IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13604-G

NICHOLAS WUKOSON,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ORDER:

Nicholas Wukoson is a federal prisoner serving a 96-month sentence for 6 counts of possession of child pornography and 1 count of witness tampering. In 2020, he filed a motion to vacate his convictions, under 28 U.S.C. § 2255, alleging ineffective assistance of counsel by two of the four attorneys who represented him in the underlying criminal proceeding and arguing that his guilty plea was involuntary.

A grand jury, by superseding indictment, charged Wukoson with six counts of possession of child pornography and one count of witness tampering. Wukoson pled guilty, pursuant to an agreement with the government, and at the plea hearing, Wukoson, who appeared with counsel, said that he had reviewed and discussed the agreement with his attorneys, understood it, and was satisfied with his representation.

APPENDIX E
(EXHIBIT 5)

This Court affirmed, and Wukoson then filed the instant § 2255 motion, arguing that deficient performance by his attorneys rendered his plea involuntary. The district court denied the motion to vacate, determining that Wukoson had not met his burden to show that his guilty plea was involuntary, in light of his statements under oath at the plea hearing that he was satisfied with his representation and pleading guilty of his own free will. The court concluded that none of his first attorney's alleged failures prejudiced Wukoson because the court allowed him to withdraw a prior guilty plea. Further, the court concluded, Wukoson could not show either deficient performance or prejudice as to his second attorney. The district court denied a certificate of appealability ("COA"), and Wukoson now moves this Court for a COA.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court denied a habeas petition on substantive grounds, the petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A knowing and voluntary guilty plea "waives all nonjurisdictional defects in the proceedings." *United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003). Thus, claims of ineffective assistance of counsel that do not implicate the validity of the plea are waived by a guilty plea, and a defendant who enters a guilty plea can attack only "the voluntary and knowing nature of the plea." *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992). However, a defendant does not knowingly and voluntarily plead guilty where he has ineffective assistance of counsel during the plea process. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). To show ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient, and

(2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, reasonable jurists would not debate the district court's conclusion that Wukoson's second guilty plea was knowing and voluntary. In this collateral attack, Wukoson brought no evidence or factual allegations undermining the truth of his statements at the plea hearing, for which there is a strong presumption of truth. *See United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). Nor would reasonable jurists debate the district court's conclusions that he showed neither deficient performance, nor prejudice, as to his second attorney. His claims that counsel failed to make objections at sentencing or investigate his case are belied by the record. Nor was his counsel deficient in failing to move for dismissal of the superseding indictment, object to certain evidence at sentencing, or object to alleged misstatements by the government because such motions or objections would have been meritless. *See Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001).

Moreover, none of counsel's alleged deficiencies prejudiced Wukoson. The transcript of the sentencing hearing reflects that the court sentenced Wukoson above the four-year term requested by the government only because it found that he had refused to accept responsibility for his actions. Thus, had counsel made the objections that Wukoson now claims that he ought to have made, there was not a reasonable probability that the court would have ordered a more lenient sentence. Accordingly, the motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 20-81547-CV-MIDDLEBROOKS
(Case No. 18-80166-CR-MIDDLEBROOKS)

NICHOLAS WUKOSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. §2255

Mr. Wukoson, under oath, pled guilty twice On both occasions, he said he was satisfied with the representation of his lawyers, said no one had attempted to force him to plead guilty, and that he was pleading guilty of his own free will because he was guilty. He agreed to a detailed recitation of the facts surrounding his possession of child pornography, and in his second guilty plea, admitted he had obstructed justice by trying to convince his 13-year-old son to take the blame for his crimes.

Now he says he lied – that he only pled guilty because of coercion by the prosecutor and the incompetence of two of his three lawyers. He also blames his ex-wife, her brother, and a friend who refused to falsely provide him an alibi. In short, everyone but himself. His claims have no substance and his motion to vacate is denied.

