APPENDIX

INDEX

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13575

Non-Argument Calendar

DONATUS O. MBANEFO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket Nos. 7:20-cv-00108-HL-TQL,
7:16-cr-00002-HL-TQL-6

Before JORDAN, BRANCH, and GRANT, Circuit Judges.

PER CURIAM:

Dr. Donatus Mbanefo claims that his trial counsel was ineffective, forcing him not to testify at his criminal trial and failing to introduce certain evidence. Because he has not satisfied the *Strickland* standard for ineffective assistance of counsel, we affirm.

I.

This is Dr. Donatus Mbanefo's third appeal stemming from his conviction. After a jury trial, he was convicted of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 and two substantive counts of unlawful dispensation of a controlled substance under 21 U.S.C. § 841(a)(1), (b)(1)(C), and (b)(2). When Dr. Mbanefo challenged the sufficiency of the evidence, the jury instructions, and the court's drug quantity findings, this Court affirmed his conviction and sentence. *United States v. Bacon*, 809 F. App'x. 757 (11th Cir. 2020). We also affirmed the district court's denial of his motion for a new trial. *United States v. Mbanefo*, No. 21-13693, 2022 WL 2983856 (11th Cir. July 28, 2022). Against the backdrop of those two decisions, we give limited additional background.

In this appeal, we review the court's denial of Dr. Mbanefo's 28 U.S.C. § 2255 motion. In the motion, he describes ten grounds for ineffective assistance of counsel, all of which the magistrate

judge below rejected without holding an evidentiary hearing. The court then adopted the magistrate judge's recommendation that the motion be denied. When Dr. Mbanefo appealed, we granted a certificate of appealability as to two of his grounds for relief.

For the first ground, Dr. Mbanefo alleges that his attorney forced him into not testifying. He claims that in the lead-up to trial, he and his attorney planned for him to testify and met in person twice to discuss trial strategy. On the morning of his planned testimony, Dr. Mbanefo says he met his attorney at the courthouse to prepare for the examination. To his surprise, his attorney had organized no questions for the examination and told Dr. Mbanefo not to take the stand. After a "heated, ugly argument," Dr. Mbanefo claims, his counsel threatened to withdraw if he decided to testify and told him he would have to proceed pro se.

This is why, Dr. Mbanefo says, he told the court he did not wish to testify. In support of this story, he produced an email exchange with his counsel dated two days before the government rested its case. In the messages, Dr. Mbanefo's counsel advised him that he needed "to be prepared to explain, both on direct and on cross" how his medical treatment complied with the pain medication regulations. Dr. Mbanefo argues that this shows an abrupt shift in trial strategy and supports that a threat was made.

The court was unconvinced. The magistrate judge decided that Dr. Mbanefo had provided only "unsupported allegations" to support his claims, allegations that "directly contradict his statements" at trial. Moreover, Dr. Mbanefo had not shown, the

court reasoned, that the result of the proceeding would have been different if he had testified, so his counsel's actions could not have caused any harm.

For the second ground, Dr. Mbanefo claims that his attorney withheld exculpatory evidence. He lists six documents that he said should have been presented at trial. This evidence includes emails that Dr. Mbanefo says show that he was deceived and pressured by the owners of the pain clinic where he worked; an airline reservation showing that he extended his trip to Africa to the detriment of the clinic; and an email from the Georgia Composite Medical Board requesting that he attend a voluntary interview as part of an investigation into his prescribing practices. For this ground, the magistrate judge concluded that counsel's choice not to introduce this evidence could be considered "sound trial strategy" and therefore could not be ineffective assistance.

II.

In considering a district court's denial of a § 2255 motion, we review findings of fact for clear error and questions of law de novo. *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011). We review the decision not to grant an evidentiary hearing in a § 2255 proceeding for abuse of discretion. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014). Because Dr. Mbanefo proceeds pro se, we will liberally construe his filings. *Id.*

III.

