APPENDIX A

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13755

ALVIN CELIUS ANDRE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:21-cv-62293-RNS

Before LUCK and ABUDU, Circuit Judges.

BY THE COURT:

Alvin Andre has filed a motion for reconsideration of this Court's June 29, 2023, order denying his motion for a certificate of appealability and for leave to proceed *in forma pauperis* on appeal. Upon review, Andre's motion is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX B

Appeal No. 22-13755

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

ALVIN CELIUS ANDRE,

Petitioner - Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent - Appellee.

APPELLANT ALVIN CELIUS ANDRE'S PETITION FOR REHEARING

(Fed. R. App. P. 40)

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CERTIFICATION OF GROUNDS FOR REHEARING

This Court overlooked or misapprehended the facts and law affecting Petitioner's § 2255 Ground One (Constructive Amendment) claim. More specifically, the Court overlooked or misapprehended that the district court relied upon a case wholly distinguishable from the instant case, wherein the adult intermediary was used to attempt to gain the minor's assent as required by Circuit precedent that is neither displaced or supplanted by the case upon which the district court relied when denying Petitioner's claim. In the instant case, there was no attempt to gain the minor's assent. Moreover, the indictment returned by the grand jury in the instant case charged that Petitioner had attempted to persuade "a person who had not attained the age of eighteen," whereas, the government argued that Petitioner had communicated only with an adult, notably without any attempt to gain the minor's assent as required by Circuit law. Furthermore, the district court did not assess, "in context," the jury instructions in relation to the government's argument - both of which broadened the possible bases for conviction beyond what was charged by the grand jury. Reviewed in context, and not in a vacuum, Petitioner has made a substantial showing of the denial of a constitutional right to wit jurists of reason could disagree with the district court's resolution of his constitutional claim - his substantial constitutional right to be tried (and convicted) on allegations returned by grand jury indictment - and jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further.

Secondly, this panel may have overlooked or misapprehended Petitioner's §2255 Ground Three (Prosecutorial Misconduct) claim. More specifically, Petitioner showed that the prosecutor misstated the law multiple times in closing, relieving themselves of their burden, and relieving the jury of their duty to determine the essential element of predisposition - a denial of Petitioner's substantial constitutional right to a fair trial and due process. A COA should therefore issue.

STATEMENT OF FACTS

On June 29, 2023, this Court issued its decision in this case, a decision attached to this Petition as Appendix H. In the decision, the Court states that Petitioner "has failed to make a substantial showing of the denial of a constitutional right." See Order at Appendix H. For the reasons certified above, Petitioner respectfully asks this Court to rehear the issues presented herein.

ARGUMENT

A. This Court Overlooked or Misapprehended Petitioner's Claim that a Constructive Amendment Occurred - Factually and Legally, Literally and in Effect.

Although this Circuit allows a defendant to be convicted even if the defendant never speaks to a minor and only speaks to an adult intermediary, this Circuit, as well as its sister circuits - namely the First, Fifth, Sixth, Seventh, and D.C. Circuits (see § 2255 mem., Civ. Doc. 1 at 16-18 (collecting cases)) - have agreed that when the defendant does speak only to an adult intermediary, the defendant's attempts at persuasion must be aimed at gaining the minor's assent. See United States v. Lee, 603 F.3d 904 (11th Cir. 2010); see also § 2255 mem., Civ. Doc. 1 at 11, 16, 17 (provided at Appendix C); Civ. Doc. 9 at 4 (provided at Appendix E); and cf with Opening Brief in Case No. 13755 at pp. 5-9 (provided at Appendix H).

As asserted in Petitioner's Section 2255 motion, the facts underlying the instant case contain no such attempt to gain the minor's assent (see § 2255 mem., Civ. Doc. 1 at 4-12 (Appendix C); Civ. Doc. 9 at 3-6 (Appendix E); and cf with pp. 5-9 of Opening Brief (Appendix H)), yet the district court ignored this issue

and failed to address it in its order denying the motion to vacate. See, generally, Civ. Doc. 11 (Appendix F). Disregarding the holding in Lee, the district court instead relied on United States v. Lanzon in denying Petitioner's Ground One claim.

In Lanzon, it was determined that a defendant "can be convicted under [§ 2422(b)] when he arranges to have sex with a minor or a supposed minor through communications with an adult intermediary." See Civ. Doc. 11 at 5, quoting Lanzon, 639 F.3d 1293, 1299 (11th Cir. 2011). As addressed in Petitioner's Reply to the Government's Response, however, Lanzon is entirely distinguishable from the facts in the instant case. In Lanzon, the government was able to show the accused performed some specific, identifiable act in an effort to achieve a mental state in the minor, that being the minor's assent. See Lanzon, 639 F.3d at 1296 ("[d]uring their third and final conversation, Lanzon again contacted Detective Clifton and asked whether he had spoken with his girlfriend's daughter"). The specific, identifiable action of asking the adult intermediary to speak to the daughter on his behalf, the government argued, proved that Lanzon attempted to gain the minor's assent through the adult intermediary. See Civ. Doc. 9 at 5 (Appendix E).

The problem in the instant case, is that unlike Lee and Lanzon - both of whom pointedly attempted to gain the minor's assent through an adult intermediary - Petitioner made no such attempt, and this fact has been entirely disregarded by the district court by reviewing the government's statement in a vaccum without due regard for Petitioner's substantial constitutional right to be tried solely on allegations returned by grand jury indictment (which may not be broadened through amendment except by grand jury itself), with this Court overlooking or misapprehending the same. With this being distinguished, Petitioner's claim that a constructive amendment occurred takes form, requiring this Court to "review the district court's jury instructions and the prosecutor's summation 'in context' to determine whether an expansion of the indictment occurred either literally or in

effect." See Opening Brief in Case No. 22-13755 at p. 7, discussing United States v. Castro, 89 F.3d 1443, 1452-53 (11th Cir. 1996) (internal quotation marks ommitted).

This Court overlooked or misapprehended the fact that the district court's analysis of Petitioner's claim did not address the jury instructions alongside the prosecutor's comments. In his § 2255, Petitioner asserted that both the jury instructions and the prosecutor's comments were at issue. See Crim. Doc. 90 at 72; argued in § 2255 mem., Civ. Doc. 1 at 4-12; and Civ. Doc. 9 at 1-3. By simply finding that "the prosecutor correctly stated the law in closing argument" (see Civ. Doc. 11 at 5) without assessing the jury instructions in context with, and in light of the indictment returned by the grand jury, the district court erred in its assessment of this claim, which was subsequently overlooked or misapprehended by this Court.[1]

The indictment states that the Petitioner did knowingly attempt to persuade ... a person who had not attained the age of eighteen. See Crim. Doc. 26 at 1 (provided at Appendix A). The prosecutor clearly and unambiguously argued to the jury that the person whom the Petitioner attempted to persuade was an adult. See § 2255 mem., Civ. Doc. 1 at 4 (provided at Appendix C); and Civ. Doc. 9 at 2 (provided at Appendix E). The government's response to Petitioner's claim ignored this assertion. See Civ. Doc. 7 (provided at Appendix D). Taking the prosecutor's comments in context with the jury instructions - allowing a finding of guilt if an adult was persuaded, as opposed to "a person who had not attained the age of eighteen" (see Sup. Indictment at Appendix A) - resulted in an expansion of the indictment, literally and in effect, violating Petitioner's substantial constitutional right to be tried solely on allegations returned by grand jury indictment.

