APPENDIX

A-1

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12158

RAYNALDO RAY QUIROGA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:22-cv-00665-SPC-NPM

ORDER:

Raynaldo Quiroga, a federal prisoner serving a 480-month sentence for Hobbs Act robbery, brandishing a firearm in furtherance of a crime of violence, aiding and abetting the possession of a stolen firearm, and possessing a firearm as a convicted felon, filed a 28 U.S.C. § 2255 motion in October 2022. He raised three claims: (1) the government committed prosecutorial misconduct by knowingly using perjured testimony and suppressing material evidence; (2) newly discovered evidence showed that he is actually innocent of the crimes; and (3) trial counsel was ineffective for failing to investigate an alternate suspect, failing to call a favorable witness, and failing to present certain evidence.

The district court denied the motion, Quiroga appealed, and he now moves this Court for a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP"). To obtain a COA, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

Here, reasonable jurists would not debate the denial of Claim 1 because there was no indication that the prosecution presented perjured testimony at trial. *See United States v. Cavallo*, 790 F.3d 1202, 1219 (11th Cir. 2015). Further, the record did not support Quiroga's contention that the prosecution suppressed the

agreement that it made with one of its witnesses or withheld evidence from the defense.

Second, reasonable jurists would not debate the denial of Claim 2 because actual innocence by itself cannot provide a basis for habeas relief. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993). Third, reasonable jurists would not debate the denial of Claim 3 because Quiroga failed to show that he established prejudice and deficient performance as a result of his counsel's actions. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Accordingly, Quiroga's motion for a COA is DENIED, and his motion to proceed IFP is DENIED AS MOOT.

/s/ Kevin C. Newsom

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RAYNALDO RAY QUIROGA,

Plaintiff,

v. Case Nos.: 2:22-cv-665-SPC-NPM
2:21-cr-066-SPC-NPM

UNITED STATES OF AMERICA,

Defendant.
_____/

OPINION AND ORDER[1]

Before the Court is Raynaldo Ray Quiroga's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 1).[2]

BACKGROUND

On May 19, 2021, a man dressed as a sheriff's deputy entered Capital Pawn in LaBelle, Florida, and approached and handcuffed an apparent customer named Jesus Alexis Vazquez. The man instructed two employees of Capital Pawn to lay face-down, then zip-tied their hands behind their backs.

[1] Disclaimer: Papers hyperlinked to CM/Cr-Doc. may be subject to PACER fees. By using hyperlinks, the Court does not endorse, recommend, approve, or guarantee any third parties or their services or products, nor does it have any agreements with them. The Court is not responsible for a hyperlink's functionality, and a failed hyperlink does not affect this Order.
[2] The Court cites to documents from the docket of Case No. 2:22-cv-665-SPC-NPM as "Doc. __" and documents from the docket of Case No. 2:21-cr-66-SPC-NPM as "Cr-Doc. __."

With the employees restrained, the man removed six guns from an open safe behind the counter, exited the store, and drove away in a Chrysler 300. An ATF investigation quickly homed in on Quiroga based on an anonymous tip submitted after a similar incident in 2019. Quiroga became a suspect because his appearance is consistent with security footage of the robber, and because he owned a Chrysler vehicle that could have been the getaway car.

A grand jury charged Quiroga with four crimes stemming from the robbery: Hobbs Act robbery (Count 1), brandishing a firearm in furtherance of a crime of violence (Count 2), possessing a stolen firearm (Count 3) and possessing a firearm as a convicted felon (Count 4). (Cr-Doc. 1). The grand jury also charged Vazquez with Counts 1 and 3. United States Magistrate Judge Mac R. McCoy appointed attorney Neil Potter to represent Quiroga. (Cr-Doc. 29). Vazquez pled guilty to Count 3 and agreed to testify at Quiroga's trial, and the government dropped Count 1 against Vazquez. After a three-day trial, the jury found Quiroga guilty on all counts. (Cr-Doc. 95). The Court sentenced Quiroga to a 480-month prison term. (Cr-Doc. 117). And the Eleventh Circuit Court of Appeals affirmed. (Cr-Doc. 138).

LEGAL STANDARD

A prisoner in federal custody may move for his sentence to be vacated, set aside, or corrected on four grounds:

> [1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack.

28 U.S.C. § 2255. Relief under § 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). A petitioner bears the burden of proving the claims in a § 2255 motion. *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (collecting cases).

DISCUSSION

A. Ground 1: Prosecutorial misconduct

Quiroga argues the government violated his right to due process in three ways. First, he claims the prosecution knowingly elicited perjured testimony from his co-defendant, Jesus Vazquez. At trial, Vazquez testified that he had known Quiroga for about two years, and he described the May 19, 2021 robbery of Capital Pawn, which he and Quiroga had planned over the previous several days. Vazquez admitted he initially lied to police when they first questioned him, but he later told an investigator about his role in the robbery and identified Quiroga as the culprit. Vazquez also identified Quiroga at trial. (Cr-Doc. 132 at 124-32). Quiroga claims Vazquez's testimony was inconsistent

with his May 20, 2021 statement to police, in which he incorrectly described Quiroga's appearance.

