IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13986-J

NESTOR LEON,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Nestor Leon failed to file a prisoner financial statement within the time fixed by the rules.

Effective February 23, 2023.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NESTOR LEON,

Petitioner,

v.

Case No: 6:19-cv-1882-Orl- JADCI

Criminal Case No. 6:14-cr-238--28DCI

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order entered November 1, 2022, the Petitioner's Second Amended motion to vacate, set aside or correct sentence, is hereby denied, and this case is dismissed with prejudice.

Date: November 2, 2022

ELIZABETH M. WARREN, CLERK

s/L.W.
By: L.W., Deputy Clerk

Copies furnished to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NESTOR LEON,

Petitioner,

v.

Case No. 6:19-cv-1882-JA-DCI
(6:14-cr-238-JA-DCI)

UNITED STATES OF AMERICA,

Respondent.

ORDER

THIS CAUSE is before the Court on Petitioner Nestor Leon's Second Amended Motion to Vacate, Set Aside, or Correct Sentence ("Second Amended Motion to Vacate," Doc. 38) filed under 28 U.S.C. § 2255, Petitioner's Motion and Supplemental Motion for Evidentiary Hearing (Doc. Nos. 68, 69), and Petitioner's Motions to Expand the Record[1] (Doc. Nos 73, 74). The Government filed a Response in Opposition to the Second Amended Motion to Vacate ("Response," Doc. 47) to which Petitioner filed a Reply to the Response ("Reply," Doc. 53).

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[1] Petitioner seeks to expand the record with his affidavit (Doc. 73-1) and the CD he received from McCoy Federal Credit Union (Doc. 74). The Court directed Petitioner to file a copy of the CD. *See* Doc. 72. Further, Petitioner's affidavit (Doc. 73-1) contains similar attestations to his numerous prior filings in this case. Consequently, Petitioner's Motions to Expand the Record (Doc. Nos. 73, 74) will be granted to the extent the Court will consider these items in the disposition of this action.

Petitioner asserts six grounds for relief in his Second Amended Motion to Vacate. As discussed below, Petitioner's Motion and Supplemental Motion for Evidentiary Hearing (Doc. Nos. 68, 69) and Second Amended Motion to Vacate (Doc. 38) are denied.

I. PROCEDURAL BACKGROUND

A Grand Jury charged Petitioner with carjacking in violation of 18 U.S.C. § 2119 (Count One) and knowingly using and carrying a firearm during and in relation to a federal crime of violence (carjacking) (Count Two) in violation of 18 U.S.C. §§ 924(c)(1)(A) and (c)(1)(A)(iii). (Criminal Case 6:14-cr-238-JA-DCI, Doc. 18.)[2] A jury found Petitioner guilty as charged. (Criminal Case, Doc. 69.) The Court sentenced Petitioner to a 96-month term of imprisonment for Count One and to a mandatory consecutive 120-month term of imprisonment for Count Two. (Criminal Case, Doc. 203.) Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed his convictions. (Criminal Case, Doc. 212.) The Supreme Court of the United States denied Petitioner's petition for writ of certiorari. (Criminal Case, Doc. 214.)

II. EVIDENCE ADDUCED AT TRIAL

The evidence adduced at trial as summarized by the Eleventh Circuit is:

> Leon and his victim, Lester Perez, were not strangers. About

[2] Criminal Case No. 6:14-cr-238-JA-DCI will be referred to as "Criminal Case."

> two weeks before Leon stole Perez's car, Perez spotted Leon outside a nightclub and thought he recognized him from high school. Perez invited Leon to his home that night where the two rekindled their relationship. Over the following days, Leon and Perez exchanged text messages. On the night of the incident giving rise to this case, Perez picked up Leon and the two drove to a credit union where Perez parked his car and walked to the ATM to withdraw money.
>
> While Perez was using the ATM, Leon slid into the driver's seat, put the car in reverse, and accelerated. Perez heard his car reversing, turned around, saw Leon in the driver's seat, and ran to the passenger side of the car. By the time Perez reached the passenger-side door, Leon had stopped the car to switch from reverse to drive. Perez exclaimed, "stop, stop, what are you doing," at which point Leon pointed a gun at Perez's face and fired a bullet through the open passenger-side window. The shot missed and Leon sped away. Perez phoned 911 from a nearby store and, shortly thereafter, police located his car and apprehended Leon.

United States v. Leon, 713 F. App'x 948 (11th Cir. 2017).

III. LEGAL STANDARDS

A. 28 U.S.C. § 2255

Section 2255 allows federal prisoners to obtain collateral relief under limited circumstances:

> 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 attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). To obtain this relief, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456

U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment). "[I]f the petitioner 'alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.'" *Aron v. United States*, 291 F.3d 708, 714–15 (11th Cir. 2002) (quoting *Holmes v. United States*, 876 F.2d 1545, 1552 (11th Cir. 1989)). If a claim is meritorious, 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." 28 U.S.C. § 2255(b).

B. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief because his counsel provided ineffective assistance. 466 U.S. 668, 687-88 (1984). To prevail under *Strickland*, a petitioner must demonstrate "(1) that his trial 'counsel's performance was deficient' and (2) that it 'prejudiced [his] defense.'" *Whatley v. Warden*, 927 F.3d 1150, 1175 (11th Cir. 2019) (quoting *Strickland*, 466 U.S. at 687).