Under 28 U.S.C. § 2255, a federal prisoner may move to vacate his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). When evaluating such a motion, the court should hold a hearing unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Id.* § 2255(b). This means that a prisoner is entitled to a hearing if he "alleges facts that, if true, would entitle him to relief." *Winthrop-Redin*, 767 F.3d at 1216 (quotation omitted). But the court "need not hold a hearing if the allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record." *Id.* (quotation omitted).

Both of Dr. Mbanefo's grounds for relief require a *Strickland* test for ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). For the first ground, Dr. Mbanefo alleges that his attorney coerced him not to testify; thus, *Strickland* is the proper framework. *Nichols v. Butler*, 953 F.2d 1550, 1552 (11th Cir. 1992) (en banc). The same is true for the second ground, which involves an attorney's alleged failure to introduce evidence. *See Kelley v. Sec'y for the Dep't of Corr.*, 377 F.3d 1317, 1351 (11th Cir. 2004).

A *Strickland* claim has two components: deficiency and prejudice. 466 U.S. at 687. An attorney is deficient if his representation "fell below an objective standard of reasonableness." *Id.* at 688. Prejudice results when "there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." *Id.* at 694. To succeed on an ineffective assistance claim, a claimant must show both deficiency and prejudice. *See id.* at 687.

Neither of Dr. Mbanefo's claims pass muster under *Strickland.*

A.

For his first ground—that he was allegedly forced not to testify—counsel's performance was not deficient. Of course, the "testimony of a criminal defendant at his own trial is unique and inherently significant." *Nichols*, 953 F.2d at 1553. As a result, an attorney's performance can be deficient if he threatens withdrawal to force a client not to testify. *Id.* But although Dr. Mbanefo has presented a detailed story to that effect, his allegations are contradicted by the record, and so we agree with the district court that no evidentiary hearing was required. *See Winthrop-Redin*, 767 F.3d at 1216.

The record reveals a rigorous inquiry into whether Dr. Mbanefo wished to testify. The court first explained in detail a defendant's testimony rights and confirmed that Dr. Mbanefo understood. Then it asked whether he had discussed his rights with his attorney, which he affirmed. The court emphasized that only Dr. Mbanefo could make the decision whether to testify and that his lawyer "can't make it for you." In addition, Dr. Mbanefo's counsel had already—on the record—told the court that he had explained these rights to Dr. Mbanefo, including that the decision

is "his alone to make" and that "*he* has decided that he is not going to testify." (emphasis added). This contradicts Dr. Mbanefo's claims.

Even if counsel were deficient, however, Dr. Mbanefo has not shown the required prejudice. None of his proposed testimony, even if true, creates a "reasonable probability" that the outcome of the trial would have been different. He says that he would have testified that he had been deceived and threatened by the owners of the clinic and had expressed concerns to a Drug Enforcement Administration investigator. But the jury had already heard the same or substantially similar evidence. He also describes how he extended his trip to Africa, which caused havoc at the understaffed clinic. But this allegation does not negate any of the elements of his crimes as charged to the jury.

Finally, he says he would have testified that he had "acted responsibly within the bounds of medically accepted procedure" while consulting at the clinic. This allegation, if true, would strike at the heart of the convictions. Yet it is no more than an unsupported generalization, and as such required no further development through an evidentiary hearing. *See Winthrop-Redin*, 767 F.3d at 1216. Dr. Mbanefo never explained to the district court *why* his prescribing practices were medically legitimate.[1] Even if he had, he could not show prejudice: any

[1] On appeal, Dr. Mbanefo included an explanation, but because it was not before the district court, we cannot consider it. *See Access Now, Inc. v. Sw.*

proposed testimony about medical legitimacy inspires no reasonable probability of a different outcome in the face of the overwhelming evidence underpinning Dr. Mbanefo's convictions. *Cf. Bacon*, 809 F. App'x. at 758 n.1, 759.

In sum, the district court did not abuse its discretion in declining to hold an evidentiary hearing about Dr. Mbanefo's decision not to testify, and because he cannot show deficiency or prejudice, this claim of ineffective assistance of counsel fails.

B.

