R. App. P. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."); *Washington v. United States,* 243 F.3d 1299, 1301 (11th Cir. 2001)(per curiam).

On October 1, 2019, after the expiration of the one-year federal limitations period, Movant filed his final Amended § 2255 Motion raising eleven grounds for relief. [ECF No. 18]. This latest filing also did not comply with Fed. R. Civ. P. 8, but it was not stricken. Further, since the claims raised therein relate back to the August 20, 2019 timely, but stricken, § 2255 Motion, they are timely, having been raised before the expiration of the one-year federal limitations period.[4] Construing the Amended § 2255 Motion liberally, as afforded *pro se* litigants pursuant to *Haines v. Kerner,* 404 U.S. 519, 520-21 (1972)(per curiam), Movant raises the following eleven claims:

1. Counsel was ineffective for failing to introduce law enforcement records at the pre-trial suppression hearing or seek a *Franks*[5] hearing in order to explain their absence, in order to properly rebut Special Agent Dearl Weber's testimony. [CV ECF No. 18 at 4].

2. Counsel was ineffective for failing to introduce law enforcement records at the pre-trial suppression hearing or seek a *Franks* hearing in order to explain their absence and to properly rebut Special Agent Christopher M. Mayo's testimony. [CV ECF No. 18 at 5].

3. Counsel was ineffective for failing to object to the Government's misconduct in eliciting and/or otherwise suborning perjury regarding the "questionably false" testimony of the two Government agents during the suppression hearing. [CV ECF No. 18 at 8].

4. Counsel was ineffective for failing to file objections to the findings of fact and conclusions of law contained in the Report recommending that the Movant's suppression motion be denied. [CV ECF No. 18 at 8].

5 Counsel was ineffective for failing to seek suppression of the June 2013 wiretap recordings on the basis that the "sealing protocol" under 28 U.S.C. § 2518(8)(a) was violated. [CV ECF No. 18 at 13].

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[4] *See Davenport v. United States,* 217 F.3d 1341, 1346 (11th Cir. 2000)(holding that were a movant adds new claims in an amended § 2255 motion to vacate which do not relate back to claims raised in an initial timely filed motion, the new claims are time-barred); *Mayle v. Felix,* 545 U.S. 644 (2005).

[5] *Franks v. Delaware,* 438 U.S. 154 (1978)(setting forth standards for considering an attack on the veracity of an affidavit filed in support of a search warrant).

6. Counsel was ineffective for failing to contest that evidence was obtained by law enforcement who unlawfully re-entered and/or remained on the premises after the federal search warrant was executed on November 2013 at Unit B of the 262/264 NW 52nd Street residence. [CV ECF No. 18 at 13].

7. Counsel was ineffective for failing to challenge the use of evidence obtained by law enforcement's unlawful trespass onto the curtilage and subsequent warrantless entry into the Movant's residence on November 21, 2013. [CV ECF No. 18 at 14].

8. Counsel was ineffective for failing to seek dismissal of the Indictment on the basis that multiple constitutional violations occurred leading to Maxi's arrest and the unlawful seizure of evidence in July 2012. [CV ECF No. 18 at 14].

9. Counsel was ineffective for failing to contest the Government's introduction of uncharged conduct at trial which later permitted the Government to make improper remarks during closing, rebuttal argument, inflaming the passions of the jury. [ECF No. 18 at 15].

10. Pursuant to the United States Supreme Court's decision in *Rehaif v. United States,* 139 S.Ct. 2191 (2019), Movant is actually innocent as to Counts 14 and 16 because the Government neither charged nor proved the "knowing" element of the offenses. [CV ECF No. 16].

11. Movant's conviction as to Count 12 is unconstitutionally vague in light of the United States Supreme Court's decision in *United States v. Davis,* 139 S.Ct. 2319 (2019). [CV ECF No. 18 at 16].

In its response, the Government argues that Movant is not entitled to relief on any of the claims presented. [CV ECF No. 22]. Movant disagrees. [CV ECF No. 26].

II. DISCUSSION

A. 28 U.S.C. § 2255 Standard of Review

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on a final judgment, pursuant to 28 U.S.C. § 2255, are extremely limited. A prisoner is entitled to relief under § 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United*

States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). Relief under § 2255 is reserved for transgressions of constitutional rights, and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *Lynn v. United States,* 365 F.3d 1225, 1232 (11th Cir. 2004)(per curiam)(citing *United States v. Frady,* 456 U.S. 152, 165 (1982)(collecting cases)); *Massaro v. United States,* 538 U.S. 500, 504 (2003).

If a court finds a claim under § 2255 valid, the court shall vacate and set aside the judgment, and discharge the prisoner, grant a new trial, or correct the sentence. *See* 28 U.S.C. § 2255. The burden of proof is on the Movant, not the Government, to establish that vacatur of the conviction or sentence is required. *Beeman v. United States,* 871 F.3d 1215, 1221-1222 (11th Cir. 2017), *rehearing en banc denied by, Beeman v. United States,* 899 F.3d 1218 (11th Cir. 2018), *cert. denied by, Beeman v. United States,* 139 S.Ct. 1168 (2019).

B. New Facts or Arguments Raised in the Reply

Before turning to the merits of Movant's ineffective assistance of counsel claims, it bears noting that Movant has improperly raised new arguments for the first time in his reply in relation **claims 1, 2, and others.** *See* Rule 2(b)(1), Rules Governing Section 2255 Cases ("The petition must ... specify all the grounds for relief available to the moving party. . ."). Also, Local Rule 7.1(c)(1) limits a reply memorandum to only rebuttal of matters in the response without re-argument of matters covered in Movant's initial § 2255 Motion. A reply memorandum may not raise new arguments or evidence, particularly where the evidence was available when the underlying motion was filed and Movant was aware (or should have been aware) of the necessity of the evidence. *See, e.g., Herring v. Sec'y, Dep't of Corr.,* 397 F.3d 1338, 1342 (11th Cir. 2005)("As we repeatedly have admonished, arguments raised for the first time in a reply brief are not properly before a reviewing court.") (internal quotations omitted); *Willis v. DHL Global*

Customer Sols. (USA), Inc., No. 10-62464-CV-Cohn, 2011 WL 4737909, at *3 (S.D. Fla. Oct. 07, 2011)(collecting cases stating that it is inappropriate to raise new arguments in a reply brief and stating that courts in this district generally do not consider these arguments); *Cohen v. Burlington, Inc.*, No. 18-81420-CV-Bloom, 2020 WL 3256863, at *3 (S.D. Fla. June 16, 2020)(finding "[a] party who fails to present its strongest case in the first instance generally has no right to raise new theories or arguments in a motion for reconsideration")(citing *McGuire v. Ryland Grp., Inc.*, 497 F. Supp. 2d 1356, 1358 (M.D. Fla. 2007)(quotation omitted));*Williams v. McNeil,* 557 F.3d 1287, 1291 (11th Cir. 2009)(district court did not abuse its discretion in declining to consider timeliness argument raised by petitioner which was not presented to the magistrate judge in the first instance).

To permit a habeas movant to raise new arguments in a reply "would 'essentially afford[ ] a litigant two bites at the apple.'" *Cohen,* 2020 WL 3256863, at *3 (quoting *Adams v. Boeneman,* No. 6:18-cv-72-Orl-41GJK, 2020 WL 3086313, at *2 (M.D. Fla. May 4, 2020) (quoting *Am. Home Assurance Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1239 (11th Cir. 1985)).

Further, a reply should not "be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made." *See Cohen,* 2020 WL 3256863, at *3 (quoting *Z.K. Marine Inc. v. M/V Archigetis,* 808 F. Supp. 1561, 1563 (S.D. Fla. Dec. 3, 1992; *Compania de Elaborados de Cafe v. Cardinal Capital Mgmt., Inc.,* 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003) ("[T]he movant must do more than simply restate his or her previous arguments, and any arguments the movant failed to raise in the earlier motion will be deemed waived.")). Thus, Movant's arguments raised for the first time in his reply should not be considered. *See Foley v. Wells Fargo Bank, N.A.,* No. 11-62314-CIV, 849 F. Supp. 2d 1345 (S.D. Fla. Feb. 17, 2012); *TCC Air Servs., Inc. v. Schlesinger,* No. 05–80543–CIV, 2009 WL 565516, at *7 (S.D. Fla. Mar.

5, 2009); *Cacoperdo v. Demosthenes,* 37 F.3d 504, 507 (9th Cir.1994) (traverse is not proper pleading to raise additional grounds for relief).

Moreover, construing this argument as an amendment would also be inappropriate because Respondent has already served its answer. *See* Fed. R. Civ. P. 15(a)(a party is permitted to amend a pleading once as a matter of course at any time before a responsive pleading is served or, otherwise, only by leave of court or by written consent of the adverse party); Rule 12 of the Rules Governing Section 2255 Proceedings (district court may apply the Federal Rules of Civil Procedure consistent with the Rules Governing Section 2255 Proceedings).

However, for purposes of completeness, the Court will acknowledge those arguments raised in his traverse as they do not affect the Court's conclusion that none of the claims raised warrant vacatur of Movant's convictions and sentences.

C. § 2255 Claims Based on Ineffective Assistance of Counsel

The Eleventh Circuit has stated, "the cases in which habeas petitioners can properly prevail . . . are few and far between." *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000)(en banc). A Movant challenging their conviction based on ineffective assistance of counsel must demonstrate (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *See Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984). However, if Movant cannot meet one of *Strickland's* prongs, the Court need not address the other prong. *Strickland,* 466 U.S. at 697; *Brown v. United States,* 720 F.3d 1316, 1326 (11th Cir. 2013). The *Strickland* standard applicable to ineffective assistance of trial counsel claims also governs ineffective assistance of appellate counsel. *See Corales-Carranza v. Sec'y, Fla. Dep't of Corr.,* 768 F. App'x 953, 957 (11th Cir. 2019)(per curiam)(quoting *Brooks v. Comm'r, Ala.*

Dep't of Corr., 719 F.3d 1292, 1300 (11th Cir. 2013)(per curiam)(internal quotation marks omitted)).

