# APPENDIX A

20-3772
*Stegemann v. United States*

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

## SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of November, two thousand twenty-two.

PRESENT:

JOHN M. WALKER, JR.,
RICHARD J. SULLIVAN,
*Circuit Judges,*
MARY KAY VYSKOCIL,*
*District Judge.*

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JOSHUA G. STEGEMANN,
*Petitioner-Appellant,*

v. No. 20-3772

UNITED STATES OF AMERICA,
*Respondent-Appellee.*

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*Judge Mary Kay Vyskocil, of the United States District Court for the Southern District of New York, sitting by designation.

**FOR PETITIONER-APPELLANT:** RICHARD W. LEVITT (Zachary Segal, *on the brief*), Levitt & Kaizer, New York, NY.

**FOR RESPONDENT-APPELLEE:** RAJIT S. DOSANJH (Richard D. Belliss, *on the brief*), Assistant United States Attorneys, *for* Carla B. Freedman, United States Attorney for the Northern District of New York, Syracuse, NY.

Appeal from an order of the United States District Court for the Northern District of New York (Gary L. Sharpe, *Judge*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the order of the district court is **AFFIRMED.**

Joshua Stegemann appeals from the district court's order denying his motion to vacate his sentence under 28 U.S.C. § 2255. On appeal, Stegemann argues that he received ineffective assistance of counsel from his retained counsel, Elizabeth Quigley, who represented him for portions of the pre-trial proceedings and at trial, and from the Assistant Federal Defenders who represented him at the post-trial proceedings, at sentencing, and on direct appeal. As to Quigley, Stegemann argues that she erred by advising him to forgo a favorable plea deal

and by failing to move to suppress evidence seized from his residence pursuant to a search warrant on the grounds that the police unlawfully detonated a flash-bang device upon entering his home. As to the Assistant Federal Defenders, Stegemann argues that they erred post-verdict, by failing to seek the release of his funds that were seized as substitute property under 21 U.S.C. § 853(p), which allegedly prevented him from retaining the counsel of his choosing, and by declining to challenge the use of his prior Massachusetts drug conviction as a predicate for the career-offender enhancement under section 4B1.1 of the Sentencing Guidelines. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

On appeal from the denial of a section-2255 motion, we review the district court's "factual findings for clear error and questions of law de novo." *Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000) (internal quotation marks and emphasis omitted). The question of whether counsel provided ineffective assistance is a mixed question of law and fact, which we review de novo. *Id.*

To establish ineffective assistance of counsel, Stegemann must show that his attorneys' performance was both objectively unreasonable and prejudicial to his

defense. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 692 (1984). Stegemann can satisfy the first prong by demonstrating that his attorneys' performance fell below an objective standard of reasonableness under "prevailing professional norms." *Id.* at 688. He can satisfy the second prong by demonstrating that there is a "reasonable probability" that, but for his attorneys' "unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. When determining whether counsel was ineffective, a court need not address both prongs if the defendant fails to make a showing on either one. *Id.* at 697.

First, Stegemann argues that Quigley's advice to reject the government's plea deal was deficient. To be sure, the decision of whether to plead guilty is often the "most important single decision in any criminal case." *Cardoza v. Rock*, 731 F.3d 169, 178 (2d Cir. 2013) (internal quotation marks omitted). In advising a client on this decision, defense counsel must "communicate to the defendant the terms of the plea offer[] and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." *Purdy v. United States*, 208 F.3d 41, 45 (2d

Cir. 2000) (citation omitted). But the decision of whether to plead guilty ultimately belongs to the defendant, and the "lawyer must take care not to coerce a client into either accepting or rejecting a plea offer." *Id.* Because defense counsel must balance, "on the one hand, failing to give advice and, on the other, coercing a plea," defense counsel's determination as to how best to advise a client "enjoys a wide range of reasonableness." *Id.*

