IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-10206-A

REGINALD EUGENE GRIMES, SR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: JORDAN and BRASHER, Circuit Judges.

BY THE COURT:

Reginald Eugene Grimes, Sr., filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated May 6, 2022, denying his second amended motion for a certificate of appealability, and his amended motion for leave to proceed *in forma pauperis*, in his appeal from the district court's denial of his construed motions for reconsideration of the court's February 4, 2020, order denying his 28 U.S.C. § 2255 motion. He also filed a motion for leave to file an out-of-time motion for reconsideration. His motion to for leave to file his out-of-time motion for reconsideration is GRANTED. Because Grimes has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

APPENDIX-"L"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-10206-A

REGINALD EUGENE GRIMES, SR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Reginald Eugene Grimes, Sr., is a federal prisoner serving 168 months' imprisonment for conspiracy to possess with intent to distribute heroin and possession with intent to distribute heroin. He filed amended motions, seeking a certificate of appealability ("COA"), and leave to proceed in forma pauperis ("IFP"), to appeal from the district court's denial of his construed motions for reconsideration of the court's February 4, 2020, order denying his 28 U.S.C. § 2255 motion. In his construed motions for reconsideration, Grimes requested that the district court vacate its order denying his § 2255 motion, and that it reconsider the claims raised in his § 2255 motion, in light of this Court's February 21, 2020, opinion in his criminal case, *United States v. Grimes*, 803 F. App'x 349 (11th Cir. 2020) (unpublished).

A COA is required to appeal from the denial of a Fed. R. Civ. P. 59(e) or 60(b) motion arising from a habeas proceeding. *Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th

APPENDIX-"K"

Cir. 2013); *Jackson v. Crosby*, 437 F.3d 1290, 1294 (11th Cir. 2005). In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, a movant must demonstrate 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) (quotation marks omitted).

This Court reviews the denial of a Rule 59(e) or 60(b) motion for an abuse of discretion. *Jackson*, 437 F.3d at 1295; *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). The only grounds for granting a Rule 59(e) motion are newly discovered evidence or manifest errors of law or fact. *Arthur*, 500 F.3d at 1343. Similarly, a Rule 60(b)(6) motion requires a showing of "extraordinary circumstances" that will "rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

Here, reasonable jurists would not debate whether the district court abused its discretion in denying Grimes' motions for reconsideration. *See Slack*, 529 U.S. at 484. Grimes failed to identify newly discovered evidence, manifest errors in law or fact, or "extraordinary circumstances" warranting reconsideration. *See Arthur*, 500 F.3d at 1343; *Gonzalez*, 545 U.S. at 535. The district court considered and denied the claims in his amended § 2255 motion, and this Court's opinion in *Grimes* did not alter any of the district court's findings in its February 4, 2020, order.

Accordingly, Grimes' second amended motion for a COA is DENIED and his amended motion for IFP is DENIED AS MOOT.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-80053-CV-MIDDLEBROOKS

REGINALD EUGENE GRIMES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOVANT'S REQUEST/MOTION FOR *NUNC PRO TUNC* ORDER GRANTING MOVANT'S 28 U.S.C. § 2255 MOTION TO VACATE

THIS CAUSE is before the Court upon Movant Reginald Eugene Grimes's ("Movant") *pro se* "Request . . . [for a] '*Nunc Pro Tunc* Order Granting' Movant's 28 U.S.C. § 2255" ("Motion"), executed on November 17, 2021, and docketed by the Clerk on November 22, 2021 (DE 65) and November 23, 2021 (DE 66).[1] For the following reasons, the Motions are **DENIED.**

I. BACKGROUND

Initially, Petitioner filed a *pro se* Amended Motion to Vacate pursuant to 28 U.S.C. § 2255 ("Amended § 2255 Motion") alleging (1) the government presented perjured testimony and capitalized on that testimony during opening statements and closing arguments; (2) the court erred in refusing to permit Movant to argue his objections to the Presentence Investigation Report, improperly applying a firearm enhancement, and unlawfully imposing a term of 168 months of imprisonment as to Count 8; (3) the government lied to the court at sentencing; and, (4) appellate

[1] The November 23, 2021 filing appears to be a duplicate of the November 22, 2021 filing. *Compare* DE 65 and 66.

counsel was ineffective for failing to raise multiple issues on appeal. (CV 9-1 at 1-8). On December 9, 2019, Magistrate Judge Lisette M. Reid issued a Report recommending that the Amended Motion be denied on the merits. (DE 45). After Movant filed Objections (DE 46) to the Report, on March 5, 2020, I reviewed the record, addressed Movant's arguments, and agreed with the Report's recommendation that the Amended § 2255 Motion be denied. (DE 49). In so ruling, I found that none of Movant's objections provide grounds for rejecting or modifying the Report's findings. (*Id.* at 3-4). On March 26, 2020, I denied Movant's Motions to Appeal *In Forma Pauperis* ("IFP") without prejudice because he did not include an Affidavit of Indigency in either Motion. (DE 56). On May 5, 2020, I granted Movant's renewed Motion to Appeal IFP, finding the appeal was not frivolous. (DE 59). On July 31, 2020, the Eleventh Circuit Court of Appeals denied Movant's motion for certificate of appealability, finding reasonable jurists would not debate the district court's denial of claims 1 through 4. (DE 60).

Over a year later, on November 17, 2021, Movant has filed the instant Motion requesting that I vacate my March 5, 2020 Order and reconsider the claims raised in his Amended § 2255 Motion in light of the appellate court's opinion in *United States v. Grimes*, 803 F. App'x 349 (11th Cir. 2020) (affirming my Order dismissing Movant's *pro se* motion to correct the PSI). In so holding, the appellate court noted that Movant could have, but failed to raise his Rule 32 violation on direct appeal. *Id.* at 351. Although the appellate court found such a post-judgment motion alleging a Rule 32 violation could be construed as a § 2255 motion, it noted that Movant had already filed a § 2255 motion raising the "very Rule 32 violation" alleged on appeal, in addition to raising a claim challenging appellate counsel's effectiveness for failing to raise the Rule 32 issue on appeal. *Id.* at 351-52. Movant maintains I had no opportunity to consider his claims in light of

the appellate opinion rendered on February 21, 2020 when I issued my February 4, 2020 Order.[2] (DE 65 at 5). As relief, Movant seeks an Order reopening this case and granting his Amended § 2255 Motion. [*Id.*].