"To establish prosecutorial misconduct for the use of false testimony, a defendant must show that the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." *United States v. Harris*, 7 F.4th 1276, 1294 (11th Cir. 2021). "[A] prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct." *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010); *see also Hays v. Alabama*, 85 F.3d 1492, 1499 (11th Cir. 1996) (determining there was no due process violation when "there has been no showing that [the witness's] later, rather than earlier, testimony was false").

Quiroga fails to show that Vazquez gave any false testimony. Even assuming Vazquez incorrectly described Quiroga to investigators, that does not suggest Vazquez lied at trial. Nor does it suggest the prosecution knowingly used perjured testimony. Vazquez's recognition of Quiroga was not in question because his identification of Quiroga was not based on physical appearance alone. Rather, Vazquez was able to identify Quiroga as the culprit because they had been friends for years, and because they planned and carried out the robbery together. What is more, Vazquez admitted on direct examination that he initially lied to police when they questioned him about the robbery.

Second, Quiroga claims the government violated his due process rights by suppressing its agreement to dismiss Count 1 against Vazquez. The record conclusively refutes this claim. The government filed the plea agreement on the docket. (Cr-Doc. 80). And Quiroga's attorney—Neil Potter—questioned Vazquez about the agreement on cross-examination. (Cr-Doc. 132 at 137-38).

Third, Quiroga claims the prosecution withheld evidence—namely, two letters that purport to be confessions from a person named Sebastian Munios Ramirez. The record refutes this claim. The prosecutor emailed the letters to Potter on November 5, 2021, a fact Quiroga acknowledges in Ground 3 of his motion. (Doc. 11-1).

Quiroga fails to demonstrate prosecutorial misconduct. Ground 1 is denied.

B. Ground 2: Actual Innocence

Quiroga next argues newly discovered evidence proves his innocence. He points to a letter and an affidavit that purport to be admissions from Sebastian Munios Ramirez. They describe a convoluted plot by Ramirez to frame Quiroga for the robbery. Even viewing this ground in a light most favorable to Quiroga, it cannot warrant § 2255 relief. "Actual innocence is not itself a substantive claim[.]" *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005); *see also Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for

federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). Thus, Ground 2 is denied.

C. Ground 3: Ineffective Assistance of Counsel

Quiroga asserts three instances of ineffective assistance of counsel. Criminal defendants have a Sixth Amendment right to reasonably effective assistance of counsel. To determine whether a convicted person is entitled to relief under the Sixth Amendment, courts engage in a two-part test. A petitioner must establish (1) that counsel's performance was deficient—that is, it fell below an objective standard of reasonableness—and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Courts need not address both prongs if the petitioner fails to satisfy either of them. *Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1344 (11th Cir. 2010).

When considering the first prong, there is a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance." *Sealey v. Warden*, 954 F.3d 1338, 1354 (11th Cir. 2020) (quoting *Strickland*, 466 U.S. at 694). To show prejudice, the petitioner must establish that "but for counsel's unprofessional performance, there is a *reasonable probability* the result of the proceeding would have been different." *Putman v. Head*, 268 F.3d 1223, 1248 (11th Cir. 2001) (citing *Strickland*, 466 U.S. at 694)

(emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Sealey*, 954 F.3d at 1355.

Quiroga first faults Potter because he did not investigate the claims made in the Ramirez letters, call Ramirez to testify, or use the letters at trial. Potter provided a statement explaining why he disregarded the Ramirez letters: they are obvious forgeries, and Ramirez does not exist. (Doc. 11-4). Those are reasonable conclusions. The letters appear to be nothing more than a clumsy attempt to deflect blame from Quiroga. Quiroga does not explain how the letters—which are unauthenticated hearsay—would have been admissible. And aside from the letters, there is no evidence that Ramirez is a real person. Even if Ramirez were real, the letters did not state how Potter could compel his attendance at trial. Rather, they said Ramirez would turn himself in if Quiroga was released. (Doc. 11-2; Doc. 11-3) Obviously, Potter could not arrange Quiroga's release. Potter cannot be deemed deficient for failing to call a non-existent witness or present inadmissible evidence, and Quiroga suffered no prejudice from their absence.

Quiroga also faults Potter for failing to enter photo line-up cards into evidence. Investigators showed the cards to the two employees of Capital Pawn during a photo lineup. Neither employee identified Quiroga, and Potter highlighted that weak point in the government's case during closing argument. Quiroga does not state how the photo cards could have helped his case. There

is no reasonable probability that presentation of the photo line-up cards would have changed the outcome in this case.

Finally, Quiroga complains that Potter failed to file a motion requesting any deals with government witnesses and statements made by government witnesses. But Quiroga does not identify any documents or information the government failed to produce. Thus, there was no reason for Potter to file such a motion, and Quiroga suffered no prejudice.