Stegemann's argument fails because he cannot show that Quigley's advice was objectively unreasonable. Stegemann contends that Quigley provided ineffective assistance by advising him to reject the government's plea offer simply because it exceeded Stegemann's stated preference for a plea deal of no more than twelve-to-fourteen years' imprisonment – a cap that Stegemann now concedes was unrealistic. But the allegation that Quigley based her advice solely on Stegemann's unrealistic preference is contradicted by Quigley's affidavit, in which she averred that she and Stegemann fully discussed the terms of the deal, including the risks and benefits of accepting the offer as well as its mandatory minimum and maximum terms. In denying Stegemann's motion, the district court credited Quigley's version of events, rendering it reasonable for the district

court to conclude that Quigley's performance did not fall below the objective standard of reasonableness under the first prong of the *Strickland* test.

Stegemann further argues that the district court erred by making its credibility determination without holding an evidentiary hearing. We disagree. A district court's decision to resolve a section-2255 motion without a hearing is reviewed for abuse of discretion. *See Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001). Where, as here, the district court presided over the underlying proceedings, a "full-blown evidentiary hearing" is often unnecessary. *Raysor v. United States*, 647 F.3d 491, 494 (2d Cir. 2011). In light of the district court's familiarity with Stegemann and Quigley, gained over the course of trial and subsequent proceedings, including an evidentiary hearing at which Stegemann testified, we find that the district court's decision to resolve the motion on the basis of written submissions falls squarely within the zone of its discretion. *See Chang*, 250 F.3d at 86 (explaining that a district court's decision to not hold an evidentiary hearing avoids "the delay, the needless expenditure of judicial resources, the burden on trial counsel and the government, and perhaps the encouragement of

other [litigants] to make similar baseless claims that would have resulted from a full testimonial hearing").

Stegemann next argues that Quigley provided ineffective assistance when she failed to move to suppress the evidence seized from Stegemann's home. Under the Fourth Amendment, search warrants must "particularly describ[e] the place to be searched[] and the persons or things to be seized." U.S. Const. amend. IV. Nothing in the Fourth Amendment, however, requires warrants to describe "the precise manner in which they are to be executed." *Dalia v. United States*, 441 U.S. 238, 257 (1979); *see, e.g., Richards v. Wisconsin*, 520 U.S. 385, 395–96 (1997) (upholding a no-knock search even without a no-knock warrant). Instead, "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Dalia*, 441 U.S. at 258.

Although Stegemann argues that Quigley should have challenged the search on the ground that the warrant did not authorize the use of a flash-bang device, the Fourth Amendment imposes no such requirement. *See id.* at 257 n.19 (noting that the Supreme Court has never held that the Constitution requires officers requesting a warrant to set forth the anticipated means for executing it).

Indeed, courts have long recognized that flash-bang devices may be used without prior authorization where, as here, "it was reasonable for the officers to fear for their safety in conducting the search." *United States v. Boulanger*, 444 F.3d 76, 84–85 (1st Cir. 2006); *see also Terebesi v. Torreso*, 764 F.3d 217, 238 (2d Cir. 2014) (explaining that it "is more likely that using a stun grenade will be considered reasonable if the subject of the search or arrest is known to pose a high risk of violent confrontation"). In this case, it was reasonable for law enforcement officers to fear for their safety because they had reason to believe that Stegemann possessed multiple firearms and knew that Stegemann had threatened to kill anyone who tried to enter his home. Since the officers' use of the flash-bang device was clearly reasonable under the circumstances, Quigley's strategic decision not to challenge the search on those grounds did not fall below "prevailing professional norms." *Strickland*, 466 U.S. at 688.