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[1] This also begs the question as to whether the district court violated Clisby v. Jones by failing to fully address and resolve this claim. Clisby, 960 F.2d 925, 935-36, 938 (11th Cir. 1992) (holding that, when a district court fails to resolve all claims for relief that a habeas petitioner raises, the case is remanded).

Long held by this Circuit, to be tried solely on allegations returned by grand jury indictment is substantial constitutional right of criminal defendant facing felony charges; after indictment is returned, charges may not be broadened through amendment except by grand jury itself; constructive amendment to indictment may occur when evidence presented at trial and instructions given to jury so modify elements of offense charged that defendant may be convicted on grounds not alleged in grand jury's indictment and when such constructive amendment occurs, defendant's rights have been violated, and decision must be reversed. United States v. Gonzalez, 661 F.2d 488 (5th Cir. 1981), a case originating out of the Southern District of Florida like the instant case.

Since the holding in Gonzalez, the constructive amendment analysis has not changed. It remains the same. Neither Lee nor Lanzon displace or supplant that analysis and the substantial constitutional rights associated with being tried solely on allegations returned by grand jury indictment.

Allowing the district court's decision to stand will be contrary to Petitioner's substantial constitutional rights - as his attorney should have objected each time the prosecutor constructively amended the indictment through its comments during closing argument in conjunction with the jury instructions - and contrary to legal authority and precedent set by this Circuit. See, e.g., United States v. Leon, 841 F.3d 1187, 1192 (11th Cir. 2016) (amendment "occurs when the theory or evidence presented by the government, or the jury instructions, alter the 'essential elements' of the offense contained in the indictment to broaden the possible bases for conviction beyond what is charged"); see also United States v. Williams, 527 F.3d 1235, 1246 (11th Cir. 2008) (holding that a constructive amendment constitutes per se reversible error because it violates a defendant's constitutional right to be tried only on the charges presented in an indictment).

This Court should therefore grant a COA because Petitioner has made a substantial showing of the denial of a constitutional right. See 28 U.S.C. §

2253(c)(2); see also this Court's order at Appendix H. In addition, a COA should issue since "[j]urists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000).

B. This Court Overlooked or Misapprehended Petitioner's Claim that the Prosecutor's Comments During Closing Arguments Rose to the Level of Prosecutorial Misconduct.

This Court should also issue a COA as it relates to Petitioner's Ground Three. See § 2255 mem., Civ. Doc. 1 (Appendix C).

As mentioned by the Eleventh Circuit in United States v. Wheeler, 16 F.4th 805 (11th Cir. 2021), "[w]hile a prosecutor can attack a defense theory during closing argument, he is not to misstate the law or tell the jury they can ignore the law." (internal citations omitted). Such a violation is a denial of a defendant's constitutional right to a fair trial and due process.

The Petitioner has shown that the prosecutor misstated the law no less than four times during closing argument, relieving themselves of their burden, but more importantly relieving the jury of their duty to determine the essential element of predisposition. See § 2255 mem., Civ. Doc. 1 at 7 (Appendix C); and Civ. Doc. 9 at 6-7 (Appendix E).

This panel may have overlooked the fact that the Petitioner's claim is a mixed matter of fact and law. Indeed, the district court's decision was based on two things. Firstly, the Eleventh Circuit's decision related to a distinctly different argument made on direct

appeal - an argument that in no way bars Petitioner's § 2255 claim as the district court concluded. See, generally, Civ. Doc. 11 (Appendix F). And secondly, the district court concluded that "[g]iven the abundant proof of predisposition, Andre fails to establish that the result of the proceeding would have been different." See Civ. Doc. 11 at 6-7 (Appendix F) (internal quotation marks and citation omitted).

However, the district court failed to acknowledge the Supreme Court's decision in Kotteakos. In Kotteakos, the Supreme Court held that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. United States, 328 U.S. 750, 764-65 (1946); cited in United States v. Turner, 61 F.4th 866 (11th Cir. 2023).

It is well-settled that "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935), cited in United States v. Wheeler, 16 F.4th 805 (11th Cir. 2021). Subsequently, "[i]mproper prosecutorial arguments, especially misstatement of the law, must be considered carefully because 'while wrapped in the cloak of state authority [they] have a heightened impact on the jury.'" Spivey v. Head, 207 F.3d 1263, 1275 (11th Cir. 2000) (quoting Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985)).

The prosecutor's multiple comments, such as, "we do not even have to go the extra step of showing that he was predisposed" (see Civ. Doc. 1 at 7 and 41-66 (Appendix C); Civ. Doc. 9 at 6-7 (Appendix E);

with the relevant transcript excerpts at Appendix B), were comments which denied the Petitioner his substantial constitutional right to a fair trial and due process - not objected to by trial counsel nor confronted by the district court sua sponte. Indeed, "the presence or absence of predisposition is for the jury to determine as part of its function to deci[de] the guilt of the accused. An entrapment defense is a question for the jury, unless the evidence is so clear and convincing that it may be ruled on by a trial judge as a matter of law." United States v. Craig, 2019 U.S. Dist. LEXIS 128760 at *14 (11th Cir. 2019).

A COA should issue on this claim so that this panel can scrutinize whether the district court erred in its factual findings, and whether the prosecutor's comments had a substantial influence on the jury, which in turn violated the Petitioner's Fifth Amendment rights.

CONCLUSION

Accordingly, Petitioner Alvin Celius Andre respectfully requests that this Court grant this petition for rehearing on this matter.

Dated: July 17, 2023

Respectfully submitted,

Alvin Andre

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Alvin Andre vs. USA Appeal No. 22-13755-B

11th Cir. R. 26.1-1(a) requires the appellant or petitioner to file a Certificate of Interested Persons and Corporate Disclosure Statement (CIP) with this court within 14 days after the date the case or appeal is docketed in this court, and to include a CIP within every motion, petition, brief, answer, response, and reply filed. Also, all appellees, intervenors, respondents, and all other parties to the case or appeal must file a CIP within 28 days after the date the case or appeal is docketed in this court. **You may use this form to fulfill these requirements.** In alphabetical order, with one name per line, please list all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

(please type or print legibly):

Andre, Alvin Celius, Defendant/Appellant

Caruso, Michael, Federal Public Defender

Cherson, Francesse Lucius, Assistant United States Attorney

Foldes, Margaret Y., Assistant Federal Public Defender

Scola, Jr., Honorable Robert N., United States District Judge

United states of America, Plaintiff / Appellee

Viamontes, Francis Z., Assistant United States Attorney

Wilcox, Daryl E., Assistant Federal Public Defender

Zacca, Deric, Former Assistant Federal Public Defender

Rev.: 12/20

CERTIFICATE OF SERVICE

I, ALVIN CELIUS ANDRE, do hereby certifiy that on July 17, 2023, I mailed a true copy of my Petition for Rehearing, to:

Francesse L. Cheron
Assistant United States Attorney
U.S. Attorney's Office
99 Northeast 4th Street
Miami, FL 33132

The foregoing was signed and sealed in a first class postage prepaid envelope and handed to USP Tucson prison mailroom staff. These documents, according to the prison mailbox rule (see Houston v. Lack), are to be considered filed on same said day.