Quiroga fails to allege any deficient performance by Potter or any prejudice stemming from Potter's representation. Ground 3 is denied.

EVIDENTIARY HEARING

A court must hold an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The Court finds an evidentiary hearing unwarranted in this case. The record conclusively proves that all three grounds of Quiroga's motion have no merit.

CERTIFICATE OF APPEALABILITY

A prisoner seeking § 2255 relief has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). To appeal such a denial, a district court must first issue a certificate of appealability, which "may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (citations omitted). The Court finds that Quiroga has not made the requisite showing. *See* 28 U.S.C. § 2255(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84. Accordingly, a certificate of appealability is **DENIED**.

Accordingly, it is now

ORDERED:

Raynaldo Ray Quiroga's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 1) is **DENIED**. The Clerk is **DIRECTED** to terminate any motions and deadlines, enter judgment against Petitioner, and close this case.

DONE and **ORDERED** in Fort Myers, Florida on May 11, 2023.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

SA: FTMP-1
Copies: All Parties of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

J 129

RAYNALDO RAY QUIROGA
Petitioner,

v.

Case No.: 2:22-cv-665-SPC-NPM
2:21-cr-66-SPC-NPM

UNITED STATES OF AMERICA,
Respondent.

UNITED STATES' RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Pursuant to 28 U.S.C. § 2255, the Rules Governing § 2255 Proceedings, and this Court's order to respond (Doc. 5), the United States files this response in opposition to Petitioner's § 2255 motion to vacate sentence (Doc. 1). [1] As discussed below, all of Petitioner's claims are meritless and should be summarily denied without an evidentiary hearing.

BACKGROUND

On July 14, 2021, Petitioner was indicted and charged with four federal crimes in connection with an armed robbery he committed at a pawn shop in LaBelle, Florida—Hobbs Act robbery, brandishing a firearm in furtherance of a crime of violence, possessing a stolen firearm, and possessing a firearm as a convicted felon. Cr. Doc. 1. A brief summary of the facts of the case can be found in a pre-trial motion

[1] Citations to this docket are "Doc. [document number]." Citations to the underlying criminal case—*United States v. Quiroga*, Case No. 2:21-cr-66-SPC-NPM (M.D. Fla.)—are "Cr. Doc. [document number]."

in limine filed by the United States in the Petitioner's underlying criminal case at Cr. Doc. 74.

Although the evidence of guilt against Petitioner was very strong—including surveillance video depicting him committing each of the crimes charged—Petitioner exercised his right to proceed to a jury trial. After a three-day trial—transcripts of which are filed at Cr. Doc. 131, 132, and 133—the Petitioner was found guilty of all charges on December 16, 2021. Cr. Doc. 117, 121. On March 22, 2021, Petitioner was sentenced by this Court to a within-guidelines term of 480 months imprisonment. Cr. Doc. 121. On September 19, 2021, the Eleventh Circuit affirmed Petitioner's judgment. *United States v. Quiroga*, 2022 WL 4295414 (11th Cir. 2021).

On October 14, 2021, Petitioner timely filed a *pro se* § 2255 post-conviction motion alleging three grounds under which he believes his conviction should be vacated. Doc. 1. *First*, Petitioner alleges that there was "prosecutorial misconduct" in his case, which violated his due process rights. Doc. 1 at 4-12. *Second*, Petitioner claims "actual innocence" as a basis for post-conviction relief. Doc. 1 at 14-16. And *third*, Petitioner alleges that he was "denied effective assistance of counsel" by his trial attorney Neil Potter. Doc. 1 at 18-20. Each of his claims are meritless and should be summarily denied.

LEGAL STANDARD

A federal prisoner may move for his or her sentence to be vacated, set aside, or corrected on four grounds: (1) the imposed sentence violates the Constitution or laws of the United States; (2) the court lacked jurisdictions to impose the sentence; (3) the

sentence was over the maximum authorized by law; or (4) the imposed sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). The petitioner bears the burden of proof in a § 2255 motion on each aspect of his claim, *Beeman v. United States*, 871 F.3d 1215, 1221–25 (11th Cir. 2017) (collecting cases), which is "a significantly higher hurdle than would exist on direct appeal" under plain error review. *United States v. Frady*, 456 U.S. 152, 164–66 (1982). Accordingly, if a Court "cannot tell one way or the other" whether the claim is valid, then the petitioner has failed to carry his burden. *Beeman*, 871 F.3d at 1225.

Generally, a § 2255 petitioner may not raise a ground in a habeas proceeding if he failed to raise it on direct appeal. *Fordham v. United States*, 706 F.3d 1345, 1349 (11th Cir. 2013). This procedural default rule "is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

Criminal defendants enjoy a Sixth Amendment right to reasonably effective assistance of counsel. Claims of ineffective assistance of counsel in a federal criminal case are grounded in the Sixth Amendment and are therefore cognizable under 28 U.S.C. § 2255. *Lynn v. United States*, 365 F.3d 1225, 1234 n.17 (11th Cir. 2004). To succeed on an ineffective assistance of counsel claim, a petitioner must establish: (1) counsel's performance was deficient and fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Failure to show either *Strickland* prong is fatal. *See Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1344 (11th Cir. 2010) ("a court

need not address both *Strickland* prongs if the petitioner fails to establish either of them"). *Strickland* sets a "high bar" for ineffective assistance claims and surmounting it "is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks and citation omitted).