II. APPLICABLE LAW

It is well settled that federal courts "have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan*, 915 F.2d 622, 624-25 (11th Cir. 1990). Therefore, construing the *pro se* Motion liberally, it is, in legal effect, seeking reconsideration under Fed. R. Civ. P. 59 and/or Fed. R. Civ. P. 60.[3]

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 on the basis of:

> (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;

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[2] The record reveals that the Clerk did not enter my Order on the docket until March 5, 2020. (DE 49).

[3] Movant's mistakenly requests that I apply Fed. R. App. P. 32, which is not applicable to these proceedings as that rule governs the filing of briefs, appendices, and other papers before the appellate court. Further, when considering Movant's filing under Rule 59, it does not appear timely, having been filed more than twenty-eight days after entry of my Order on March 5, 2020.

(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).

III. DISCUSSION

Movant seeks reconsideration under Rule 60(b), claiming I failed to consider the merits of the claims raised in his Amended § 2255 Motion in light of the appellate court's decision. However, nothing in that opinion alters my findings. The appellate court noted correctly that the issues were pending before the Court at the time. Further, contrary to Movant's argument, his claims were considered and rejected on the merits. Thus, none of the purported reasons for reopening this case come within any of the above-enumerated Rule 60(b) grounds to warrant granting Petitioner's motion. Consequently, I find this Second Motion should be DENIED.

Finally, Petitioner is cautioned that his continued post-conviction filings in this closed § 2255 proceeding are viewed with disfavor because they are expending unnecessary judicial time and resources. Thus, Petitioner is cautioned that any future *pro se* filings in this case may be restricted. This injunctive restriction may be deemed essential and prudent to avoid conduct that impairs the rights of other litigants and the Court's ability to effectively carry out its Article III functions. *See Simmons v. Warden,* 589 F. App'x 919, 923 (11th Cir. 2014) (per curiam) (citing *Procup v. Strickland,* 792 F.2d 1069, 1071, 1073 (11th Cir. 1986)(en banc)(per curiam).

IV. CERTIFICATE OF APPEALABILITY

The Eleventh Circuit has held that the denial of a Rule 60 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); *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

Because I find that Petitioner's reason for reopening of this case do not come within any of the above-enumerated grounds for reconsideration, it is

ORDERED AND ADJUDGED as follows:

1. Movant's Motions (DE 65 and 66) are **DENIED;**
2. A Certificate of Appealability is **DENIED;** and,
3. All pending motions are **DENIED AS MOOT.**

SIGNED in Chambers at West Palm Beach, Florida this 2 day of December, 2021.

DONALD M. MIDDLEBROOKS,
UNITED STATES DISTRICT JUDGE

REGINALD EUGENE GRIMES, Movant, v. UNITED STATES OF AMERICA, Respondents.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2020 U.S. Dist. LEXIS 39652
CASE NO.: 18-80053-CIV-MIDDLEBROOKS/Reid
February 4, 2020, Decided
March 5, 2020, Entered on Docket

Editorial Information: Subsequent History

Certificate of appealability denied, Motion denied by, As moot Grimes v. United States, 2020 U.S. App. LEXIS 24298 (11th Cir. Fla., July 31, 2020)

Editorial Information: Prior History

Grimes v. United States, 2019 U.S. Dist. LEXIS 212653 (S.D. Fla., Dec. 9, 2019)

Counsel {2020 U.S. Dist. LEXIS 1}Reginald Eugene Grimes, Plaintiff, Pro se, Pensacola, FL.

For United States of America, Defendant: Noticing 2255 US Attorney, LEAD ATTORNEY; Adam C. McMichael, LEAD ATTORNEY, US Attorney's Office, West Palm Beach, FL.

Judges: DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: DONALD M. MIDDLEBROOKS

Opinion

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on Magistrate Judge Lisette M. Reid's Report and Recommendation on Petition for Writ of Habeas Corpus ("Report"), issued on December 9, 2019. (DE 45). The Report recommends denial of the Petition, which seeks relief under 28 U.S.C. § 2255, on several bases. Movant filed Objections to the Report on January 3, 2020. (DE 46). As Movant states that he received the Report on December 16, 2019 and his objections are dated December 20, 2019, I will consider his objections to be timely filed.

Movant seeks relief on seven grounds, and objects to the Magistrate Judge's recommendations on each ground. I note that many of Movant's objections are merely restatements of his position, rather than an argument as to the Report's specific findings. In this Order, I address only those arguments in which Movant substantively disputes a particular finding in the{2020 U.S. Dist. LEXIS 2} Report. I all other respects, I have conducted a de novo review of the record, and I agree with the Report and there recommendations therein in their entirety.

First, Movant alleges that his constitutional rights were violated when AUSA Adam McMichael discussed a purchase of 18 grams of heroin and allowed Gary Moore to testify as to that amount; when there was a proffer (the "Proffer") which contradicted this figure. The Report finds that despite the contradictory Proffer, there was ample documentation elsewhere in the record to support the

18-gram figure. Movant objects, arguing that "a lie is a lie no matter the subject" and consequently requests an evidentiary hearing to explore the difference between the Proffer and the other conflicting evidence. Movant's objection is overruled. The standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Significantly, the issue is not whether the outcome of trial would have been different if it were proven that the heroin transaction in question involved 2 grams of heroin instead of 18, but instead whether omission of the Proffer constitutes{**2020 U.S. Dist. LEXIS 3**} government misconduct and whether that misconduct would have affected the outcome of the trial. Given the other evidence in the record supporting the 18-gram figure, I find that this was not misconduct, and even if it was, it would not have affected the outcome of the trial.

Movant also argues that I violated his rights by not allowing him to make objections to the Presentence Investigation Report during sentencing. The Report finds that disallowing Movant from objecting was appropriate. Movant disputes this finding, citing Rule 32 of the Federal Rules of Criminal Procedure, which state that "[a]t sentencing, the court must-for any disputed portion of the presentence report or other controverted matter-rule on the dispute or *determine that a ruling is unnecessary* either *because the matter will not affect sentencing*, or because the court will not consider the matter in sentencing." (emphasis added).

As made clear in the Report, I determined at the time of sentencing that none of Movant's arguments affected the calculation of guidelines at sentencing, and therefore overruled Movant's objections and disallowed additional objections. Accordingly, the Report correctly concluded that disallowing these objections was not a violation of Movants{**2020 U.S. Dist. LEXIS 4**} rights.

Movant also argues that I improperly applied a firearm enhancement. The Report finds that the firearm enhancement was properly applied, as confirmed by the Eleventh Circuit on appeal. Movant argues that this finding is in conflict with the Supreme Court's holding in *Nelson v. Colorado*, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017). However, Nelson answers the following question: "When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction?" *Id.* at 1252. The Supreme Court's ruling is irrelevant to the issue of whether a firearm enhancement is appropriately applied. Accordingly, Movant's objection is overruled.