Dr. Mbanefo also claims that his attorney failed to introduce exculpatory evidence, but he has not shown that his attorney's performance was deficient in this regard. "Judicial scrutiny of counsel's performance must be highly deferential" and a "strong presumption" exists that counsel's conduct is professionally reasonable. *Strickland*, 466 U.S. at 689. A court cannot judge an attorney deficient if his approach "might be considered sound trial strategy." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (quotation omitted).

Just so here. Dr. Mbanefo again points to documents that he says show he was deceived and pressured by the owners of the clinic, expressed concerns about the clinic, and extended his trip to Africa. It is not clear from the record whether Dr. Mbanefo's

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Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004). The same goes for some of the evidence that Dr. Mbanefo claims, for the first time on appeal, should have been introduced by his attorney.

counsel knew about this evidence. But even assuming that he did, and chose not to introduce it, this choice could be sound trial strategy. An attorney could reasonably determine that duplicative arguments and evidence were unnecessary or would be confusing to the jury. After all, counsel "must be permitted to weed out some arguments to stress others and advocate effectively." *Haliburton v. Sec'y for the Dep't of Corr.*, 342 F.3d 1233, 1244 (11th Cir. 2003).

The same holds for the email from the Georgia Composite Medical Board. The email describes an investigation into a complaint or malpractice action against Dr. Mbanefo. On its face, the email is not exculpatory—quite the opposite. The existence of an independent investigation by a state agency could raise a red flag for a jury. Dr. Mbanefo claims that the Board did not find him "wanting or sanction him." Even if true, an attorney could reasonably believe that without documentary evidence to support this exoneration, it was sound trial strategy to avoid the Board investigation altogether.

* * *

For these reasons, the district court did not err in denying Dr. Mbanefo's § 2255 motion without an evidentiary hearing. We **AFFIRM**.

APPENDIX E

Magistrate's Report and

Recommendations Doc. 589

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

DONATUS O. MBANEFO,	:	
Petitioner,	:	
VS.	:	**28 U.S.C. § 2255 Case No.** 7 : 20-CV-108 (HL)
UNITED STATES OF AMERICA,	:	**Criminal Case No.** 7 : 16-CR-02-6 (HL)
Respondent.	:	

ORDER and RECOMMENDATION

Petitioner's Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255, filed on June 4, 2020. (Doc. 543) is before this Court for the issuance of a recommendation of disposition pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

Procedural History

Petitioner was charged by means of a Superseding Indictment filed on June 15, 2016 with conspiracy to distribute and dispense controlled substances, unlawful dispensation of controlled substances, and conspiracy to launder monetary instruments. (Doc. 88). Following a jury trial, Petitioner was found guilty of one (1) count of conspiracy to distribute and dispense controlled substances and two (2) counts of the unlawful dispensation of controlled substances, and was

sentenced on December 5, 2018 to 96 months imprisonment on each of the three (3) counts, to be served concurrently, followed by three (3) years of supervised release on each count, to be served concurrently. (Docs. 325, 444).

Petitioner appealed his convictions. (Doc. 480). By Order dated April 13, 2020, the Eleventh Circuit Court of Appeals affirmed Petitioner's convictions, rejecting Petitioner's challenge to the sufficiency of the evidence to support the conspiracy verdict, his assertion that there had been a constructive amendment to the jury charge, and his challenge to the Court's findings with respect to the drug quantity for which Petitioner should be held accountable. (Doc. 529).

Petitioner's Motion to Vacate was executed on June 1, 2020 and filed with the Court on June 4, 2020. (Doc. 543). Petitioner raises ten (10) grounds for relief, based on trial counsel's and appellate counsel's alleged ineffective assistance, as follows:

1. Trial counsel failed to timely release and review discovery with Petitioner.
2. Trial counsel failed to notify the trial court of a tainted juror.
3. Trial counsel failed to retain a medical expert.
4. Trial counsel failed to have sufficient contact with Petitioner and failed to prepare Petitioner to testify.
5. Trial counsel failed to file pretrial motions to dismiss the indictment based on grand jury abuse.
6. Trial counsel failed to file pretrial motions to dismiss the indictment based on selective prosecution.
7. Trial counsel failed to file pretrial motions to dismiss the indictment based on a charge of a single versus multiple conspiracies.
8. Trial counsel failed to file pretrial severance motions.
9. Trial counsel withheld exculpatory evidence and testimony.
10. Appellate counsel failed to raise certain claims on appeal, failed to file a rebuttal to the government's brief, failed to discuss oral argument with Petitioner, and failed to attend oral arguments.