Stegemann next contends that his court-appointed counsel erred by failing, post-verdict, to seek the return of funds that had been seized, arguing for the first time in his section-2255 motion that he would have retained new counsel for sentencing were those funds made available to him. The Sixth Amendment

allows "a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The deprivation of the right to counsel of choice is a "structural error," for which a defendant need not demonstrate prejudice. *Id.* at 150 (internal quotation marks omitted). But even if it could be argued that Stegemann's counsel should have moved to release his funds – which the government now concedes were not forfeitable as the proceeds of unlawful activity – Stegemann's claim nevertheless fails because he has not demonstrated that he was in fact deprived of the right to the attorney of his choosing. Stegemann offers no evidence to suggest that he would have procured retained counsel in the event that his funds had been returned. Indeed, although Stegemann asked the district court to "*appoint* [him] counsel" after Quigley filed her motion to withdraw, Gov't App'x at 642 (emphasis added), Stegemann never stated or implied that the seizure of his assets prevented him from retaining "his preferred representational choice," *Luis v. United States*, 578 U.S. 5, 12 (2016). And while Stegemann did advise the district court that he was "completely indigent," that comment was in response to the district court questioning why it should "not compel [Stegemann] to go out and hire another

lawyer." Gov't App'x at 642–43. Stegemann certainly never said that he had contacted a lawyer – or even that he had one in mind – who, but for Stegemann's lack of ready funds, was prepared to take the case on short notice, post-verdict, to wrap up the sentencing. In short, Stegemann has not demonstrated any link between his counsel's asserted failure to move for the return of his funds and the denial of his right to choose who will represent him. Absent such a showing, Stegemann is not entitled to a presumption of prejudice, and this claim of ineffective assistance fails.

Finally, Stegemann argues that his counsel, both at sentencing and on direct appeal, rendered ineffective assistance by failing to challenge the district court's consideration of his 1999 Massachusetts state-court conviction as a basis to adjudge him a career offender under section 4B1.1 of the Sentencing Guidelines. Under the Sentencing Guidelines, a defendant is subject to the career-offender enhancement when, among other things, he has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). A court tasked with determining whether a particular conviction qualifies as a career-offender predicate must employ a "modified

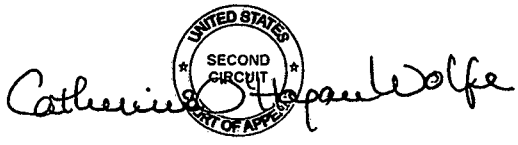
categorical approach," which generally considers the elements of the statute of conviction, rather than the facts underlying that offense. *United States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008).

Here, Stegemann's counsel did not err by declining to challenge the 1999 conviction as a predicate under the career offender enhancement. Stegemann cites to no authority to support his claim that, at the time of his sentencing, his 1999 conviction under Mass. Gen. Laws ch. 94C, § 32E(b) did not qualify as a predicate under the career offender enhancement. To the contrary, while Stegemann's conviction was on direct appeal, the First Circuit expressly held that this statute was "unarguably a conviction for a controlled substance offense and, thus, a proper predicate offense under the career offender guideline." *United States v. Montoya*, 844 F.3d 63, 72 (1st Cir. 2016). On that basis alone, counsel's decision to forego such a legal argument cannot be said to fall below prevailing professional norms. *See United States v. Regalado*, 518 F.3d 143, 149–50 n.3 (2d Cir. 2008) (explaining that it is "beyond any doubt" that an attorney's "failure to make a meritless argument" cannot "amount to ineffective assistance" (internal quotation marks and alteration omitted)). Nor can it be argued that Stegemann

was prejudiced by that decision, since it is not reasonably probable that the district court would have credited the argument and reached a conclusion at odds with the First Circuit's subsequent holding on the same issue. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Accordingly, we find that Stegemann has failed to show that he received ineffective assistance of counsel in connection with his sentencing.