Additionally, Movant argues that Mr. McMichael lied during sentencing. This argument is raised, but never fully addressed in the Report, nor is it addressed in the Objections. Accordingly, it appears that it may be waived. However, in an abundance of caution, I will address it briefly. I look to Movant's Amended Complaint to assess the viability of this claim. Movant's Amended Complaint states that "(AUSA) Adam Craig McMichael LIED to The Honorable district [sic] Court Judge Donald{**2020 U.S. Dist. LEXIS 5**} M. Middlebrooks, on October 8, 2015, during Movant's sentencing Hearing by stating 'He (Adam C. McMichael) Did Not Correct alleged co-defendant's (Antonio Escamilia, Jr.'s) Factual Basis" on April 1, 2015." (DE 9). In Movant's Memorandum in support of his Amended Complaint, he further explains that Mr. McMichael allegedly lied when he said that the government had not "changed thing on people's documents and misled the jury." This appears to be a reference to the Proffer stating that 2 grams of heroin were sold instead of 18. As previously discussed, I found that Mr. McMichael committed no misconduct, and further, even if he had done so, the outcome of the trial (or sentencing) would not have been affected, given the substantial other evidence available.

After a careful review of Judge Reid's Report and the record in this case, I agree with the Report's recommendations. None of Movant's objections provide grounds for rejecting or modifying the Report's findings. Further, I find that Petitioner has failed to make "a substantial showing of the

denial of a constitutional right" sufficient to support the issuance of a Certificate of Appealability. 28 U.S.C. § 2253. Accordingly, it is hereby

ORDERED AND ADJUDGED{2020 U.S. Dist. LEXIS 6} that

(1) The Report (DE 45) is **RATIFIED, ADOPTED, AND APPROVED** in its entirety.

(2) Movant's Verified Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 (DE 9) is **DENIED.**

(3) A Certificate of Appealability is **DENIED.**

(4) The Clerk of Court is directed to **CLOSE THIS CASE.**

(5) All pending motions are **DENIED AS MOOT.**

SIGNED in Chambers in West Palm Beach, Florida, this 4 day of February, 2020.

/s/ Donald M. Middlebrooks

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

REGINALD EUGENE GRIMES, Movant, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2019 U.S. Dist. LEXIS 212653
CASE NO. 18-CV-80053-MIDDLEBROOKS,CASE NO. 15-CR-80003-MIDDLEBROOKS
December 9, 2019, Decided
December 9, 2019, Entered on Docket

Editorial Information: Subsequent History

Adopted by, Post-conviction relief denied at, Certificate of appealability denied, Motion denied by, As moot, Objection overruled by Grimes v. United States, 2020 U.S. Dist. LEXIS 39652 (S.D. Fla., Feb. 4, 2020)

Editorial Information: Prior History

United States v. Grimes, 705 Fed. Appx. 897, 2017 U.S. App. LEXIS 16245 (11th Cir. Fla., Aug. 25, 2017)

Counsel {2019 U.S. Dist. LEXIS 1}**Reginald Eugene Grimes**, Plaintiff, Pro se, Pensacola, FL.

For United States of America, Defendant: Noticing 2255 US Attorney, LEAD ATTORNEY; Adam C. McMichael, LEAD ATTORNEY, US Attorney's Office, West Palm Beach, FL.

Judges: Lisette M. Reid, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: Lisette M. Reid

Opinion

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* movant, **Reginald Eugene Grimes** ("Movant"), has filed this motion to vacate, pursuant to 28 U.S.C. § 2255, attacking the constitutionality of his convictions and sentences for conspiracy to possess with intent to distribute one kilogram or more of heroin and possession with intent to distribute a detectable amount of heroin, entered following a jury verdict in Case No. 15-CR-80003-DMM. For the reasons set forth below, the Movant is not entitled to relief.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B), (C); S.D. Fla. Admin. Order 2019-02; and Rules 8 and 10 Governing Section 2255 cases in the United States District Courts.

II. Claims

Construing the § 2255 motion liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), Movant raises the following grounds for relief:

1. The government violated Movant's constitutional rights when AUSA Adam McMichael presented the perjured{2019 U.S. Dist. LEXIS 2} testimony of Gary Moore and Robert Keating at trial and capitalized on that testimony during opening and closing arguments. [CV ECF 9, p. 5]; [CV ECF 9-1, p. 1].

2. The District Court violated his constitutional rights when it

a. refused to allow Movant to argue his objections to the Presentence Investigation Report;

b. improperly applied a firearm enhancement pursuant to U.S.S.G. § 2D1.1(b)(1); and,

c. sentenced him to 168 months' imprisonment on Count 8. [CV ECF 9, p. 6]; [CV ECF 9-1, pp. 3-4].3. The government violated his constitutional rights when AUSA McMichael lied to the District Court at sentencing. [CV ECF 9, p. 8]; [CV ECF 9-1, p. 5].

4. He received ineffective assistance of appellate counsel where his lawyer failed to raise multiple issues on appeal. [CV ECF 9, p. 9]; [CV ECF 9-1, pp. 5-8].

III. Procedural Background

A. Indictment

Movant was charged with conspiracy to possess with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. § 841(b)(1)(A)(i) (Count 1), and possession with intent to distribute a controlled substance involving a detectable amount of heroin, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C) (Count 8). [CR ECF 3].

B. Facts Adduced at Trial1

Sergeant Robert Keating ("Keating") testified that he was one of{2019 U.S. Dist. LEXIS 3} the investigators involved in a heroin distribution investigation beginning in December 2013. [CR ECF 750, pp. 125-129]. Specifically, he began investigating Gary Moore ("Moore") due to a spike in heroin overdoses in the Delray Beach area and began a wire-tap of Moore's phone. [*Id.* pp. 128-129, 135, 156]. Towards the end of the investigation, Sergeant Keating discovered that Delray Beach Police Sergeant Darrell Hunter's wife, Errika Hunter ("Hunter"), was involved in the conspiracy. [*Id.* pp. 131-132].

In June 2014, Keating, while conducting surveillance in the case, observed Movant meet with Lakisha Wise ("Wise"), Moore's girlfriend, at a gas station. [*Id.* pp. 158-159]. Through surveillance, Movant was observed leaving Hunter's address in West Palm Beach, and Wise's address in Pompano Beach. [*Id.* pp. 165-169]. The two heroin operations were entirely separate, but Movant was seen going to both addresses every couple of days. [*Id.* pp. 168-169, 172-174, 177-78, 181-82, 184, 185]. During all of these visits, Movant was often seen driving different rental cars. [*Id.* p. 187]. Based on Keating's experience, he believed that this was done to make it more difficult for law enforcement to track Movant. [*Id.* p. 188].