Dated this 17th Day of July, 2023.

Submitted by, Alvin Andre

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APPENDIX C

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13755

ALVIN CELIUS ANDRE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:21-cv-62293-RNS

ORDER:

Alvin Andre moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion. His motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Robert J. Luck

UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALVIN CELIUS ANDRE, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	Appeal No. 22-13755-8 D.Ct. No. 0:21-cv-62293-RNS APPLICATION FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY (Fed. R. App. P. 22(b))

Relief Sought

Appellant, ALVIN CELIUS ANDRE, respectfully moves this Court for a Certificate of Appealability within the meaning of Section 2253(c) of Title 28 of the United States Code and Rule 22(b) of the Federal Rules of Appellate Procedure.

Grounds for Application

On November 5, 2021, Appellant filed a Petition for a Writ of Habeas Corpus, as authorized by Section 2255 of Title 28 of the United States Code. In that Petition, Petitioner argued that his detention was unconstitutional because:

1. Trial counsel rendered ineffective assistance when failing to object to the prosecutor's statements during closing which constituted a constructive amendment.

2. Trial counsel rendered ineffective assistance by failing to object to an obvious fatal variance when the government presented evidence not contained in the indictment.

3. Trial counsel rendered ineffective assistance when he failed to object to the government's misstatements rising to the level of prosecutorial misconduct during closing.

4. Although there were an additional five claims raised in the Petition, Appellant herein only seeks a Certificate of Appealability on the first three (3) grounds.

Procedural Status of Case

An application to the Judges of the Court of Appeals for a Certificate of Appealability is appropriate at this time because:

1. The district court entered a final, appealable judgement in this matter on October 4, 2022 that denied Petitioner (now Appellant) relief on his Petition for Habeas Corpus.

2. Appellant desires to appeal this judgment, as is authorized by Section 2253(c) of Title 28 of the United States Code. However, Section 2253(c)(1) and Appellate Rule 22(b)(1) require a Certificate of Appealability as a precondition of proceeding with the appeal.

3. A timely Notice of Appeal was filed in this matter on October 28, 2022.

4. The instant Application for Issuance of a Certificate of Appealability, and Appellant's Opening Brief set out the issues for which the Appellant seeks a Certificate of Appealability which the district court denied.

Argument in Support of Issuance of
Certificate of Appealability

1. As set forth in Appellant's Opening Brief (included with this Application), Appellant demonstrates a substantial showing of the denial of his constitutional rights in three claims (Grounds One, Two, and Three) denied by the district court.

2. In disposing of Ground One, Two, and Three the district court either failed to liberally construe Appellant's claims, or erred in its factual findings, or both; applied the wrong legal standard; and failed to address any of the controlling authority raised throughout each claim. See Appellant's Opening Brief included with this Application. The district court's disposal of each claim warrants further review by this Court.

3. Appellant includes his Opening Brief with this Application which sets forth the arguments in support of issuance of a Certificate of Appealability.

Conclusion

For the reasons stated above, in conjunction with the included Opening Brief, Petitioner and Appellant Alvin Celius Andre respectfully requests that this Court issue the requested Certificate of Appealability on all of the issues set forth in this Application and in Appellant's Opening Brief included herewith.

Dated this 21st day of December, 2022.

Respectfully submitted,

Alvin Andre

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Appellant in Pro Se

Submitted Without Oral Argument

C.A. No. 22-13755-B
D. Ct. No. 0:21-cv-62293-RNS
Crim. Case 0:18-cr-60271-RNS

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALVIN CELIUS ANDRE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

A P P E L L A N T ' S O P E N I N G B R I E F

ALVIN CELIUS ANDRE
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Appellant in Pro Se

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

The Appellant is Alvin Celius Andre, sole Petitioner/Defendant in the district court.

The Appellee is the United States of America, the only Respondent/Plaintiff in the district court.

The was no amicus curiae.

2. Ruling Under Review

This is an appeal from the District Court's Order Denying Motion to Vacate Sentence entered on October 4, 2022.

3. Related Cases

This case has not previously been before this Court, and there are no related cases.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 2255

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court's order denying motion to vacate sentence is a final judgment.

The district court entered its order denying motion to vacate sentence on October 4, 2022, and the Petitioner's Notice of Appeal was timely filed on October 28, 2022.

STATEMENT OF THE ISSUES

I. Whether the district court erred in its factual findings; applied the wrong legal standard; and whether a Certificate of Appealability should issue in relation to Ground One - Constructive Amendment to Count One.

II. Whether the district court erred in its factual findings; applied the wrong legal standard; and whether a Certificate of Appealability should issue in relation to Ground Two - Fatal Variance to Count One.

III. Whether the district court erred in its factual findings; applied the wrong legal standard; and whether a Certificate of Appealability should issue in relation to Ground Three - Prosecutorial Misconduct Which Relieved the Government of Their Burden of Proof.

STATEMENT OF THE CASE

Appellant was indicted by a Grand Jury on September 27, 2018. Crim Doc. 7. A superseding indictment issued on January 17, 2019. Crim. Doc. 26. A two-day jury trial was held on January 29th and 30th. Appellant was found guilty on Count One (18 U.S.C. § 2422(b)) and Count Two (18 U.S.C. § 1594(a)). Crim. Doc. 52. On April 15, 2019, the district court sentenced Appellant to 10 years on Count One and 30 years on Count Two, consecutive to Count One. Crim. Doc. 80. Appellant filed a timely Notice of Appeal on April 15, 2019. Crim. Doc. 81. An Appeal was filed on September 26, 2019. Case No. 19-11486. The Court of Appeals for the Eleventh Circuit affirmed the conviction on May 8, 2020. Id. A Petition for Writ of Certiorari was filed on October 5, 2020 and denied on November 9, 2020. Case No. 20-6003. On November 5, 2021, Appellant filed Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. The district court denied the § 2255 motion on October 4, 2022. Appellant filed a timely Notice of Appeal on October 28, 2022 and docketed with the Eleventh Circuit on November 4, 2022.

This appeal follows.

SUMMARY OF ARGUMENT

In a proceeding on a § 2255 motion, the Eleventh Circuit reviews a district court's factual finding for clear error and legal issues de novo. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004).

I. GROUND ONE - CONSTRUCTIVE AMENDMENT TO COUNT ONE

When disposing of Ground One, the district court erroneously assessed both the facts and relevant law of the claim, entirely ignoring claim-dispositive legal issues and controlling authority cited and discussed by appellant in his initial § 2255 motion and brief, as well as in his reply to the government's response.

II. GROUND TWO - FATAL VARIANCE TO COUNT ONE

When disposing of Ground Two, the district court erroneously assessed both the facts and relevant law of the claim, entirely ignoring claim-dispositive legal issues and controlling authority cited and discussed by appellant in his initial § 2255 motion and brief, as well as in his reply to the government's response.