When considering the first *Strickland* prong, courts must apply a "strong presumption" that counsel has "rendered adequate assistance and [has] made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. . . . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc; quoting *White v. Singletary*, 972 F.2d 1218, 1220–21 (11th Cir. 1992)).

To establish the second *Strickland* prong, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). The standard that the petitioner must meet is both "rigorous" and "highly demanding," and requires a showing of "gross incompetence" on counsel's part. *Kimmelman v. Morrison*, 477 U.S. 365, 381–82 (1986). A petitioner must "affirmatively prove prejudice" to meet the second prong of *Strickland*, and he can only do so if he establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Strickland*, 466 U.S. at 693-94. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

EVIDENTIARY HEARING

To establish entitlement to an evidentiary hearing on a claim of ineffective assistance of counsel, a petitioner must "allege facts that would prove both that [his] counsel performed deficiently and that [he] was prejudiced by [his] counsel's deficient performance." *Hernandez v. United States*, 778 F.3d 1230, 1232–33 (11th Cir. 2015). The petitioner has the burden of establishing the need for an evidentiary hearing, *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984) (en banc), and he would be entitled to a hearing only if his allegations, if proved, would establish a right to collateral relief. *Townsend v. Sain*, 372 U.S. 293, 307 (1963).

Rule 2(b)(2) of the Rules Governing Section 2255 Proceedings in the United States District Courts requires a movant to "state the facts supporting each ground." This rule has been interpreted to mandate "fact pleading," a "heightened pleading requirement" in which a petitioner must state specific, particularized facts which entitle him to relief. *Borden v. Allen*, 646 F.3d 785, 810-11 (11th Cir. 2011) ("The § 2254 Rules and the § 2255 Rules mandate 'fact pleading' as opposed to 'notice pleading,' as authorized under Federal Rule of Civil Procedure 8(a)."). These facts must include sufficient detail to enable the Court to determine, from the face of the motion alone, whether the petition merits further review. *See Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990) (applying this interpretation to nearly identical rule governing § 2254

cases). Failure to do so is fatal: "Conclusory allegations of ineffective assistance [of counsel] are insufficient." *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992) (quoting *United States v. Lawson*, 947 F.2d 849, 853 (7th Cir. 1991)).

This Court may consider the entire record when determining whether to hold an evidentiary hearing. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014). Summary dismissal is warranted when "it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief[.]" *Broadwater v. United States*, 292 F.3d 1302, 1303 (11th Cir. 2003) (quoting 28 U.S.C. § 2255). Accordingly, no evidentiary hearing is required when the record establishes that a § 2255 claim lacks merit, *United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984), or that it is defaulted. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Similarly, no hearing is required when the petitioner's allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record. *Aron v. United States*, 291 F.3d 708, 714–15 (11th Cir. 2002) (citation omitted).

DISCUSSION

In his § 2255 motion, Petitioner lists three grounds in support of vacating his sentence. Each ground is discussed below.

A. Ground One: Prosecutorial Misconduct

In his first ground for relief, Petitioner alleges that his conviction should be vacated due to "prosecutorial misconduct," because the prosecuting attorney (1)

"knowingly used perjured testimony," (2) "suppressed [an] agreement with [Petitioner's] co-conspirator," and (3) "suppressed 'material' evidence." Doc. 1 at 4.

Within his first ground for relief on the basis of so-called "prosecutorial misconduct," Petitioner alleges that co-defendant "[Jesus] Vazquez['s] testimony in trial was false, and the prosecution knew of his perjured testimony," but used it anyway. *Id.* at 4-7. Petitioner's chief complaint regarding Vazquez's inculpatory trial testimony appears to be that it was inconsistent with a prior statement Vazquez gave to law enforcement early in the investigation which did not initially implicate Petitioner. *See id.* at 6. ("By affirmatively omitting the self-incriminating and inconsistent statement of its key witness Mr. Vazquez the government by a vindictive presentation obtained a conviction of an innocent man by testimony known to the government to be perjured, where the presence of a prior recorded statement made by the said witness clearly exonerates the defendant.").