Officer Jeff Messer also testified that he was involved in the investigation of Moore and his associates. [*Id.* p. 226]. During the{2019 U.S. Dist. LEXIS 4} investigation, he observed Movant at Wise's house in Pompano, and Hunter's apartment in West Palm Beach several times per week. [*Id.* pp. 229-231, 233-34]. Based on the surveillance, Messer believed that there may have been drugs inside of the apartments. [*Id.* p. 243]. Agent Matthew Scarini and Sergeant Bryan Griffith also testified as to Movant's presence at both locations. [CR ECF 751, pp. 19-24, 38]

Narcotics Agent Adan Pacheco testified that he too was part of the surveillance team during the investigation, and observed Movant visit Wise's address on multiple occasions. [*Id.* pp. 47-51].

Notably, on November 9, 2014, while doing surveillance unrelated to Movant, Pacheco observed a meeting between Moore and Cynthia Benavidez ("Benavidez"), Moore's source of supply. [*Id.* pp. 52-53]. After the meeting, Pacheco followed Benavidez until she was stopped by a marked patrol unit. [*Id.* pp. 54-55]. Benavidez was found with a large amount of cash that she received from Moore for previous narcotics transactions, but was not arrested. [*Id.* pp. 55-57].

Officer Christine Suarez testified that she intercepted Moore and Wise's phones via wire-tap. [*Id.* pp. 111-122]. On November 9, 2014, law enforcement was monitoring Moore's phone calls and knew that he would be meeting with Benavidez so that Moore**{2019 U.S. Dist. LEXIS 5}** could pay her for drugs. [*Id.* p. 124]. When Benavidez was stopped, authorities elected to seize the $54,000 found in her car and let her go because they did not want to alert Benavidez to the fact that she was being monitored. [*Id.* p. 127]. Afterward, Moore had a conversation with Movant about the seizure. [*Id.* p. 128]. In total, there were approximately 6000 intercepted calls. [*Id.*]. Movant was a participant in many of those calls, and used three different telephone numbers. [*Id.* pp. 128-129].

Gary Moore, Movant's co-conspirator and half-brother, testified that he was the target of the investigation, and his phones were tapped by the Drug Enforcement Agency (DEA) between September and December 2014. [*Id.* pp.197-198]. After he was arrested on January 14, 2015, he pled guilty to conspiracy to possess with intent to distribute heroin and possession of a firearm by a convicted felon. [*Id.* p. 198]. As part of his plea agreement, he agreed to cooperate, but the United States did not promise anything in exchange for his cooperation. [*Id.*]. Moore admitted that a firearm was found in his home in relation to this case, and he knew that he was not allowed to possess a firearm because he was a convicted felon. [*Id.* pp. 200-201].

Moore further admitted that he was involved in the**{2019 U.S. Dist. LEXIS 6}** drug ring in 2014, and that he worked with Wise, Hunter and Movant to distribute heroin. [*Id.* pp. 201-202]. Wise and Hunter, Moore's girlfriends who did not know about each other, used their homes to store and process the heroin for distribution. [*Id.* pp. 203-204]. Moore would package the heroin in 50 capsules per package and distribute them for $400 to $500 a piece. [*Id.* pp. 204-205]. Benavidez was one of his sources of supply. [*Id.*, p. 206].

Each day, Moore would travel to Wise's house to see what the orders were for that day. [*Id.* p. 207]. Movant would call and obtain heroin from Moore to distribute, and would go to either Wise or Hunter's house to pick it up. [*Id.* pp. 208-209]. Moore stated that during their phone calls, Movant would use the code word "chicken dinner" to refer to single packet of heroin. [*Id.* p. 210]. A "chicken wing" referred to a single capsule of heroin. [*Id.* pp. 210-211]. Moore also distributed marijuana, but that was referred to as "Crystal Delight," "Big Bud," or "L.A. Confidential." [*Id.* pp. 211-212].

During the conspiracy, Movant would pick up both heroin and marijuana "every other day or once every three days." [*Id.* pp. 212-213]. Moore never saw Movant use heroin himself. [*Id.*]. Movant was distributing the heroin to individuals in the Lake Worth area. [*Id.* p. 215]. Movant knew that Moore was getting**{2019 U.S. Dist. LEXIS 7}** heroin from Benavidez, and knew her by her first name. [*Id.* pp. 216-217].

In mid-September, Moore paid Benavidez $54,000 for half a kilogram of heroin. [*Id.* p. 238]. After Benavidez was stopped by police on November 9, 2014, she called Moore and told him that authorities had found $54,000 that Moore had given her for an additional half kilogram. [*Id.* pp. 217-218, 238-239]. Moore discussed the seizure of the money with Movant and he was aware of the purpose of the money---to pay for heroin purchased by Moore. [*Id.* p. 218]. Moore then began using another source of supply for heroin. [*Id.*].

During their conversations, Movant used at least three different phone numbers to communicate with

Moore. [*Id.* p. 223]. Transcripts of the intercepted phone calls between Movant and Moore were admitted into evidence. [*Id.* p. 227]. In one of the calls, Movant asked Moore for "a 14-piece chicken dinner," which Moore testified meant 14 packets of heroin, or approximately 70 grams. [*Id.* pp. 234-235]. Moore further testified as to the meaning and context of multiple other calls between the two. [*Id.* pp. 235-269].

On cross examination, Moore admitted that he had a child with Hunter and the only person that knew was Movant. [CR ECF 752, p. 15]. Moore testified that Movant is a porn star, promoter and sells Rick Ross{**2019 U.S. Dist. LEXIS 8**} t-shirts and books for a living. [*Id.* p. 21]. Moore also admitted that he had previously agreed to cooperate in exchange for a lesser sentence in a prior case. [*Id.* pp. 46-53]. Regarding the coded language between the two, Moore reiterated that "chicken dinners" referred to heroin, and not marijuana. [*Id.* p. 54].

Candace Simmons, a defense witness, testified that she knew Moore but had never met Movant. [*Id.*, pp. 109-110]. After Moore's arrest, she contacted Movant on Moore's behalf, telling him that Moore wanted him to plead guilty. [*Id.*, p. 110]. Moore sent Movant a warning that he was pleading guilty and would be required to testify against him if Movant proceeded to trial. [*Id.* p.123].