To demonstrate prejudice requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

III. ANALYSIS

A. Ground One

Petitioner asserts trial counsel James Smith (hereinafter, "Smith" or "trial counsel") rendered ineffective assistance by failing to investigate and challenge the Government's video from the McCoy Federal Credit Union ("MCU") presented at trial. (Doc. 38 at 4.) According to Petitioner, Smith's failure to challenge the Government's sixty-second video[3] of the carjacking allowed the jury to infer that this was the only video footage of the incident. (*Id.*) Petitioner notes that after he initiated this case, the Florida Public Defender ("Florida PD") provided the Federal Public Defender ("Federal PD") five video clips that Smith did not present at trial, and he argues these clips would have led the jury to doubt the reliability of the Government's video.[4] (*Id.*) Petitioner contends that he told Smith before trial that the Government's discovery

[3] The video presented at trial was fifty-eight seconds in length. In this Order, the Court will refer to the video presented at trial as the sixty-second video for clarity and consistency.

[4] Petitioner essentially contends that there was video footage from MCU that would have refuted Perez's testimony that Petitioner fired a gun at him through the partially open passenger window.

indicated that "Detective Brian Savelli had recovered 4 video's [sic] from. . ." MCU, and despite this, Smith told him "he was relying on the Governments [sic] investigation and would not look any further for video's [sic]. . . ." (Doc. 73-1 at 1-2.) Finally, Petitioner argues that the materials he submitted to the Court prove that the Government "doctored" the video evidence from MCU "to produce only a fraction of the original footage. . . ." (Doc. 53 at 8.)

To support this and other grounds, Petitioner submitted the MCU videos he received from the Federal PD, the Government, and the Florida PD after the initiation of this action. *See* Doc. Nos. 42, 48. Further, Petitioner submitted the CD he received from MCU in response to the subpoena duces tecum issued during this proceeding.[5] *See* Doc. Nos. 59, 71, 74. To address this and other grounds, it is necessary to understand the litigation history of Petitioner's criminal case and the video evidence and other evidence before the Court.

1. Litigation History and Evidence Before the Court

The State of Florida originally charged Petitioner in the state court with offenses emanating from the incident occurring at MCU on June 28, 2014, at approximately 12:45 a.m. The Florida PD represented Petitioner in that action,

[5] In response to the subpoena, MCU indicated it no longer has all views of surveillance from June 28, 2014, because the items were destroyed, not saved past retention, or the records were not found, *etc.* (Doc. 71-1 at 1.) MCU provided Petitioner a CD, however, which Petitioner was directed to submit to the Court. *See* Doc. 72. Although Petitioner asserts that the CD is blank, *see* Doc. 74, the Court's review of the CD establishes that it contains the video played at trial.

and on July 15, 2014, his counsel subpoenaed MCU for the "[s]urveillance video from ATM and any other SV from, June 28, 2014, 11:30 p.m. to June 29, 2014 1:30 a,m." (Doc. 53-1 at 2.) The Florida PD's subpoena duces tecum, therefore, requested video footage from MCU for times that did not include the incident at issue in this case. After Petitioner initiated this case, however, his Florida PD notified Petitioner that he believes he sent an investigative subpoena to MCU to preserve evidence from the night of the incident. *See* Doc. 53-2 at 10-11.

An MCU Certification of Business Records dated July 16, 2014, reflects that the MCU Manager of the Risk Services Department and Custodian of Records (hereinafter, "MCU manager") provided "all documents responsive to the subpoena issued to [MCU]. . . [in the] custody or control of [MCU]. . . *for the incident taking place . . . on June 28, 2014* in response to the subpoena for Case No. 14-CF-008803-A-OR." (Doc. 53-2 at 3) (emphasis added). Another MCU Certification of Business Records issued on the same date indicates that the MCU manager provided someone a CD containing the incident occurring "on the early morning of 6/28/14 as requested by Detective Brian Savelli on 7/16/14."[6] (Doc. 53-1 at 3.)

[6] Neither MCU Certification of Business Records states to whom the materials were provided. Based on Sandra Deisler's "Receipt" acknowledging the materials she received from the Federal PD discussed *infra*, however, it appears that the Florida PD received a CD from MCU pursuant to a subpoena containing the video played at trial and that video was in turn given to the Federal PD who then gave it to Deisler. (Doc. 53-1 at 7.)

On September 15, 2014, a Criminal Complaint supported by FBI Special Agent Kevin Kaufman's ("SA Kaufman") affidavit[7] was filed against Petitioner in this Court. (Criminal Case, Doc. 1 at 2-6.) Thereafter, on September 24, 2014, Petitioner was arrested for the offenses at issue in this case, and the Federal PD was appointed to represent him. (Criminal Case, Doc. 9.)

At Petitioner's preliminary hearing on September 25, 2014, Federal PD Larry Henderson questioned SA Kaufman about the evidence he reviewed to conclude that probable cause existed to charge Petitioner. *See United States v. Leon*, Case No. 6:14-mj-01461-TBS, Doc. 20 at 10-19. Federal PD Henderson asked SA Kaufman if he'd viewed any surveillance video from MCU to which SA Kaufman responded, "There's video that captured [Perez] walking up, but it does not actually capture the event on camera." (*Id.* at 13.) Federal PD Henderson then asked SA Kaufman if he was aware whether other surveillance video of the incident existed other than from the ATM camera, such as from the parking lot, and SA Kaufman responded that he was unaware of any other video. (*Id.*)

Soon after the preliminary hearing, on October 23, 2014, the Court appointed conflict counsel Sandra Deisler ("Deisler") to represent Petitioner.

[7] In the affidavit, SA Kaufman mentioned that he conferred with Orange County Sheriff's Office Detective Savelli ("Savelli") and other law enforcement officers during the investigation. (Criminal Case, Doc. 1 at 3.)

