MICHAEL STAPLETON

V.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI FROM THE ELEVENTH CIRCUIT COURT OF APPEALS.

1) 2013 Indictment
2) 2014 Indictment
3) Order of dismissal of the 2013 Indictment
4) CR-DE-33
5) CR-DE-43
6) CR-DE-56
7) CR-DE-96
8) CR-DE-99
9) CR-DE-114
10) CR-DE-133
11) CR-DE 152
12) Motion to Vacate and Memorandum of Law
13) CV-DE-25 Governments response to motion to vacate
14) Movants reply to governments response
15) CV-DE 28 Oder denying motion to vacate
16) Motion to COA-Motion in support of COA
17) Motion to Expand the request for COA
18) Mandate denying request for COA
19) Status Conference transcripts
20) Sentencing transcripts
21) Sworn Declaration of Geicy Souza and Michelle Pacheco
22) Letter from attorney Mr. Richard Della Fera
23) Solicitor Gereral response to first Writ of Certiorari
24) Opinion of the Court of Appeals
25) Grand Jury transcripts of 2014 indictment.

APPENDIX LIST

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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June 27, 2024

Michael Stapleton
FCI Petersburg Med - Inmate Legal Mail
PO BOX 1000
PETERSBURG, VA 23804

Appeal Number: 24-10024-G
Case Style: Michael Stapleton v. USA
District Court Docket No: 9:23-cv-81082-DMM
Secondary Case Number: 9-14-cr-80151-DMM-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10024

MICHAEL STAPLETON,

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. 9:23-cv-81082-DMM

ORDER:

Michael Stapleton is a federal prisoner serving a 262-month total sentence for 47 convictions related to the smuggling of migrants into the United States. He filed a *pro se* 28 U.S.C. § 2255 motion to vacate, alleging that: (1) the government: (a) withheld exculpatory evidence; (b) elicited false testimony; and (c) made improper closing arguments; (2) trial counsel failed to challenge the indictment on certain bases; (3) appellate counsel failed to challenge the sufficiency of the evidence for certain convictions; and (4) appellate counsel failed to argue that certain sentencing enhancements violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Stapleton seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis*. He also seeks to expedite his COA motion and to "expand" his COA motion, asserting three new claims.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denied a motion to vacate on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the movant states a valid claim alleging the denial of a constitutional right, and (2) whether the district court's procedural ruling was correct. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court denied a motion to vacate on substantive grounds, the movant must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Id.*

Here, reasonable jurists would not debate the denial of Ground 1 as procedurally defaulted, as Stapleton failed to raise this issue at trial or on direct appeal. *See Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). Further, the district court correctly determined that Stapleton failed to show cause to excuse this default, as appellate counsel was not ineffective. First, a challenge under *Brady v. Maryland*, 373 U.S. 83 (1963), based on Souza's and Pacheco's allegedly withheld credible-fear statements, would have been meritless, as the statements would have had little, if any, additional impeachment value. *See Spivey v. Head*, 207 F.3d 1263, 1283 (11th Cir. 2000). For the same reason, even if considered newly discovered evidence, the statements did not show that it was more likely than not that no reasonable juror would have convicted him had the statements been introduced a trial. *See Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001). Accordingly, the miscarriage-of-justice exception did not apply.

Second, Stapleton failed to show that appellate counsel was deficient for not raising a challenge under *Giglio v. United States*, 405 U.S. 150 (1972), based on Pacheco's and Souza's testimony that Stapleton sexually assaulted them. Even if the two versions of events were inconsistent, that alone would not have shown that Souza's and Pacheco's trial testimony was false, or that the government knew as much. *See Maharaj v. Sec'y for Dep't of Corrs.*, 432 F.3d 1292, 1312 (11th Cir. 2005). Third, Stapleton failed to show that appellate counsel was deficient for not arguing that the prosecutor made improper comments during closing argument. The comments accurately recounted Souza's and Pacheco's testimony and drew a

reasonable inference. *See United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984). Accordingly, Stapleton failed to show cause to excuse his default of Ground 1.