DEA Agent Matthew Davis testified that he was part of the search team that searched Wise's residence in Pompano Beach, where authorities recovered various drug preparation items, heroin, cocaine, pills, and marijuana. [*Id.* pp.127-135). Officer Carlos Ribeiro, who was part of the search team for Hunter's home, also recovered money, drugs, and drug paraphernalia. [*Id.* pp. 138-151].

Lakisha Wise testified that she pled guilty to conspiracy to distribute heroin with Moore and acknowledged that the government promised her nothing in exchange for her guilty plea. [*Id.* pp. 207-209]. She first met Movant through Gary{**2019 U.S. Dist. LEXIS 9**} Moore, and distributed heroin to him. [*Id.* p. 218]. She also stated that she used coded language with Movant when talking on the phone. [*Id.* p. 222]. Specifically, "chicken wings" referred to single capsules of heroin and "chicken dinners" referred to packets of heroin. [*Id.* pp. 222-223]. A number of intercepted phone calls between Movant and Wise were played in front of the jury. [*Id.* pp. 230-252].

Movant testified in his own defense. He stated that Moore put him in an unpleasant position when he told him that Hunter was pregnant with his child. [CR ECF 753, p. 74]. He explained that when he visited Hunter's house, he was bringing the child toys, and was not picking up drugs. [*Id.* pp. 74-75]. When he visited Wise's house, he was picking up marijuana, not heroin. [*Id.* p. 75]. "Chicken dinners," Movant testified, referred to marijuana. [*Id.*]. Movant insisted that he did not plead guilty because he was innocent of possessing and distributing heroin. [*Id.* p. 76].

C. Sentencing

Prior to sentencing, a Presentence Investigation Report ("PSI") was prepared, setting Movant's base offense level at 30 pursuant to U.S.S.G. § 2D1.1(c)(5). [PSI ¶ 119]. Since a firearm was possessed during the crimes, the offense level was increased by two levels pursuant to U.S.S.G. § 2D1.1(b)(1). [PSI ¶ 120]. The total offense level was{**2019 U.S. Dist. LEXIS 10**} set at 32. [PSI ¶ 127].

Next, the probation officer determined the Movant had a total of three criminal history points, resulting in a criminal history category II. [PSI ¶ 149]. Based on a total offense level 32 and a criminal history category II, the advisory guideline range was 135 to 168 months' imprisonment. [PSI ¶ 192]. Statutorily, as to Count 1, Movant faced a minimum term of ten years' imprisonment for violation of 21 U.S.C. § 841(b)(1)(A). [PSI ¶ 191]. As to Count 8, the maximum term of imprisonment was 20 years pursuant to 21 U.S.C. § 841(b)(1)(C). [*Id.*].

Movant raised numerous objections to the PSI, mostly arguing that the facts established at trial were

untrue. [CR ECF 747]. In pertinent part, Movant argued that the amount of heroin sold to Moore by Benavidez and Escamilla in mid-September, and the amount paid for the heroin was incorrect. [*Id.* p. 5]. Movant also argued that "chicken wings" is coded language for marijuana, not heroin. [*Id.* pp. 6-7, 9]. Finally, Movant argued that there was no evidence that he possessed any heroin or a firearm, and that his prior arrests and convictions could not be considered because they were based on perjured testimony. [*Id.* pp. 8, 13-17].

The government filed a motion for upward departure based on (1) Movant's criminal history{2019 U.S. Dist. LEXIS 11} and (2) obstruction of justice. [CR ECF 755, pp. 1-2]. Regarding the departure for obstruction of justice, the government argued that Movant committed perjury when he testified at trial that he did not possess heroin. [*Id.* pp. 2-3]. Regarding Movant's criminal history, the government argued that the PSI underrepresented Movant's prior criminal convictions because it only accounted for conduct that occurred within the last fifteen years. [*Id.* p. 3]. Based upon these requested departures, the government recommended that Movant be sentenced to 320 months in prison. [*Id.* p. 2].

On October 8, 2015, the Movant appeared for sentencing. [CR ECF 790]. The District Court overruled many of Movant's factual objections to the PSI on the basis that his guilt had been determined at trial, and the sentencing hearing was not the appropriate venue to challenge issues of guilt already determined by the jury. [*Id.* pp. 6-7]. The Court agreed that Movant's testimony was untruthful, but denied the government's request for an upward departure based on obstruction of justice. [*Id.* p. 15].

Regarding the firearm enhancement, the government noted that evidence concerning the presence of a firearm during the conspiracy was excluded from the trial by agreement,{2019 U.S. Dist. LEXIS 12} but sought to admit evidence about the firearm through testimony at sentencing. [*Id.* p. 17]. Agent Christine Suarez testified that Hunter told her that a firearm, belonging to Moore, was seized from her residence on the date of her arrest. [*Id.* pp. 19-21]. At one point in time, Moore took the firearm from Hunter's home, which Movant later returned. [*Id.* pp. 21-22]. Suarez testified that when the firearm was seized, it was in close proximity to heroin. [*Id.* p. 22]. Suarez also testified that Moore told her that Movant brought the firearm back to Hunter's residence. [*Id.* p. 24]. After hearing argument from both parties, the Court overruled Movant's objection, finding Suarez's testimony regarding the firearm reliable. [*Id.* p. 44]. The Court also denied the government's request for an upward departure based on Movant's criminal history. [*Id.* p. 60].

Prior to imposing sentence, in response to Movant's suggestion that it had not addressed all his factual objections, the District Court noted that it was "going to rely on the transcript of the trial and not the language in the PSI." [*Id.* p. 61]. The District Court told Movant "I know you don't agree with what the PSI says, but we have a transcript of a several-day trial, and those are the facts that led to the jury's decision,{2019 U.S. Dist. LEXIS 13} and those are the facts that I rely on in sentencing." [*Id.*]. Based on this, the District Court rejected Movant's argument that the government allowed false evidence to be submitted to the jury regarding the amount of heroin sold to Moore by Benavidez, ultimately finding that the record at trial, rather than the PSI, was relevant to sentencing. [*Id.* p. 65].

Thereafter, the Court sentencing Movant to 168 months on both counts to be served concurrently. [*Id.* p. 87].