BACKGROUND

In 2017, a Federal Bureau of Investigation ("FBI") agent discovered and downloaded multiple images and videos depicting the sexual abuse of prepubescent children, under age twelve, from a computer using a program to upload files to other users. An administrative subpoena confirmed that the suspect computer was at an internet address corresponding to Mr. Wukoson's home address. The FBI executed a search warrant at Mr. Wukoson's house and recovered two

APPENDIX C
(EXHIBIT 3)

laptop computers that Mr. Wukoson admitted belonged to him. After examining the laptops, the FBI uncovered several videos and images of confirmed child pornography and evidence of hundreds more videos and images of suspected child pornography. Mr. Wukoson admitted that he was responsible for downloading the child pornography on the two laptops; however after the search warrant was executed, Mr. Wukoson told his 13-year-old son, J.W., to take responsibility for the child pornography because he would only get a "slap on the wrist." When the FBI formally interviewed J.W., he told agents that "it could have been me," regarding the child pornography on Mr. Wukoson's laptops.[1]

Mr. Wukoson initially pled guilty to a one-count Information charging him with possession of child pornography involving a prepubescent minor. (Case No. 18-80166-CR-DMM DE 11).[2] Thereafter, he retained new counsel and filed a motion to withdraw his guilty plea, essentially arguing that later discovered evidence "support[ed] [his] belief that his son was actually responsible for downloading and viewing the child pornography images" at issue in the case, and arguing that Mr. Wukoson's decision to plead guilty was based "at least in part" on his desire to "protect his son." (DE 89). The Motion to Withdraw Plea was not opposed by the government, and I ultimately granted it. (CR DE 36). Then the government obtained a superseding indictment charging Mr. Wukoson with six counts of possession of child pornography involving a

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[1] In conjunction with his plea agreement, Mr. Wukoson executed a written factual proffer setting forth these undisputed facts. Moreover, in his appellate brief, Mr. Wukoson explained he did not recount the conduct underlying the child pornography offense "[b]ut it was described in the Government's factual proffer." Appellant's Brief of Nicholas Wukoson, p. 2 n.1 (CV DE 23-15). Mr. Wukoson did not raise any objection to any of these facts during his direct appeal or claim his guilty plea resulted from coercion.

2 Hereafter, docket entries for Case No. 18-80166-CR-DMM shall be referred to as "CR DE" and docket entries for this habeas case, Case No. 20-81547-CV-DMM, shall be referred to as "CV DE."

prepubescent minor, in violation of 18 U.S.C. § 2252(a)(4)(B), (b)(2) (Counts 1-6), and one count of witness tampering, in violation of 18 U.S.C. § 1512(c)(2) (Count 7) (CR DE 48).

Mr. Wukoson again decided to enter a guilty plea. He executed a plea agreement with the government in which he committed to plead guilty to Counts 1-7 in return for the government's promise to recommend a sentence of no more than 4 years of imprisonment. (CR DE 85). The plea agreement provided that Mr. Wukoson's sentence would be imposed after consideration of the Sentencing Guidelines, that a sentence could be imposed above or below the advisory guideline range, that the court was permitted to tailor the ultimate sentence in light of other statutory concerns and possessed the authority to impose any sentence within and up to the statutory maximum; Mr. Wukoson would not be able to withdraw his guilty plea as a result of the sentence imposed. (*Id.*).

During the hearing at which Mr. Wukoson pled guilty for the second time, he testified as follows:

> Q: Are you satisfied with the representation your lawyers have provided to you?
>
> A: Yes, sir, I am.

(CV DE 23-1 at 5). He confirmed his signature on the written plea agreement, said he had reviewed and discussed it with counsel, and that he understood it. (*Id.* at 5-6). When asked whether the government had made any promises to him outside of the written agreement, Mr. Wukoson responded that it had not. I asked:

> Q: Are you pleading guilty [of] your own free will because you are guilty?
>
> A: Yes, sir.

(*Id.* at 11). Mr. Wukoson also confirmed his signature on the written factual proffer and said he agreed with its recitation of the facts. (*Id.* at 12).

The prosecutor then read the entire factual proffer after which we had the following exchange:

> Q: Mr. Wukoson, you heard the prosecutor describe what he would have proven at trial; did you do those things?
>
> A: Yes, sir.
>
> Q: This was your child pornography?
>
> A: Yes, sir.
>
> Q: It was not your son's?
>
> A: No, sir.
>
> Q: How do you plead to the charges, guilty or not guilty?
>
> A: Guilty, your honor.

(*Id.* at 17).