(Criminal Case, Doc. 22). The Federal PD provided Deisler with two CDs. (Doc. 53-1 at 7.) On October 24, 2014, Deisler acknowledged receipt of a CD labeled "'Case # 14-cf-008803-A-O 6/28/14 McCoy FCU'" that Petitioner's Federal PD received from the Florida PD. The CD was accompanied by the MCU "original certification of business records" and a "copy of subpoena dated 7/15/14 and stamped 'received' on 7/15/14."[8] (*Id.*) Deisler noted that this CD contained video of the incident "from one camera situated above the ATM that shows only the front of a vehicle and a person who, while making an ATM transaction, turns and runs after the vehicle." (*Id.*) The second CD provided to Deisler contained a video entitled "CFP ATM 6-28-2014 stolen car.avi," the recording of Perez's 911 call, and a "PDF of 'certification of business records.'" (*Id.*) Prior to trial, Smith and Deisler jointly moved for Smith to be substituted as Petitioner's counsel, and the Court granted the motion. (Criminal Case, Doc. 46.)

After trial but before sentencing, Petitioner, proceeding *pro se*, filed a motion to inspect and review the Government's videos from MCU, arguing that he believed the video footage had been edited and that there was exculpatory evidence in the unedited videos. *See* Criminal Case, Doc. 126. Magistrate Judge

[8] The subpoena referenced by Deisler appears to be the Florida PD's July 15, 2014, subpoena duces tecum. *See* Doc. 53-1 at 2. Nevertheless, MCU provided the Florida PD the video played at trial. *See* 53-1 at 7 (Deisler describing the content of the CD accompanied by the original MCU Certification of Business Records and July 15, 2014 subpoena).

Karla Spaulding granted Petitioner's motion to allow him an opportunity to view the videos in the Government's possession. *See* Criminal Case, Doc. 133. It appears that the only video of the incident from MCU in the Government's possession was the sixty-second second video played at trial.

After the initiation of this action, the Florida PD's Office notified Petitioner that it had mailed the Federal PD's Office, on or about October 29, 2019, a CD containing four surveillance videos. (Doc. 53-1 at 9.) Subsequently, the Federal PD notified the Court that it had received a CD from the Florida PD containing "five video clips (2 of them being copies of the same video clip). . . ," with a total of approximately twelve minutes of footage, not including the duplicate video clip. (Doc. 19.) The Court directed the Federal PD to provide Petitioner with this CD. *See* Doc. 33. The Court further directed the Government to provide Petitioner with any video in its possession from MCU from the date of the offenses. (*Id.*) The Federal PD and the Government provided Petitioner with CDs, which Petitioner then submitted to the Court. *See* Doc. Nos. 35, 42. In addition, Petitioner later received a CD from the Florida PD containing four videos from MCU, which he submitted to the Court. (Doc. 48.) Finally, MCU provided Petitioner a CD, which he submitted to the Court. (Doc. 74.)

With respect to the video footage contained in the CDs, the Government's CD and the CD provided to Petitioner by MCU contains the video played at

trial.[9] *See* Doc. Nos. 42, 74. The video in both CDs was recorded by a camera (camera 16)[10] located above the right side of the ATM under the ATM awning. It shows the front of Perez's vehicle pull into a parking space in front of the ATM, Perez approach the ATM and use it, and while Perez does so, the front of his vehicle begins backing away at which point Perez turns and runs toward his vehicle. By the time Perez turns and begins to run, his car is almost completely out of the camera's view, and the video does not capture either Perez or his vehicle when Perez reaches his car.

The CD provided to Petitioner by the Federal PD contains five video clips from MCU. (Doc. 42.) Two of the clips are duplicates labeled "cfp 6/29/14" and contain eight minutes and twenty-two seconds of video footage from MCU on June 29, 2014, the day after the offenses. This video footage is taken from two cameras – cameras 15 and 16 – located under the ATM awning, above and on either side of the ATM. These duplicate clips show three ATM users arriving, using the ATM, and leaving. The footage from camera 15 shows the ATM from the left side and in one instance provides a limited view of the corner of the

[9] The Government's CD contains the exhibits admitted at trial, including the fifty-eight second MCU video and Perez's 911 call. *See* Criminal Case, Doc. 70 (trial exhibit list).

[10] The camera number is not reflected on the Government's video, but it is on the video provided by MCU. In addition, the Government's video does not contain a time, but the videos of the incident provided to Petitioner by MCU, the Florida PD, and the Federal PD reflect the times of 50:33 to 51:31.

passenger's side hood of an ATM user's vehicle. Similarly, another clip, two minutes and fifteen seconds in length labeled "cfp 6/28/14," contains the same type of footage of a single ATM user on June 28, 2014, between 23:43:02 and 23:50:42, from cameras 15 and 16.[11] The footage from camera 15 shows the front corner of the passenger side hood of the ATM user's car. The format of these video clips shows footage taken by cameras 15 and 16 in side-by-side boxes under which are two blank, black boxes. *See, e.g.,* Doc. 53-1 at 1 (photo from MCU ATM consistent with video footage). A third video clip labeled "cfp 6/29/14 dt" shows irrelevant video footage from camera 14 of the MCU drive through on June 29, 2014. Finally, a fourth clip labeled "cfp atm 6/28/14 stolen car" contains the video played at trial recorded by camera 16.

The CD provided to Petitioner by the Florida PD contains the same three irrelevant videos and the video played at trial. (Doc. 48.) From this evidence, the Court next considers if Petitioner has demonstrated that Smith was deficient for failing to investigate and challenge the Government's video from MCU or that prejudice resulted from Smith's failure to do so.

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[11] This appears to be video footage of the ATM around 11:43 p.m. on June 28, 2014, whereas the offenses occurred around 12:45 a.m. on June 28, 2014. The video clip starts at 23:43:02, runs through 23:45:00, then jumps to 23:50:23 and ends at 23:50:42.