Aside from being procedurally defaulted, Petitioner's argument regarding Vazquez's allegedly false inculpatory testimony is substantively meritless as well. "To establish prosecutorial misconduct for the use of false testimony, a defendant must show the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010). However, the Eleventh Circuit has held that evidence of "a prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct." *Id.* at 1208; *see also United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994) ("We

refuse to impute knowledge of falsity to the prosecutor where a key government witness'[s] testimony is in conflict with another's statement or testimony."); *Hays v. Alabama*, 85 F.3d 1492, 1499 (11th Cir. 1996) (determining there was no due process violation where "there has been no showing that [the witness's] later, rather than earlier, testimony was false"); *United States v. Gibbs*, 662 F.2d 728, 730 (11th Cir. 1981) ("Though knowing prosecutorial use of false evidence or perjured testimony violates due process . . . it is not enough that the testimony . . . is inconsistent with prior statements."); *United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981) ("[D]ue process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements."). And here, Petitioner has done nothing more than superficially challenge the veracity of Vazquez's trial testimony, which is facially insufficient to demonstrate prosecutorial misconduct. Therefore, pursuant to Eleventh Circuit precedent, this aspect of Petitioner's first ground for relief should be summarily denied.

Within his first ground for relief, Petitioner also alleges that the prosecuting attorney "suppressed" an agreement with Vazquez to dismiss Count One of the Indictment in exchange for his testimony. Doc. 1 at 7. As to Petitioner's allegation that the Government "concealed" its agreement with Vazquez, not only is this claim procedurally defaulted, but this accusation is affirmatively contradicted by the fact that the Government's written plea agreement with Vazquez was *publicly filed* in the docket

in Petitioner's case *before* trial (*See* Cr. Doc. 80), and that Petitioner's trial counsel cross-examined Vazquez on the very terms of the agreement that Petitioner claims were concealed by the Government. *See* Doc. 132 at 137-138 (POTTER: "And, in this case, the government agreed to – if you plead to . . . count three, which is the possession and aiding and abetting and possessing a stolen firearm, that they would drop – against you, they would drop the main count, which is the robbery of the pawnshop? . . . And, in return for that, one of the things that you have to do is you have to cooperate with the government and come in here and testify in court today?").

Petitioner also alleges that the prosecuting attorney failed to provide him with "material evidence" in the form of exculpatory letters allegedly authored by a man named *Sebastian Munios Ramirez,* who the Petitioner characterizes as the actual assailant in this case.[2] Aside from being procedurally defaulted, this allegation is also demonstrably false. On November 5, 2021, the Government provided letters it received from a someone identifying themselves as *Sebastian Munios Ramirez* to counsel for Petitioner via e-mail, *even though* they were obvious forgeries. Attached as *Government's Exhibit One* is a copy of the e-mail that the prosecuting attorney sent to Neil Potter, attorney of the Petitioner, on November 5, 2021, which includes the two letters that Petitioner claims were withheld by the Government in his § 2255 motion. Moreover, even assuming *arguendo* that the Government failed to disclose these so-

[2] Curiously, while Petitioner claims in his first ground that the prosecuting attorney *concealed* this exculpatory evidence, in his third ground for relief Petitioner alleges that the prosecuting attorney actually *provided* this exculpatory exculpatory evidence to his attorney but threatened him not to use it in trial. *Compare* Doc. 1 at 10-11 *with* Doc. 1 at 18-19.

called exculpatory letters authored by *Sebastian Munios Ramirez;* Petitioner's claim of prosecutorial misconduct should still be summarily denied because he fails to demonstrate prejudice, a necessary component of any claim of prosecutorial misconduct on the basis of withheld evidence.[3] *See, e.g., Banks v. Dretke*, 540 U.S. 668, 691 (2004) ("We [have previously] set out in *Strickler v. Greene*, 527 U.S. 263, 281–282 (1999), the three components or essential elements of a *Brady* prosecutorial misconduct claim: 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; *and prejudice must have ensued.*'") (emphasis added). Therefore, both of Petitioner's claims of withheld or "suppressed" evidence should be summarily denied as well.

B. Ground Two: Actual Innocence

As his second ground for relief, the Petitioner alleges "actual innocence" of his crimes of conviction, and claims that there is "newly discovered evidence of the actual person who committed the crime." Doc. 1 at 14-16. In support of his claim of actual innocence, Petitioner attaches several exhibits to his motion: *Petitioner's Exhibit A* purports to be a sworn affidavit[4] allegedly authored by *Sebastian Munios Ramirez* (a/k/a "Sabi") confessing to committing the robbery in this case; *Petitioner's Exhibit B* purports

[3] The Petitioner testified in trial that he did not commit the robbery charged in this case, but instead it was committed by a shadowy figure named *Sabi* who set him up. *See* Petitioner's Trial Testimony, Doc. 133 at 19-137. As the defendant pursued the same line of defense that was outlined in the letters he alleges were withheld, he has failed to show any meaningful prejudice.

[4] Although titled as such, Petitioner's Exhibit A is *neither* a sworn affidavit, *nor* an unsworn declaration under penalty of perjury under 28 U.S.C. § 1746.

to be a copy of the envelope that contained the affidavit; and Petitioner's *Exhibit C* purports to be a copy of a letter allegedly authored by *Sebastian Munios Ramirez* that Petitioner received.