III. GROUND THREE - PROSECUTORIAL MISCONDUCT WHICH RELIEVED THE GOVERNMENT OF THEIR BURDEN OF PROOF

When disposing of Ground Three, the district court erroneously assessed both the facts and relevant law of the claim, entirely ignoring claim-dispositive legal issues and controlling authority cited and discussed by appellant in his initial § 2255 motion and brief, as well as in his reply to the government's response.

ARGUMENT

I. GROUND ONE - CONSTRUCTIVE AMENDMENT TO COUNT ONE

In Ground One (Civ. Doc. 1 at 4, 25-33; and Civ. Doc. 9 at 1-3), Appellant explained that trial counsel was ineffective for failing to object to any one of numerous misstatements by the prosecutor during closing arguments, which relieved the government of its burden, and resulted in a constructive amendment to Count One of the indictment (in violation of 18 U.S.C. § 2422(b)). The prosecutor achieved this when substituting the individual being persuaded - "an individual who had not attained the age of eighteen years" as set out in the indictment (see Crim. Doc. 26 at 1; argued in Civ. Doc. 1 at 29-30; and Civ. Doc. 9 at 1-3) - to <u>any</u> individual, in this case "the father" (Crim. Doc. 90 at 72; argued in Civ. Doc. 1 at 25-33; and Civ. Doc. 9 at 1-3). More specifically, the prosecutor told the jury that the defendant "needed to persuade <u>someone</u>" (id.) (emphasis added), and that "<u>someone</u>" was "the father" (id.).[1] The prosecutor then convinced the jury that "[t]hat's how we proved the first element of Count 1." Id. As argued in Appellant's Section 2255 petition (Ground One), the prosecutor stated to the jury no less than six (6) times that Mr. Andre persuaded AN ADULT. See Civ. Doc. 1 at 4, 27; and Civ. Doc. 9 at 2. Not only were these misstatements repetitively and intentionally placed before the jury; and not only did defense counsel fail to object to any one of them, nor to correct them during defense closing; but the district court

[1] For a conviction under 18 U.S.C. § 2422(b), Eleventh Circuit Pattern Criminal Jury Instruction, Offense Instruction 92.2, provides that: "[t]he Defendant can be found guilty of this crime <u>only if all the following facts are proved</u> beyond a reasonable doubt: [Element No.] (1) the Defendant knowingly persuaded ... [<u>individual named in the indictment</u>]." Emphasis added.

did not sua sponte correct the misstatements. Although there is no excuse for defense counsel's failure to object, the reason the district court likely did not correct the misstatements, is because the district court chose to omit "named in the indictment" from the first (and third) element from the Eleventh Circuit Pattern Criminal Jury Instruction, Offense Instruction 92.2, over request and objection. See footnote n.1 supra; see also Civ. Doc. 1 at 26; and Civ. Doc. 9 at 2. Thus, not only did the prosecutor's misstatements constructively amend the indictment, but the jury instructions also thwarted the plain meaning of § 2422(b) by replacing the statutory object ("any individual who has not attained the age of 18 years") with its opposite ("an adult"). Substituting the object of persuasion (i.e., the individual being persuaded) in closing arguments, to a different individual (i.e., an adult) who was not set out in the indictment, constitutes a constructive amendment which broadens the possible bases of conviction.

Nevertheless, the government's reply to Ground One entirely evades the constructive amendment issue by focusing on Eleventh Circuit precedent dealing with whether a conviction under § 2422(b) can be sustained without any direct communication with an individual under eighteen years of age; as opposed to focusing on what actually constitutes a constructive amendment, and whether one occurred in this case as alleged. See Civ. Doc. 7 at 6-8. The two are not the same, and Appellant made patently clear that he was not challenging the sufficiency of the evidence; rather, he was challenging the legitimacy of his conviction as a result of the prosecution's closing arguments which, by the letter of the law, constructively amended the indictment and relieved the government of their burden

without objection. See Civ. Doc. 9 at 5.

Likewise, the district court, although accurately stating what constitutes a constructive amendment (Crim. Doc. 107 at 4-5), then mistakenly looked to whether "the prosecutor correctly stated the law" (id. at 5) without regard to whether the essential elements contained in the indictment were altered or broadened. Failing to differentiate between what constitutes an offense under § 2422(b), and what constitutes a constructive amendment, was unreasonable. Id. at 4-5. Ultimately, the district court either failed to liberally construe the claim, or erred in its factfinding, or both; failed to properly apply the facts to the relevant law at issue; and failed to address any of the controlling authority raised in Appellant's Ground One claim. See Civ. Doc. 1 at 25-33; Civ. Doc. 9 at 1-3; and cf with Crim. Doc. 107 at 4-5.

Had the district court properly construed the claim, and not erred in its factfinding and application of relevant law, the claim would have been resolved in a different manner - whether favorably for the Appellant, or in a way that would have differently guided any appeal. However, because the district court erred in its factual findings and application of relevant law, this Court reviews the factual findings for clear error and legal issues de novo. See Lynn, 365 F.3d at 1232. Additionally, in evaluating whether the indictment was constructively amended, this Court reviews the district court's jury instructions and the prosecutor's summation in context to determine whether an expansion of the indictment occurred either literally or in effect. See United States v. Castro, 89 F.3d 1443, 1450 (11th Cir. 1996).

II. GROUND TWO - FATAL VARIANCE

In Ground Two (Civ. Doc. 1 at 5; 33-41; and Civ. Doc. 9 at 3-6), Appellant explained that trial counsel was ineffective for failing to object to evidence, including testimony, presented at trial that was not contained in the indictment, resulting in a fatal variance.

In the government's response (Civ. Doc. 7) the government co-mingled Grounds One and Two without making any distinction between the two.

The district court failed to properly assess the claim, both its facts and the legal authority cited by Appellant, and proceeded to dispose of the claim in a way that gives Appellant no meaningful opportunity to appeal the matter of a fatal variance with this Court. The district court essentially concluded that because Mr. Andre and the fictional father spoke about the fictional child, then no variance occurred. See Crim. Doc. 107 at 5-6. The district court took no steps toward addressing any of the legal authority cited by Appellant (Civ. Doc. 1 at 37-39), and moreover, the district court avoided addressing that legal authority in relation to the fact that none of the communications were aimed at obtaining the assent of the minor, and avoided addressing the fact that Mr. Andre performed no specifically identifiable action to obtain the minor's assent to any unlawful activity set out in the indictment. See Civ. Doc. 1 at 33-35; and cf with Crim. Doc. 26 at 1. According to the legal authority set out in Appellant's initial § 2255 petition, these facts demonstrate that a fatal variance occurred.

Had the district court properly construed the claim, and not

erred in its factfinding and application of relevant law, the claim would have been resolved in a different manner - whether favorably for the Appellant, or in a way that would have differently guided any appeal. However, because the district court erred in its factual findings and application of relevant law, this Court reviews the factual finding for clear error and legal issues de novo. See Lynn, 365 F.3d at 1232.