At the second change of plea hearing, Mr. Wukoson was represented by two lawyers, Michael B. Cohen and Alan Schlesinger. Mr. Schlesinger, a member of the Connecticut Bar, had been granted leave to appear pro hac vice as co-counsel for Mr. Wukoson (CR DE 42), approximately one week after Mr. Wukoson's first guilty plea was vacated. (CR DE 36).

At sentencing, there was agreement that the advisory guidelines range was 108 to 135 months. Defense counsel asked that the PSI be amended to add Mr. Wukoson's denial of a previous incident of alleged child abuse that had been nolle prossed. I ordered that the denial be included and did not consider those allegations in sentencing Mr. Wukoson. (CR DE 125 at 4-6).

has caused my loved ones and my friends and my family . . . The admission and my being sorry for what has happened stands. I am guilty of what I have been accused." (*Id.* at 50-51).

I chose not to accept the recommendation of the parties contained with the plea agreement. And I explained the reasons.

First, the seriousness of the crime; that the guidelines are relatively severe in child pornography cases because of the need to suppress demand for the production of images that cause lasting impact on children. Second, I turned to the personal characteristics of the defendant. I was troubled by Mr. Wukoson's reluctance to accept responsibility for his actions. Mr. Wukoson refused to acknowledge, perhaps even to himself, what he has done. "[H]e says he accepts responsibility, and that he is sorry, but he then points to usually other people which is unfortunate." (*Id.* at 53). I explained that I had never seen, until this case, a defendant try to put the blame on a family member, especially a father to a son. (*Id.*).

As I saw it, to accept the plea agreement's recommendation would reward the defendant's effort to obstruct justice. Mr. Wukoson tried to persuade his son to say that the child pornography was his. He then used his son's initial statements to the FBI to create reasonable doubt. Had a trial been necessary, he would have put the government in the difficult position of calling a young boy as a witness to testify against his father. Moreover, Mr. Wukoson sought to implicate his friend, David Crow. To me, there was simply no way that 48 months would be a just sentence for a child pornography case except in the rarest, most unusual of circumstances, and here, such a lenient sentence was particularly inappropriate given Mr. Wukoson's attempt to place the blame for his crimes on his son. I still sentenced Mr. Wukoson below the advisory guidelines because of the parties' efforts to resolve what I perceived to be a difficult and significant case, but for that reason only. (*Id.* at 54). I sentenced Mr. Wukoson to 96 months imprisonment. (CR DE 130).

Both the prosecution and defense recommended the 48-month sentence contemplated by the plea agreement. Several people wanted to speak both against and in support of Mr. Wukoson. His ex-wife, Karyn Wukoson, his previous wife, Leah Trietiak, and a former friend, David Crow, spoke and Ms. Trietiak read letters from her children. Mr. Wukoson's mother, sister and a close family friend spoke on his behalf. (*See generally* CR DE 125)

Mr. Wukoson then allocated, in part as follows:

> . . . I am taking responsibility for what I have prior and previously pled guilty to, again here today before you. I am more than sad. I'm devasted over the pains that anyone in this situation has faced and suffered with. I say devastated, especially when I think of my children in this situation: For my daughter who thinks her father abandoned her; to my son who has been dragged through this. And from the day that the door opened in a predawn raid and gun pointed at his head which I know haunts him forever, things like that, Your Honor, is what keeps me up at night, all night. I am truly devastated and saddened by the pains that others as well are facing in this situation.

(CR DE 125 at 47).

He went on to say he had never used drugs, or abused alcohol, and he even had a clean driving record. He said he had always been involved in the community and just wanted to get back to church and provide for his children. He concluded by saying: "I have made mistakes and I am owning up to them." (*Id.* at 49).

I questioned what he meant. "You have pled guilty twice and told me you did it, but I don't hear anything about an understanding of what you have done in this case . . . Tell me how any of that is the fault of the women you were married to or had relationships with or law enforcement or anybody but you. That's the problem I have with this. You seem like you are still persisting in this; you know, it is everybody else's fault and I didn't do anything wrong." (*Id.* at 50). Mr. Wukoson responded: "I truly – as God is my witness, I am truly broken over what I have done and what it

ANALYSIS

Mr. Wukoson has filed a timely (Amended) Motion to Vacate, Set Aside, or Correct Sentence. (CV DE 13). Mr. Wukoson summarizes his claim as follows:

> In this Pro Se motion, I will show stand-alone errors, cumulative error, actual prejudice, actual conflict and how counsel (sic) deficient performance actually lead (sic) to my involuntary accepting a coerced plea deal twice.