2. Deficient Performance

As explained by the Eleventh Circuit,

> Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. 2052. The defendant must show that "his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). To meet that standard, the defendant must establish that no competent counsel would have taken the action that his counsel took, taking into consideration only what reasonably could have motivated counsel and not counsel's actual strategy or oversights. *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all of the circumstances." *Kimmelman*, 477 U.S. at 384, 106 S.Ct. 2574.

Ford v. United States, 856 F. App'x 839, 840 (11th Cir. 2021) "Professionally competent assistance includes a duty to conduct a reasonable investigation." *Price v. Allen*, 679 F.3d 1315, 1323 (11th Cir. 2012) (citing *Strickland*, 466 U.S. at 690–91). "'[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. . . .'" *Id.* (quoting *Strickland*, 466 U.S. at 691).

Here, the evidence shows that the Florida PD obtained video from MCU of the incident occurring on June 28, 2014. Further, this video along with the original MCU Certification of Business Records and subpoena from Petitioner's state criminal proceeding were provided to Petitioner's attorneys in his federal

criminal proceeding. There is no indication that Smith did not receive this evidence from Deisler when he began representing Petitioner. Consequently, Smith reasonably could have concluded that MCU had provided all the video footage of the incident to the defense and determined that additional investigation concerning the MCU video of the incident was not warranted.

Petitioner contends that he told Smith that the Government's discovery indicated that Savelli obtained four videos from MCU. Interestingly, Petitioner did not file a copy of the Government's purported discovery from which he gleaned that Savelli received four videos even though Petitioner sought and was permitted to expand the record multiple times in this case with *inter alia* multiple pages of documents that included discovery materials from his criminal cases. *See, e.g.,* Doc. Nos. 23, 23-1, 23-2, 23-3, 25, 26, 30, 33, 53, 53-1, 53-2. The evidence before the Court casts substantial doubt on Petitioner's contention that he saw something indicating that Savelli obtained four videos from MCU.

Nevertheless, even if Petitioner saw something in his discovery materials reflecting that Savelli received four videos from MCU, they were likely the four videos provided to the Florida PD by MCU, all of which were irrelevant except for the one video that was played at trial. This conclusion is supported by the fact that the MCU manager complied with the Florida PD's subpoena and Savelli's request on the same date. Thus, it's logical to assume that if the MCU manager gave Savelli four videos, that she gave him the same videos provided

to the Florida PD. There is no indication that the Government ever received the irrelevant videos.

Based on Deisler's notation on her receipt of records from the Federal PD, the three irrelevant video clips that MCU provided to the Florida PD seemingly were not forwarded to the Federal PD when they began representing Petitioner on his federal charges. If so, Smith would have been unaware that MCU provided the Florida PD with four videos. Trial counsel cannot be deemed deficient for relying on the evidence provided to the Federal PD by the Florida PD from MCU given that the CD was accompanied by the original MCU Certification of Business Records in which the MCU manager represented that she had provided all evidence related to the incident occurring on June 28, 2014. In other words, based on this, trial counsel reasonably could have concluded that additional investigation into whether MCU or the Government had more video footage of the incident was unnecessary and that no basis existed on which to challenge the video admitted at trial. Consequently, Petitioner has not established that no competent counsel would have chosen not to investigate and challenge the Government's video evidence. *See, e.g., Ford*, 856 F. App'x at 840-41 (concluding the district court did not err in denying claim of ineffective assistance of counsel where the petitioner failed to show that no competent counsel would have done as counsel did when considering the evidence). Considering the record, the Court concludes that Petitioner has not shown that

trial counsel was deficient for failing to investigate and challenge the Government's video evidence. Moreover, as discussed below, Petitioner has not demonstrated that prejudice resulted from trial counsel's failure to do so.

3. Prejudice

To prove prejudice, Petitioner must show that there is a reasonable probability – meaning sufficient to undermine confidence in the verdict – that, but for Smith's purported errors, the result of the trial would have been different. *Delva v. United States*, 851 F. App'x 148, 152 (11th Cir. 2021) (citing *Strickland*, 466 U.S. at 694). Importantly, "'[t]he likelihood of a different result must be substantial, not just conceivable.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

Other than the video played at trial, the footage contained in the irrelevant videos does not show Perez or his vehicle. This video footage also does not in any way undermine Perez's testimony that Petitioner took his vehicle while Perez was using the ATM and fired a gun at Perez through the partially open passenger window as he drove away. Likewise, these videos do not undermine the reliability of the video of the incident admitted at trial.

After review of the irrelevant video clips, the Court concludes that even if MCU or the Government had video footage of the incident from camera 15 that it did not provide to the defense, the footage from camera 15 only would have shown Perez using the ATM from the opposite side of camera 16. Camera 15

would have recorded virtually none of Perez's vehicle or the part of the MCU parking lot where the incident occurred. *See, e.g.*, Doc. 30-1 at 3-5 (photos from MCU ATM). Consequently, footage of the incident from camera 15 would not have captured Perez or his vehicle in the parking lot when Perez ran to his vehicle and as Petitioner drove away from MCU. Similarly, video footage from the MCU drive through from camera 14 would have captured nothing that would have refuted Perez's testimony concerning the incident.

In addition, contrary to Petitioner's argument otherwise, *see* Doc. 38 at 12, the video of the incident provided to him by the Florida PD was not longer than the video admitted at trial. All the videos submitted to the Court of the incident from camera 16 are either fifty-eight or fifty-nine seconds in length and display the same footage. Thus, Petitioner's contention that the video provided to him by the Florida PD of the incident necessarily would have "captured the reaction of a bullet strike if it had hit the area where the alleged marking was found above the blue awning," *see id.*, is without merit.