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III. GROUND THREE - PROSECUTORIAL MISCONDUCT WHICH RELIEVED THE GOVERNMENT OF THEIR BURDEN OF PROOF

In Ground Three (Civ. Doc. 1 at 7; 41-46; and Civ. Doc. 9 at 6-7), Appellant explained that his defense at trial was entrapment. That defense proceeded once Appellant had produced sufficient evidence of government inducement to the court, and the court subsequently agreeing to charge the jury - prior to closing arguments - with an entrapment instruction. Indeed, this was the first time in Judge Scola's 23 years as a district court judge, in which he had found sufficient evidence of government inducement, agreeing to give an entrapment instruction. See Crim. Doc. 89 at 236. Particularly relevant to this claim, in cases involving an entrapment defense and instruction, the burden of proof of predisposition shifts to the government. See Civ. Doc. 1 at 42-43; see also United States v. Mayweather, 991 F.3d 1163, 1176 (11th Cir. 2021) (discussing trial court's determination as to defendant's initial burden of producing sufficient evidence of government inducement); United States v. Sistrunk, 622 F.3d 1328, 1332-33 (11th Cir. 2010) (same); and cf with United States v. Orisnord, 483 F.3d 1169, 1178 (11th Cir. 2007) (concluding that once before the jury, the burden shifts to the government to prove predisposition); and Jacobson v. United States, 503 U.S. 540, 549 (1992) (holding that the jury must make a succinct determination as to predisposition, where the defense of entrapment is at issue, at which point the prosecution must prove the defendant was predisposed).

Following the district court's once-over instruction on entrapment (Crim. Doc. 90 at 63-64; and Civ. Doc. 1 at 42), the

government "misstated the law multiple times during closing [and rebuttal] argument, when urging the petit jury to ignore the essential element of predisposition. Her repeated remarks 'we do not even have to go the extra step of showing that he was predisposed,' doc. 90 at 80; 'we do not have to show that he was predisposed,' id. at 87; 'what does he say about his predisposition?...just to be clear, I'm not conceding we have to show that,' id.; and 'we don't have to prove that he was predisposed,' id. at 89[,]" were improper, contrary to well-established law, burden-relieving, and particularly misleading. Civ. Doc. 1 at 7; 41-46 and Civ. Doc. 9 at 6-7. These repetitious and extensive remarks, deliberately placed before the jury, compromised the fundamental fairness of the trial, rendering the resulting conviction a denial of due process - and this, ultimately the result of trial counsel's deficient performance. Id.

As asserted in Ground Three, and reiterated in the reply to the government's response, trial counsel was ineffective when failing to object to any one or more of the government's improper remarks in closing arguments - statements rising to the level of prosecutorial misconduct. Id. Appellant specifically asserted that "[t]rial counsel was not just ineffective for failing to object to the government's prosecutorial misconduct, but was further ineffective for not requesting a specific curative instruction. Additionally, trial counsel was ineffective when he also failed to acknowledge that predisposition is the affirmative defense of entrapment. Counsel weakly argued the issue when he told the jury merely that 'predisposition is an important element for you to consider,' doc. 90 at 83, leaving the jury the impression that considering whether

Appellant was predisposed to commit the crimes prior to his contact with the government was merely important - but not necessary[.]" Civ. Doc. 1 at 45. "Counsel's failure to emphasize to the jury its responsibility, thereby pointedly contradicting the government's misleading statements, was compounded by the fact that counsel did not object to the prosecutor's statements in the first place." Id.

Further compounding these problems is the fact that trial counsel neglected to submit that the jury verdict form should contain a specific, unanimous finding as to predisposition, or a lack thereof. Indeed, the jury verdict form lacked any such finding. Crim. Doc. 52; and Civ. Doc. 9 at 6, n.1. Absent any such indication, it is impossible to know with certainty the scope of influence the unchallenged, uncontroverted, and uncured misleading remarks had on the jurors; their deliberations; or their decision to convict. Nevertheless, the government's misleading remarks infected the trial with unfairness, again rendering the resulting conviction a denial of due process. Civ. Doc. 1 at 41-46.

Appellant further argued in Ground Three that counsel failed to acknowledge that this type of improper prosecutorial argument is misconduct that justifies a new trial. Had counsel taken appropriate steps, it could have been argued that a new trial is required when a prosecutor's remarks are (a) improper, and (b) prejudicial to the defendant's substantial rights. Civ. Doc. 1 at 41, citing United States v. Eckhardt, 466 F.3d 938, 947 (11th Cir. 2006), itself citing United States v. Eyster, 948 F.2d 1196 (11th Cir. 1991). Such substantial rights include the right to a fundamentally fair trial untainted by (unchallenged, uncontroverted,

and uncured) improper argument that misleads the jury in their role and relieves the government of its burden.

In sum, Appellant asserted in Ground Three that trial counsel was ineffective in a number of ways, each one inextricably linked to counsel's failure to object to the government's misstatements. Those failures included: trial counsel's failure to request a specific finding of predisposition (or lack thereof) on the jury verdict form; trial counsel's failure to object to any/all of the government's misleading remarks; trial counsel's failure to emphasize in closing the jury's responsibility to determine the element of predisposition; and trial counsel's failure to request a specific curative instruction to remedy the government's misleading remarks. But for the sum of trial counsel's deficient performance in these regards, Appellant argued, there is a reasonable probability that the result of the trial, or the direct appeal, would have been different. Moreover, had counsel not provided ineffective assistance, Appellant's constitutional right to due process and a fundamentally fair trial would not have been violated. Allowing the conviction to stand in light of these issues would be contrary to justice. Civ. Doc. 1 at 7; 41-46; and Civ. Doc. 9 at 6-7.

Yet in spite of all Appellant's assertions and legal arguments in Ground Three, the government's response glossed over them all, failing even to address the central theme of its wrongdoing. Civ. Doc. 7 at 6-8. As if to pardon that wrongdoing, the government reasoned that "the Eleventh Circuit concluded that the government proved Movant was predisposed to commit the crimes, thus foreclosing on Movant's lack of predisposition argument. [United States v.

Andre, 813 Fed. Appx. 409 (11th Cir. 2020)] at 414-15." Civ. Doc. 7 at 7. The Eleventh Circuit's opinion, however, was based on whether the evidence was sufficient to sustain a conviction, not whether, as here, the government had engaged in misconduct effectively depriving Appellant of due process and a jury verdict untainted by the government's improper, burden-relieving remarks -- framed in Ground Three as an IAC claim.

Nevertheless, neither the government's response nor the Eleventh Circuit holding dispose of Appellant's many assertions and legal arguments within Ground Three. In fact, the government's response, adopted by the district court as discussed below, exacerbates the very problem resulting from the prosecutor's misconduct - that it was the jury's function alone to resolve the factual question of whether Appellant was predisposed. Once the district court found sufficient evidence of government inducement and agreed to charge the jury with an entrapment instruction, the burden of proof shifted to the government (the burden the prosecutor urged the jury need not be proven). Cf Mayweather, 991 F.3d at 1176 (discussing defendant's initial burden), with Orisnord, 483 F.3d at 1178 (discussing point at which the burden shifts to the government). Furthermore, since Appellant invoked his right to trial by jury, and not by bench, it was the jury's responsibility to resolve the factual question of predisposition -- not any court, as the government, and ultimately the district court, would have the burden shifted. See Mayweather, 991 F.3d at 1176 ("[t]he question of entrapment is generally one for the jury, rather than for the court.") (citing Mathews v. United States, 485 U.S. 58, 63 (1988)).

Civ. Doc. 1 at 7; 41-46; and Civ. Doc. 9 at 6-7.