To show deficient performance, a movant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States,* 518 F.3d 1291, 1301 (11th Cir. 2008)(citations omitted). The *Strickland* test does not require a showing of what the best or good lawyers would have done, but rather whether some reasonable lawyer could have acted as defense counsel acted under in the circumstances. *Dingle v. Sec'y, Dep't of Corr.,* 480 F.3d 1092, 1099 (11th Cir. 2007). In retrospect, where counsel's decision appears to have been unwise, it will have been ineffective only if it was "so patently unreasonable that no competent attorney would have chosen it." *Dingle,* 480 F.3d at 1099 (citations omitted).

With regard to the prejudice requirement, the Movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694. Counsel, however, has no duty to raise non-meritorious claims. *Hittson v. GDCP Warden,* 759 F.3d 1210, 1262 (11th Cir. 2014). Courts may not vacate a conviction or sentence solely because the outcome would have been different, but for counsel's error, as it may grant the defendant a windfall to which the law does not entitle him. *Lockhart v. Fretwell,* 506 U.S. 364, 369-70 (1993); *Allen v. Sec'y, Fla. Dep't of Corr.,* 611 F.3d 740, 754 (11th Cir. 2010). Instead, the Court must also consider "whether the result of the proceeding was fundamentally unfair or unreliable." *Allen,* 611 F.3d at 753. Further, bare and conclusory allegations of ineffective assistance are also insufficient to satisfy the *Strickland* test. *See Blackledge v. Allison,* 431 U.S. 63, 74 (1977); *Boyd v. Comm'r, Ala. Dep't of Corr.,* 697 F.3d 1320, 1333-34 (11th Cir. 2012). The Movant must identify specific acts or omissions that area alleged not to have been the result of reasonable professional judgment. *Strickland,* 466 U.S. at 690.

A meritorious claim of ineffective assistance of counsel can also constitute cause for a procedurally defaulted claim. *See United States v. Nyhuis,* 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by way of a §2255 motion regardless of whether they could have been brought on direct appeal. *Massaro,* 538 U.S. at 50; *United States v. Patterson,* 595 F.3d 1324, 1328 (11th Cir. 2010).

1. Claims Surrounding the Motion to Suppress Proceedings (Claims 1-5)

a) *Failure to Introduce Records (Claims 1-2)*

In **claims 1 and 2,** Movant asserts that counsel was ineffective for failing to introduce "necessary records," such as "(FBI CHS, STF, and other reports)," at the pre-trial suppression hearing, in order to properly rebut the testimonies of Special Agent Dearl Weber and Special Agent Christopher M. Mayo. [CV ECF No. 18 at 4, 5]. He also maintains that counsel failed to explain the absence of these records to the Court and request a *Franks* hearing. [*Id.*]. Movant concludes that counsel's deficiency resulted in prejudice claiming evidence would have been suppressed which would have resulted in his acquittal at trial as to Counts 7-9, 11, 12, 14, 16-21, and 25 of the Indictment. [*Id.*].

The Government argues that Movant's claims 1 through 5 are refuted by the Court's criminal docket in *United States v. Blanc,* No. 14-CR-20104-ROSENBERG (GRAHAM). [ECF No. 22 at 7-8]. The Government also argues that, although counsel did not seek admission of the "law enforcement reports" relied upon by Movant, the Movant cannot prevail on this claim, having failed to demonstrate that the outcome of his trial would have been different. [CV ECF No. 22 at 7-8]. Generally, the Government argues counsel "aggressively and effectively represented"

Movant in challenging the wiretap records during the suppression proceedings, notwithstanding the fact that he did not introduce the records, as suggested. [*Id.*].

Movant disagrees, arguing for the first time in his reply that, at the suppression hearing Special Agent Dearl W. Weber ("S/A Weber") testified that the confidential source ("CS") had indicated co-conspirator "Pierre was driven around by somebody else," and the Government "eluded asking the identity of the driver," instead "alluding to" the description of the vehicle. [CV ECF No. 26 at 2]. Movant relies upon S/A Weber's April 17, 2013, "Unclassified Federal Bureau of Investigation ["FBI"] CHS Reporting Document (FD-1023) ("Weber Report") which states, in relevant part, as follows:

> A photograph of MARKENTZ BLANC, date of birth March 13, 1981, was shown to the CHS that did not list any biographical identifiers. The CHS identified the individual as MR. BURNS. BLANC was identified as running a retail drug distribution point on 56th Street in Miami, Florida. BLANC was known to convert powder cocaine to crack cocaine and to drive "PAPA D" (ESPERE PIERRE) around.
>
> The CHS stated that "Manje" and "Sack" were codes used for drugs.

[CV ECF No. 26, Ex. B at p. 17].[6] Movant also relies upon S/A Weber's a March 4, 2013 Weber Report which reveals that "BLANC drives a White Toyota Camry, possibly a 2007 or 2008," and "is PIERRE'S partner and conducts the same narcotics trafficking activities." [CV ECF No. 26, Ex. A at 14]. Movant further relies upon an U.S. Department of Justice ("DOJ"), Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Report of Investigation, in "Operation Duck & Cover," ("ATF Report No. 9") summarizing events surrounding the April 9, 2013 purchase of thirty-one grams of crack cocaine from a drug distribution point operated by Pierre. [CV ECF No. 26, Ex. C at 18-19]. The ATF Report No. 9 reveals that, at approximately 6:42 p.m. that day,

[6] Unless otherwise noted, the page referenced is that imprinted on the filing by CM/ECF, the Court's electronic docketing system.

Sergeant J. Ruiz "observed a silver Dodge Journey matching the description of the vehicle known to be driven by PIERRE exiting the driveway of 184 NW 58 Street." [*Id.* at 19]. Movant maintains that S/A Weber purposefully omitted any reference to Pierre's personal vehicle, the Dodge Journey in order to shift the focus regarding the identity of the "unknown driver." [CV ECF No. 26 at 2]. Movant claims Weber was aware of Movant owned a white Toyota since February 2013, and his testimony at the suppression hearing that they became aware of the vehicle "later in the investigation" was deliberately "false." [CV ECF No. 26 at 2]. Movant explains that, contrary to the Government's focus at trial, Movant argues that, under Fed. R. Evid. 803(6)(A) hearsay evidence is admissible during suppression hearings, especially where, as here, S/A Weber testified that "everything the CS provided law enforcement were independently corroborated, making the report[s] authentic and reliable." [*Id.* at 3]. Movant maintains that its admissibility would have been considered since the Magistrate Judge offered counsel the opportunity to furnish the reports, but counsel declined to do so. [*Id.* at 3].

Criminal Complaint and Supporting Probable Cause Affidavit

Prosecution of the Movant began with the filing of a Criminal Complaint alleging Movant and his co-conspirators, Espere Desmond Pierre ("Pierre") and Meluin Jermaine Braynen ("Braynen") conspired to possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846. [CR ECF No. 1]. Attached thereto was S/A Weber's Affidavit executed "for the purpose of establishing probable cause" to support the arrest of Movant and his co-conspirators; and, as such, did not contain all the information known to him or other law enforcement officers regarding the investigation. [*Id.* at 3-4, ¶¶ 1-2]. The information contained in S/A Weber's Affidavit was based on "personal knowledge" and information provided to him by "law enforcement agents and officers or other sources of information." [*Id.*, ¶¶ 2-3].

Therein, S/A Weber explained that "local law enforcement authorities had been investigating a drug trafficking organization ("DTO") headed by PIERRE and BLANC that operates several retail narcotics distribution locations in the Little Haiti area of Miami." [Id. at 4, ¶ 3]. On July 9, 2012, a vehicular traffic stop was had on a black truck being driven by Movant and in which Pierre was a passenger. [*Id.*]. After explaining that he and Pierre were coming from a friend's house, law enforcement released them, at which time Movant and Pierre returned to the 132 N.E. 64th Street residence in Miami. [*Id.*]. After learning of the presence of law enforcement at the residence, Movant was observed fleeing on foot. [*Id.*]. Law enforcement made contact with Maxi, who was present inside the residence, and after observing crack cocaine in plain view, a search warrant was obtained and executed. [*Id.*]. Law enforcement seized numerous firearms and narcotics from the residence. [*Id.*]. As a result, Maxi was arrested and advised law enforcement that narcotics trafficking was operated by Pierre from the residence. [*Id.*].

On June 4, 2013, United States District Court Judge Ursula Ungaro signed an Order authorizing the interception of wire and electronic communications, from June 4, 2013 through July 3, 2013, over Pierre's cellular telephone. [*Id.* at 4-5, ¶ 4]. Calls and text messages were "captured between Pierre, Movant, and Braynen indicating their participation in the operation of the DTO," which included operating a "stash house" to store larger quantities of narcotics, in addition to, several retail narcotics distribution points in Little Haiti. [*Id.*]. For example, a search warrant was executed on a residence located at 184 NW 58th Street in Miami, known to be a retail narcotics distribution location operated by Movant and Pierre, during which approximately 100 individually-packaged plastic bags containing suspect crack cocaine were seized. [*Id.*]. Shortly thereafter, Movant and Pierre were captured speaking on the phone, during which Movant informed Pierre that law enforcement officers were at the residence. [*Id.*]. In response, Pierre

informed the Movant he would contact "Manman,"[7] drive to the residence, and investigate what was occurring. [*Id.*].

On October 28, 2013, United States District Judge Federico Moreno signed an order authorizing the interception of wire and electronic communications occurring over Movant's cellular phone beginning on October 28, 2013 through November 26, 2013. [*Id.* at 5, ¶ 5]. Again, numerous telephone calls and text messages were captured between Movant, Pierre, and Braynen establishing that each participated substantially in the DTO operation. [*Id.* at 6, ¶ 5]. As an example, S/A Weber stated that on November 7, 2013, shortly after a search warrant was executed at another known DTO residence, located at 8105 NE 3rd Place in Miami, text message reading, "I thnk dey hit 80 again," was intercepted from Pierre to Movant pursuant to the active wiretap on Movant's phone. [*Id.* at 6, ¶ 6]. A recorded conversation was also recorded between Movant and Pierre discussing the recently executed warrant. [*Id.*]. S/A Weber stated that the term "sack" was often used by narcotics traffickers and refers to a quantity of illegal drugs; in this case referring to the 112 small packages containing suspected crack cocaine which had just been seized. [*Id.*]. During that discussion, Movant confirmed that Voltaire also known as "Pitt," had already discussed the circumstances surrounding the execution of the warrant with Pierre. [*Id.*]. During this telephone call, it was also established that the DTO operated a "stash house" at 262/264 NW 52nd Street, in Miami, which also served as Braynen's residence, in additional to several other narcotics retail locations throughout Little Haiti. [*Id.* at 6, ¶ 7].