Reasonable jurists would not debate the denial of Ground 2, as the district court correctly found that Stapleton had no constitutional right to standby counsel and, thus, no right to effective standby counsel. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). Reasonable jurists would not debate the denial of Ground 3, as appellate counsel was not deficient for failing to challenge the sufficiency of the evidence to convict Stapleton of Counts 25 through 46. The evidence at trial proved beyond a reasonable doubt that Stapleton committed the substantive smuggling offense under the theory of aiding and abetting. *United States v. Dominguez*, 661 F.3d 1051, 1065 (11th Cir. 2011).

Finally, reasonable jurists would not debate the denial of Ground 4, as appellate counsel was not deficient for failing to argue that certain sentencing enhancements violated *Apprendi*, as they did not increase his statutory maximum sentence. *See United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000). Accordingly, Stapleton's COA motion is DENIED, and his remaining motions are DENIED AS MOOT.

/s/ Robin S. Rosenbaum

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-81082-CV-MIDDLEBROOKS
(CASE NO. 14-80151-CR-MIDDLEBROOKS)

MICHAEL STAPLETON,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO VACATE BROUGHT PURSUANT TO 28 U.S.C. § 2255

THIS CAUSE is before the Court on the *pro se* Second Amended Motion to Vacate brought pursuant to 28 U.S.C. § 2255 (DE 23-1)[1] ("Second Motion") with supporting Second Amended Memorandum of Law (DE 23-2) ("Second Memorandum") filed by Movant Michael Stapleton ("Movant") attacking his convictions and sentences on forty-seven counts relating to his role in smuggling aliens into the United States following a jury verdict. *See United States v. Stapleton*, No. 9:14-cr-80151-DMM (S.D. Fla. 2014). Movant raises a claim of prosecutorial misconduct, and three claims alleging ineffective assistance of trial and appellate counsel. (DE 21-1; DE 23-2). For the reasons set forth below, Movant's Second Amended Motions is **DENIED**.

[1] The notation "CDE ___" refers to docket entries in the criminal case, while the notation "DE ___" refers to docket entries in this civil proceeding.

I. BACKGROUND

A. Criminal Proceedings

On September 4, 2014,[2] an Indictment was returned charging Movant with two counts of conspiracy to induce aliens to enter the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) (Counts 1–2); twenty-two (22) counts of encouraging or inducing aliens to enter the United States, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv), (v)(II); 18 U.S.C. § 2 (Counts 3–24); twenty-two (22) counts of knowingly bringing an alien into the United States for private financial gain, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2 (Counts 25–46); and aiding an inadmissible alien who has been convicted of an aggravated felony to enter the United States, in violation of 8 U.S.C. § 1327 and 18 U.S.C. § 2 (Count 47). (CDE 1). On October 7, 2018, while represented by counsel, Movant "[m]oved to dismiss the indictment on several grounds, including that the indictment impermissibly charged two conspiracy counts for a single conspiracy, that those counts didn't identify his co-conspirators, and that the indictment didn't specify which section of the aiding-and-abetting statute was relevant to him." *United States v. Stapleton*, 39 F.4th 1320, 1326 (11th Cir. 2022). Defense counsel "[a]lso filed a motion to dismiss the indictment on speedy-trial grounds." *Id.* The Court denied the motions. *Id.*; *see also* (CDE 95; CDE 96).

Pursuant to the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, multiple attorneys were appointed and then subsequently discharged by Movant.[3] (CDE 8; CDE 20; CDE 23 at 1; CDE 25;

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[2] On that same day, Movant was charged in a separate case with conspiracy to encourage and induce an alien to enter the United States, eleven counts of encouraging and inducing an alien to enter the United States and aiding and assisting certain aliens to enter the United States. *See United States v. Stapleton*, No. 13-80201-CR-UNGARO (S.D. Fla. 2013) (the "Ungaro Case").