Having relieved itself of its burden by making improper jury argument, urging the jury to ignore the essential element of predisposition - without a specific determination of predisposition on the jury verdict form; nor any objection by trial counsel; nor any emphasis during defense closing of the jury's responsibility to determine predisposition (or lack thereof); nor any specific curative instruction sought or given -the government, as a result of trial counsel's ineffective assistance, cannot now be excused by supplementing a court's distinguishable factual determination with the one indelibly belonging to the jury - the one which is central to Ground Three. Id.[2]

Appellant made every reasonable effort to demonstrate to the district court how the government's response was improper and inadequate. See Reply, Civ. Doc. 9 at 6-7. Nevertheless, the district court fell into lockstep with the government's position on the matter. Cf Crim. Doc. 107 at 6-7, with Civ. Doc. 7 at 6-8. In so doing, the district court based its conclusion on an erroneous assessment of the claim, and neglected to confront claim

[2] Even outside the context of IAC claims, it is well-settled that improper jury argument by the prosecution violates a defendant's constitutional right to a fair trial in some circumstances. See, e.g., Heagney v. Sec'y, 2021 U.S. Dist. LEXIS 218160 (Oct. 15, 2021, N.D. Fl.). "[T]he appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" Davis v. Kemp, 829 F.2d 1522, 1527 (11th Cir. 1987). Courts apply a two-step process in reviewing such a claim: (1) the court considers whether the argument was improper; and (2) whether any improper argument was so prejudicial as to render the trial fundamentally unfair. Id. at 1526. Thus, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. at 1526-27 (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). Here, the question is compounded by counsel's deficient performance in numerous interrelated aspects.

dispositive legal issues and controlling authority.[3]

The district court concluded, without commenting on the impropriety of the prosecutorial misconduct complained of, nor any substantive argument nor a single cited authority, that "a prosecutor's statements in closing argument are not evidence," and that "[t]he jury was instructed on the law by the Court," Crim. Doc. 107 at 6. While it is generally true that a jury is presumed to have followed the district court's instructions, the government's extensive and improper remarks during closing arguments diminished the effectiveness of the court's once-over charge (given prior to closing arguments). Normally, the risk of prejudice from improper arguments are reduced by a court's limiting instruction, see United States v. Ramirez, 420 F.3d 1344, 1354 (11th Cir. 2005), and courts subsequently apply a "strong presumption that jurors are capable of respecting limiting instructions, see United States v. Hill, 643 F.3d 807, 829 (11th Cir. 2010). But no such "limiting instruction" (or "curative instruction") was requested by trial counsel, nor given sua sponte. Nevertheless, even when such an instruction is given, courts recognize that "curative instructions do not always eradicate the prejudice resulting from an improper argument." McWhorter v. City of Birmingham, 906 F.2d 675, 678 (11th Cir.

[3] See Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (holding that a pro se litigant's claim should be liberally construed); Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992) (requiring district courts to resolve all claims and arguments therein); and Lynn, 365 F.3d at 1232 (in a proceeding on a § 2255 motion, the Eleventh Circuit reviews a district court's factual finding for clear error and legal issues de novo).

1990). For instance, "repeated exposure of a jury to prejudicial information" undoubtedly diminishes the effectiveness of a cautionary instruction. Austin v. Fl Hud Rosewood LLC, 2018 U.S. Dist. LEXIS 235219 (Feb. 15, 2018, N.D. Fl.) (citing O'Rear v. Fruehauf Corp, 554 F.2d 1304, 1309 (5th Cir. 1997) ("[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.")

Here, the burden was upon the government, and by repeatedly telling the fact finders (the jurors) that the government need not meet that burden - with counsel doing nothing to eradicate the prejudice - it is likely that some or all of the jurors took the government at their word, and made no specific determination of predisposition (or lack thereof). It is precisely for that reason that the trial was fundamentally unfair.

In Jacobson, the Supreme Court made clear that where the defense of entrapment is at issue, the jury must make a succinct determination as to predisposition, and it is the government's burden to prove predisposition to the jury beyond reasonable doubt. Civ. Doc. 1 at 44-45, citing Jacobson, 530 U.S. at 549. The district court's order denying Ground Three runs afoul of the Supreme Court's holding in Jacobson, as well as running afoul of Haines and Clisby (footnote n.2 supra), and the many controlling cases discussed in Ground Three which are dispositive of this claim. Cf Civ. Doc. 1 at 41-46, with Crim. Doc. 107 at 6-7.

Furthermore, to conclusively dispose of Ground Three, the district court erroneously relies upon the Eleventh Circuit's opinion on direct appeal. Crim. Doc. 107 at 6-7. The question

decided in that opinion, however was whether the evidence was sufficient to sustain a conviction under 18 U.S.C. § 2422(b); whereas here, the issue is whether the prosecutor engaged in prosecutorial misconduct by making its repeated improper arguments to the jury; whether counsel's performance was deficient for not objecting to any of those improper arguments or rebutting these improper remarks in defense closing; whether counsel's performance was deficient for not requesting a specific determination of predisposition to be included on the jury verdict form; whether counsel's performance was deficient for not requesting a specific curative instruction to eradicate any prejudice from those improper remarks; and whether, individually or as a whole, counsel's deficient performance in those interrelated aspects, deprived Appellant of a fundamentally fair trial and his right to due process.

The district court's reliance on the Eleventh Circuit's opinion on direct appeal highlights, again, the very problem complained of -- that it was the jury whom was required to make the determination of predisposition, see Jacobson, 503 U.S. at 549; Civ. Doc. 1 at 44-45, and that it was prosecutorial misconduct to urge the jury that it need not be proven (thus need not be determined), cf Eckhardt, 466 F.3d at 947, with Orisnord, 483 F.3d at 1178 and Jacobson, id. at 549; Civ. Doc. 1 at 42-43, and that the determination was for the jury (not a court), see Mayweather, 991 F.3d at 1176; Civ. Doc. 1 at 43.

These issues of ineffective assistance of counsel are sufficient to meet both prongs of Strickland. The district court

nevertheless, determined that there was no prejudice, and therefore did not address trial counsel's performance in any of the interrelated areas discussed in Ground Three by Appellant. See Crim. Doc. 107 at 6-7, and cf with Civ. Doc. 1 at 7; 41-46; and Civ. Doc. 9 at 6-7. Lastly, the district court (either or both) neglected to liberally construe Appellant's claim as required by Haines, 404 U.S. at 520-21, and/or neglected to resolve the claim and the arguments and authority therein, as required by Clibsby, 960 F.2d at 936. Accordingly, because the district court's factual finding were based upon erroneos assessment of the claim, resulting in its disregard of the claim - dispositive legal issues and cited authority, review by the Eleventh Circuit is necessary and appropriate. See Lynn, 365 F.3d at 1232.

CONCLUSION

For the foregoing reasons, a Certificate of Appealability should issue, as "reasonable jurists could debate whether ... the petition should have been resolved in a different manner," and because "the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484-85 (2000) (internal quotation omitted). Under 28 U.S.C. § 2253(c)(2), "[a] certificate of appealability may issue ... if the applicant has made a substantial showing of the denial of a constitutional right" such as those which Appellant has shown related to the three grounds raised above.

Dated this 21st day of December, 2022.