On November 11, 2013, during an intercepted, recorded incoming telephone call from Nonnie Dulcio ("Dulcio"), the mother of Pierre's child, a discussion ensued with the Movant regarding an ongoing domestic dispute between Dulcio and Pierre, and the consequences that it

[7] Braynen's nickname.

could have for the narcotics-trafficking organization being run by Movant, Pierre, and others . [*Id.* at 8, ¶ 9]. Following Movant's request, Dulcio agreed not to bring any "drama" to the "Manman crib" located "on 52nd," because she knew that Movant, Manman, and Pitt would be there. [*Id.*].

According to S/A Weber, on November 21, 2013 and continuing into the morning of November 22, 2013, five separate search warrants were executed at five drug "stash" residences, which included Movant's and Braynen's residences, and which the DTO used as retail narcotics distribution locations. [*Id.* at 9, ¶ 11]. Movant, Pierre, and Braynen were present when Braynen's residence was searched, at which time law enforcement seized approximately fifty-six grams of crack cocaine, twenty-two grams of marijuana, a stolen firearm, approximately $13,000 in U.S. currency, in addition to, numerous documents and financial instruments related to identity theft and tax fraud. [*Id.*]. From Movant's residence, law enforcement seized suspected crack cocaine, a stolen firearm, a bulletproof vest, $9,000 in U.S. currency, and numerous documents relating to identity theft and tax fraud, including identity information of hundreds of persons with no apparent relation or connection to the Movant. [*Id.* at ¶ 12]. Given all of the foregoing, S/A Weber averred there was probable cause that Movant, Pierre, and Braynen were conspiring with each other to possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846. [*Id.* at 9-10].

Motion to Suppress

Following Movant's arrest, and the return of an Indictment charging Movant and his co-conspirators with numerous felony offenses [CR ECF No. 32], Movant filed a motion to suppress "any intercepted communications acquired in conjunction with the wiretap orders entered *In the Matter of the Application of United States of America, etc.*, Miscellaneous Case Nos. 13-WT-20013 ("Pierre Wiretap") and 13-WT-20025 ("Movant Wiretap"). [CR ECF No. 185]. Movant

argued that the Government "had no necessity to obtain or apply for interceptions" and "omitted material information," as required by 18 U.S.C. § 2518(10)(a), especially where, as here, law enforcement had already introduced a CS to Movant and Pierre, and made controlled narcotics purchases prior to the wiretap on the phones belonging to the Movant and Pierre. [*Id.* at 1-2, 8-9]. Movant claimed the CS served as a lieutenant in the DTO, was familiar with the DTO operations, and previously provided agents the names of three potential drug supply sources for the DTO. [*Id.* at 2]. Movant also argued that law enforcement failed to disclose there were three other confidential informants ("CIs") working with law enforcement, who also had provided supplied information regarding the DTO and its drug supply source. [*Id.*at 2, 7]. Movant further argued the Affidavit attached to the Criminal Complaint contained "false representations regarding the lack of evidence to establish probable cause that Pierre's driver was also involved in the DTO." [*Id.* at 7]. Movant argued that the information in the Movant Wiretap Affidavit deceived the issuing judge by suggesting there was only one information reporting to law enforcement on the activities of Movant and Pierre; and, in fact, is a duplicative of the Pierre Wiretap Affidavit. [*Id.* at 8-9]. Movant claimed that S/A Weber falsely stated he was unaware there were no other individuals cooperating with law enforcement when, in fact, there were three additional cooperating CI's, in addition to, the deceased CS. [*Id.* at 10]. Moreover, Movant argued that the Movant Wiretap Affidavit failed to provide a "complete statement regarding necessity" to justify the use of the wiretaps instead of traditional investigative means to investigate the Movant. [*Id.* at 13]. Finally, relying on *Franks,* Movant argued that if the Court determines the affiant "knowingly or recklessly included false information that is material to the determination of probable cause, evidence seized pursuant to that warrant must be suppressed." [*Id.* at 14]. Movant maintained that a *Franks* hearing was required based on Movant's allegations that S/A Weber "'omitted facts required to prevent

technically true statements in the affidavit from being misleading.'" [*Id.* at 15 citing *United States v. Stanert,* 762 F.2d 775, 780-81 (9th Cir.), *as amended,* 769 F.2d 1410 (9th Cir. 1985)].

Government Response

The Government disagreed, arguing that the suppression motion should be denied because each affidavit to support the wiretap applications adequately demonstrated the necessity requirement for obtaining the wiretaps, and did not contain any false statements, nor did it omit material information. [CV ECF No. 194 at 9-21].

Evidentiary Hearing

On March 4, 2015, the Court held an evidentiary hearing on Movant's suppression motion, joined by Pierre. [CR ECF Nos. 185, 189]. S/A Weber testified as to the allegations contained in his probable cause affidavit attached to the Criminal Complaint and his Affidavit attached to the Pierre Wiretap, introduced as Exhibit "A" at the hearing. [CR ECF 201 at 4; CR ECF No. 251 at MST. 2].[8] S/A Mayo testified as to the allegations contained in the Movant Wiretap, entered into evidence as Exhibit "B." [*Id.*; *Id.*].

S/A Weber testified that he participated in an investigation into a DTO headed by Movant and Pierre (the "Movant and Pierre DTO") which was brought to the attention of the FBI in July 2012, after law enforcement received information that there were narcotics at 132 NE 64th Street. [*Id.* at MST. 11]. Surveillance was set up in the area during which law enforcement observed Movant and Pierre get into a vehicle and drive away. [*Id.* at MST. 12]. When law enforcement approached the residence, Willis answered the door. [*Id*]. After a search warrant was obtained and executed on the residence, law enforcement seized crack cocaine and multiple firearms from that

[8] The letter's "MST" in this Order refer to the motion to suppress transcript docketed in the underlying criminal case at CR ECF No. 251. The page number following the letters "MST" are those of the actual transcript not that imprinted by the Court's electronic docket.

location, after which Willis was arrested. [*Id.* at 13]. During the execution of the warrant, shots were fired at law enforcement who were standing outside the residence. [*Id.* at MST. 13]. Thereafter, Willis advised law enforcement that he worked as a lieutenant in the Movant and Pierre DTO, and that the narcotics and weapons recovered belonged to Pierre. [*Id.* at 13].

Almost a year passed until June 4, 2013 when law enforcement applied for the Pierre wiretap. [*Id.* at MSTt 13-14]. In order to gather evidence about the Movant and Pierre DTO, S/A Weber testified that confidential sources were debriefed, other law enforcement agencies were contacted who were also investigating activities in the area, surveillance was conducted, a pen register was placed, toll records analyzed, and data bases searched. [*Id.* at MST. 14]. Even with all the foregoing, S/A Weber testified that law enforcement did not have everything they needed to fully prosecute everyone involved in the Movant and Pierre DTO. [*Id.* at MST. 14-15]. As a result, S/A Weber decided to proceed with the Pierre Wiretap, and executed the Affidavit for the Title III application on the Pierre Wiretap on Pierre's phone number. [*Id.* at MST. 15-16].

Prior to obtaining the June 2013 Pierre Wiretap, law enforcement conducted several controlled drug purchases in an effect to establish probable cause to support the wiretap applications. [*Id.*]. On April 9 and 22, 2013, the CS conducted controlled purchases of narcotics from the DTO. [*Id.* at 19-21]. On April 22nd, the CS made a recorded telephone call and sent a text message to Pierre asking to purchase additional narcotics, at which time he was directed to go to the same 58th Street location where the CS had previously made a controlled purchase. [*Id.* at MST. 21]. Pierre advised that Pitt would be supplying the CS the drugs. [*Id.*]. During the two controlled purchases, the narcotics were packaged in retail $5 or $10 packages. [*Id.* at MST. 22]. Despite all of the controlled purchases, law enforcement was unable to identify the DTO's drug supplier, other retail distribution locations, the methods used to obtain the cocaine, nor did it reveal

the identity of the other DTO members. [*Id.* at MST. 22-23]. S/A Weber did not believe that additional controlled purchases would have likely revealed that information. [*Id.* at MST. 23]. S/A Weber further testified that the pen register and traffic trace devices would have also yielded the same results. [*Id.* at MST. 24]. Prior to the Pierre Wiretap, the pen register and traffic trace devices were used but it had limitations as it could not identify the identity of the speakers and may not be able to identify the context of the conversation. [*Id.* at MST. 25-26]. Even if S/A Weber had served a subpoena to obtain subscriber information for the phone numbers yielded as a result of the pen register and traffic trace, S/A Weber testified it may not necessarily have yielded the identity of the individual Pierre was talking with because individuals in a DTO often use fictitious names and addresses when registering for phones. [*Id.* at MST. 26-27]. Both Movant and Pierre's phones were registered in a fictitious name and address. [*Id.* at MST. 27]. S/A Weber further explained the Movant and Pierre DTO focused on retail and not larger, wholesale quantities of drugs. [*Id.* at MST. 29]. Thus, any request to purchase a large quantity of narcotics from Pierre would have raised Pierre's suspicions. [*Id*].

Regarding the Affidavit, S/A Weber testified it contained a detailed explanation why the wiretap was necessary to the objective of the investigation and why other investigative techniques were not feasible, safe, or might not provide all of the evidence necessary to achieve the investigative goals which included identifying all of the DTO members, the locations connected with the DTO and where drugs were packaged and stored, and the laundering of the money. [*Id.*at MST. 16-18]. The end goal was to be able to prosecute all the individuals involved in the Movant and Pierre DTO. [*Id.* at MST. 18].