Even in a light most favorable to the Petitioner, his "actual innocence" claims as raised in ground two of his motion are not cognizable under § 2255, because they do not raise any constitutional issue. The Eleventh Circuit does not recognize freestanding claims of actual innocence as constitutional claims in § 2255 cases. *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("[O]ur precedent forbids granting habeas relief based upon a claim of actual innocence . . . in non-capital cases); *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) ("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by [petitioner's] failure to timely file his § 2255 motion.") (citation omitted); *Herrera v. Collins*, 506 U.S. 390, 390–91 (1993) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation."). Accordingly, Petitioner's second ground for relief should be summarily denied by this Court as well, as it is not independently cognizable in a § 2255 motion.

C. Ground Three: Ineffective Assistance of Counsel

As his third ground for relief, the Petitioner alleges that he was denied effective assistance of counsel for various reasons outlined below. Petitioner's trial attorney Neil Potter provided the undersigned a written statement regarding Petitioner's § 2255

ineffective assistance allegations against him, which is attached to this response as *Government's Exhibit Two.*

As his first complaint with his attorney's performance, Petitioner alleges that his attorney "neglected to investigate . . . and neglected to call . . . [*Sebastian Munios Ramirez*] as a witness" in trial. Doc. 1 at 18. According to the Petitioner, *Sebastian Munios Ramirez* was the actual assailant and so his attorney's failure to call him as a witness was ineffective. Yet, Petitioner offers no suggestion as to how his attorney—or anyone for that matter—could have located the mysterious *Sebastian Munios Ramirez,* a person who appears to be nothing more than a figment of Petitioner's imagination. Aside from unsworn and unauthenticated handwritten letters, this Court has nothing before it from which to conclude *Sebastian Munios Ramirez* is a real person. As such, this claim against his trial counsel amounts to nothing more than a frivolous and conclusory allegation of ineffectiveness, which should be summarily denied. As Petitioner's trial counsel aptly notes: "[T]he bottom line is that [*Sebastian Munios Ramirez*] does not exist. . . . It is quite difficult to contact, subpoena and call as a witness a non-existent person." *Government's Exhibit Two* at 1.

Second, Petitioner complains that his attorney "failed to place into evidence letters received by the government from the witness *Mr. Ramirez*" or "photo-line-up cards . . . by witnesses of the capital pawn." Doc. 1 at 18-19. Though he criticizes his counsel's failure to introduce such items of evidence he fails to articulate how such evidence would have been admissible in trial. And in fact, both items would be

inadmissible as evidence in trial. Letters allegedly written by a non-testifying witness are inadmissible hearsay pursuant to Fed. R. Evid. 802. So too are photographic lineup cards that *fail* to identify a person after perceiving the person. See Fed. R. Evid. 801(d)(1)(C) (excepting from the definition of hearsay only statements of a prior identification of a person after perceiving the person). As such, these allegations of ineffective assistance of counsel are patently frivolous and should be summarily denied as well.

Third, Petitioner complains that his attorney "failed to file a motion requesting . . . any deals, promises, or inducements made to government witnesses in exchange for their testimony" and "failed submit a motion ordering the United States to produce any statement of [a] witness." Doc. 1 at 19-20. His attorney, however, never had to make such motions because the Government affirmatively disclosed all *Brady*, *Giglio*, and *Jencks* material in advance of trial in this matter, mooting the need for trial counsel to file any such motion. Aside from a conclusory allegation, Petitioner fails to identify anything in particular that he believes the Government should have disclosed that it did not. As such, this claim fails as well, and should be summarily denied.

Last, Petitioner alleges that his attorney "allowed the government to intimidate the defense" and "interfere in certain ways with the ability of counsel to make independent decisions." Doc. 1 at 18-20. This allegation is facially insufficient to merit relief as it is merely a conclusory allegation of general ineffectiveness, subject to summary denial. *See Aron*, 291 F.3d at 714–15.

CONCLUSION

In this case, each of the Petitioner's three grounds cited in support of vacating his sentence are substantively meritless and he has failed to meet *his* burden of establishing the need for an evidentiary hearing. Therefore, his motion should be summarily denied in its entirety.

Respectfully submitted,

ROGER B. HANDBERG
United States Attorney

By: */s/ Simon R. Eth*

SIMON R. ETH
Assistant United States Attorney
Florida Bar No. 0091415
2110 First Street, Suite 3-137
Ft. Myers, Florida 33901
Telephone: (239) 461-2200
Facsimile: (239) 461-2219
E-mail: simon.eth@usdoj.gov

Raynaldo Ray Quiroga v. United States **Case No.: 2:22-cv-665-SPC-NPM**
2:21-cr-66-SPC-NPM

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, and mailed a copy of this filing to the following non-CM/ECF participant:

Raynaldo Ray Quiroga
56156-509
FCI Coleman
Federal Correctional Institution
P.O. Box 1033
Coleman, FL 33521

/s/ Simon R. Eth
SIMON R. ETH
Assistant United States Attorney
Florida Bar No. 0091415
2110 First Street, Suite 3-137
Ft. Myers, Florida 33901
Telephone: (239) 461-2200
Facsimile: (239) 461-2219
E-mail: simon.eth@usdoj.gov

A-4

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RAYNALDO RAY QUIROGA,

Plaintiff,

v.