(CV DE 13). The Government responded to Mr. Wukoson's § 2255 motion on May 3, 2021. (CV DE 23). Mr. Wukoson filed a Reply on June 21, 2021 (CV DE 30).

Mr. Wukoson brings his claim under the rubric of ineffective assistance of counsel. He attacks the performance of Douglas Rudman who represented Mr. Wukoson through his first guilty plea. He then complains about Michael Cohen, who successfully obtained an Order vacating the first guilty plea and who, along with another lawyer, Alan Schlesinger, represented Mr. Wukoson through his second guilty plea and at sentencing. He has no complaint with Schlesinger, claiming that "he clearly played the adversarial role and pushed hard to protect Movant's rights." (CV DE 30 at 16). He is also silent about his fourth attorney, Thomas A. Burns, who represented Mr. Wukoson on direct appeal.

The voluntariness of Mr. Wukoson's plea could have been raised on direct appeal, but it was not. Indeed, appellate counsel accepted the government's factual proffer as accurately recounting the conduct underlying the child pornography offenses. (CV DE 23-13 at 2 FN 1).

In some circumstances, an allegation of a coerced plea, supported by a factual allegation, can support a § 2255 motion. *See Fontaine v. United States,* 411 U.S. 213, 214-15 (1973); *United States v. Lampanianie*, 251 F. 3d 519, 524 (5th Cir. 2001). However, a defendant's statements during a Rule 11 colloquy, as well as any findings made by the judge accepting the plea, constitute

a formidable barrier in any subsequent collateral proceedings. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *see also Holmes v. United States,* 876 F.2d 1545, 1550 (11th Cir. 1999) (trial court satisfied itself during Rule 11 colloquy of voluntary and understanding nature of plea). Solemn declarations made under oath in open court carry a strong presumption of verity. *Blackledge*, 431 U.S. at 73-74; *United States v. Medlock,* 12 F.3d 185, 187 (11th Cir. 1994) (citations omitted). They are presumptively trustworthy and are considered conclusive absent compelling evidence showing otherwise; the subsequent presentation of conclusory and contradictory allegations does not suffice. *Blackledge,* 431 U.S. at 73-74. Consequently, a defendant "bears a heavy burden to show his statements [under oath] were false." *United States v. Rogers,* 848 F. 2d 166, 168 (11th Cir. 1988).

Mr. Wukoson expressed his satisfaction with counsel and said he was pleading guilty of his own free will because he was guilty. He did so under oath. I saw no indication of coercion. He agreed with the factual proffer. I found his plea to be knowing and voluntary, made with full knowledge of the possible consequences of the plea. He has not met his heavy burden to show his statements under oath were false. *Rogers,* 848 F.2d at 168.

The claims of ineffectiveness by counsel lack merit. To show a violation of the constitutional right to counsel, a defendant must demonstrate both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. *See Strickland v. Washington,* 466 U.S. 668, 686 (1984); *Gaskin v. Secretary, Department of Corrections,* 494 F. 3d 997, 1002 (11th Cir. 2007).

"*Strickland*'s two-part test also applies where a prisoner contends ineffective assistance led him or her to enter an improvident guilty plea." *Yordan v Dugger,* 909 F.2d 474, 477 (11th Cir. 1990) (citing *Hill v. Lockhart,* 474 U.S. 52 (1985)); *United States v. Pease,* 240 F.3d 938, 941 (11th

Cir. 2001). In applying *Strickland*, the court may dispose of an ineffective assistance claim if defendant fails to carry his burden on either of the two prongs. *Strickland,* 466 U.S. at 697.