S/A Weber also testified that there was one CS that was recruited by law enforcement and agreed to cooperate in the Pierre and Movant DTO investigation. [*Id.* at MST. 30-31]. The CS was

debriefed several times in order to identify as much information about the DTO, its associates, sources of supply, its interactions, and the names and identities of those who worked for the DTO. [*Id.* at MST. 31]. However, S/A Weber testified that the CS did not know the identity of the drug supplier, all of the locations from where drugs were sold for the DTO, how money was laundered, who was employed by Movant and Pierre, nor out of which locations those individuals worked or resided. [*Id.* at MST. 32]. S/A Weber confirmed that there was another CI used. [*Id.* at MST. 36-37]. To his knowledge, however, the CI was unable to gain any additional information that the primacy CS did not have. [*Id.* at MST. 37]. Moreover, at the time of the Pierre Wiretap, law enforcement had not identified the location of the drug stash house, Pierre's residence, nor Movant's residence. [*Id.* at MST. 39]. Even had law enforcement obtained this information, S/A Weber testified that there were difficulties in conducting effective physical surveillance because they could only surveil the area for a given period of time as individuals within the neighborhood were within the DTO and would then contact the DTO members, notifying them of the presence of law enforcement. [*Id.* at MST. 40].

S/A Weber confirmed they had probable cause to obtain a search warrant on the 58th Street address prior to the Pierre Wiretap, but doing so would not have yielded substantial evidence of the extent of Movant's and Pierre's involvement in the DTO. [*Id.* at MST. 41-47]. S/A Weber also could not guarantee that even if a DTO member were present at a retail location and were arrested, they could not be assured that he would necessarily cooperate and provide information regarding the Movant and Pierre DTO. [*Id.* at MST. 47-48]. Further, the introduction of an undercover agent into the Pierre and Movant DTO would have yielded the same evidence because the DTO "was a very close-knit group," and it was "highly unlikely" that an outside individual would be given a significant role in the group. [*Id,.* at MST. 49]. But for the Pierre Wiretap and the Movant Wiretap,

S/A Weber explained law enforcement would have been unable to intercept and record conversations between Movant and Pierre regarding the execution of the search warrants at the various residences. [*Id.* at MST. 49].

Regarding Pierre's use of vehicles, law enforcement was advised primarily by the CS that Pierre was driven around by someone, but did not identify the driver, nor where the vehicle would typically be parked. [*Id.* at MST. 51]. In fact, prior to the June 2013 Pierre Wiretap, the CS did not specifically identify a vehicle that Pierre might be driven around in. [*Id.* at MST. 52]. According to S/A Weber they learned about the vehicle used by Movant after the Pierre wiretap, but even if they had known about Movant's vehicle prior to the Pierre wiretap, investigators could not have easily installed a tracking device on the vehicle because Movant lived in an apartment complex, and Movant would be able to observe activities going on in the parking lot of the complex by stepping outside his front door on third floor. [*Id.* at MST. 53-54]. Law enforcement was also unaware whether individuals within the apartment complex would notify Movant if they observed anyone attempting to put a tracking device on Movant's vehicle. [*Id.* at 54]. Even if it had been installed, that too had its limitations, because law enforcement cannot tell who would be driving the vehicle, when they depart the vehicle and walk around to another location, and would be unable to ascertain the occupants of the vehicle. [*Id.* at MST. 54-56]. Use of a fixed surveillance camera also has limitations in that it only provides a description of the individuals as they approach and leave but not the true identities of those individuals. [*Id.*].

Next, FBI Special Agent Christopher Mayo ("S/C Mayo") testified he became involved in the Movant and Pierre DTO investigation in April 2013, and during the course of the investigations pursuant to the Pierre Wiretap, the "main source was murdered." [*Id.* at MST. 99]. He further testified that they had not identified the DTO's source of drug supply.[*Id.* at MST. 98]. Further, it

became apparent that in late August-early September 2013, Movant had ceased using the cellular phone which was the subject of a pen register. [*Id.* at MST. 101]. As a result, further investigation and surveillance yielded Movant's new phone number, after which S/A Mayo executed an Affidavit and obtained authorization to intercept that new phone (the "Movant Wiretap"). [*Id.* at MST. 102]. S/A Mayo was aware and claims he did include in his Affidavit the necessity requirement to support the Movant Wiretap. [*Id.* at MST. 103-04]. S/A Mayo explained there were a number of investigative techniques that were tried and others they determined would be "dangerous or ineffective" and they had yet to discover the sources of the Movant and Pierre DTO drug supply. [*Id.* at MST. 104]. In fact, S/A Mayo testified that as of October 23rd, an individual known as "Reality," while a drug supply source for the Movant and Pierre DTO, he was not the "primary source." [*Id.* at MST. 106-07]. When S/A Mayo executed the Movant Wiretap, they had not identified Pitt as the drug supplier, but was "highly important" as he had been observed delivering narcotics on April 9th and April 22nd to the Movant and Pierre DTO. [*Id.* at MST 107].

Following a June 20, 2013 intercepted call between Pierre and another unidentified individual, law enforcement surveilled Pierre who met with two unknown males at the back of a restaurant. [*Id.* at MST 108-09]. Law enforcement could not hear the contents of their conversations, but were able to intercept a conversation between Pierre and Movant afterwards in which Pierre referred to having met with JR and Black to discuss the purchase of a kilogram of cocaine for $32,500. [*Id.* at MST 109]. During the conversation, it became apparent these two individuals were also not the only source of drug supply for the Movant and Pierre DTO because Pierre had commented that they had received narcotics from someone else just two days ago. [*Id.* at MST. 109-110]. S/A Mayo testified that they were able to confirm that "ManMan" was co-conspirator Melvin Braynen ("Braynen"). [*Id.* at MST. 113].

Although JR and Black were identified as one of the possible sources of drug supply, S/A Mayo was unable to obtain their real identities during the course of the investigation. [*Id.* at MST. 110-11]. Before applying for the Movant Wiretap, one of the goals of the investigation was also to determine additional locations of the drug stash houses since law enforcement did not believe the Movant and Pierre DTO would continue using the 64th Street location because it had already been "hit by law enforcement." [*Id.* at MST. 113]. S/A Mayo also explained it was difficult to conduct investigations of potential stash houses because the streets were "pretty narrow," and they were located in "residential areas," not a "major thoroughfare," making it "impossible to park near the residence to see what's going around the residence without being noticed," especially because the Movant and Pierre DTO were "very surveillance conscious." [*Id.* at MST. 114-15].

Regarding the surveillance of the 262/264 N.W. 52nd Street residence, S/A Mayo testified that surveillance of that suspect stash house was not easy because of its location. [*Id.*]. Many times, surveillance had to be set up on 52nd Street, a block further south, and all the way over to 2nd Avenue in order to try to see all the way down the street. [*Id.* at MST. 116]. That residence was surveilled for several weeks prior to seeking the Movant Wiretap during which Movant, Pierre, Braynen, and Voltaire were observed coming and going from that residence. [*Id.* at MST. 117). Law enforcement further believed that additional stash houses included those where Movant and Pierre stayed at night. [*Id.* at MST. 118]. It was not until after S/A Mayo obtained the Movant Wiretap that they were able to establish probable cause to then obtain a search warrant for Unit B at the 52nd Street residence. [*Id.* at MST. 120]. When the warrant was executed, the unit was vacant. [*Id.*]. S/A Mayo learned that a few weeks prior the Movant and Pierre DTO had moved from Unit B to Unit A. [*Id.*].

Regarding placing trackers on Movant's vehicles, S/A Mayo testified Movant had been identified as using at a minimum three vehicles, and because of the location where Movant resided placing a tracker on the vehicles in the apartment parking lot without being observed was too risky. [*Id.* at MST. 121-122].

Report Recommending Denial Suppression Motion

Following the evidentiary hearing, a Report was entered finding that the Affidavits supporting the Pierre Wiretap and Movant Wiretap provided "extensive discussion of the problems of various investigative techniques in furthering the goals and objectives of the investigation," including "identifying key personnel involved in the DTO, the identities of suppliers, locations of stash houses, and the management of disposition of proceeds." [CR ECF No. 201 at 5]. The Court rejected Movant's argument that further physical surveillance, installation GPS tracking devices, or the use of the primary or additional CS's would have achieved all of the goals of the investigation without requiring a wiretap. [*Id.* at 5-9].

Moreover, the Court also rejected Movant's argument that the Government "intentionally or recklessly" made "material false statements" or omitted "material facts in the affidavits by not referring to the CS as a "lieutenant" in the Movant and Pierre DTO or that the CS was a lessee of one of the stash houses of the DTO located at 132 N.E. 64th Street in Miami, Florida. [*Id.* at8- 9]. The Court found "there was nothing false or misleading in the Government's affidavits," rejecting Movant's argument that S/A Weber's affidavit "gave the impression that the primary CS was a mere customer in the DTO." [*Id.*]. In so ruling, the Court found both affidavits support a finding that "the primary CS was more than a customer," but "formerly was a member of the DTO" with " a limited knowledge of the operational activities of the DTO.'" [*Id.* at 10].

Although the Court found "troubling" that the Government failed to disclose that "the primary CS was the lessee of a stash house located at 132 N.E. 64th Street, Miami. . . searched on July 9, 2012," it found such an omission did not "rise to the level of being reckless or intentional." [*Id.*]. In so finding, the Court relied upon S/A Weber's testimony that he did not learn of the CS's status as the lessee until long after the wiretap applications, and after the Indictment was returned in this case. [*Id.*]. At best, the Court found the omission "amount to no more than negligence," and thus did not "invalidate the wiretaps." [*Id.*].

Alternatively, the Court further found that, even if the omission was intentional and reckless, the inclusion of the information in the wiretap application "would not have defeated the necessity requirement for the wiretap applications." [*Id.* at 10-11]. Thus, the Court concluded that "the affidavits adequately reflected the CS's role as a member in the DTO; and the Government demonstrated that even with the help of the CS, several investigation objectives were not met, such as determining the identities of suppliers and locations of stash houses." [*Id.* at 11].