D. Direct Appeal

Movant, who was appointed appellate counsel, prosecuted a direct appeal raising the following arguments: (1) the District Court erred by improperly restricting his right to cross examination; (2) the District Court erred by denying his motion to dismiss Counts 1 and 8 of the Indictment; and, (3) the

District Court erred at sentencing by overruling his objection to the firearm enhancement. *See Grimes v. United States*, Nos. 15-14533 and 15-14525, 2016 WL 1392667 (11th Cir. 2016). The Eleventh Circuit affirmed Movant's judgment of conviction in a written opinion. *See United States v. Grimes*, 705 F. App'x 897 (11th Cir. 2017) (unpublished).

The instant amended motion [CV ECF 9] and supporting memorandum of law [CV ECF 9-1] are timely, having been filed before the expiration of the one-year federal limitations period. *{2019 U.S. Dist. LEXIS 14}See* 28 U.S.C. § 2255(f).

IV. Standard of Review

A. Section 2255

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). Thus, 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. *United States v. Frady*, 456 U.S. 152, 165, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). If a court finds a claim under § 2255 valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner, grant a new trial, or correct the sentence. 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).

To overcome a procedural default arising from a claim that could have been, but was not raised on direct appeal, the movant must demonstrate: (1) cause for failing to raise the claim and**{2019 U.S. Dist. LEXIS 15}** resulting prejudice; or, (2) that a miscarriage of justice excuses the procedural default because the movant is actually innocent. *See McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). The actual innocence exception is exceedingly narrow in scope as it concerns a petitioner's "actual" innocence, rather than his "legal" innocence. *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001).

B. Ineffective Assistance of Counsel Principles

Where, as here, a defendant challenges counsel's effectiveness, he must demonstrate that: (1) 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, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). However, if the movant cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. *Strickland*, 466 U.S. at 697; *Brown v. United States*, 720 F.3d 1316 (11th Cir. 2013).

Regarding the performance of appellate counsel, the Sixth Amendment does not require attorneys to press every non-frivolous issue that might be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. *Jones v. Barnes*, 463 U.S. 745, 753-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The Supreme Court has recognized that "a brief that raises every colorable issue runs the risk of burying good arguments - those that . . . 'go for the jugular.'" *Id.* at 753. To be effective, therefore, appellate counsel may select among competing non-frivolous arguments in order to maximize the likelihood**{2019 U.S. Dist. LEXIS 16}** of success on appeal."

Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). Indeed, the practice of "winnowing out" weaker arguments on appeal, so to focus on those that are more likely to prevail, is the "hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). In considering the reasonableness of an appellate attorney's decision not to raise a particular claim, therefore, this Court must consider "all the circumstances, applying a heavy measure of deference to counsel's judgments." *Eagle v. Linahan*, 279 F.3d 926, 940 (11th Cir. 2001), quoting, *Strickland*, 466 U.S. at 691.

In the context of an ineffective assistance of appellate counsel claim, "prejudice" refers to the reasonable probability that the outcome of the appeal would have been different. *Eagle*, 279 F.3d at 943; *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990). Thus, in determining whether the failure to raise a claim on appeal resulted in prejudice, the courts must review the merits of the omitted claim and, only if it is concluded that it would have had a reasonable probability of success, then can counsel's performance be deemed necessarily prejudicial because it affected the outcome of the appeal. *Eagle*, 279 F.3d at 943.

V. Discussion

In **claim 1**, movant alleges that AUSA Adam McMichael committed prosecutorial misconduct when he (1) told the jury that the evidence would show Benavidez sold Moore 18 ounces of heroin on September 18, 2014, even though**{2019 U.S. Dist. LEXIS 17}** Escamilia's factual proffer was changed to show that Benavidez only supplied Moore with 2 ounces of heroin on that date, and (2) knowingly allowed Moore and Keating to testify falsely at trial. [CV ECF 9-1, pp. 2-3]. In related claim 3, Movant alleges that AUSA McMichael violated his constitutional rights when he lied at the sentencing hearing regarding the amount of drugs sold to Moore by Benavidez. [CV ECF 9-1, p. 5].

The standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Hall v. Wainwright*, 733 F.2d 766, 773 (11th Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, the totality of the circumstances is to be considered in the context of the entire trial. *Davis v. Zant*, 36 F.3d 1538, 1551 (11th Cir. 1983). "Such a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different." *Williams v. Weldon*, 826 F.2d 1018, 1023 (11th Cir. 1988).

In order to prevail on a *Giglio*2 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. *United States v. Vallejo*, 297 F.3d 1154, 1163-64 (11th Cir. 2002); *Tompkins v. Moore*, 193 F.3d 1327, 1339 (11th Cir. 1999) (quoting, *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995)). Under *Giglio*, "the**{2019 U.S. Dist. LEXIS 18}** falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* (quoting, *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). 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). If the government capitalizes on materially false testimony, the defendant's due process rights are violated. *See United States v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017).

Review of the record reveals that Movant raised a similar claim on direct appeal, where he argued that the District Court erred by denying his motion to dismiss the indictment based on "perjured testimony" presented before the grand jury. *See Grimes v. United States*, Nos. 15-14533 and 15-14525, 2016 WL 1392667, at *39 (11th Cir. 2016). Movant asserted that the government

capitalized on this "perjured testimony" at trial during both opening and closing arguments. *Id.* at *39-40. These "perjurious statements" stemmed from the Prosecutor scratching through Escamilia's factual proffer, changing the amount of heroin and the amount of money associated with the September 18, 2014 transaction. *Id.* The Eleventh Circuit held that the District Court correctly{2019 U.S. Dist. LEXIS 19} denied his motion to dismiss and his motion for judgment of acquittal because he presented no evidence of perjury. *United States v. Grimes*, 705 F. App'x at 900. To the extent that Movant realleges in claim 1 issues that were already decided by the Eleventh Circuit, such allegations cannot be relitigated in this § 2255 motion. *United States v. Frady*, 456 U.S. at 166-168.

Nevertheless, even when looking to the merits of Movant's claim, the record is devoid of any objective evidence that the government suborned any perjurious testimony in this case. While it is unclear why Escamilia's factual proffer was changed to show that the September 18, 2014 transaction between Benavidez and Moore involved an exchange of 2 ounces of heroin for $5,400 [CR ECF 341. p. 2], instead of an exchange of 18 ounces of heroin for $54,000, as Moore testified to during trial, there is little to suggest that Moore's testimony about this transaction constituted perjury. In fact, another part of Escamilia's factual proffer states that Moore gave Benavidez $54,000 for a transaction in September, consistent with Moore's testimony at trial. [CR ECF 341, p. 6].