Case Nos.: 2:22-cv-665-SPC-NPM
2:21-cr-066-SPC-NPM

UNITED STATES OF AMERICA,

Defendant.
_____/

OPINION AND ORDER[1]

Before the Court is Raynaldo Ray Quiroga's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 1).[2]

BACKGROUND

On May 19, 2021, a man dressed as a sheriff's deputy entered Capital Pawn in LaBelle, Florida, and approached and handcuffed an apparent customer named Jesus Alexis Vazquez. The man instructed two employees of Capital Pawn to lay face-down, then zip-tied their hands behind their backs.

[1] Disclaimer: Papers hyperlinked to CM/Cr-Doc. may be subject to PACER fees. By using hyperlinks, the Court does not endorse, recommend, approve, or guarantee any third parties or their services or products, nor does it have any agreements with them. The Court is not responsible for a hyperlink's functionality, and a failed hyperlink does not affect this Order.
[2] The Court cites to documents from the docket of Case No. 2:22-cv-665-SPC-NPM as "Doc. __" and documents from the docket of Case No. 2:21-cr-66-SPC-NPM as "Cr-Doc. __."

With the employees restrained, the man removed six guns from an open safe behind the counter, exited the store, and drove away in a Chrysler 300. An ATF investigation quickly homed in on Quiroga based on an anonymous tip submitted after a similar incident in 2019. Quiroga became a suspect because his appearance is consistent with security footage of the robber, and because he owned a Chrysler vehicle that could have been the getaway car.

A grand jury charged Quiroga with four crimes stemming from the robbery: Hobbs Act robbery (Count 1), brandishing a firearm in furtherance of a crime of violence (Count 2), possessing a stolen firearm (Count 3) and possessing a firearm as a convicted felon (Count 4). (Cr-Doc. 1). The grand jury also charged Vazquez with Counts 1 and 3. United States Magistrate Judge Mac R. McCoy appointed attorney Neil Potter to represent Quiroga. (Cr-Doc. 29). Vazquez pled guilty to Count 3 and agreed to testify at Quiroga's trial, and the government dropped Count 1 against Vazquez. After a three-day trial, the jury found Quiroga guilty on all counts. (Cr-Doc. 95). The Court sentenced Quiroga to a 480-month prison term. (Cr-Doc. 117). And the Eleventh Circuit Court of Appeals affirmed. (Cr-Doc. 138).

LEGAL STANDARD

A prisoner in federal custody may move for his sentence to be vacated, set aside, or corrected on four grounds:

> [1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack.

28 U.S.C. § 2255. Relief under § 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). A petitioner bears the burden of proving the claims in a § 2255 motion. *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (collecting cases).

DISCUSSION

A. Ground 1: Prosecutorial misconduct

Quiroga argues the government violated his right to due process in three ways. First, he claims the prosecution knowingly elicited perjured testimony from his co-defendant, Jesus Vazquez. At trial, Vazquez testified that he had known Quiroga for about two years, and he described the May 19, 2021 robbery of Capital Pawn, which he and Quiroga had planned over the previous several days. Vazquez admitted he initially lied to police when they first questioned him, but he later told an investigator about his role in the robbery and identified Quiroga as the culprit. Vazquez also identified Quiroga at trial. (Cr-Doc. 132 at 124-32). Quiroga claims Vazquez's testimony was inconsistent

with his May 20, 2021 statement to police, in which he incorrectly described Quiroga's appearance.

"To establish prosecutorial misconduct for the use of false testimony, a defendant must show that the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." *United States v. Harris*, 7 F.4th 1276, 1294 (11th Cir. 2021). "[A] prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct." *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010); *see also Hays v. Alabama*, 85 F.3d 1492, 1499 (11th Cir. 1996) (determining there was no due process violation when "there has been no showing that [the witness's] later, rather than earlier, testimony was false").

Quiroga fails to show that Vazquez gave any false testimony. Even assuming Vazquez incorrectly described Quiroga to investigators, that does not suggest Vazquez lied at trial. Nor does it suggest the prosecution knowingly used perjured testimony. Vazquez's recognition of Quiroga was not in question because his identification of Quiroga was not based on physical appearance alone. Rather, Vazquez was able to identify Quiroga as the culprit because they had been friends for years, and because they planned and carried out the robbery together. What is more, Vazquez admitted on direct examination that he initially lied to police when they questioned him about the robbery.

Second, Quiroga claims the government violated his due process rights by suppressing its agreement to dismiss Count 1 against Vazquez. The record conclusively refutes this claim. The government filed the plea agreement on the docket. (Cr-Doc. 80). And Quiroga's attorney—Neil Potter—questioned Vazquez about the agreement on cross-examination. (Cr-Doc. 132 at 137-38).