Given all of the foregoing, together with the Court's findings, as discussed below, Movant has not demonstrated either deficiency or prejudice under *Strickland* arising from counsel's failure to introduce the reports prepared during the course of the investigation, as suggested. Under *Franks,* a defendant may challenge a search warrant where the affidavit in support thereof knowingly or recklessly makes false statements or misleading omissions material to the determination of probable cause. *Franks* 438 U.S. at 172; *United States v. Novaton,* 271 F.3d 968, 986 (11th Cir. 2001). In order to challenge "the veracity of an affidavit supporting a search warrant, the burden falls on the defendant to show that the affiant 'knowingly and intentionally, or with reckless disregard for the truth,' misstated facts that were essential to the finding of probable cause." *See United States v. Donaldson,* 767 F. App'x 903, 913 (11th Cir. 2019)(quoting *Franks,*

438 U.S. at 155–156. A search warrant will only be invalidated where the "intentional or reckless omissions" "would have prevented a finding of probable cause." *See Donaldson,* 767 F. App'x at 913 (quoting *United States v. Lebowitz,* 676 F.3d 1000, 1010 (11th Cir. 2012)(per curiam)(internal citation omitted)). However, "there is no . . . .*Franks* violation" if "probable cause still exists once any misrepresentations are taken out of the warrant and any omissions are inserted." *See Donaldson,* 767 F. App'x at 913 (quoting *United States v. Capers,* 708 F.3d 1286, 1296 (11th Cir. 2013)).

As applied, Movant has failed to demonstrate that counsel could have met the *Franks* standard as it relates to the Affidavits of S/A Weber and S/A Mayo and the introduction of the law enforcement reports at the suppression proceeding. *See Fields v. United States,* No. 18-14466-F, 2019 WL 3526490, at *2 (11th Cir. Feb. 21, 2019) (citing *Strickland,* 466 U.S. at 690). Even had the reports been introduced and the affidavits challenged, as suggested by Movant, he has failed to demonstrate that this would have resulted in suppression of the evidence obtained as a result of the Pierre Wiretap and Movant Wiretap. Probable cause supported the now challenged search warrants, and the detailed affidavits contained sufficient evidence in support of the Movant and Pierre DTO. Contrary to Movant's representation, S/A Weber and S/A Mayo made clear that there were numerous vehicles associated with Movant. Regardless of when precisely they became aware of the vehicles, there was ample evidence demonstrating Movant's extensive involvement in the Movant and Pierre DTO. Thus, the introduction of the reports as suggested and further questioning of the Government as to their contradict would not have changed the outcome of the suppression proceeding. Thus, Movant is not entitled to relief on these two claims.

b) ***Failure to Object to Government Suborning Perjury***

In **claim 3,** Movant asserts that counsel was ineffective for failing to object to the Government's misconduct in eliciting and/or otherwise suborning perjury regarding the "questionably false" testimony of the two Government agents during the suppression hearing. [CV ECF No. 18 at 8].

In order to prevail on a *Giglio*[9] claim, the Movant must establish that the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. *See United States v. Vallejo,* 297 F.3d 1154, 1163-64 (11th Cir. 2002). Under *Giglio,* "the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *United States v. Rodriguez,* 703 F. App'x 784, 786 (11th Cir. 2017)(per curiam)(quoting *United States v. Alzate,* 47 F.3d 1103, 1110 (11th Cir. 1995)(finding the prosecution's "explicit" and "implicit" factual representations" during side bar and cross-examination involved prosecutorial misconduct "and a corruption of the truth-seeking function of the trial.")). The government is also required to turn over to a criminal defendant any impeachment evidence that is likely to cast doubt on the reliability of a witness whose testimony may be determinative of guilt or innocence. *United States v. Jordan,* 316 F.3d 1215, 1226 n.16, 1253 (11th Cir. 2003).

Careful review of the record does not support Movant's claim that the Government suborned perjury, much less that the prosecution was based on lies or omissions. To the contrary, the fact that Movant takes issue with the testimony of prosecution witnesses does not mean that such testimony was untruthful or a product of misconduct on the part of the government. Moreover,

[9]*Giglio v. United States,* 405 U.S. 150, 153-155 (1972).

the witnesses were subject to cross-examination by defense counsel regarding their credibility and the reliability of their testimony both during the suppression proceeding and at trial. Defense counsel conducted thorough and forceful cross-examination of the prosecution witnesses. For the reasons previously discussed in relation to claims 1 and 2 above, Movant has not demonstrated that the Government suborned perjury at the suppression proceeding. Therefore, Movant has failed to demonstrate deficiency or prejudice under *Strickland* and is entitled to no relief on this basis.

It is worth mentioning at this juncture that on appeal, Movant also argued, as he does here, that the Court erred in failing to suppress the Pierre Wiretap and Movant Wiretap evidence on the basis that the affidavits omitted material facts and relied on affiants who intentionally or recklessly made material false statements. *Maxi,* 886 F.3d at 1331. The Eleventh Circuit affirmed denial of the suppression motion finding Movant had failed "to show that the omissions he identified were made intentionally or recklessly, or that if the identified additional information had been included, it would have undermined a finding of probable cause." *Id.* Even with the introduction of the records, as suggested, or further investigation or inquiry as to their absence, Movant has not demonstrated here that the outcome of the suppression proceeding would have been different. This is fatal to his claim. Movant cannot demonstrate *Strickland* prejudice and is not entitled to relief.

To the extent he suggests that the outcome of his trial would have been different had counsel renewed an objection to the Government eliciting or permitting false testimony at trial, it is readily apparent that defense counsel conducted thorough and forceful cross-examination of the Government witnesses, but the jury rejected the defense presented and, instead, believed the Government's theory and strong evidence presented by them. Thus, this court should not second-guess the jury's credibility findings here. *See United States v. Vargas,* 792 F. App'x 764, 775 (11th Cir. 2019)(quoting *United States v. Hernandez,* 743 F.3d 812, 814 (11th Cir. 2014)(per

curiam)(finding the jury as exclusive province over credibility of witnesses)(quoting *United States v. Emmanuel,* 565 F.3d 1324, 1334 (11th Cir. 2009)).

As applied, there was more than ample evidence adduced at trial establishing Movant's participation in the Movant and Pierre's DTO under surveillance by law enforcement since July 9, 2012. *See Maxi,* 886 F.3d at 1322-24. Specifically, following a July 9, 2012 "tip from a confidential informant [("CI")], that Pierre was "engaged in drug activity and kept firearms at one unit of a duplex located at 132 NE 64th Street in Miami," law enforcement met with the CI, who advised that guns and drugs would be found in the back unit of the duplex. *Maxi,* 886 F.3d at 1322. During surveillance of the property, two men were observed leaving the duplex in a truck, and about "a quarter mile from the duplex" law enforcement stepped the vehicle and asked the occupants for identification. *Maxi,* 388 F.3d at 1322. At that time, it was confirmed that Movant was driving the truck and Pierre was the passenger, but after law enforcement failed to discover any contraband, the Movant and Pierre were allowed to leave. *Id.* After being advised that the truck was returning to the duplex, five law enforcement vehicles descended on the residence, at which time Movant "'took off running and was apprehended shortly after." *Id.* However, they were released shortly thereafter without being charged. *Id.* Meanwhile, law enforcement knocked at the back of the residence, and Maxi opened the door. *Maxi,* 388 F.3d at 1323. At that time, law enforcement could see "'a mixing bowl as well as a white plate, with the plate having naked crack rocks, and the clear mixing bowl having packaged crack cocaine and a razor blade on the plate and a scrap piece of paper.'" *Id.* Concerned Maxi would destroy evidence, law enforcement forced open a security gate and then pulled Maxi out of the building and handcuffed him. *Id.* Following a protective sweep, more packaged crack cocaine, a semiautomatic handgun, four rifles, and a stack of money was observed inside the unit. *Id.* Before a search warrant was obtained, but after the protective sweep

conducted, a "walk through" to verify the items listed in the search warrant application was what they had seen. *Id.* Lieutenant Luis Almagar testified that the search warrant application did not rely on any of his observation from the walk through. *Id.* After the search warrant was issued and executed, law enforcement seized the crack cocaine, firearms, Maxi's driver's license, and other papers. *Id.* After the search was completed, Max was advised of and waived his constitutional rights, advising law enforcement that worked as a "cut man" for Pierre, "bagged crack cocaine, provided security, and resupplied other locations with crack cocaine." *Id.*

Law enforcement continued their investigations into the Movant and Pierre DTO, working with CI's to make controlled crack cocaine purchases from suspected members of the organization, and then using a pen register, a tap and trace device, and later a wiretap on Pierre's phone during the summer of 2013. *Maxi,* 866 F.3d at 1324. In October 2013, law enforcement applied for a wiretap on Movant's phone, claiming it was necessary to accomplish the goals of the investigation into the DTO, listing "a number of other investigative techniques that had been used or considered." *Id.* At trial, it was further proven that the Movant Wiretap was approved, and Movant's phone tapped from October 28 to November 26, 2013. *Id.* More than a year after the search that led to Maxi's arrest, law enforcement executed at search warrant at 262 NW 52nd Street in Miami on November 21, 2013, at which time Movant was observed outside the property. *Id.* When police yelled "stop," Movant turned, running into the house, where he was later detained. *Id.* "Drugs, guns, ammunition, and other evidence were also collected from this house." *Id.*

Even if, as suggested, the government suborned what Movant claims to be purported false testimony by its witnesses, no showing has been made in this collateral proceeding that the Court would have granted a motion for mistrial or acquittal on that basis, much less that the outcome of the guilt phase portion of the proceeding would have been different, especially in light of the more

than sufficient evidence implicating Movant in the offenses. Thus, Movant has not demonstrated prosecutorial misconduct. *United States v. Rodriguez,* 427 F. App'x 784, 791 (11th Cir. 2011)(per curiam)(citations omitted). Consequently, where Movant has not shown that there was a *Giglio* violation, he cannot establish that counsel was ineffective for failing to pursue this non-meritorious issue.

c) ***Failure to File Objections to Report Recommending Denial of Motion***

In **claim 4,** Movant asserts that counsel was ineffective for failing to file objections to the findings of fact and conclusions of law contained in the Report recommending that Movant's suppression motion be denied. [CV ECF No. 18 at 8]. He maintains counsel should have objected to the fact that the two testifying agents offered "contradicting and questionable testimony." [*Id.*]. Movant suggests that the Court's findings that any "omissions" by law enforcement, as suggested by the defense, was "unintentional and immaterial" is unsupported by the record. [*Id.*].