We have considered Stegemann's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the order of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



# APPENDIX B

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

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**UNITED STATES OF AMERICA,**

**1:13-cr-357 (GLS)**

**v.**

**JOSHUA G. STEGEMANN,**

**Defendant.**

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**APPEARANCES:** **OF COUNSEL:**

**FOR THE UNITED STATES:**
HON. GRANT C. JACQUITH
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100 South Clinton Street
Syracuse, NY 13261

RICHARD D. BELLISS
Assistant U.S. Attorney

**FOR THE DEFENDANT:**
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**Gary L. Sharpe**
**Senior District Judge**

## MEMORANDUM-DECISION AND ORDER

### I. Introduction

Pending is defendant *pro se* Joshua G. Stegemann's motion to vacate pursuant to 28 U.S.C. § 2255, seeking dismissal of the charges

against him, a new trial, and/or a new sentencing hearing, based on alleged violations of due process and his Sixth Amendment right to effective assistance of counsel. (Dkt. Nos. 241, 246, 247, 255, 263, 274.) For the reasons that follow, Stegemann's motion is denied, and the court declines to issue a certificate of appealability.

## II. Background

The court presumes a basic familiarity with the underlying facts and the early procedural history of this action, which is set forth in the court's previous Memorandum-Decision and Orders dated July 29, 2014 and July 24, 2015. (Dkt. Nos. 64, 136.)

On August 5, 2015, following a jury trial, Stegemann was convicted of (1) possession of cocaine, heroin, and oxycodone with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 851; (2) possession of firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); and (3) possession of firearms and ammunition after having previously been convicted of a felony in violation of 18 U.S.C. § 922(g)(1). (Dkt. No. 150; Dkt. No. 199 at 1.) Stegemann was sentenced to a total term of imprisonment of 360 months, and a lifetime period of supervised release. (Dkt. No. 208.) The Second Circuit

affirmed Stegemann's conviction in July 2017. (Dkt. No. 215.)

Stegemann then filed a motion for a new trial pursuant to Fed. R. Civ. P. 33, and a motion for leave to file a suppression motion pursuant to Fed. R. Civ. P. 12(c)(3). (Dkt. No. 231.) The court denied these motions, (Dkt. No. 235), and the Second Circuit dismissed Stegemann's appeal of that denial, (Dkt. No. 271).

On June 28, 2018, Stegemann filed the pending motion, arguing that (1) trial counsel, Elizabeth Quigley, represented him with a conflict of interest; (2) Quigley was ineffective in failing to seek suppressions of certain evidence obtained from an "unannounced flashbang entry" into his residence and from a "warrantless seizure" of "DVR files"; and (3) attorney Gene Primomo, who represented Stegemann in connection with his sentencing, was ineffective in failing to challenge the applicability of one of the prior convictions that was used to establish Stegemann's career offender status for purposes of sentencing. (Dkt. No. 241 at 11-25.)

Stegemann subsequently filed various amendments to his motion, in which he argues the following additional points: (4) Primomo and appellate counsel James Egan were ineffective in failing to argue that Stegemann was denied his counsel of choice due to the "baseless restraint of [his]

assets," (Dkt. No. 246 at 3-5; Dkt. No. 247 at 1-2); (5) Egan was ineffective in failing to challenge the court's finding that Stegemann's prior convictions could be used to enhance his sentence, (Dkt. No. 247 at 3; Dkt. No. 255 at 1-3); (6) the government deprived Stegemann of due process by failing to disclose information regarding certain DNA testing, (Dkt. No. 255 at 3-5); (7) the government violated the terms of a June 14, 2013 proffer letter (hereinafter "the Proffer Letter"), (Dkt. No. 263 at 5-6); and (8) Quigley ran afoul of the advocate-witness rule in failing to impeach a government witness that she allegedly knew to be lying at trial,[1] (Dkt. No. 274).

## III. Standard of Review

A Section 2255 challenge is limited to claims that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Thus, relief pursuant to Section 2255 "is available 'only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that

[1] Stegemann's request to file a reply as to this ground for relief, (Dkt. No. 284), is denied.

constitutes a fundamental defect which inherently results in [a] complete miscarriage of justice.'" *Salemo v. United States*, 187 F. Supp. 3d 402, 413 (S.D.N.Y. 2016) (quoting *Graziano v. United States*, 83 F.3d 587, 590 (2d Cir. 1996)). The defendant bears the burden of proof by a preponderance of the evidence. *See Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000).