Although there are blank, black boxes in the irrelevant video clips under the recordings from cameras 15 and 16, this does not establish that the MCU ATMs had cameras, nor does anything else before the Court. Further, even if the ATMs had cameras, a finding not made by the Court, Petitioner has not demonstrated that those cameras were working the night of the incident, or more importantly, that those purported cameras would have captured anything

occurring in the MCU parking lot. Of note, the incident occurred in the early morning hours while it was still dark, the incident happened in a matter of seconds and the vehicle was moving, and as evidenced by the video of the incident, Perez's vehicle was several feet from the ATMs when Perez approached the vehicle.

Finally, Perez's testimony that Petitioner fired a gun at him through the partially open passenger window is corroborated by his 911-call recorded minutes after the incident in which he expresses concern for law enforcement's welfare, tells the 911-operator to warn officers to be careful because Petitioner has a gun, mentions multiple times that Petitioner had a gun and fired it at him at him, and describes the gun to the operator. Perez's testimony is further corroborated by the bullet casing recovered by police on the passenger seat of Perez's vehicle, which smelled freshly fired, and the damage to MCU above the ATM awning that appeared to be fresh.

In conclusion, nothing in the videos provided to the Court establishes that exculpatory or impeaching video evidence existed or that the Government tampered with or fabricated any video footage. Rather, it appears that MCU provided both the defense and prosecution with video footage of the incident from camera 16, and if the Government edited the video, it only edited the

footage to exclude the camera number and time reflected on the video.[12] Petitioner, therefore, has not demonstrated that a reasonable probability exists that the outcome of the trial would have been different had Smith investigated and challenged the Government's video evidence. Accordingly, Ground One is denied.

B. Ground Two

Petitioner contends trial counsel was ineffective for failing to impeach Perez. (Doc. 38 at 5.) Specifically, Petitioner complains that counsel should have impeached Perez with the "criminal report sheet," the sixty-second MCU video, and Perez's sworn statement.[13] (*Id.*) Petitioner argues that this evidence refutes Perez's testimony that he ran to the passenger side of the vehicle as it pulled

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[12] To the extent Petitioner argues that the unedited video from camera 16 refutes Perez's testimony regarding when the incident occurred, this argument is unavailing. Petitioner correctly notes that the unedited video footage from the Federal PD and the Florida PD reflects that the time on the video from camera 16 runs from 50:33 to 51:31. There is no evidence, however, demonstrating that the time on the video was accurate. Furthermore, Perez's ATM receipt shows that he used the ATM at 12:45 a.m. on June 28, 2014, consistent with his testimony, and this is corroborated by Perez's 911-call that began at 12:47 a.m., after Perez ran from MCU to a 7-11 convenience store to call for help. Petitioner, therefore, has not demonstrated that a reasonable probability exists that the outcome of the trial would have been different had the jury seen the unedited video or had counsel challenged Perez's testimony with the unedited MCU video of the incident.

[13] With respect to the "criminal report sheet" the Court assumes Petitioner is referring to the Orange County Arrest Affidavit ("Arrest Affidavit"). *See* Doc. Nos. 53 at 5, 8; 53-1 at 10. The Court further assumes Petitioner is referring to Perez's sworn written statement completed on the date of the incident. *See* Doc. Nos. 53 at 5, 8; 53-2 at 8.

out of the MCU parking space. (Doc. 53 at 8.)

The jury watched the sixty-second MCU video at trial. The jury, therefore, had an opportunity to determine whether Perez's testimony was refuted by the video. Additionally, from the Court's review of the video, it did not refute or impeach Perez's testimony.

As to counsel's purported failure to impeach Perez with the Arrest Affidavit and his sworn statement, the Arrest Affidavit stated that Perez ran "towards the front corner of the vehicle. . . ." *See* Doc. 53-1 at 10. Similarly, Perez wrote in his sworn statement that he ran to the front of the car as it was backing up and Petitioner pointed a gun at him, shot, and then drove off. (Doc. 53-2 at 8.) It is questionable that the Arrest Affidavit was permissible impeachment evidence against Perez because an officer, not Perez, wrote it. Regardless, however, Petitioner has not shown either deficient performance or prejudice in relation to this ground.

At trial, Perez testified that he ran to the passenger side of his car. (Criminal Case, Doc. 83 at 27, 52.) During cross-examination, Smith questioned Perez about his sworn statement, and Perez admitted that he said he went to the front of the car. (*Id.* at 53.) Perez explained, however, that as Petitioner was backing up, he ran toward the front of the car and as Petitioner straightened the car, Perez was by the passenger's side of the vehicle. (*Id.* at 50, 53.)

Trial counsel questioned Perez about his sworn statement to show that it

was inconsistent with his trial testimony. Perez, however, subsequently clarified that at one point he was near the front of the vehicle, consistent with his pretrial statement(s). Counsel, therefore, was not deficient for failing to impeach Perez with the pretrial statements and the sixty-second video. Additionally, a reasonable probability does not exist that the outcome of the trial would have been different had counsel further attempted to impeach Perez with his pretrial statements or the video. Accordingly, Ground Two is denied.

C. Grounds Three and Five

In Ground Three, Petitioner asserts trial counsel rendered ineffective assistance by failing to investigate and challenge the evidence regarding the damage to the MCU building near the ATM. (Doc. 38 at 7.) Petitioner complains that there was no "forensic investigation" done on the damage to show that it was "fresh" or possibly the result of a bullet strike and there was not a proper foundation for Deputy Hollock to testify concerning the damage to MCU. (*Id.*); *see also* Doc. 53 at 21.