In determining whether counsel's conduct was deficient, a court must, with much deference, consider "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688; *see also Dingle v. Secretary for Dept. of Corrections,* 480 F.3d 1092, 1099 (11th Cir. 2007). Counsel's performance must be evaluated with a high degree of deference and without the distorting effects of hindsight. *Strickland,* at 689. To show counsel's performance was unreasonable, a defendant must establish 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); *Chandler,* 218 F.2d at 1315 (en banc)). When examining the performance of an experienced trial counsel, the presumption that counsel's conduct was reasonable is even stronger, because "[e]xperience is due some respect." *Chandler,* 218 F.3d at 1316 n.18.

With regard to the prejudice requirement, a defendant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland* at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 354, 369-70 (1993). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockart,* 506 U.S. at 369 (quoting *Strickland,* 466 U.S. at 687). Or in the case of alleged sentencing errors, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level. *Glover v. United States,* 531 U.S. 198, 203-04 (2001). A significant increase in

sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." *Id.*

With respect to Mr. Rudman, the claim is disposed of on the prejudice prong. A stipulation for substitution of counsel was filed on November 26, 2018 (CR DE 25). On November 28, 2018, Mr. Rudman moved to withdraw as counsel. (CR DE 29). On December 13, 2018, Mr. Rudman's Motion to Withdraw was granted. (CR DE 33). Trial was reset for February 4, 2019. (CR DE 37). On January 3, 2019, Mr. Wukoson's Motion to Withdraw Plea was granted. (CR DE 36). On January 11, 2019, Mr. Schlesinger entered a pro hac vice appearance on behalf of Mr. Wukoson (CR DE 41). On January 18, 2019, Mr. Cohen filed a motion to continue citing the need for additional time to conduct forensic examination. Based on the need to properly prepare Mr. Wukoson's case for trial, counsel suggested late March as a trial date. The motion was granted, and the case was reset for March 25, 2019. (CR DE 46).

Nothing that Mr. Rudman did or didn't do prejudiced Mr. Wukoson. Mr. Wukoson's guilty plea was vacated and his newly retained counsel were granted the time they asked for to prepare.

With respect to Mr. Wukoson's complaint about Mr. Cohen neither *Strickland* prong can be met. First it is illogical that Mr. Wukoson, represented by two lawyers, can contend that Mr. Cohen was ineffective while praising Mr. Schlesinger. Second, Mr. Cohen performed admirably. He is an experienced lawyer with an excellent reputation and based upon my observations did a good job for a difficult client. He retained forensic and computer experts. (CR DE 51), sought to suppress evidence derived from the search warrant (CR DE 55), moved to exclude 404(b) and intrinsic evidence (CR DE 57), and noticed an alibi witness (CR DE 77).

Prior to sentencing, Mr. Cohen objected to the paragraph in the Presentence Investigation Report concerning the prior allegations of child abuse that had been noll prossed, filed the results

of a polygraph examination to support an argument that Mr. Wukoson did not present a danger to others, and submitted a myriad of letters in support of Mr. Wukoson. (CR DE 97 and 98). Several of those individuals spoke at sentencing.

Mr. Wukoson's complaints about Mr. Cohen are conclusory and frivolous.

For example, he claims a "breach of the plea deal made." On direct appeal, the Eleventh Circuit rejected Mr. Wukoson's contention that the government breached the plea agreement. *United States v. Wukoson,* 798 Fed. Appx. 551 (11th Cir. 2020).

He complains that Mr. Cohen "failed to motion court over *Berger* violation" and quotes language from *Berger v. United States,* 295 U.S. 78 (1935) in his Reply. In *Berger,* the Assistant United States Attorney who prosecuted the case misstated the facts in cross-examining witnesses, assumed prejudicial facts not in evidence, and presented a closing argument calculated to mislead the jury. That case has no bearing here. Mr. Wukoson's alleged *Berger* violation – that the AUSA "tried to mislead" Mr. Cohen but that "[t]hankfully, I had already updated Mr. Cohen on everything . . ." – is untenable. I never observed any misconduct on the part of Mr. Schiller.

Mr. Wukoson's complaints about sentencing reflect a misunderstanding of the nature of sentencing. He complains that Mr. Cohen did not object to the prior allegations of child abuse that were nolle prossed. But Mr. Cohen did object and Mr. Wukoson's denial of those allegations was added to the Presentence Investigation Report. He complains that Mr. Cohen did not object when his ex-wives and Mr. Crow spoke at sentencing. Any objection by Mr. Cohen would have been futile. I always allow people to speak at sentencing and to submit letters in support of, or critical of, a defendant. Mr. Cohen submitted letters supporting Mr. Wukoson and also invited Mr. Wukoson's mother, sister and a close family friend to speak at the hearing and they did so without objection.