"Because collateral challenges are in tension with society's strong interest in the finality of criminal convictions, the courts have established rules that make it more difficult for a defendant to upset a conviction by collateral, as opposed to direct, attack." *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir.2010) (internal quotation marks and citation omitted). Although a hearing is necessary to adjudicate a Section 2255 motion under certain circumstances, "if it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion." *Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009) (internal quotation marks, alteration, and citation omitted).

A district court's final order is subject to appellate review if the applicant makes a substantial showing of the denial of a constitutional right

and a circuit or district court judge issues a certificate of appealability. *See* 28 U.S.C. § 2253.

## IV. Discussion

### A. Sixth Amendment Right to Counsel

In order to establish a Sixth Amendment violation for ineffective assistance of counsel, a defendant must prove: "(1) counsel's conduct 'fell below an objective standard of reasonableness,' and (2) this incompetence caused prejudice to the defendant." *United States v. Guevara*, 277 F.3d 111, 127 (2d Cir. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

In analyzing the first prong, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Given this presumption, "the burden rests on the accused to demonstrate a constitutional violation." *United States v. Cronic*, 466 U.S. 648, 658 (1984). The standard is one of objective reasonableness, and "[t]he first prong of the *Strickland* test is not satisfied merely by showing that counsel employed poor strategy or made a wrong decision. Instead, it must be shown that counsel made errors so serious that counsel was not

functioning as the counsel guaranteed . . . by the Sixth Amendment.'" *United States v. Salvagno*, No. 5:02-CR-0051, 2013 WL 12364812, at *2 (N.D.N.Y. July 25, 2013) (internal quotation marks and citation omitted).

To satisfy the second prong of *Strickland*, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Here, none of the errors alleged by Stegemann of his counsel demonstrate that he was provided less than effective assistance of counsel in contravention of his constitutional rights. Indeed, an attorney is not ineffective for failing to advance meritless arguments. *See Black v. Rock*, 103 F. Supp. 3d 305, 321 (E.D.N.Y. 2015) ("[T]he failure to include a meritless argument does not fall outside the wide range of professionally competent assistance to which Petitioner [i]s entitled." (citation omitted)); *United States v. Rich*, 83 F Supp. 3d 424, 430-31 (E.D.N.Y. 2015) ("The decision not to pursue a meritless motion does not constitute ineffective assistance of counsel." (citations omitted)).

First, Stegemann's suggestion that Quigley undertook a course of

conduct to ensure a continued source of funding for her legal fees, (Dkt. No. 241 at 11-15), is entirely speculative and belied by the record. To be sure, in a sworn affidavit submitted to the court, Quigley testified that Stegemann insisted on a plea resolution that would limit his time in prison to twelve to fourteen years. (Dkt. No. 260, Attach. 7 at 4.) Because the plea resolution offered to Stegemann would not limit his time in prison to fourteen years, Quigley advised Stegemann to reject the government's offer. (*Id.*) But Quigley discussed the benefits and risks associated with accepting the plea offer, and it was ultimately Stegemann's decision to reject the offer and to risk a higher sentence for the possibility of a lower sentence. (*Id.* at 4-5.) Quigley attempted to negotiate with the government for a more favorable plea offer to no avail. (*Id.* at 5-6.)

Given the court's past dealings with Stegemann throughout the proceedings, his credibility is nil, and, thus, the court credits the assertions made in Quigley's sworn affidavit over his unsupported accusations. Accordingly, Stegemann has not shown by a preponderance of the evidence that he was provided with ineffective assistance of counsel on the basis that Quigley labored under a conflict of interest.