Similarly, in Ground Five, Petitioner asserts that the Assistant United States Attorney ("AUSA") interfered with trial counsel's decision regarding whether to file a motion in limine to exclude evidence about the damage to MCU. (Doc. 38 at 16-21.) Petitioner argues that the AUSA "faked an agreement with. . . Smith that Orange County Sheriff's Officer Stephen Hollock would not testify that he believed the marking on the side of the McCoy F.C.U. was a 'possible

bullet strike' or 'fresh'[,]" which led Petitioner to believe that it was unnecessary to move to exclude this evidence. (*Id.* at 16.) Petitioner notes that Smith brought the AUSA's email regarding the agreement to the jail before trial and showed it to him. (*Id.* at 17; Doc. 53 at 21.) Additionally, Petitioner maintains counsel rendered ineffective assistance by failing to move to exclude Deputy Hollock's testimony or other evidence regarding the damage to MCU. (Doc. Nos. 38 at 7, 20; 53 at 21.) According to Petitioner, but for the AUSA's actions and trial counsel's failure to move to exclude Deputy Hollock's testimony, a reasonable probability exists that the result of the trial would have been different because evidence concerning the damage to MCU, which allowed the jury to infer the damage was possibly from a bullet strike, would not have been admitted. (Doc. 38 at 7, 20-21.)

Respondent argues that Ground Five is procedurally barred from review because Petitioner failed to raise it on direct appeal. (Doc. 47 at 6-7.) "A federal criminal defendant who fails to preserve a claim by objecting at trial or raising it on direct appeal is procedurally barred from raising the claim in a ' 2255 motion, absent a showing of cause and prejudice or a fundamental miscarriage of justice." *Rivers v. United States*, 476 F. App'x 848, 849 (11th Cir. 2012). To demonstrate cause for failing to raise a claim in an earlier proceeding, a petitioner must establish "'some external impediment preventing counsel from constructing or raising the claim.'" *High v. Head*, 209 F.3d 1257, 1262-63 (11th

Cir. 2000) (quoting *McCleskey v. Zant*, 499 U.S. 467, 497 (1991)). To show prejudice, the petitioner must establish that there is "at least a reasonable probability that the result of the proceeding would have been different." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). A petitioner may show the applicability of the fundamental miscarriage of justice exception by demonstrating "actual innocence." *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). "'[A]ctual innocence' means *factual* innocence, not mere legal insufficiency." *Id.* at 1197 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)) (emphasis in original).

To the extent Ground Five asserts a claim of prosecutorial misconduct, Petitioner did not raise this ground on direct appeal. Petitioner has not demonstrated cause or prejudice or actual innocence to overcome his failure to do so. Thus, the prosecutorial misconduct portion of Ground Five is procedurally barred from review. Alternatively, this portion of Ground Five, like the ineffective assistance of counsel claims in Grounds Three and Five, is without merit as discussed below.

Prior to trial, the AUSA notified the courtroom deputy via email that he and Smith had reached an agreement whereby Deputy Hollock would not testify that he believed the damage to the MCU building was from a "possible bullet strike." (Doc. 53-2 at 9.) There was no other agreement regarding Deputy Hollock's testimony such as he would not testify about his observations of the

damage to MCU.[14] *See id.* Before trial, Petitioner saw the email regarding the AUSA's stipulation. *See* Doc. Nos. 38 at 17; 53 at 21.

At trial, Deputy Hollock testified that the damage above the left side of the ATM awning on the MCU building appeared to be fresh. (Criminal Case, Doc. 83 at 95.) When the Government sought to introduce a photo of the damage, defense counsel expressed concern that the Government planned to try to elicit testimony, and argue, that the damage was possibly the result of a bullet strike. (*Id.* at 96-98.) The Court noted that there was no official stipulation concerning the damage and determined that it was appropriate to admit a photograph to show what the deputy observed. (*Id.* at 98.)

Consistent with the AUSA's pretrial representation, Deputy Hollock never testified that the damage to the building was possibly the result of a bullet strike. Further, nothing in Smith and the AUSA's agreement demonstrates that the AUSA misled or hindered counsel from taking action to prevent Deputy Hollock from testifying about the damage to MCU. Thus, Petitioner has not shown that the prosecutor's action constituted misconduct.

Turning to counsel's failure to challenge or move to exclude evidence regarding the damage to MCU, Petitioner has not demonstrated that Deputy

[14] Petitioner incorrectly asserts that the AUSA and Smith agreed that there would be no argument that the jury could infer that the damage to MCU was from a bullet strike. *See* Doc. 53 at 21.

Hollock's testimony that the damage to MCU appeared to be fresh was inadmissible. Generally, "'[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.'" *United States v. Reyes-Garcia*, 798 F. App'x 346, 356–57 (11th Cir. 2019) (quoting Fed. R. Evid. 602). A witness may give a lay opinion if the testimony is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

In this case, a fact in issue at trial was whether Petitioner had a gun that he fired at Perez as he drove away from MCU in Perez's vehicle. Deputy Hollock, who investigated the scene where the offenses occurred, testified that the damage to MCU above the ATM appeared fresh based on his observation that a chunk of the building was missing, exposing the concrete under the paint, while the paint around the damage looked intact and normal, and there was no mold or weathering on the exposed concrete. (Criminal Case, Doc. 83 at 95.) Deputy Hollock's testimony was based on his personal observations and was not based on any scientific, technical, or special knowledge. Thus, this testimony was admissible, and counsel had no reason to move to exclude this testimony or object to it. *See, e.g., Reyes-Garcia*, 798 F. App'x at 357 (concluding officers' testimony was admissible because it was a non-technical comparison of the

appearance of the defendants' boat with others they had seen before and was based on personal and professional experience and direct observations). Thus, Smith was not deficient for failing to seek the exclusion of this evidence.

In addition, Smith did challenge Deputy Hollock's testimony concerning the damage to MCU. Specifically, he asked Deputy Hollock whether the marking was tested, eliciting an admission that no testing was performed to determine if the marking was caused by a firearm. (Criminal Case, Doc. 83 at 103.) Smith then argued in closing that the jury had no objective evidence that the mark was from a bullet strike because the police failed to test it. (Criminal Case, Doc. 84 at 18-19.)