Id.

Petitioner was represented at trial and on appeal by retained counsel Charles Cox.

Legal Standards

Section 2255 provides that:

> a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

If a prisoner's § 2255 claim is found to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.*

Evidentiary Hearing

Petitioner bears the burden of establishing that an evidentiary hearing is needed to dispose of his § 2255 motion. *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984). "A federal habeas corpus petitioner is entitled to an evidentiary hearing if he alleges facts which, if proven, would entitle him to relief." *Futch v. Dugger*, 874 F.2d 1483,1485 (11th Cir. 1989). The Court is not required to hold an evidentiary hearing, however, where the record makes "manifest the lack of merit of a Section 2255 claim." *United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984). "[If] the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schirro v. Landrigan*, 550 U.S. 465,

474 (2007). The record herein is sufficient to evidence that Petitioner's claims lack merit, and therefore no evidentiary hearing is necessary as to his grounds.

Facts

The Eleventh Circuit Court of Appeals found that

> the superseding indictment alleged that eight individuals conspired to operate the Wellness Center of Valdosta (the "Valdosta clinic") and the Relief Institute of Columbus (the "Columbus clinic") as pill mills for the purpose of enriching themselves by unlawfully dispensing controlled substances. Drs. Bacon and Mbafeno proceeded to trial while the other defendants pled guilty.

(Doc. 529).

Discussion

In order to establish that his counsel's representation was constitutionally defective, the Petitioner must show (1) that his counsel's representation was deficient, and (2) that the Petitioner was prejudiced by his counsel's alleged deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith v. Wainwright*, 777 F.2d 609, 615 (11th Cir. 1985). "Our role in collaterally reviewing [] judicial proceedings is not to point out counsel's errors, but only to determine whether counsel's performance in a given proceeding was so beneath prevailing professional norms that the attorney was not performing as 'counsel' guaranteed by the sixth amendment." *Bertolotti v. Dugger*, 883 F.2d 1503, 1510 (11th Cir. 1989).

The *Strickland* court stated that "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

> [A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. . . . *It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . [rather][t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.* . . . In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

Strickland, 466 U.S. at 693-694, *emphasis added.*

In evaluating whether Petitioner has established a reasonable probability that the outcome would have been different absent counsel's alleged errors, a court "must consider the totality of the evidence before the judge or jury." *Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002). "As to counsel's performance, 'the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Reed v. Sec'y. Fla. Dep't. of Corr.*, 593 F.3d 1217, 1240 (11th Cir. 2010) (quoting *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009)). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). In order to find that counsel's performance was objectively unreasonable, the performance must be such that no competent counsel would have taken the action at issue. *Hall v. Thomas*, 611 F.3d 1259, 1290 (11th Cir. 2010).

"Claims of ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*." *Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir.

2009). A criminal defendant has a right to counsel on appeal, "limited to the first appeal as of right". *Evitts v. Lucy*, 469 U.S. 387, 394 (1985). However, this right does not encompass a right to compel said counsel to pursue every claim deemed meritorious by the defendant. The Supreme Court has expressly held that "[n]either *Anders* nor any other decision of this Court suggests, [however], that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.*

Appellate counsel is not ineffective in failing to raise claims "reasonably considered to be without merit". *Alford v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). To determine whether defense counsel rendered ineffective assistance by failing to raise certain issues on appeal, the Court must examine the merits of the issues Petitioner alleges should have been raised on appeal. *Miller v. Dugger*, 858 F.2d 1536, 1538 (11th Cir. 1988).

Release and review of discovery and contact with Petitioner (Grounds 1 and 4)

Petitioner alleges that trial counsel failed to timely release and review discovery with Petitioner, allowing him only two (2) days to review over 500 pages of discovery in trial counsel's office. Petitioner also alleges that counsel failed to spend adequate time with Petitioner and failed to adequately prepare Petitioner to testify.