Next, as to Stegemann's ineffective assistance of counsel claims

based on (1) Quigley's failure to seek suppressions of evidence related to his home security, as well as other evidence on the basis of law enforcement's allegedly unlawful entry into his residence; (2) Primomo's and Egan's failure to challenge the court's finding that Stegemann was a "career offender" for purposes of sentencing; (3) Primomo's failure to challenge the imposition of lifetime supervised release; (4) Primomo's and Egan's failure to argue that Stegemann was denied his counsel of choice due to restraints on his financial assets; and (5) Quigley's alleged conflict of interest based on the advocate-witness rule, the government provides a host of reasons as to why Stegemann is not entitled to habeas relief, (Dkt. No. 260 at 7-17; Dkt. No. 283 at 1-2), all of which the court adopts without rehashing them here. However, the court offers further explanation as to a few grounds for relief below.

First, Quigley's failure to seek suppression of evidence based on an allegedly unlawful flashbang entry can easily be seen as a competent strategy decision, as such a motion would have been meritless given Stegemann's criminal history; his statements "caught on a wiretap . . . that he would shoot any person who came onto his property without permission"; and the fact that a "No Knock" entry was authorized by a

judge. (Dkt. No. 260 at 8; Dkt. No. 260, Attach. 7 at 9.) Similarly, Quigley testified that she did not file a separate suppression motion as to Stegemann's video-surveillance system, because the defense had already moved to suppress all items seized from within Stegemann's residence (including the surveillance system) on different grounds. (Dkt. No. 260, Attach. 7 at 9-10.) It is not objectively unreasonable for counsel to make the strategic decision of not wasting the time of her client and the court by bringing meritless or duplicative suppression motions. *See Black*, 103 F. Supp. 3d at 321; *Rich*, 83 F Supp. 3d at 430-31.

Next, Primomo and Egan were not ineffective for failing to challenge Stegemann's "career offender" status for purposes of sentencing, as this challenge also would have been meritless. Stegemann plainly meets the qualifications for "career offender" status: he was "at least eighteen years old at the time [he] committed the instant offense of conviction"; "the instant offense of conviction is a felony that is . . . a controlled substance offense"; and Stegemann "has at least two prior felony convictions of . . . a controlled substance offense." U.S.S.G. § 4B1.1(a) (2018); (Dkt. No. 199 at 18-19).

As to his 1999 conviction for trafficking cocaine, and his 2003

conviction for distribution of cocaine, it is of no consequence that the Massachusetts statute under which Stegemann was convicted was amended since his conviction, or that the statute criminalizes certain controlled substances that are not criminalized under federal law. The facts are what they are: Stegemann was convicted of trafficking twenty-seven grams of cocaine in 1999, and for distributing cocaine in 2003, (Dkt. No. 199 at 18-19), which are felonies under the old and new versions of Massachusetts law, and under federal law. *See* 21 U.S.C. § 841(a)(1); Mass. Gen. Laws Ann. ch. 94C, § 32E(b)(1). Accordingly, any challenge by Primomo or Egan would have been meritless, and, thus, they were not ineffective in failing to advance that challenge. *See Black*, 103 F. Supp. 3d at 321; *Rich*, 83 F Supp. 3d at 430-31.

**B. Other Grounds for Relief**

Even if Stegeman has not procedurally defaulted on his substantive arguments regarding certain DNA testing and the Proffer Letter—which was not addressed by the government, and, thus, will not be addressed any further by the court—they also fail, as explained below. And to the extent that Stegemann advances ineffective assistance of counsel claims based on these issues, they fail for similar reasons described

above—attorneys are not ineffective for failing to advance meritless arguments.