Furthermore, given the evidence, a reasonable probability does not exist that the outcome of the trial would have been different had the evidence regarding the damage on MCU been excluded. Perez testified that Petitioner shot at him through the partially open passenger side window of the car with a small black gun when Perez ran to his vehicle. (Criminal Case, Doc. 83 at 29.) Petitioner drove away in the vehicle and soon thereafter was apprehended fleeing from Perez's vehicle. (*Id.* at 62-66.) As Petitioner ran from police, he was observed reaching into the front of his waistband and left pocket and making three separate throwing motions toward a pond beside which he was running. (*Id.* at 62-66, 70.) Officers searched approximately twenty percent of the pond but were unable to find a firearm. (*Id.* at 74-79.) Nevertheless, consistent with

Perez's testimony and 911 call, a bullet casing was found on the front seat of Perez's vehicle. (*Id.* at 110.) The officer who located the casing testified that it smelled freshly fired, like burnt gunpowder. (*Id.* at 111.) Perez testified that he did not own a gun or bullets, had never fired a gun, and had no bullets or shell casings in his car before he picked up Petitioner the night of the incident. (*Id.* at 29-30.) Considering (1) Perez's testimony, which was consistent with his 911-call, (2) Petitioner's actions when he fled Perez's vehicle, (3) the bullet casing on the passenger seat of Perez's front seat, and (4) the testimony that the casing smelled freshly fired, ample evidence other than the damage on MCU supported the verdict. Petitioner, therefore, has not shown either deficient performance or prejudice or prosecutorial misconduct. Accordingly, Grounds Three and Five are denied.

D. Ground Four

Petitioner asserts counsel rendered ineffective assistance by failing to investigate and present an "expert reconstruction," "cell phone forensics and data analysis," and the MCU videos discussed in Ground One. (Doc. 38 at 8-15.) Petitioner theorizes that an expert could have reconstructed the events using cell phone forensics and the MCU videos to show that Perez's testimony was inconsistent with the physical evidence.[15] (*Id.* at 9-15.) Petitioner further argues

[15] Petitioner also argues that the MCU video of the incident he received from the Florida PD is longer than the one played at trial and the other irrelevant videos

that an expert could have used a laser to demonstrate that the damage on the MCU building could not have been caused by a bullet given Perez's account of how the incident occurred. (*Id.* at 9.) Petitioner also contends that an expert could have shown where a bullet would have struck the building had it been fired as Perez testified, thereby refuting Perez's testimony that a gun was fired.[16] (*Id.* at 10, 12-13.)

As noted *supra*, the jury watched the sixty-second MCU video at trial, and therefore, had an opportunity to decide whether the video refuted Perez's testimony. Furthermore, it is purely speculation, and highly improbable, that an expert would have been able to determine from the cellular data, the video evidence, and Perez's testimony the exact location of Perez's vehicle when the shot was fired or the trajectory of the bullet.

Finally, even speculating that an expert could have testified about the trajectory of the bullet or the position of the vehicle to challenge Perez's testimony, this would not have refuted the evidence that a freshly fired bullet

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prove there were other videos that were edited and destroyed to exclude favorable evidence. (Doc. 38 at 12.) The Court addressed these arguments in Ground One *supra*.

[16] In addition to these arguments, Petitioner also complains that the Florida PD ordered MCU video footage from the wrong date. (Doc. 53 at 13.) Regardless of what video footage the Florida PD requested, the MCU manager sent the Florida PD the video footage of "the incident . . .taking place on June 28, 2014. . . ." (Doc. 53-2 at 3.) Thus, the Florida PD received the MCU video from the date of the incident, and Petitioner has not demonstrated prejudice resulted.

casing was on the passenger seat of Perez's vehicle when it was recovered from Petitioner's control and that Petitioner was observed making throwing motions toward a pond as he ran from Perez's vehicle. Consequently, Petitioner has not demonstrated deficient performance or prejudice. Accordingly, Ground Four is denied.

E. Ground Six

Petitioner maintains that newly discovered evidence, namely the CDs he received from the Florida and Federal PD discussed *supra* in Ground One, shows that there was other video footage of the incident that was either altered or destroyed and not provided to the defense in violation of *Brady*.[17] (Doc. 38 at 23-31.) Petitioner further contends that these videos prove that the Government knowingly presented false testimony in violation of *Giglio*.[18] (Doc. 38 at 23-31.)

To support this ground, Petitioner again argues that the video footage in the CDs prove that the Government had additional footage of the incident from the two purported cameras on the MCU ATMs, the camera (camera 15) above the left side of the ATM, and the drive through camera (camera 14), which establishes that the Government edited and destroyed the purportedly favorable evidence. As to Perez's testimony, Petitioner contends that the CDs prove that

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[17] *Brady v. Maryland*, 373 U.S. 83 (1963).

[18] *Giglio v. United States*, 405 U.S. 150 (1972).

the Government knew that Perez's testimony was false that (1) Petitioner fired a gun at him, (2) Perez ran to the passenger side of the vehicle, (3) the incident occurred at 12:44 a.m., and (4) Perez called 911 within minutes after the incident occurred. (Doc. 38 at 28-31.)

As explained by the Eleventh Circuit,

> [a] *Brady* violation occurs when the prosecution withholds evidence favorable to an accused upon request, "irrespective of the good or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196–97. As the Supreme Court has made clear, there are three components of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, which means it is either exculpatory or impeaching, (2) the evidence must have been willfully or inadvertently suppressed by the prosecution, and (3) the accused must have been prejudiced as a result. *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). Evidence is material, *i.e.*, prejudicial, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of J. Blackmun); *id.* at 685, 105 S. Ct. at 3385 (White, J., concurring in part and concurring in the judgment).