"Whether [Petitioner's] counsel performed deficiently depends on the facts available to counsel at the time he made the challenged decisions. 'Even if counsel's decision appears to

have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it.'". *Richardson v. U.S.*, 2011 WL 2682963, at *3 (S.D.Fla. 2011), *quoting Dingle v. Secretary for Dep't of Corrs.*, 480 F.3d 1092, 1099 (11th Cir. 2007).

Petitioner's arguments that counsel was ineffective in failing to provide Petitioner with more time to review discovery and discuss the discovery with counsel imply that Petitioner's input regarding discovery and strategy was somehow critical and essential to the actual defense of his case against the government's prosecution. However, Petitioner hired his trial counsel to perform just that job, i.e., to represent him on the charges pending against him and defend him against the government's prosecution. Petitioner has provided no explanation as to how the time frame within which counsel apprised Petitioner of discovery prejudiced Petitioner, so that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's actions. *See Barlow v. United States,* 2017 WL 903477 (S.D.Ala. 2017) (petitioner failed to show how lack of investigation by counsel prejudiced his case, and therefore failed to establish ineffective assistance of counsel); *Espinal v. United States,* 2017 WL 9439169 (N.D.Ga. 2017) (petitioner failed to specify what additional discovery or information counsel should have provided him, explain how the information would have changed the outcome of the proceeding, or how his input would have assisted counsel).

Moreover, Petitioner has not explained how he was prejudiced by counsel's decisions regarding discovery and trial strategy. "A strategic decision by defense counsel will be held to constitute ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it." *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987).

Counsel's decision as to when and how much he would share and discuss discovery with Petitioner was clearly a matter of strategy, and "[h]ow a lawyer spends his inherently limited time and resources is entitled to great deference by a court." *Chandler v. United States*, 218 F.3d 1305, 1318 n.22 (11th Cir. 2000).

In regard to the time trial counsel spent with Petitioner and his assertion that he left him unprepared to testify, resulting in Petitioner's choice not to testify, Petitioner has failed to provide more than unsupported allegations, which directly contradict his statements under oath to the Court. After being advised by the Court regarding his right to testify, Petitioner stated that he understood that the decision to testify was his to make and that he had consulted with counsel before deciding not to testify. (Doc. 372 at pp. 111-12). As with the other elements of these grounds, Petitioner has failed to show how counsel's actions or inactions prejudiced Petitioner, so that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's actions.

Tainted juror (Ground 2)

In Ground 2, Petitioner alleges that counsel failed to notify the Court of a "tainted juror", allegedly the sister of a state trooper who was sued by an individual represented by Petitioner's trial counsel in an action brought pursuant to 42 U.S.C. § 1983. Petitioner asserts that counsel revealed this connection to a juror during the "Pre-Sentence Review Interview", five (5) months after Petitioner's conviction, and that the state trooper defendant lost at the trial and appellate levels. Petitioner provides the case cite for the § 1983 action as *Merenda v. Trabor,* 506 F. A'ppx 862 (2013). Petitioner maintains that the juror could have "harbor[ed] some residual hostility towards trial counsel, yet trial counsel did not notify the Court of this tainted juror so

she could be struck for cause." (Doc. 543-1, p. 3).

In the *Merenda* case, in a decision dated February 1, 2013, the Eleventh Circuit affirmed the district court's denial of summary judgment to the defendant and dismissed the appeal to the extent that the defendant challenged the grant of summary judgment to Plaintiff. *Merenda v. Tabor,* No. 5 : 10-cv-493 (M.D.Ga. Feb. 1, 2013)(MTT). The case record reveals that the case was dismissed by plaintiff with defendant's permission on April 11, 2013. *Merenda v. Tabor,* No. 5 : 10-cv-493 (M.D.Ga. April 11, 2013)(MTT).