*1. Government's Alleged Due Process Violation*

Stegemann argues that he was denied due process, because (1) the government falsely represented at his trial that the handguns and cocaine, for which Stegemann was charged and convicted, were not subject to DNA testing, and (2) the government failed to disclose the results of the DNA testing. (Dkt. No. 255, Attach. 1 at 3-5.) In response, the government explains that although "samples of DNA were collected from the seized handguns and ammunition, . . . no actual DNA testing was initiated or completed," and, thus, "there are no laboratory reports to disclose to [Stegemann]." (Dkt. No. 260 at 18-19.) The government includes affidavits from two law enforcement officers in support of this assertion. (Dkt. No. 260, Attachs. 1-2.)

On reply, Stegemann appears to change his argument to one that an investigator "lied" at trial about whether any DNA samples were taken from the evidence seized. (Dkt. No. 270 at 6-10.) Stegemann's argument, which was advanced for the first time on reply, is procedurally improper. *See Zirogiannis v. Seterus, Inc.*, 221 F. Supp. 3d 292, 298 (E.D.N.Y.

2016), *aff'd*, 707 F. App'x 724 (2d Cir. 2017) ("It is well-established that [a]rguments may not be made for the first time in a reply brief." (internal quotation marks and citation omitted)). In any event, it is unpersuasive.

First, contrary to Stegemann's assertion, the court does not view the investigator's statements at trial that, "I don't believe we took any DNA sampling," (Dkt. No. 184 at 211-12), as a "lie." On its face, the statement connotes uncertainty as to its truth. And it is not difficult to believe that he was unsure if samples were taken or not, as they were never tested or used as evidence. Regardless, Stegemann suffered no prejudice with regard to the investigator's testimony, because the samples were never tested, and thus, there was nothing for the government to disclose with respect to DNA. Accordingly, Stegemann cannot show that the result would have been different, and that he suffered any prejudice as a result of the allegedly false testimony. Indeed, there was ample evidence as to Stegemann's guilt,[2] and there is no indication that the DNA on the seized items belonged to anybody but him. Any argument by Stegemann to the contrary is mere speculation.

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[2] The Second Circuit found that the evidence against Stegemann was "overwhelming." *See United States v. Stegemann*, 701 F. App'x 35, 38-39 (2d Cir. 2017).

*2. Government's Alleged Violation of the Proffer Letter*

Stegemann argues that the government violated the terms of the Proffer Letter by using statements he made at the proffer to locate a key witness at trial, Robert Turner. (Dkt. No. 263 at 5-6.) The government argues that Stegemann did not give statements at the proffer under derivative use immunity. (Dkt. No. 268 at 1-2.) That is to say, although the government could not use Stegemann's statements against him at trial, they could use information he provided them with to locate new evidence and witnesses. (*Id.*) Indeed, the terms of the Proffer Letter say as much: "The [g]overnment may pursue any investigative leads suggested by any statements or other information provided by [Stegemann], and such derivative information may be used against [him]." (Dkt. No. 268 at 3.) Accordingly, this ground for relief is denied as well.

## V. Conclusion

**WHEREFORE**, for the foregoing reasons, it is hereby

**ORDERED** that Stegemann's request to file a reply as to his fifth amendment to his motion to vacate (Dkt. No. 284) is **DENIED**; and it is further

**ORDERED** that Stegemann's motion to vacate pursuant to 28 U.S.C.

§ 2255 (Dkt. Nos. 241, 246, 247, 255, 263, 274) is **DENIED**; and it is further

**ORDERED** that the court **DECLINES** to issue a certificate of appealability pursuant to 28 U.S.C. § 2253; and it is further

**ORDERED** that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

**IT IS SO ORDERED.**

June 30, 2020
Albany, New York

Gary L. Sharpe
U.S. District Judge

# APPENDIX C

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

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**UNITED STATES OF AMERICA,**