This claim is a mere reiteration of the arguments raised in relation to claims 1 through 3 above and is DENIED for the reasons set forth therein. As will be recalled, the Court's findings were amply supporting by the evidence adduced at the evidentiary hearing. More importantly, this claim is clearly refuted by the record which reveals that defense counsel did, in fact, object to the Court's findings and conclusions. *See* [CR ECF No. 212]. Movant has no shown deficiency or prejudice arising from counsel's failure to lodge further objections, much less that had he done so, that the outcome of the suppression or trial would have been different. Therefore, he has not shown prejudice under *Strickland* and is not entitled to relief on this claim.

d) *Failure to Seek Suppression of Wiretap*

In **claim 5,** Movant asserts that counsel was ineffective for failing to seek suppression of the June 2013 wiretap recordings on the basis that the "sealing protocol" under 28 U.S.C. § 2518(8)(a) was violated. [CV ECF No. 18 at 13].

Under 28 U.S.C. § 2518(8)(a), "the contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years." The primary purpose of § 2518(8)(a) "is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance." *United States v. Ojeda-Rios,* 495 U.S. 257, 263 (1990).

A defendant's claim seeking to suppress evidence on this basis must be "definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim is presented .... A court need not act upon general or conclusory assertions...." *See United States v. Richardson,* 764 F.2d 1514, 1527 (11th Cir.1985) (citations omitted). "Conclusory allegations based upon mere suspicions" are insufficient to warrant suppression of evidence. *See United States v. de la Fuente,* 548 F.2d 528, 533-34 (5th Cir. 1977).[10]

[10] Pursuant to *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981), opinions of the Fifth Circuit issued prior to October 1, 1981, are binding precedent in the Eleventh Circuit..

As applied, Movant does not provide any factual support regarding how the sealing protocol was violated, much less that it was "in excess of the statute's requirement," as alleged. Thus, absent any facts or proof, such conclusory allegations do not warrant relief. *See de la Fuente,* 548 F.2d at 534. Therefore, Movant cannot demonstrate deficiency or prejudice under *Strickland* arising from counsel's failure to seek suppression on the basis now alleged. Therefore, this claim is DENIED.

2. Failure to Argue Evidence Obtained Unlawfully

a) *Law Enforcement's Re-Entry onto Premises*

In **claim 6,** Movant asserts that counsel was ineffective for failing to contest that evidence was obtained by law enforcement who unlawfully re-entered and/or remained on the premises after the federal search warrant was executed on November 22, 2013 at 262/264 NW 52nd Street, Unit B in Miami. [CV ECF No. 18 at 13; CV ECF No. 26 at 4]. In his reply, Movant explains for the for the first time Movant that after law enforcement searched the residence and declared it vacant of "suspects and evidence," departing at 7:06 p.m. [CV ECF No. 26 at 4]. He alleges that approximately forty-five minutes later, between 7:30 and 7:45 p.m., law enforcement had no reason to return to the premises in order to observe and encounter Movant on the home's curtilage since they had already executed the warrant. [*Id.*]. Movant disputes the Government's representation that law enforcement never left, remaining on the premises collecting evidence following his 7:45 p.m. arrest. [*Id.* at 5].

Even if, as alleged, counsel could have argued that law enforcement left and then returned, as alleged, this would not have affected the outcome of the suppression or guilt phase of Movant's trial. As will be recalled, there was abundant evidence that Movant and Pierre were under surveillance, as was the 52nd Street residence in relation to the Movant and Pierre DTO. Moreover,

at trial, the evidence established that on November 21, 2013, law enforcement executed an initial search warrant at 262 N.W. 52nd Street residence between 7:00 p.m. and 7:45 p.m., when Detective Yaniel Hernandez ("Det. Hernandez") with the Miami-Dade Police Department ("MDPD"), while wearing a police vest, spotted the Movant outside the residence, going up trying to jump a fence. [CR DE# 343 at T. 45, 51-53]. When law enforcement called out, "Police, stop," Movant fled, running back inside the other portion of the home, not Unit B. [*Id.* at T. 53]. Det. Hernandez gave chase, taking Movant into custody inside the kitchen area of the home. [*Id.* at T. 53-54]. At the time of Movant's arrest, Det. Hernandez seized a telephone from his person that was the subject of the Movant Wiretap. [*Id.* at T. 55].

After Movant was taken into custody, a "protective sweep" of the home was conducted to ensure there was no one else inside the house and it was "safe for law enforcement to be in the area. [*Id.*]. At that time, Pierre and Braynen were discovered inside the home. [*Id.* at T. 55-56]. The home had an attic that was open and located where Pierre and Braynen were found and arrested. [*Id.* at T. 56]. During the protective sweep, Det. Hernandez also observed a firearm on a brown sofa, several baggies of crack cocaine in the bathroom, several empty baggies in the living room area, and money all over the house. [*Id.* at T. 57-58]. None of the evidence observed during the protective sweep was collected, and instead, an application for a second search warrant was prepared and obtained. [*Id.* at T. 45-46, 58-59]. The second search warrant was executed that same evening, going into the morning hours of the next day. [*Id.* at T. 59]. Law enforcement seized a composition notebook containing names, social security numbers, and dates of birth, in addition to, ammunition, a loaded firearm, two phones, large bags of crack cocaine, a large bag containing U.S. currency, and a sandwich bag of marijuana. [*Id.* at T. 61-71].

On this record, Movant has not alleged, let alone demonstrated that the seizure of the evidence following his arrest on November 21, 2013 was unlawful. In fact, the evidence shows that not just one, but two search warrants were properly obtained and executed. Evidence following his arrest were obtained pursuant to the second search warrant that was properly obtained and then executed on that day and into the early morning hours of the following day. Therefore, Movant has failed to demonstrate deficient performance or prejudice under *Strickland* arising from counsel's failure to seek suppression of the evidence seized following Movant's arrest.

b) ***Law Enforcement's Trespass onto Curtilage and Warrantless Entry into Home***

In **claim 7,** Movant asserts that counsel was ineffective for failing to challenge the use of evidence obtained by law enforcement's unlawful trespass onto the curtilage and subsequent warrantless entry into the Movant's residence on November 21, 2013. [CV ECF No. 18 at 14]. He claims law enforcement lacked probable cause to enter the premises where no exigent circumstances existed. [*Id.*]. The Government's response failed to address this precise claim, incorrectly focusing on the execution of a July 9, 2012 search warrant, not at issue here. [CV ECF No. 22 at 9]. However, as discussed below, Movant is not entitled to relief on this claim.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

See Kentucky v. King, 563 U.S. 452, 459–60 (2011). Thus, "all searches and seizures must be reasonable;" and, "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *See Kentucky,* 563 U.S. at 459-60 (citing *Payton v. New York,* 445 U.S. 573, 584 (1980)). "'Searches and seizures inside a home

without a warrant are presumptively unreasonable.'" *See Kentucky,* 563 U.S. at 459-60 (quoting *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006) (quoting *Groh v. Ramirez,* 540 U.S. 551, 559 (2004)). The presumption, however, "may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Kentucky,* 563 U.S. at 459-60 (quoting *Brigham City,*547 U.S. at 403; *Michigan v. Fisher,* 558 U.S. 45, 47 (2009) (per curiam)).

The law is well settled that law enforcement officers "may enter premises without a warrant when they are in hot pursuit of a fleeing suspect," as was the case here. *See Kentucky,* 563 U.S. at 459-60 (citing *United States v. Santana,* 427 U.S. 38, 42–43 (1976)). Another well recognized exception is the need by law enforcement "'to prevent the imminent destruction of evidence.". *Kentucky,* 563 U.S. at 459-60 (quoting *Brigham City, supra,* at 403; *Georgia v. Randolph,* 547 U.S. 103, 116, n. 6 (2006); *Minnesota v. Olson,* 495 U.S. 91, 100 (1990)).

Thus, where Det. Hernandez was in pursuit of the fleeing Movant, exigent circumstances existed to justify the warrantless entry into the kitchen area of the home where Movant was arrested. *Kentucky,* 563 U.S. at 459-60 (citing *Santana,* 427 U.S. at 42-43). Further, after Movant was arrested and a protective sweep conducted, additional co-conspirators where found inside the home, and law enforcement observed drugs and a firearm in plain view. The officer's entry into the home and the ensuing arrest of the Movant was proper. Movant cannot demonstrate deficiency or prejudice under *Strickland* arising from counsel's failure to pursue this non-meritorious claim.

3. Failure to Seek Dismissal of Indictment

In **claim 8,** Movant asserts counsel was ineffective for failing to seek dismissal of the Indictment on the basis that multiple constitutional violations occurred on July 9, 2012 leading to Maxi's arrest and the unlawful seizure of evidence. [CV ECF No. 18 at 14-15]. Maxi challenged the search and seizure of evidence on July 9, 2012. *Maxi,* 886 F.3d at 1325-29. Although the

Eleventh Circuit found constitutional violations because Maxi had not given law enforcement officers express license to come into his yard, the appellate court nonetheless concluded that the "constitutional violations of the officers did not result in the production of evidence," noting there was no evidence that things would have turned out differently had law enforcement conducted a proper "knock and talk." *See Maxi,* 886 F.3d at 1328 (quoting *Florida v. Jardines,* 569 U.S. 1, 8 (2013)). Thus, even if Movant had challenged the July 2012 search and seizure as alleged, for the same reasons expressed by the appellate court, Movant cannot demonstrate that the unconstitutional violations yielded any evidence at that time. Thus, Movant has failed to establish deficiency or prejudice under *Strickland* arising from counsel's failure to pursue this non-meritorious claim.