"To exclude a prospective juror for cause, a party must demonstrate through questioning that the juror lacks impartiality. That is, the party 'must demonstrate that the juror in question exhibited actual bias by showing either an express admission of bias or facts demonstrating such a close connection to the present case that bias must be presumed.'" *Bell v. U.S.,* 351 F. A'ppx 357, 359 (11th Cir. 2009), *citing United States v. Chandler,* 996 F.2d 1073, 1102 (11th Cir. 1993).

As noted by the government, Petitioner has put forth argument regarding the "tainted juror" based only on a presumption of this juror's bias due to a potential adversarial relationship between the juror's brother and Petitioner's trial counsel, without any evidence or allegation of this juror's actual bias, or suggestion that the voir dire process was somehow deficient and did not uncover the alleged bias. Petitioner does not allege that the juror knew of the connection between her brother and trial counsel. As such, this ground does not support the granting of habeas relief.

Medical expert (Ground 3)

In Ground 3, Petitioner asserts that counsel was ineffective in failing to obtain a medical expert's testimony, despite counsel's agreement with Petitioner that he would do so. Petitioner

asserts that counsel told him he was unable to obtain a medical expert and that Petitioner would have to testify as a medical expert. Petitioner ultimately did not testify.

As noted by the government, the Supreme Court has found that in order for a petitioner to establish ineffective assistance based on failure to call an expert witness, "[petitioner] would still need to show it was indisputable that *Strickland* required his attorney to act upon [] knowledge [that the prosecution would offer expert evidence]." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). "But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Id.* at 111.

A review of the testimony at trial shows that Petitioner's counsel conducted a thorough cross-examination of the government's experts, as well as the government's other witnesses. (Doc. 371, pp. 180-192; Doc. 372, pp. 38-75; Docs. 366-373). Witnesses were also cross-examined by counsel for Petitioner's co-defendant. *See* Docs. 366-373. Thus, "trial counsel's decision to not call the expert witness was not so patently unreasonable a strategic decision that no competent attorney would have chosen this strategy." *Dorsey v. Chapman*, 262 F.3d 1181, 1186 (11th Cir. 2001). Petitioner has failed to establish that there was a reasonable probability that another expert's testimony would have changed the outcome of his trial. *Earhart v. Johnson*, 132 F.3d 1062, 1067-68 (5th Cir. 1998) (to succeed on ineffective assistance claim predicated on counsel's failure to call expert, petitioner had to show prejudice to the outcome of his trial).

Motions to dismiss the indictment (Grounds 5, 6, 7)

In Grounds 5, 6, and 7, Petitioner asserts that trial counsel was ineffective in failing to

move to have the indictment dismissed, on grounds of grand jury abuse, selective prosecution, and charging only one conspiracy. Petitioner asserts that GBI Agent Stripling Luke made false statements in proceedings before the grand jury, allegedly calling into question Petitioner's ability as a physician and his practices as a physician. Petitioner further alleges that the government's investigation of the conspiracy for which Petitioner stands convicted selectively targeted minority doctors, and that the government erroneously presented multiple conspiracies as one conspiracy in the indictment.

An attorney is not ineffective for failing to file a meritless motion. *Deverso v. U.S.*, 2011 WL550205 (M.D.Fla. 2011). The record herein reveals that a motion to dismiss the indictment lacked merit on the bases set forth by Petitioner.

"[A]s a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudice the defendant[]". *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 254 (1988). "[D]ismissal of the indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 256. Additionally, "a petit jury's subsequent guilty verdict renders 'any error in the grand jury proceeding connected with the charging decision [] harmless beyond a reasonable doubt.'". *U.S. v. Cosme*, 134 F. A'ppx 391, 393 (11th Cir. 2005) *citing United States v. Mechanik*, 475 U.S. 66. 70 (1986). As Petitioner has not demonstrated any prejudice from the grand jury's indictment or 'grave doubt' that the decision to indict was free from substantial influence, he has failed to show that counsel was ineffective for failing to move to dismiss the indictment on this ground. *Cosme*, at 394. The Court notes that many of the grand jury witness statements to which

Petitioner points were not specifically about Petitioner, but rather the clinics and their general practices in hiring physicians. Petitioner has made no showing beyond his conclusory allegations that the statements made by Agent Luke before the grand jury were somehow false or perjurious.