Respectfully submitted,

ALVIN CELIUS ANDRE

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2022, a true and correct copy of the foregoing Appellant's Opening Brief was mailed, USPS, first-class postage paid, addressed to:

Francis L. Cheron
Assistant United States Attorney
U.S. Attorney's Office
99 Northwest 4th Street
Miami, FL 33132

ALVIN CELIUS ANDRE

APPENDIX E

United States District Court
for the
Southern District of Florida

Alvin Celius Andre, Movant,	)	
	)	
v.	)	Civil Action No. 21-62293-Civ-Scola
	)	(Criminal Case No. 18-60271-CR-Scola)
United States of America,	)	
Respondent.	)	

Order Denying Motion to Vacate Sentence

Before the Court is Movant Alvin Celius Andre's Motion to Vacate Sentence Under 28 U.S.C. § 2255. Therein, Andre moves to vacate his sentence in Case No. 18-60271-CR-Scola. The Court has considered Andre's motion and supporting memorandum of law (ECF No. 1), the government's response (ECF No. 7), Andre's reply (ECF No. 9), the entire record, and is otherwise fully advised. For the reasons explained below, the Motion is denied on all grounds.

1. Background

The underlying facts and procedural history in this case are not in dispute. Andre indicates in his reply that he "attacks the legitimacy of his conviction, not the sufficiency of the evidence." (ECF No. 9 at 5). The Court therefore adopts the procedural history and factual background[1] provided in the response (*see* ECF No. 7 at 1-3) and sets forth the facts relevant to its analysis of the instant motion.

Andre raises eight claims of ineffective assistance of trial and appellate counsel. (*See generally* ECF No. 1). Grounds one through five allege ineffective assistance of trial counsel. (*See id.* at 4-13). Grounds six through eight pertain to appellate counsel. (*See id.* at 14-16).

In Ground One, Andre asserts counsel's ineffectiveness in failing to object to "the prosecutor's statements during closing which constituted a constructive amendment." (*Id.* at 4). This ground relates to the prosecutor's statements

[1] The factual background section of the Response is taken from the Eleventh Circuit Court of Appeals' opinion affirming the convictions and sentences. *See United States v. Andre*, 813 F. App'x 409, 410-11 (11th Cir. 2020).

concerning the charges in Count One of the indictment. (*See id.*). In Ground Two, he alleges ineffective assistance in counsel "failing to object to an obvious fatal variance when the government presented evidence not contained in the indictment." (*Id.* at 5). In Ground Three, he alleges that counsel rendered ineffective assistance in failing "to object to the government's misstatements rising to the level of prosecutorial misconduct during closing arguments." (*Id.* at 7). In Ground Four, he asserts counsel was ineffective for "failing to object to the prosecutor's statement during closing which constituted a constructive amendment." (*Id.* at 8). This ground relates to the prosecutor's statements concerning the charges in Count Two of the indictment. (*See id.*). In Ground Five, Andre alleges that the "cumulative effect of counsel's errors" rises to the level of ineffective assistance. (*Id.* at 13).

Grounds Six through Eight pertain to appellate counsel. In Ground Six, he asserts that counsel was ineffective for failing to raise the constructive amendment issue set out in Ground One of the motion. (*Id.* at 14). In Ground Seven, he asserts that counsel was ineffective for failing to raise the constructive amendment issue set out in Ground Two of the motion. (*Id.* at 15). Finally, in Ground Eight, he asserts that counsel was ineffective for failing to raise the prosecutorial misconduct issue raised in Count Three of the motion. (*Id.* at 16).

2. Legal Standard

A. Section 2255 Motions

Under section 2255, "[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 . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence." 28 U.S.C. § 2255(a) (alterations added). Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments under section 2255 are extremely limited. *See United States v. Frady*, 456 U.S. 152, 165 (1982) A prisoner is entitled to relief under section 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States;

(2) exceeded its jurisdiction; (3) exceeded the maximum authorized by law; or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "[R]elief under 28 U.S.C. [section] 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (cleaned up).

B. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to assistance of counsel during criminal proceedings. *See Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). When assessing counsel's performance under *Strickland*, the Court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]" *Burt v. Titlow*, 571 U.S. 12, 20 (2013).

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88.

To establish deficient performance, the petitioner must show that "counsel's conduct fell 'outside the wide range of professionally competent assistance.'" *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690). Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. The court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate, but only [on] what is constitutionally compelled." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (cleaned up).

To establish prejudice, "[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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

A court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs. *See id.* at 697; *Brown v. United States*, 720 F.3d 1316, 1326 (11th Cir. 2013).

3. Discussion

A. Timeliness and Procedural Default

The parties agree the motion is timely and no claims are procedurally defaulted. (Mot. at 11, ECF No. 1; Resp. at 5, ECF No. 7). Having reviewed the record in full, the Court confirms the same. The parties dispute the merits of Andre's ineffective assistance of counsel ("IAC") claims in Grounds One through Eight of the Motion. Accordingly, the Court proceeds to the merits.

B. IAC Ground One

Andre asserts ineffective assistance in trial counsel's failure to object to the prosecutor's statements during closing argument which constituted a constructive amendment. (*See* ECF No. 1 at 4). He argues that Count One of the indictment "did not include attempted persuasion, enticement, inducement, or coercion of AN ADULT." *Id.* However, in closing argument the prosecutor constructively amended the indictment by stating no less than six times that persuading an adult (the father who is bringing the daughter) was a sufficient basis for conviction. *Id.* Andre alleges ineffective assistance in counsel's failure to object to each of the prosecutor's statements and for failure to request a curative instruction. *Id.*

"A constructive amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." *United States v. Narog*, 372 F.3d 1243, 1247 (11th Cir. 2004). The Court finds that constructive

amendment did not occur in this case. Rather, the prosecutor correctly stated the law in closing argument. As explained by the Eleventh Circuit in affirming Andre's convictions, a "defendant does not have to communicate or negotiate directly with a child to be convicted under § 2422(b), nor does the child even have to exist. A defendant 'can be convicted under [§ 2422(b)] when he arranges to have sex with a minor or a supposed minor through communications with an adult intermediary.' *United States v. Lanzon*, 639 F.3d 1293, 1299 (11th Cir. 2011)." *Andre*, 813 F. App'x. at 413. Ultimately, "[w]hat matters is that Andre agreed to pay money to have sex with a child." *Id.* at 414. Because the prosecutor correctly stated the law in closing argument, Ground One is meritless.

Counsel is not ineffective for failing to raise non-meritorious issues, *see Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001); nor is counsel required to present every non-frivolous argument, *see Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013). Andre fails to show "deficient performance" or "prejudice." *Strickland.* 466 U.S. at 687-88. Accordingly, Ground One is denied.