4. Failure to Contest Introduction Uncharged Conduct

In **claim 9,** Movant asserts that counsel was ineffective for failing to contest the Government's introduction of uncharged conduct at trial which later permitted the Government to make improper remarks during closing, rebuttal argument, inflaming the passions of the jury. [ECF No. 18 at 15]. Movant does not identify or provide any facts regarding the nature of the improper remarks, instead referring this Court to the trial transcript. *See* [CV ECF No. 18 at 15 citing (CR ECF No. 345 at T. 177)].

First, Movant is reminded that this Court is not required to act as a researcher/investigator on a scavenger hunt for facts to support Movant's claims. *See Fils v. City of Aventura,* 647 F.3d 1272, 1284 (11th Cir. 2011) (A court may not act as a Movant's lawyer and construct the party's theory of liability from facts never alleged, alluded to, or mentioned during the litigation.); *Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1059-60 (11th Cir. 2011)(finding that courts, with their

typically heavy caseload and always limited resources, cannot be expected to do a petitioner's work for him.).

Notwithstanding, review of the Government's rebuttal argument reveals that the Government was emphasizing that Movant and Pierre employed Maxi and others to actively run their crack cocaine Movant and Pierre DTO, and that at the time, they trusted one of their employees, Alex Bermudez ("Bermudez"), despite Movant now claiming Bermudez's testimony should not be trusted." [CR ECF No. 345 at T. 177]. The Government then went on, giving examples from the evidence adduced at trial that corroborated Bermudez's testimony. [*Id.* at T. 177-79].

The sole purpose of closing argument is to assist the jury in analyzing the evidence. *See United States v. Iglesias,* 915 F.2d 1524, 1529 (11th Cir. 1990) (citing *United States v. Pearson,* 746 F.2d 787, 796 (11th Cir.1984)). The jury's decision is to be based upon the evidence presented at trial and the legal instructions given by the court. *See Chandler v. Florida,* 449 U.S. 560, 574 (1981)("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). Argument urging the jury to decide the matter based upon factors other than those it is instructed to consider is improper. As a result, courts have condemned argument that is inflammatory or appeals to bias or prejudice. *See United States v. Childress,* 58 F.3d 693, 715 (D.C. Cir. 1995)("It is well established that a prosecutor may not use the bully-pulpit of a closing argument to inflame the passions or prejudices of the jury or to argue facts not in evidence."). Moreover, expression by the prosecutor of his or her own belief in the defendant's guilt is improper. *See Darden v. Wainwright,* 477 U.S. 168, 181 (1986)(quoting *Donnelly, supra.*)

A new trial based on prosecutorial misconduct "'is an extreme sanction which should be infrequently utilized.'" *Rodriguez,* 427 F. App'x at 791(quoting *United States v. Accetturo,* 858 F.2d 679, 681 (11th Cir. 1988)(quoting *United States v. Pabian,* 704 F.2d 1533, 1536 (11th Cir. 1983)). It is also well settled that the standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *See United States v. Jenkins,* 546 F. App'x 915, 916-17 (11th Cir. 2013)(per curiam)(citations omitted); *Donnelly v. DeChristoforo,* 416 U.S. 637, 642-45 (1974). In assessing whether the fundamental fairness of the trial has been compromised, the totality of the circumstances are to be considered in the context of the entire trial, *Hance v. Zant,* 696 F.2d 940 (11th Cir. 1983).

In this case, the Government did not personally vouch for the testimony of its witnesses. Rather, when read in context, it was permissible for the Government to rebut the defense's argument that Bermudez's testimony was not to be trusted. It does not appear from the record that the Government staked its reputation of that of the United States Attorney nor did it argue facts not in evidence. *See United States v. Hernandez,* 921 F.2d 1569, 1573 (11th Cir. 1991). The Government was not prohibited from arguing that its witnesses were, in fact, credible. *See United States v. Caporale,* 806 F.2d 1487, 1513 (11th Cir. 1986).

In any event, it bears noting that immediately before closing argument, the Court clearly and correctly instructed the jury that what the lawyers said was not evidence in the case, should not be considered as such, and that the case must be decided only upon the evidence presented at trial. [CR ECF 345 at T. 84-85]. It is generally presumed that jurors follow the Court's instructions. *See, e.g., Richardson v. Marsh,* 481 U.S. 200, 211 (1987). Given this record, there is nothing to suggest that the Government's closing argument violated Movant's constitutional rights. Because

Movant has not demonstrated deficiency or prejudice under *Strickland* arising from counsel's failure to pursue this non-meritorious claim, the claim is DENIED.

D. Claims Based on Rehaif and Davis

1. Rehaif Claim

In **claim 10,** Movant asserts that, pursuant to the United States Supreme Court's decision in *Rehaif v. United States,* 139 S.Ct. 2191 (2019), Movant is actually innocent as to Counts 14 and 16 because the Government neither charged nor proved the "knowing" element of the offenses. [CV ECF No. 16]. The Government failed to address Movant's *Rehaif* claim. In any event, Movant is not entitled to relief under *Rehaif.*

On April 23, 2019, the United States Supreme Court held in *Rehaif* that, "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif,* 139 S. Ct. at 2194. This claim is procedurally defaulted as it could have been but was not raised on direct appeal. *See Lynn,* 365 F.3d at 1232; *Massaro,* 538 U.S. at 504. A procedurally default claim will not be considered unless Movant establishes objective cause for the default and actual prejudice resulting from the alleged constitutional violation. *Massaro,* 538 U.S. at 504; *Spencer v. Sec'y, Dep't of Corr.,* 609 F.3d 1170, 1179-80 (11th Cir. 2010); *Vega v. United States,* 719 F. App'x 918, 919 (11th Cir. 2019)(per curiam)(citing *Lynn,* 365 F.3d at 1234); *Rose v. United States,* 738 F. App'x 617, 624 (11th Cir. 2018)(per curiam)(citing *McCay v. United States,* 657 F.3d 1190, 1196 (11th Cir. 2011)). A § 2255 movant can avoid a procedural default by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. *Rose,* 738 F. App'x at 624 (citing *United States v. Nyhuis,* 211 F.3d 1340, 1344 (11th Cir. 2000)).

As applied, the Eleventh Circuit has made clear that *Rehaif* did not announce a new rule of constitutional law, but rather clarified the requirements of 18 U.S.C. § 922(g) and § 924(a)(2), therefore, it does not apply retroactively to cases on collateral review. *See United States v. Finley,* 805 F. App'x 823, 826 (11th Cir. 2020)(citing *In re Palacios,* 931 F.3d 1314, 1315 (11th Cir. 2019). Because Movant has not shown cause for failing to raise his *Rehaif* claim on appeal, the court need not decide whether he can demonstrate prejudice. *See Bousley,* 523 U.S. at 622.

Even absent a showing of cause and prejudice, under exceptional circumstances, Movant may also obtain federal review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Bousley,* 523 U.S. at 622; *Lynn,* 365 F.3d at 1234-35 (quoting *Mills v. United States,* 36 F.3d 1052, 1055 (11th Cir. 1994)(per curiam)). "Actual innocence" means factual innocence, not mere legal insufficiency. *Bousley,* 523 U.S. at 623; *Mills,* 36 F.3d at 1055-56 (citing *Murray v. Carrier,* 477 U.S. 478, 490-92 (1986)).

As applied, Movant has not demonstrated that he is factually innocent. Instead, his argument is one of legal sufficiency not actual, factual innocence. Movant is not factually innocent, as there was more than sufficient evidence adduced at trial to support Movant's convictions. *See Morales,* 893 F.3d at 1371. Since Movant has not demonstrated cause and prejudice, much less that a fundamental miscarriage of justice will result if his *Rehaif* is not reviewed on the merits, the claim remains procedurally barred from review in this proceeding.

2. Davis Claim

In **claim 11,** Movant asserts that his conviction s to Count 12 is unconstitutionally vague in light of the United States Supreme Court's decision in *United States v. Davis,* 139 S.Ct. 2319

(2019). [CV ECF No. 18 at 16]. The Government did not address the merits of this claim. However, as discussed below, Movant is not entitled to *Davis* relief.

A § 2255 movant "bear[s] the burden of showing that he is actually entitled to relief on his *Davis* claim, meaning he [must] show that his § 924(c) conviction resulted from application of solely the [unconstitutional] residual clause [in § 924(c)(3)(B)]." *In re Hammoud,* 931 F.3d 1032, 1041 (11th Cir. 2019) (citing *Beeman,* 871 F.3d at 1222-25; *In re Moore,* 830 F.3d 1268, 1271 (11th Cir. 2016)). To be entitled to relief, Movant must demonstrate "that it was more likely than not [that] he in fact was sentenced ... [solely] under [§ 924(c)'s] residual clause." *See Beeman,* 871 F.3d at 1225; *see also In re Cannon,* 931 F.3d 1236, 1243 (11th Cir. 2019) ("[T]he [§ 2255] movant ... bears the burden of proving the likelihood that the jury based its verdict of guilty ... solely on the [offense that is not a crime of violence under § 924(c)'s residual clause], and not also on one of the other valid predicate offenses identified in the count...." (*citing Beeman,* 871 F.3d at 1222; *Moore,* 830 F.3d at 1272)). Thus, post-*Davis,* it is no longer possible to possess a firearm in furtherance of a crime of violence that is defined by the now-invalid residual clause, because "a vague law is no law at all." *Davis,* 138 S.Ct. at 2323. Where it is demonstrated that a defendant was convicted solely on the basis of the now invalid residual clause, Movant is entitled to habeas corpus relief, having established a conviction based on a "nonexistent crime." *Id.*

In Count 12, Movant was charged with the November 21, 2013 possession of a firearm in furtherance of a drug trafficking crime, a violation of 21 U.S.C. § 841(a)(1), as alleged in Count 11 of the Indictment, in violation of § 924(c)(1)(A)(i) ("§ 924(c)") and 18 U.S.C. § 2. [CR ECF No. 32 at 9]. Count 11 charged Movant with possession with intent to distribute twenty-eight grams or more of crack cocaine, in violation 21 U.S.C. § 841(a)(1), § 841(b)(1)(B) and 18 U.S.C.