To the extent that Petitioner alleges the indictment against him was the result of selective prosecution, and therefore subject to dismissal, such a claim requires a showing that "the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose . . . To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *U.S. v. Armstrong,* 517 U.S. 456, 465 (1996), *internal citations omitted.* Petitioner claims that similarly situated physicians were not indicted, and that he was indicted because of his race, despite one given reason for Petitioner's indictment being the longevity of his employment with the clinic.

As pointed out by the government, the physicians who worked at the clinics but were not indicted were not in fact similarly situated to Petitioner, as one doctor worked only five days and then reported the clinic to the DEA and other authorities, and another doctor worked for only one day. As noted by the government, Petitioner and his co-defendant physicians "were the top three prescribers at these clinics. There were many other doctors, but they were only there for very brief periods of time." (Doc. 373 at p. 133). Petitioner has provided no specific information, only conclusory allegations, regarding his alleged selective prosecution, and therefore has failed to establish that such a claim could have supported a motion to dismiss filed by his counsel.

Finally, there is Petitioner's argument that the indictment should have been dismissed because it alleged only one conspiracy instead of multiple conspiracies. As the government points out, the evidence conclusively showed that there was one conspiracy, and this finding by

the jury was affirmed on appeal to the Eleventh Circuit. The Eleventh Circuit found that

> [a]though Dr. Mbanefo's tenure at the Columbus clinic (where he worked) was only several months, the evidence of his guilt was stronger even than that supporting the conviction of [his co-defendant] Dr. Bacon. All of the evidence [] with respect to Dr. Bacon-or equivalent evidence-was applicable also to Dr. Mbanefo. If anything, the eight prescription records (of Dr. Mbanefo) reviewed by the two expert witnesses were even more damning than those of Dr. Bacon. And the operation of the two clinics . . . was substantially the same. In short, there was ample evidence on the basis of which the jury could reasonably find Dr. Mbanefo guilty [of conspiracy].

(Doc. 529, p. 4).

Moreover, courts have recognized that "dismissal of the indictment is not the appropriate remedy where multiple conspiracies emerge despite the indictment only describing one conspiracy." *U.S. v. Damiani*, 2011 WL 7574628 (N.D.Ga. 2011), *citing United States v. Bowline*, 593 F.2d 944, 947 (10th Cir. 1979). As such, counsel's failure to file a motion to dismiss the indictment based on the allegation of one versus multiple conspiracies does not support this ground of alleged ineffectiveness.

Severance motions (Ground 8)

Petitioner also alleges that counsel was ineffective in failing to file motions to sever the defendants and charges. Petitioner contends that the crimes involved different individuals, "with no overlapping of participants and no concert of purpose to be achieved by mutual actions." (Doc. 543, p. 5). The Court notes initially that the guilty verdict on the conspiracy count, and the Eleventh Circuit's affirmance thereof, directly contradicts Petitioner's contentions in Ground 8.

Additionally, "[j]oinder under [Federal Rule of Criminal Procedure] 8 is designed to promote judicial economy and efficiency. *Damiani*, 2011 WL 7574628 at *17. Pursuant to Rule

8(b), "[t]he indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). "A severance under Rule 14 of the Federal Rules of Criminal Procedure should be granted only if the defendant can demonstrate that a joint trial would result in specific and compelling prejudice to the conduct of his defense." *Damiani*, 2011 WL 7574628 at *18. Moreover, a defendant is entitled to severance only if that "prejudice flowing from a joint trial is clearly beyond the curative powers of precautionary instruction." *United States v. Morrow*, 567 F.2d 120, 123 (5th Cir. 1976).

Petitioner has failed to show that he was entitled to severance and that failure to file a motion for severance was ineffective assistance of trial counsel.

Withholding evidence (Ground 9)

Petitioner alleges in Ground 9 that counsel was ineffective for "withholding" certain pieces of evidence which Petitioner asserts were inconsistent with his convictions. As found by the Eleventh Circuit, the evidence against Petitioner was extensive, and Petitioner's attempt to undermine the verdicts by pointing to evidence that he believes to be inconsistent is without merit. "We must avoid second-guessing counsel's performance . . . It does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance. Nor does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness. . . Thus, counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy." *Chandler*, 218 F.3d at 1314, *internal citations omitted.* This ground does not support the granting of habeas relief.