Moreover, review of the record reveals that nearly every other document that references this transaction shows that 18 ounces of heroin was exchanged{2019 U.S. Dist. LEXIS 20} for $54,000 on the date in question. In pertinent part, "offense conduct" facts set forth in Escamilia's PSI state that on September 18th, "based on the intercepted calls, Gary Moore met with Benavidez and received approximately 18 ounces of heroin for $54,000." [*See* Escamilia PSI ¶12]. Benavidez's factual proffer, signed on the same date as Escamilia's, reflects the same. [CR ECF 338, p. 2]. Regarding Escamilia's offense level calculation, he, like Movant, was also found responsible for at least one kilogram, but less than three kilograms of heroin, resulting in a base offense level of 30. [*See* Escamilia PSI ¶ 113]. Thus, it appears that Escamilia received no benefit from the changes made to his factual proffer.

More importantly, AUSA McMichael's statements during opening and closing arguments regarding this $54,000 transaction were supported by the evidence presented at trial. Escamilia did not testify. As previously discussed, however, Moore testified that Movant knew that he was obtaining the heroin from his source of supply, Benavidez. [CR ECF 751, p. 216]. Moore admitted that he gave $54,000 to Benavidez for heroin in mid-September [*Id.* p. 238], and that Movant was aware of the purpose{2019 U.S. Dist. LEXIS 21} of the money. [*Id.*, p. 218]. Given the available record, Movant fails to meet his burden to show that Moore's testimony was perjurious.

Regarding Movant's claim that Sergeant Keating committed perjury at trial, such a claim is also without merit. Specifically, Movant alleges that Sergeant Keating lied when he testified that the investigation of the conspiracy began in December 2013. [CR ECF 9-1, p. 2]. To support his claim, Movant cites to the government's response to his motion to dismiss, where it stated that law enforcement began investigating the drug trafficking organization in July 2013. [CR ECF 289]. Movant claims that this is relevant because it caused him to change his theory of defense that he could not have committed the crimes because he was incarcerated until October 7, 2013. [CR ECF 9-1, p. 3].3

There is plainly nothing to suggest that Keating's testimony as to the date the investigation of Moore and his associates began was false. The indictment alleged only that the conspiracy began in May 2014, and continued through December 2014. [CR ECF 3, p. 2]. Furthermore, the majority of the evidence presented at trial involved evidence obtained from the wire-tap of Moore's phone, which did{2019 U.S. Dist. LEXIS 22} not begin until September 2014. [CR ECF 751, p. 69]. Moore

specifically testified that Movant did not become involved in the conspiracy until late 2013. [CR ECF 751, p. 212]. As such, whether or not the investigation began in July or December 2013 is of no consequence as there was sufficient evidence presented at trial to show Movant's involvement in the conspiracy after December 2013. See *United States v. Vallejo*, 297 F.3d at 1163-64 (finding that the defendant must demonstrate that the prosecutor knowingly used *materially* false testimony).

Given the foregoing, Movant fails to demonstrate that AUSA McMichael committed prosecutorial misconduct by knowingly presented perjured testimony at trial. Accordingly, claims 1 and 3 should be denied.

In **claim 2a**, movant alleges that the District Court violated the Federal Rules of Criminal Procedure,4 when it refused to allow him to argue objections to the PSI at sentencing. Review of the record reveals that the District Court gave Movant great leeway to argue his objections. As discussed previously, Movant focused most of his objections on issues with the facts set forth in the PSI. The District Court informed Movant that it would rely only on the transcript of the trial and not the language**{2019 U.S. Dist. LEXIS 23}** in the PSI for purposes of sentencing. [CR ECF 790, p. 61]. Nevertheless, the District Court allowed Movant to continue to argue his factual objections, but found that none of his arguments "affect[ed] the calculation of the guidelines," and as such, overruled his objections for purposes of the record. [*Id.* p. 67]. The District Court clarified that Movant was free to raise his argument about the sufficiency of the evidence on appeal, but that such an argument was not appropriately brought at sentencing. [*Id.*]. After further discussion, Movant agreed that the District Court covered all of his objections to the PSI. [*Id.* p. 68]. Given the available record, there is plainly nothing to suggest that the District Court refused to allow Movant to argue his objections at sentencing. Accordingly, claim 2a should be denied.

In **claim 2b**, Movant alleges that the District Court improperly applied a two-level firearm enhancement to his offense level pursuant to U.S.S.G. § 2D1.1(b)(1) because he had nothing to do with the firearm that was found inside co-conspirator Hunter's apartment.5 This claim was raised and rejected by the Eleventh Circuit on direct appeal. *See United States v. Grimes*, 705 F. App'x at 900-01. Specifically, the Eleventh Circuit found the following:

> The district**{2019 U.S. Dist. LEXIS 24}** court did not clearly err in applying a two-level sentence enhancement based on the use of a firearm in connection with the conspiracy, because the government presented unrefuted evidence that a firearm was present in close proximity to the drugs being trafficked. Moore's testimony at trial established that Hunter's apartment was one of the sites where the heroin in the conspiracy was packaged and distributed, including to Grimes. Suarez's testimony at sentencing established that Moore stored a firearm at the apartment, removed it, Grimes returned it to the apartment, and the[] gun was eventually found near the heroin when the apartment was searched. Moore's and Suarez's testimony combined established that the firearm was in close proximity to the drugs involved in the conspiracy.*Id.*

An issue resolved against a movant on direct appeal cannot be relitigated in a § 2255 motion. *United States v. Frady*, 456 U.S. at 166-168; *Dermota v. United States*, 895 F.2d 1324 (11th Cir. 1990). Only if there has been an intervening change in the law can an issue decided on direct appeal be relitigated in a motion to vacate. *See Generally Davis v. United States*, 417 U.S. 333, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974). Here, the presentation of the claim in this § 2255 proceeding adds nothing of substance which would justify a different result. *See United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000). Accordingly, this claim is barred from consideration**{2019 U.S. Dist. LEXIS 25}** in this § 2255 proceeding and should be denied.

In **claim 2c**, Movant alleges that the District Court erred by sentencing him to 168 months' imprisonment on Count 8. [ECF 9-1, p. 4]. Specifically, he alleges that his conviction regarding

Count 8 is void because (1) AUSA McMichael asserted in opening statement that Movant was never physically seen with heroin during the conspiracy, and (2) the PSI improperly calculated his guideline sentence. [*Id.*]. Regarding the PSI, Movant claims that his base offense level for Count 8 should have been a level 16 based on the amount of heroin he was convicted of possessing on the date alleged in the indictment. [*Id.*].