[3] Specifically, On August 1, 2018, the Court appointed Harry Solomon, Esquire ("Atty Solomon") to represent the Movant. (CDE 8). On September 13, 2018, Atty Solomon filed a motion to withdraw as Movant's CJA Counsel because "[t]he attorney-client relationship . . . is eroded beyond repair;" and four days later Movant filed a *pro se* motion to discharge counsel, alleging

CDE 40; CDE 73). On December 18, 2018, a *Faretta*[4] hearing was held by United States Magistrate Judge John J. O'Sullivan based on Movant's "[s]tated desire that he wished to represent himself in this matter for all pre-trial matters and at trial." (CDE 73 at 1). At the hearing, after being "[a]dvised of his right to counsel . . . the Defendant [Movant] knowingly and voluntarily waived that right." (*Id.*). As a result, Movant's CJA counsel, Allen S. Kaufman, Esquire ("Atty Kaufman") was "[d]ischarged as counsel of record" and ordered to "[s]erve only as standby counsel." (*Id.*). Following a three-day jury trial, on January 30, 2019, the jury returned a Verdict convicting Movant as charged. (CDE 141).

Prior to sentencing, the probation officer prepared a Presentence Investigation Report ("PSI") which described Movant's crimes and calculated his criminal history. Because Movant was previously convicted of violating 8 U.S.C. § 1327, the base offense level was set at 23. (PSI ¶ 112). The base offense level was increased to a level 43 based on specific offense characteristics. (PSI ¶¶ 113–123). Movant had zero criminal history points which established a criminal history category I. (PSI ¶ 126). Although Movant's advisory guideline range was life imprisonment based on an offense level 43 and a criminal history category I, because the statutorily authorized maximum sentences were less than the minimum of the applicable guideline range, the guideline

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counsel insists Movant plead guilty, utilizing "scare tactics," rather than preparing a defense to the charges. (CDE 20; CDE 23 at 1). Following a September 17, 2018 hearing, the Court granted defense counsel's motion (CDE 20), and appointed replacement CJA Counsel, Allen S. Kaufman, Esquire ("Atty Kaufman"). (CDE 25). On September 29, 2018, Movant filed a letter seeking the discharge Atty Kaufman and appointment of new CJA counsel because Atty Kaufman was refusing to file pre-trial motions on Movant's behalf. After holding a hearing on the motion on October 15, 2023, the Court entered an Order denying the motion for the reasons stated at the hearing. (CDE 40). Atty Kaufman was also discharged as counsel of record and Movant allowed to represent him. (CDE 73).

[4] *Faretta v. California*, 422 U.S. 806 (1975).

range was reduced to 5,520 months in prison. (PSI ¶ 172). Statutorily, Movant faced the following statutory maximums terms of imprisonment: (a) ten years as to Count 1 and 2; (b) five years as to Counts 3 through 24; (c) ten years as to Counts 25, 26, and 47; and (d) fifteen years as to Counts 27 through 46. (PSI ¶ 171).

On April 10, 2019, Movant appeared for a sentencing hearing. (CDE 202). At the hearing, Movant advised the Court that he wished to have an attorney appointed to represent him during sentencing and on appeal. (*Id.*). On that same date, I entered an Order appointing Attorney Richard Della Fera ("Atty Della Fera") to represent Movant at sentencing and on appeal, and rescheduled sentencing for May 23, 2019. (*Id.*). Thereafter, Movant filed counseled Objections to the PSI, challenging the prior convictions identified in paragraphs 3 through 13, claiming none are related to him, and denied the facts set forth in paragraph 14 through 105. (CDE 205).[5]

On July 12, 2019, Movant appeared for sentencing. (CDE 259; CDE 260; CDE 278). I heard testimony from the victims, Michelle Pacheco and from Wilson Adrian Acevedo-Bedoya, and found sufficient evidence that Movant carried a firearm during the smuggling operations, but insufficient notice and evidence regarding his carrying or brandishing a knife. (CDE 278 at 101–02). Based on my findings,[6] the total offense level was reduced to a level 41, resulting in an advisory guideline range of 324 to 405 months of imprisonment. (*Id.* at 102). After considering the statements of all parties, the PSI containing the advisory guidelines and statutory factors, I varied downward from the advisory guidelines, and sentenced Movant to a term of 262 months of

[5] Prior to Atty Della Fera's appointment, Movant filed *pro se* Objections to the PSI. (CDE 176).