Third, Quiroga claims the prosecution withheld evidence—namely, two letters that purport to be confessions from a person named Sebastian Munios Ramirez. The record refutes this claim. The prosecutor emailed the letters to Potter on November 5, 2021, a fact Quiroga acknowledges in Ground 3 of his motion. (Doc. 11-1).

Quiroga fails to demonstrate prosecutorial misconduct. Ground 1 is denied.

B. Ground 2: Actual Innocence

Quiroga next argues newly discovered evidence proves his innocence. He points to a letter and an affidavit that purport to be admissions from Sebastian Munios Ramirez. They describe a convoluted plot by Ramirez to frame Quiroga for the robbery. Even viewing this ground in a light most favorable to Quiroga, it cannot warrant § 2255 relief. "Actual innocence is not itself a substantive claim[.]" *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005); *see also Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for

federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). Thus, Ground 2 is denied.

C. Ground 3: Ineffective Assistance of Counsel

Quiroga asserts three instances of ineffective assistance of counsel. Criminal defendants have a Sixth Amendment right to reasonably effective assistance of counsel. To determine whether a convicted person is entitled to relief under the Sixth Amendment, courts engage in a two-part test. A petitioner must establish (1) that counsel's performance was deficient—that is, it fell below an objective standard of reasonableness—and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Courts need not address both prongs if the petitioner fails to satisfy either of them. *Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1344 (11th Cir. 2010).

When considering the first prong, there is a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance." *Sealey v. Warden*, 954 F.3d 1338, 1354 (11th Cir. 2020) (quoting *Strickland*, 466 U.S. at 694). To show prejudice, the petitioner must establish that "but for counsel's unprofessional performance, there is a *reasonable probability* the result of the proceeding would have been different." *Putman v. Head*, 268 F.3d 1223, 1248 (11th Cir. 2001) (citing *Strickland*, 466 U.S. at 694)

(emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Sealey*, 954 F.3d at 1355.

Quiroga first faults Potter because he did not investigate the claims made in the Ramirez letters, call Ramirez to testify, or use the letters at trial. Potter provided a statement explaining why he disregarded the Ramirez letters: they are obvious forgeries, and Ramirez does not exist. (Doc. 11-4). Those are reasonable conclusions. The letters appear to be nothing more than a clumsy attempt to deflect blame from Quiroga. Quiroga does not explain how the letters—which are unauthenticated hearsay—would have been admissible. And aside from the letters, there is no evidence that Ramirez is a real person. Even if Ramirez were real, the letters did not state how Potter could compel his attendance at trial. Rather, they said Ramirez would turn himself in if Quiroga was released. (Doc. 11-2; Doc. 11-3) Obviously, Potter could not arrange Quiroga's release. Potter cannot be deemed deficient for failing to call a non-existent witness or present inadmissible evidence, and Quiroga suffered no prejudice from their absence.

Quiroga also faults Potter for failing to enter photo line-up cards into evidence. Investigators showed the cards to the two employees of Capital Pawn during a photo lineup. Neither employee identified Quiroga, and Potter highlighted that weak point in the government's case during closing argument. Quiroga does not state how the photo cards could have helped his case. There

is no reasonable probability that presentation of the photo line-up cards would have changed the outcome in this case.

Finally, Quiroga complains that Potter failed to file a motion requesting any deals with government witnesses and statements made by government witnesses. But Quiroga does not identify any documents or information the government failed to produce. Thus, there was no reason for Potter to file such a motion, and Quiroga suffered no prejudice.

Quiroga fails to allege any deficient performance by Potter or any prejudice stemming from Potter's representation. Ground 3 is denied.

EVIDENTIARY HEARING

A court must hold an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The Court finds an evidentiary hearing unwarranted in this case. The record conclusively proves that all three grounds of Quiroga's motion have no merit.

CERTIFICATE OF APPEALABILITY

A prisoner seeking § 2255 relief has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). To appeal such a denial, a district court must first issue a certificate of appealability, which "may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (citations omitted). The Court finds that Quiroga has not made the requisite showing. *See* 28 U.S.C. § 2255(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84. Accordingly, a certificate of appealability is **DENIED**.

Accordingly, it is now

ORDERED:

Raynaldo Ray Quiroga's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 1) is **DENIED**. The Clerk is **DIRECTED** to terminate any motions and deadlines, enter judgment against Petitioner, and close this case.

DONE and **ORDERED** in Fort Myers, Florida on May 11, 2023.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

SA: FTMP-1
Copies: All Parties of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RAYNALDO RAY QUIROGA,

Plaintiff,

v.

Case No: 2:22-cv-665-FtM-38NPM

Criminal Case No. 2:21-CR-66-SPC-NPM

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Opinion and Order entered May 12, 2023, the Petitioner's motion to vacate, set aside or correct sentence, is hereby denied as to all claims. A certificate of appealability and leave to appeal in forma pauperis are denied.

ELIZABETH M. WARREN, CLERK

By: jlk, Deputy Clerk

Date: May 12, 2023

Copies furnished to:

Counsel of Record
Unrepresented Parties

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