Review of the record reveals that at trial, the government presented a phone call in evidence where Moore told Wise that Movant came to pick up six and a half packets of heroin (which amounts to 30.5 grams of heroin according to Movant) [CV ECF 9-1, p. 4] on October 29, 2014, the date alleged in Count 8 of the indictment. [CR ECF 751, p. 257]. The indictment, however, did not specify that Movant possessed a quantity of heroin other than merely a "detectable amount." [CR ECF 3, p. 10]. Both Movant's substantive possession of heroin (Count 8) and**{2019 U.S. Dist. LEXIS 26}** his conspiracy to possess heroin (Count 1) are covered by § 2D1.1, which required offenses involving drugs to be grouped under § 3D1.2.

When counts are grouped pursuant to § 3D1.2(d), "the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines, [courts should] use the guideline that produces the highest offense level." U.S.S.G. § 3D1.3 cmt. n. 3. Here, because both of Movant's offenses fell under § 2D1.1, the trial properly applied the offense level associated with Count 1, which was the highest offense level of the two counts of conviction. Given the foregoing, claim 2c should be denied.

In **claim 4**, Movant alleges that he received ineffective assistance of appellate counsel because his lawyer failed to raise multiple issues on direct appeal. [CV ECF 9-1, p. 7].

First, regarding claims 1, 2 and 3 addressed above, it is clear from review of the record that counsel was not ineffective for failing to raise these issues on appeal because (1) they are entirely without merit and (2) Movant fails to demonstrate a reasonable probability of success on appeal had the issues been raised by defense counsel. *Eagle*, 279 F.3d at 943. Counsel made a strategic decision to raise the issues on appeal that he believed**{2019 U.S. Dist. LEXIS 27}** had the highest likelihood of success, declining to raise the issues addressed in claims 1, 2 and 3 because they were nonmeritorious. *See USA v. Reginald Grimes, Sr.*, Nos. 15-14625 and 15-14533, Response to Motion to Stay Pending Appeal (11th Cir. May 3, 2016). This strategic decision should not be second-guessed. *Eagle*, 279 F.3d at 940.

The other issues6 that Movant claims counsel should have raised on appeal are similarly without merit. At the close of the government's case, Movant made a motion for judgment of acquittal pursuant to Rule 29, where he argued that there was no evidence to show that he possessed any amount of heroin and that "chicken dinners" were "not illegal." [CR ECF 753, pp. 9-10]. The District Court denied the motion, finding that there was sufficient evidence presented at trial. [*Id.*]. Movant did not review his motion for judgment of acquittal after the close of his case, but did file two motions for judgment of acquittal [CR ECF 675; 685]7 within 14 days of the verdict under Rule 29(c)(1), again arguing that there was insufficient evidence against him, and that the government had presented perjured testimony. The District Court denied the motions. [CR ECF 744].

As stated throughout this report,**{2019 U.S. Dist. LEXIS 28}** there was more than sufficient evidence presented at trial to support Movant's conviction, including evidence of recorded phone calls and surveillance photos that depicted his involvement in the conspiracy. Moore, Movant's own brother and co-defendant, testified against him, and directly stated that Movant would buy heroin from him and distribute it. There is plainly nothing in the record to suggest that a challenge to the sufficiency of the evidence on appeal would have been successful. As such, counsel cannot be faulted for failing to raise this meritless issue on appeal. *See United States v. Winfield*, 960 F.2d 970, 974 (11th Cir.

entitlement to appeal, and to do so, must obtain a certificate of appealability ("COA"). See 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009). This Court should issue a certificate of appealability only if the petitioner makes{2019 U.S. Dist. LEXIS 31} "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if the Movant does not agree, he may bring this argument to the attention of the district judge in objections.

IX. Recommendations

Based on the foregoing, it is recommended that:

1. Movant's motion requesting ruling on the instant motion [CV ECF 41] be denied as moot;
2. the motion to vacate be DENIED on the merits;
3. final judgment be entered in favor of the respondent;
4. that no certificate of appealability issue; and,{2019 U.S. Dist. LEXIS 32}
5. the case CLOSED.

Any party who objects to this recommendation or anything in it must, within fourteen days of the date of service of this document, file specific written objections with the Clerk of this court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C.§ 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009) (finding district court has discretion to decline consideration of arguments not presented to the magistrate judge in the first instance).

Signed this 9th day of December, 2019.

/s/ Lisette M. Reid

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

Movant proceeded *pro se* at trial, and was appointed standby counsel. [CR ECF 191; 202].

2

In *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the Supreme Court of the United States held that it is the prosecution's duty to present all material, exculpatory evidence to the jury.

3

To the extent that Movant appears to suggest that he was unable to call Sergeant Darrell Hunter as

witness because Keating falsely testified that the investigation began in December 2013, rather than in June 2013, such a claim appears to be irrelevant to his claim that he could not have participated in the conspiracy beginning in June 2013 because he was incarcerated. Movant articulates no basis as to why Darrell Hunter's testimony would have been advantageous to his case, nor does he explain why he was unable to call him as a witness simply because of Keating's allegedly "perjured" testimony.
4

Movant argues that the District Court violated Fed. R. Crim. P. 32(c)(3)(D), but this Rule was not in effect at the time of his sentencing. *See United States v. Brey*, 627 F. App'x 775, 778, n. 2 (11th Cir. 2015)(stating that Rule 32(c)(3)(D), which was in effect from 1983 to 2002, was incorporated into Rule 32(i)(3)(B) as part of the restyling of the Criminal Rules in 2002). Rule 32(i)(3)(B) states that "for any disputed portion of the presentence report," the sentencing court must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B). As discussed herein, the District Court, in compliance with Rule 32, acknowledged Movant's factual objections to the PSI and determined that they would not affect sentencing because the Court was only considering the facts adduced at trial.
5

Movant also claims that because the firearm was recovered from Hunter's apartment on January 14, 2015, outside the time period set forth in the indictment, that he cannot be held accountable for it. [CV ECF 9-1, p. 4]. However, as discussed above, Suarez testified at sentencing that Hunter told her that Movant returned the firearm to her within the time period of the conspiracy. The fact that it was recovered after the conspiracy concluded is not relevant.
6

Movant also claims that appellate counsel failed to argue that the government presented perjured testimony in violation of *United States v. Stein*, 846 F.3d 1135 (11th Cir. 2017). The Eleventh Circuit cited *Stein* in its opinion affirming Movant's convictions. *See United States v. Grimes*, 705 F. App'x at 900. Given the Eleventh Circuit's analysis of Movant's claim, counsel's failure to cite to this specific case made no material difference on appeal.
7

The motions appear to be identical or nearly identical. [CR ECF 675; 685].
8

Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992).