Rodriguez v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1277, 1303 (11th Cir. 2014) (footnote omitted). "[M]ere speculation or allegations that the prosecution possesses exculpatory information will not suffice to prove 'materiality.'" *United States v. Jordan*, 316 F.3d 1215, 1252 n. 81 (11th Cir. 2003). *Brady* "applies only to information possessed by the prosecutor or anyone over whom he has authority." *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989).

A violation of *Giglio v. United States*, 405 U.S. 150 (1972) "occurs when the prosecution solicits or fails to correct false or perjured testimony and 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Id.* at 1302 (quoting *Giglio*, 405 U.S. at 153–54). To prevail on a *Giglio* claim, therefore, "a petitioner must prove (1) that the prosecution used or failed to correct testimony that he knew or should have known was false and (2) materiality—that there is any reasonable likelihood the false testimony could have affected the judgment." *Id.*

In habeas actions, the harmless error standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) applies to *Giglio* claims such that relief may be granted "only 'if the [c]onstitutional violation at the trial level resulted in 'actual prejudice' to the petitioner.'" *Phillips v. United States*, 849 F.3d 988, 993 (11th Cir. 2017) (quoting *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1347 (11th Cir. 2011) (quoting *Brecht*, 507 U.S. at 637)). Actual prejudice occurs when the alleged error "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Guzman*, 663 F.3d at 1347) (quoting *Brecht*, 507 U.S. at 637). When conducting harmless error review under *Brecht*, "'[i]f, when all is said and done, the [court's] conviction is sure that the error did not influence, or had but very slight effect, the verdict and the judgment should stand.'" *Ross v. United States*, 289 F.3d 677, 683 (11th Cir. 2002) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995)).

The Government argues that Ground Six is procedurally barred from review because it was not raised on direct appeal. (Doc. 47 at 6-8.) Assuming without deciding that Petitioner could demonstrate cause for his failure to raise this ground on direct appeal, as discussed below, Petitioner has not established prejudice or actual innocence to overcome the procedural bar. For the same reasons, Petitioner has not demonstrated that his *Brady* and *Giglio* claims are meritorious.

It is purely speculation that there were cameras on the MCU ATMs, and if so, that those purported cameras were working the night of the incident or would have captured anything in the MCU parking lot where the incident occurred. Further, any video footage from cameras 14 and 15 would not have captured any of the incident in the MCU parking lot. Petitioner's conjecture that there was additional video footage of the incident does not undermine the evidence supporting that Petitioner had a firearm, which he shot at Perez while taking his vehicle. Namely, police found a freshly fired bullet casing shortly after the incident on the passenger seat of Perez's vehicle, corroborating Perez's trial testimony and 911 call, and police observed Petitioner reach into his waistband and pocket and make throwing motions toward a pond as he fled from Perez's vehicle. Simply put, nothing in the CDs from the Florida and Federal PDs is exculpatory or impeaching or establishes that there was any video of the

incident that would have refuted Perez's testimony or the other evidence presented at trial.

Petitioner correctly notes that the unedited video footage of the incident from the Federal PD and the Florida PD reflects that the time on the video from camera 16 runs from 50:33 to 51:31. There is no evidence, however, demonstrating that this time is accurate. Furthermore, Perez's ATM receipt shows that he used the MCU ATM at 12:45 a.m. on June 28, 2014, and this is corroborated by Perez's 911-call that began at 12:47 a.m., after Perez ran to the 7-11 convenience store near MCU to call for help.[19] Petitioner, therefore, has not demonstrated that Perez gave false testimony. Further, even if Perez's testimony regarding the time he used the ATM was not accurate, a finding not made by the Court, there is no reasonable likelihood that this testimony could have affected the verdict. In sum, Petitioner has not demonstrated that there is a reasonable probability that, had the video footage in the CDs or any other purported MCU video footage from the night of the incident been disclosed to the defense, the result of the proceeding would have been different. He also has not shown that the purported nondisclosure of this evidence had a substantial

[19] Petitioner argues that in the incident report the responding officer indicated that the initial call came in at 12:56 a.m., which combined with the time on the video shows that Perez had an approximate four-minute window between being shot at and calling 911. (Doc. 38 at 30.) However, the Arrest Affidavit states that the responding officer "responded" at approximately 12:56 a.m. (Doc. 53-1 at 10.) Consistent with this, the 911 call started at 12:47 a.m. and ended approximately ten minutes later when Perez advised the operator that police had arrived.

and injurious effect on the verdict. Accordingly, Ground Six is procedurally barred and otherwise denied on the merits.

In conclusion, the Court finds that Petitioner's grounds are speculative and, considering the record, without merit. An evidentiary hearing, therefore, is not necessary to resolve Petitioner's Second Amended Motion to Vacate. *See Schriro v. Landrigan,* 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."). Any allegations not specifically addressed are without merit.

V. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Second Amended Motion to Vacate, Set Aside, or Correct Sentence (Doc. 38) is **DENIED,** and this case is **DISMISSED** with prejudice.

2. Petitioner's Motions to Expand the Record (Doc. Nos. 73, 74) are **GRANTED**. The Court has considered the exhibits to the motions referenced therein in the disposition of this action.

3. Petitioner's Motion and Supplemental Motion for an Evidentiary Hearing (Doc. Nos. 68, 69) are **DENIED**

4. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

5. The Clerk of the Court is directed to file a copy of this Order in criminal

case number 6:14-cr-238-JA-DCI and to terminate the Petition (Criminal Case, Doc. 227) pending in that case.

6. This Court should grant an application for certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right.[20] Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida, on October 31st, 2022.

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

[20] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).