The complaint against Mr. Cohen also fails on the prejudice prong of *Strickland.* Mr. Cohen's efforts on behalf of Mr. Wukoson resulted in a lower sentence than Mr. Wukoson would have otherwise received.

I sentenced Mr. Wukoson for precisely the reasons I stated. I did not consider the prior child abuse allegations that were nolle prossed. I did not change my mind or increase the sentence based upon the statements by the ex-wives or Mr. Crow. I considered the advisory Sentencing Guidelines, the nature and seriousness of the crime, Mr. Wukoson's personal and individual characteristics, his failure to acknowledge his crime, and his effort to obstruct justice by trying to shift blame to his son.

The efforts by Mr. Cohen and the other lawyers to resolve this case reduced Mr. Wukoson's sentence. His advisory guidelines, with credit for acceptance of responsibility, were 108 to 135 months. The evidence of Mr. Wukoson's guilt was overwhelming and had he been convicted at trial his guidelines would have been 135 -168 months. As I said at sentencing, the only reason I varied downward to 96 months was the Parties' efforts to resolve the case and Mr. Cohen's arguments as to that resolution.

CONCLUSION

Evidentiary Hearing. Mr. Wukoson is not entitled to an evidentiary hearing because "the motion and the files and records of the case conclusively show" that Mr. Wukoson is not entitled to relief. *See* 28 U.S.C. § 2255(b).

Certificate of Appealability. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district

court rejects a habeas petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). By contrast, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows . . . 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.*

Here, I have rejected Mr. Wukoson's claim on the merits. Because I conclude that no reasonable jurist would find my assessment of Mr. Wukoson's constitutional claims debatable, I will deny a certificate of appealability.

Based upon the foregoing, it is **ORDERED AND ADJUDGED** that:

1. The Amended Motion to Vacate pursuant to 28 U.S.C. § 2255 (DE 13) is **DENIED**.
2. No certificate of appealability shall issue.
3. Final judgment shall be entered by separate Order.

SIGNED in Chambers at West Palm Beach, Florida, this 23rd day of September, 2021.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc:
Nicholas Wukoson, *Pro Se*
Reg. No. 19092-104
Federal Correctional Institution-Jesup
Inmate Mail/Parcels
2680 301 South
Jesup, GA 31599

Gregory Schiller, AUSA
U.S. Attorney's Office
500 S. Australian Ave., Suite 400
West Palm Beach, FL 33401
Email: gregory.schiller@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 20-81547-CV-MIDDLEBROOKS
(Case No. 18-80166-CR-MIDDLEBROOKS)

NICHOLAS WUKOSON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT

Pursuant to my Order denying Movant, NICHOLAS WUKOSON's *pro se* motion to vacate, pursuant to 28 U.S.C. § 2255, it is hereby **ORDERED AND ADJUDGED** that:

1. Judgment is **ENTERED** in favor of the United States of America.

2. The Clerk of Court shall **CLOSE THIS CASE.**

3. All pending motions are **DENIED AS MOOT.**

SIGNED in Chambers in West Palm Beach, Florida this 29th day of September, 2021.

Donald M. Middlebrooks
United States District Judge

cc:
Nicholas Wukoson, *Pro Se*
Reg. No. 19092-104
Federal Correctional Institution-Jesup
Inmate Mail/Parcels
2680 301 South
Jesup, GA 31599

Gregory Schiller, AUSA
U.S. Attorney's Office
500 S. Australian Ave., Suite 400
West Palm Beach, FL 33401
Email: gregory.schiller@usdoj.gov

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13604-G

NICHOLAS WUKOSON,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

Before: NEWSOM and BRANCH, Circuit Judges.

BY THE COURT:

Nicholas Wukoson has filed a motion for reconsideration of this Court's February 8, 2022, order denying his motion for a certificate of appealability from the denial of his 28 U.S.C. § 2255 motion. Upon review, Wukoson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX G
(Exhibit 7)

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