Appellate counsel (Ground 10)

In Ground 10, Petitioner asserts that appellate counsel was ineffective for failing to raise the grounds of alleged ineffectiveness by trial counsel on appeal, in failing to file a rebuttal to the government's brief on appeal, in failing to discuss oral argument points with Petitioner, and in failing to attend oral argument.

Petitioner's § 2255 Motion and the appellate record evidence appellate counsel's decision to pursue certain claims and remove others from consideration. *See* Doc. 529. "Such winnowing of claims for presentation on appeal is reasonable and proper." *U.S. v. Allen*, 2009 WL 857385 (S.D.Ala. 2009) *citing Johnson v. Alabama*, 256 F.3d 1156, 1188 (11th Cir. 2001). As evidenced by the findings herein, "[i]n any event, there was little persuasive foundation, and little likelihood of success, for . . . the arguments [the Petitioner] now suggests should have been pressed on appeal." *Johnson,* 256 F.3d at 1188.

In regard to counsel's failure to file a reply brief on appeal, failure to discuss oral argument with Petitioner, and failure to appear for oral argument, Petitioner has failed to show how these actions, or inactions, resulted in prejudice to Petitioner. "[T]he failure to file a reply brief or to appear at oral argument does not prevent review of the issues raised on appeal [and was not ineffective assistance of counsel]." *Oliver v. Secretary, Dept. of Corrections*, 2014 WL 407988, *4 (M.D.Fla. 2014), *quoting United States v. Birtle,* 792 F.2d 846, 848 (9th Cir. 1986). "[Petitioner] has not demonstrated that appellate counsel's failure to file a reply brief prevented review of the issues raised on appeal . . . [and] he has not shown that the outcome of his appeal would have been different had appellate counsel filed a reply brief or otherwise demonstrated prejudice to the defense." *Id.*

Additionally, as noted by the government, in light of the COVID-19 pandemic, the Eleventh Circuit provided counsel a choice between proceeding on the briefs or holding oral argument by telephone, and counsel chose to waive proceeding by telephone. *United States v. Bacon*, No. 18-15145 (11th Cir. Mar. 18, 2020). The Eleventh Circuit granted the motion to proceed on the briefs. *United States v. Bacon*, No. 18-15145 (11th Cir. Marc. 20, 2020). There was no need, therefore, for discussion of the substance of any oral argument with Petitioner.

Petitioner has therefore failed to establish ineffective assistance of appellate counsel that resulted in prejudice to the outcome of his appeal. "Counsel is not ineffective for failing to preserve or argue a meritless claim." *U.S. v. Beall*, 2014 WL 1613939 *8 (N.D.Fla. 2014); *see also Lattimore v. United States*, 345 F. A'ppx 506, 508 (11th Cir. 2009) (counsel not ineffective for failing to make a meritless objection to an obstruction enhancement); *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002) (counsel not ineffective for failing to raise issues clearly lacking in merit). Moreover, Petitioner has failed to establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the appellate proceeding would have been different.

Conclusion

WHEREFORE, it is recommended that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 543) be **DENIED.**

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge shall make a de novo

determination as to those portions of the Recommendation to which objection is made; all other portions of the Recommendation may be reviewed by the District Judge for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

The undersigned finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is recommended that the Court deny a certificate of appealability in its Order addressing the grounds raised in this § 2255 Petition. If the Petitioner files an objection to this Recommendation, he may include therein any arguments he wishes to make regarding a certificate of appealability.

Petitioner's motion for clarification, motions seeking an evidentiary hearing, and motion to appoint counsel are **DENIED** as moot. (Docs. 560, 572, 573, 577).

SO ORDERED and RECOMMENDED, this 12th day of April, 2021.

s/ ***Thomas Q. Langstaff***
UNITED STATES MAGISTRATE JUDGE