C. IAC Ground Two

In Ground Two, Andre alleges counsel was ineffective for "failing to object to an obvious fatal variance when the government presented evidence not contained in the indictment." (ECF No. 1 at 5). A variance between indictment and proof is fatal only when it affects the "substantial rights" of the defendant by insufficiently notifying him of the charges against him so that he may prepare a proper defense. *See Berger v. United States*, 295 U.S. 78, 82 (1935). Once again, Andre misunderstands the law. As explained above, a defendant can be convicted under Section 2422(b) when he arranges to have sex with a minor or a supposed minor through communications with an adult intermediary. That is what happened in this case. Andre was indicted, and later convicted at trial, for communications he had with the fictional father concerning the fictional child. As explained by the Eleventh Circuit, a defendant can be convicted under Section 2422(b) for exactly this conduct. *See Andre*, 813 F. App'x. at 413. The Court finds that there was no variance between the indictment and proof at trial. As such,

counsel was not ineffective for failing to raise a non-meritorious issue. *See Chandler*, 240 F.3d at 917. Andre fails to show "deficient performance" or "prejudice." *Strickland.* 466 U.S. at 687-88. Accordingly, Ground Two is denied.

D. IAC Ground Three

Andre alleges in Ground Three that counsel rendered ineffective assistance in failing "to object to the government's misstatements rising to the level of prosecutorial misconduct during closing arguments." (ECF No. 1 at 7). This claim centers on the prosecutor's statements to the jury asserting that "we do not have to show that he had a predisposition." *Id.* Andre states that entrapment was his defense at trial, meaning that "the government was required to prove the essential element of predisposition." *Id.* He alleges that, no less than four times during closing argument, the prosecutor told the jury that "we do not have to show that he had a predisposition." *Id.* Andre asserts that counsel was ineffective for failing to object and seek a curative instruction. *Id.*

The Court first notes that a prosecutor's statements in closing argument are not evidence. The jury was instructed on the law by the Court. On direct appeal, the Eleventh Circuit held that the Court did not abuse its discretion in giving the entrapment pattern jury instruction, which states in relevant part: "if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty." *Andre*, 813 F. App'x at 412; Eleventh Circuit Criminal Pattern Instruction, No. S13.1 (2016).

The Eleventh Circuit also addressed the question of whether Andre was predisposed to commit his crimes before he was contacted by the government. On this point, the Eleventh Circuit stated:

> "Even though predisposition involves the defendant's willingness to commit the crime before he was contacted by the government, proving it does not require pre-contact evidence. Predisposition can be proven by the defendant's 'ready commission' of the charged crime. Or it can be shown if the defendant is given the opportunity to back out of the illegal activity but fails to do so. Whether a

> defendant was predisposed to committing a crime is a 'fact-intensive and subjective inquiry.'
>
> The government's evidence proved that Andre was predisposed to commit the crimes. It showed that Andre was the one who initially contacted Fowler in response to the Craigslist ad. It showed that once Andre knew the daughter was nine years old he chose to ask for photos of her and continued to plan to have sex with her. And it showed that Andre had plenty of opportunity to back out of the crimes during the months-long gap in communication but chose instead to re-engage with Fowler and break the law. That is enough to show predisposition."

Andre, 813 F. App'x at 414-15 (cleaned up). Given the abundant proof of predisposition, Andre fails to establish that "the result of the proceeding would have been different" had counsel objected and requested a curative instruction. *Strickland*, 466 U.S. at 694. Having failed to demonstrate any prejudice under *Strickland*, Ground 3 is denied. *See Dale v. United States*, 809 F. App'x 727, 728 (11th Cir. 2020) (noting "a court need not address both prongs if a defendant has made an insufficient showing of one.").

E. IAC Ground Four

In Ground Four, Andre asserts counsel was ineffective for "failing to object to the prosecutor's statement during closing which constituted a constructive amendment." (*Id.* at 8). This ground relates to the prosecutor's statements concerning the charges in Count Two of the indictment. (*See id.*). Andre was indicted for attempted enticement of a minor to engage in illicit sexual activity, in violation of 18 U.S.C. § 2422(b) (Count I) (*See* CR ECF No. 7). In a Superseding Indictment, he was indicted on a second count of attempted sex trafficking of a minor, in violation of 18 U.S.C. § 1591 (*See* CR ECF No. 26). Andre asserts that in closing argument the prosecutor referenced solicitation of "the father, not the minor." (ECF No. 1 at 8). He claims ineffective assistance in counsel's failure to object to each of the prosecutor's statements and to request a curative instruction. (*See id.*).

For the reasons explained in IAC Ground One, this claim is meritless. The Eleventh Circuit has foreclosed the distinction that Andre seeks to draw between

solicitation of the fictional father and fictional minor child. *See Andre*, 813 F. App'x. at 413. ("[w]hat matters is that Andre agreed to pay money to have sex with a child."). Counsel is not ineffective for failing to raise non-meritorious issues. *See Chandler*, 240 F.3d at 917. Andre fails to show "deficient performance" or "prejudice." *Strickland*. 466 U.S. at 687-88. Accordingly, Ground Four is denied.

F. IAC Ground Five

In Ground Five, Andre alleges that the "cumulative effect of counsel's errors" rises to the level of ineffective assistance. (*Id.* at 13). Andre does not provide any specific errors, rather he seems to assert that the cumulative effect of the errors alleged in Grounds One through Five rise to the level of ineffective assistance. As discussed above, the Court finds that trial counsel did not err in failing to raise meritless issues. Andre fails to show "deficient performance" or "prejudice." *Strickland*. 466 U.S. at 687-88. Accordingly, Ground Five is denied.

G. IAC Grounds Six, Seven, and Eight

In Ground Six through Eight, Andre asserts ineffective assistance of appellate counsel. In Ground Six, he asserts that counsel was ineffective for failing to raise the constructive amendment issue set out in Ground One of the motion. (*Id.* at 14). In Ground Seven, he asserts that counsel was ineffective for failing to raise the constructive amendment issue set out in Ground Two of the motion. (*Id.* at 15). Finally, in Ground Eight, he asserts that counsel was ineffective for failing to raise the prosecutorial misconduct issue raised in Count Three of the motion. (*Id.* at 16).

As discussed above, the claims in Grounds One, Two, and Three are meritless. Therefore, appellate counsel cannot be ineffective for failing to raise them on direct appeal. *See Chandler*, 240 F.3d at 917. Andre fails to show "deficient performance" or "prejudice." *Strickland*. 466 U.S. at 687-88. Accordingly, Grounds Six, Seven, and Eight are denied.

H. Evidentiary Hearing

A district court is not required to hold an evidentiary hearing where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous. *See Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002). The Court finds the claims to be patently frivolous and that the motion and the files and records of the case conclusively show that Andre is not entitled to relief. *See* 28 U.S.C. § 2255(b). Therefore, Andre's request for an evidentiary hearing is denied.

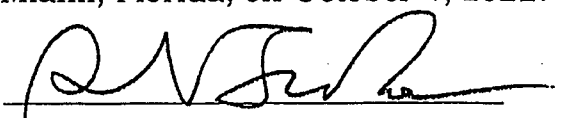
I. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). Here, Andre fails to make "a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Accordingly, upon consideration of the record, the Court denies the issuance of a certificate of appealability.

4. Conclusion

For the foregoing reasons, all grounds in Andre's Motion to Vacate Sentence Under 28 U.S.C. § 2255 (ECF No. 1) are **denied**. No evidentiary hearing will be set, and the Court does not issue a certificate of appealability. The Court directs the Clerk to **close** this case. Any pending motions are **denied** as moot.

Done and ordered, in chambers, in Miami, Florida, on October 4, 2022.



Robert N. Scola, Jr.
United States District Judge

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