**1:13-cr-357**
**(GLS)**

**v.**

**JOSHUA G. STEGEMANN,**

**Defendant.**

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**SUMMARY ORDER**

Pending before the court is defendant Joshua G. Stegemann's motion pursuant to 18 U.S.C. § 3582, in which he seeks compassionate release based upon his health and the COVID-19 pandemic. (Dkt. Nos. 296, 298-300, 306, 312.)[1] Stegemann was convicted, following a jury trial of possession of cocaine, heroin, and oxycodone with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 851; possession of firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); and possession of firearms and ammunition after having previously been convicted of a felony in violation of 18 U.S.C. § 922(g)(1). (Dkt. No. 150 at 2-3; Dkt. No. 199 at 1.) He was sentenced to

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[1] The court construes Stegemann's first compassionate release motion, (Dkt. No. 296), his second compassionate release motion, (Dkt. No. 298), and all supplemental filings, (Dkt. No. 299, 300, 306, 312), as one motion for compassionate release.

F.3d 228, 234 (2d Cir. 2020). "The Sentencing Commission has issued no policy statement applicable to motions for sentence reductions filed by defendants; its policy statement applies only to sentence-reduction motions filed by the Bureau of Prisons." *United States v. Giddens*, No. 20-3270, 2021 WL 5267993, at *2 (2d Cir. Nov. 12, 2021) (citing *Brooker*, 976 F.3d at 235-36).

Stegemann raises several arguments in support of his motion, including: (1) his ineligibility to receive a COVID-19 vaccine, (Dkt. No. 296 at 2); (2) his personal health conditions, which include headaches and muscle and kidney problems, (*id.*; Dkt. No. 307); (3) the fact that his criminal record is non-violent, (Dkt. No. 296 at 5); (4) his "common law wife" is ill and his parents are "increasingly frail," (*id.* at 5-6); (5) FCI Ray Brook's mishandling of the COVID-19 pandemic, (*id.* at 1-2); and (6) that he is no threat of violence to the community, (*id.* at 9).

The government argues that Stegemann has not established "extraordinary and compelling" reasons warranting his release, and, even if he had, the factors set out in 18 U.S.C. § 3553(a) weigh against release. (Dkt. No. 303 at 6, 11-12.) The government also argues that, while the U.S. Sentencing Commission's policy statement in U.S. Sentencing

the only available caregiver for [her]." (*Id.*; Dkt. No. 317 at 1.)

Second, even if Stegemann had met the extraordinary and compelling standard, the factors in 18 U.S.C. § 3553(a) weigh against his release. While Stegemann attempts to contest his status as a career offender, the court has previously decided this issue: Stegemann is a career offender. (Dkt. No. 285 at 10-11.) Additionally, Stegemann is a threat to the public given that he has a history of firearm possession and drug trafficking. Given that he was sentenced to a term of imprisonment for 360 months and has only been in custody since June of 2013, has a history of recidivism, and is a threat to the public, Stegemann's release is inappropriate in light of the 18 U.S.C. § 3553(a) factors.

Finally, the court notes that based on its numerous prior dealings with Stegemann, his penchant for honesty is lacking.

Accordingly, it is hereby

**ORDERED** that Stegemann's motion for compassionate release (Dkt. Nos. 296, 298-300, 306, 312.) is **DENIED**; and it is further

**ORDERED** that the Clerk provide a copy of this Summary Order to the parties.

**IT IS SO ORDERED.**

# UNITED STATES COURT OF APPEALS
## FOR THE
## SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of January, two thousand twenty-three.

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Joshua G. Stegemann,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

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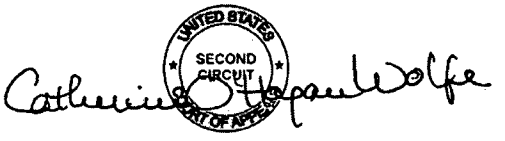
**ORDER**

Docket No: 20-3772

Appellant, Joshua G. Stegemann, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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FROM: Levitt, Richard
TO: 20552052
SUBJECT: rehearing denied
DATE: 01/12/2023 12:36:14 PM

(2nd Cir. 20-3772, DKT. #115)

Appellant, Joshua G. Stegemann, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc. IT IS HEREBY ORDERED that the petition is denied.