§ 2. [*Id.* at 8]. The jury specific found as to Count 11, that the quantity of drugs involved in the offense was at least 28 grams of cocaine base. [CR ECF No. 277 at 3].

The Court instructed the jury as to Count 12, that Movant could be found guilty of possessing a firearm in furtherance of a drug-trafficking crime, as charged in Count 12, a violation of 18 U.S.C. § 924(c)(1)(A), if all of the following are proved beyond a reasonable doubt: (1) "that the Defendant committed the drug-trafficking crime charged in . . . Count 11 of the Indictment (as to Count 12); and" (2) "that the Defendant knowingly possessed a firearm in furtherance of that crime, as charged in the Indictment." [CR ECF No. 273 at 21]. The court defined possessing a firearm "in furtherance of" a crime to mean that "the firearm helped, promoted, or advanced the crime in some way." [*Id.*]. The jury was further instructed as to Count 12 under an aiding and abetting theory, that "even if he did not personally possess the firearm. But to be found guilty on this basis, Defendant Blanc must have actively participated in the drug-trafficking crime with advance knowledge that a confederate would possess a firearm in furtherance of the drug-trafficking crime." [CR ECF No. 273 at 23].

As to the predicate controlled substance offense as charged in Count 11, the court instructed the jury that 21 U.S.C. § 841(a)(1) makes it a federal offense to possess cocaine base, commonly referred to as "'crack cocaine, heroin, and methylone," all 'constrolled substances'." [CR ECF No. 273 at 20]. The jury was also instructed that Movant can be found guilty if the Government proved beyond a reasonable doubt that; (1) "the defendant knowingly possessed the controlled substance; and" (2) "the Defendant intended to distribute the controlled substance." [*Id.*]. Specifically, the court instructed that Movant was charged "with possessing and intending to distribute at least twenty-eight (28) grams of cocaine base," but if the jury found him guilty of an amount less than

that, they must also "unanimously agree on the weight of the cocaine base Blanc possessed and specify the amount on the verdict form." [*Id.*].

Movant's argument that relief is warranted because he was convicted based on a "vague," unlawful statute and the jury did not make the determination as to the qualifying predicate offense [CV ECF No. 26] is incorrect. The jury was properly instructed and returned a verdict finding Movant guilty as to Count 11, the predicate offense supporting his § 924(c) conviction, which proscribes using, carrying, or possessing a firearm during and in relation to any crime of violence ***or drug trafficking crime***. *See* 18 U.S.C. § 924(c)(1)(A) (emphasis added). [CR ECF No. 277 at 3]. The jury further made a specific finding that the quantity of drugs attributable to the Movant was at least twenty-eight grams or more of cocaine base. [*Id.*].

A § 924(c) offenses requires that the qualifying predicate offense be either a "crime of violence" as defined in 18 U.S.C. § 924(c)(3), or a "drug trafficking crime," as defined in 18 U.S.C. § 924(c)(2). In *Davis,* the United States Supreme Court found the "residual clause" portion of the definition of the term "crime of violence" set forth in Section 924(c)(3) was unconstitutionally vague. Here, Movant's predicate offense was for a drug trafficking crime, as defined in § 924(c)(2), not a crime of violence. *See* [CR ECF Nos. 32, 277]. Thus, Movant's conviction as to Count 12 is not affected by *Davis* because the United States Supreme Court left undisturbed those convictions predicated on drug trafficking crimes, as defined under § 924(c)(2). *See United States v. Duhart,* 803 F. App'x 267, 271 (11th Cir. 2020)(citing *In re Navarro,* 931 F.3d 1298, 1302–03 (11th Cir. 2019)(per curiam)(holding that § 924(c) conviction "fully supported by [] drug-trafficking crimes" are "outside the scope of *Davis"*). Because Movant's predicate offense, as charged in Counts 12 is a drug trafficking crime, as charged in Count 11, it supports his § 924(c) conviction. *See Donjoie v. United States,* 806 Fed. Appx. 934, 924-35 (11th Cir. 2020) (finding

defendant cannot prevail on *Davis* claim because his drug crimes still qualify as § 924(c) predicate offenses post-*Davis*)(citing *In re Navarro,* 931 F.3d at 1302–03 (finding that conspiracy to distribute and possess with intent to distribute cocaine and attempted possession with intent to distribute cocaine constitute drug trafficking crimes).

C. Request for Evidentiary Hearing

Movant request for an evidentiary hearing [CV ECF No. 18 at 12] is DENIED. Movant has the burden of establishing the need for a federal evidentiary hearing by showing that his allegations, if proven, would establish his right to collateral relief. *See Schriro v. Landrigan,* 550 U.S. 465, 473-75 (2007)(holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing); *Townsend v. Sain,* 372 U.S. 293, 307 (1963); *Holmes v. United States,* 876 F.2d 1545, 1553 (11th Cir. 1989)(holding that § 2255 does not require that the district court hold an evidentiary hearing every time a § 2255 petitioner simply asserts a claim of ineffective assistance of counsel, stating "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted by the record."). As applied, Movant has not demonstrated that he is entitled to an evidentiary hearing, and the record proves otherwise.

D. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his § 2255 motion to vacate has no absolute entitlement to appeal and must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. § 2255(c)(1); *Harbison v. Bell,* 556 U.S. 180, 183 (2009); *Jackson v. United States,* 875 F.3d 1089, 1090 (11th Cir. 2017)(per curiam). This Court should issue a Certificate of Appealability only if the Movant makes "a substantial showing of the denial of a constitutional

right." See 28 U.S.C. § 2253(c)(2). Where a district court has rejected Movant's constitutional claims on the merits, the Movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel,* 539 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, Movant must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Upon consideration of the record, a Certificate of Appealability shall not issue.

III. CONCLUSION

For the reasons discussed above, Movant's claim is either not supported by the record or the law to justify granting a motion to vacate. Thus, it is hereby:

ORDERED AND ADJUDGED that

1. Movant's Amended § 2255 Motion [CV ECF No. 18] is DENIED;
2. Final Judgment is entered in favor of Respondent;
3. No Certificate of Appealability shall issue;
4. All pending motions are DENIED, as moot; and,
5. The case CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of May, 2021.

s/Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-CV-22725-GRAHAM
CASE NO. 14-CR-20104-ROSENBERG (GRAHAM)

MARKENTZ BLANC,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court on Movant Markentz Blanc's *pro se* Motion for Reconsideration ("Motion"), docketed by the Clerk on June 8, 2021. [CV-ECF No. 34]. For the reasons set forth below, the Motion is DENIED.

I. BACKGROUND

Movant timely filed this Amended Motion to Vacate proceeding pursuant to 28 U.S.C. § 2255 ("§ 2255 Amended Motion"), challenging his convictions and sentences following a jury verdict for conspiracy to possess with intent to distribute 280 grams or more of cocaine base, three counts of possession with intent to distribute a detectable amount of cocaine base, possession of a firearm in furtherance of a drug trafficking crime, felon in possession of a firearm, possession of fifteen or more unauthorized access devices, two counts of aggravated identity theft, and conspiracy to commit wire fraud. Following the Government's Response, an Order was entered denying the § 2255 Motion and Final Judgment was entered in favor of the Government. [CV-ECF No. 33]. Movant has now filed a Motion for Reconsideration. [CV-ECF No. 34].

II. APPLICABLE LAW

A litigant may move for reconsideration pursuant to Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. Under Rule 59(e), reconsideration is proper when there is: (1) newly discovered evidence; (2) an intervening change in controlling law; or, (3) a need to correct a clear error of law or fact or prevent manifest injustice. *See Bd. of Trs. of Bay Med. Ctr. v. Humana Mil. Healthcare Servs., Inc.*, 447 F.3d 1370, 1377 (11th Cir. 2006) (citation omitted). Similarly, under Rule 60(b), relief from a final order is appropriate based on:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud . . . misrepresentation, or other misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on the earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

To prevail on a motion to reconsider, the moving party must demonstrate why the court should reverse its prior decision by setting forth facts or law of a strongly convincing nature. A motion to reconsider should not be used as a vehicle "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).[1]

[1] I note that Movant has not identified whether he moves under Rule 59(e) or Rule 60(b). Under either Rule, however, the Motion is timely, but Movant is not entitled to relief.

III. DISCUSSION

Movant seeks reconsideration of this § 2255 proceeding to raise arguments previously raised and rejected by this Court. None of the reasons for reopening of this case come within any of the above-enumerated Rule 59 or Rule 60(b) grounds. Movant does not offer any new evidence or new arguments not previously considered, and merely seeks reconsideration of claims previously raised and rejected by the Court.

IV. CERTIFICATE OF APPEALABILITY

The Eleventh Circuit has held that the denial of a Rule 59 motion is a "final order" in a habeas corpus proceeding and requires a Certificate of Appealability before an appeal may proceed. *See* 28 U.S.C. § 2253(c)(1); *Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013)(citations omitted); *see also Gonzalez v. Sec;'y for the Dep't of Corr.*, 366 F.3d 1253, 1263–64 (11th Cir.2004) (en banc) (concluding that the denial of a Fed.R.Civ.P. 60(b) motion constitutes a "final order" under section 2253(c)(1) and, thus, requires a COA). Upon consideration of the record as a whole, a certificate of appealability shall not issue.

V. CONCLUSION

For the reasons discussed above, Movant's reasons for reconsideration are either not supported by the record or the law to justify granting the motion. Thus, it is hereby

ORDERED AND ADJUDGED that:

1. Movant's Motion for Reconsideration [ECF No. 34] is **DENIED;**
2. No Certificate of Appealability shall issue;
3. All pending motions are DENIED, as moot; and,

4. The case remains CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 29th day of July, 2021.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

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