[6] The findings included application of a six-level not the recommended nine-level enhancement, limiting the extent of the smuggling operation "to those who were proven at trial and also the Rule 404(b) evidence." (*Id.* at 111).

imprisonment consisting of: 120 months in prison as to Count 1 and 2 to run consecutively to each other; 60 months as to Counts 3 through 24 to run concurrently with each other and to all other counts; 120 months in prison as to Counts 25 to 46 to run concurrently with each other and to all other counts; and 22 months in prison as to Count 47 to run consecutively to Counts 1 and 2. (CDE 278 at 115-16; CDE 260 at 2). On July 12, 2022, the Eleventh Circuit Court of Appeals affirmed Movant's convictions and sentences.[7] *United States v. Stapleton*, 39 F.4th 1320 (11th Cir. 2022). On June 30, 2023, the United States Supreme Court denied Movant's petition for writ of certiorari. *Stapleton v. United States*, 143 S.Ct. 2693 (2023).

B. Motion to Vacate Proceedings

On July 14, 2023, Movant filed an initial *pro se* § 2255 Motion. (DE 1 at 15). Before the Government filed a response, Movant filed a motion for leave to amend with a supporting memorandum. (DE 8; DE 8-1; DE 8-2). Because the proposed motion lacked factual support, I ordered Movant to file a second amended motion, if he chose to do so. (DE 9). On September 12, 2023, Movant complied, and timely filing the Second Motion (DE 23-1) and Second Memorandum (DE 232). Therein, Movant raises the following grounds for relief: (1) Prosecutorial misconduct (a) for withholding evidence that could be use at trial and sentencing, (b) for soliciting and using perjured testimony; (c) during closing argument to inflame the passion and mislead the jury regarding the charged offenses; (2) trial counsel was ineffective for failing to challenge the Indictment on the basis that it failed to state an offense, violated congressional intent, was jurisdictionally defective, and violated Movant's double jeopardy rights; (3) appellate counsel was ineffective for failing to challenge the sufficiency of the evidence as to Counts 25 through 46; and

[7] On appeal, Movant's counsel, Atty Della Fera, filed a motion to withdraw, but the appellate court denied the motion, directing counsel to file a merits brief.

(4) appellate counsel was ineffective for failing to challenge the 12-level enhancement imposed at sentencing in violation of *Apprendi*.[8] (DE 23–1 at 4–8; DE 23-2 at 1–8). The Government has filed a Response (DE 25) with multiple exhibits, and Movant has filed a Reply (DE 27).

II. APPLICABLE LEGAL STANDARDS

A. 28 U.S.C. § 2255

The grounds for relief under 28 U.S.C. § 2255 are extremely limited. An inmate 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. 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011) (citing § 2255(a)). A claim is procedurally defaulted if it could have been, but was not raised on direct appeal, unless Movant shows: (1) cause for the default and actual prejudice or (2) a miscarriage of justice (also known as the "actual innocence" exception). *See McKay*, 657 F.3d at 1196 (citing *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004)).

B. Ineffective Assistance of Counsel Principles

A prisoner challenging counsel's effectiveness must demonstrate that: (1) counsel's performance was deficient, and (2) a reasonable probability that the deficiency resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). The *Strickland* standard also applies to claims of ineffective assistance of counsel on appeal. *See Chateloin v. Singletary*, 89 F.3d 749, 752 (11th Cir. 1996) (citing *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987) ("The standard for ineffective assistance is the same for trial and appellate counsel."); *see also Eagle v. Linahan*, 279 F.3d 926, 937 (11th Cir. 2001) (citing *Murray v. Carrier*, 477 U.S.

[8] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

478, 488 (1986) (holding "[a]ttorney error is cause for procedural default only if the error rises to the level of constitutionally deficient assistance of counsel under the Sixth Amendment").

Deficient performance requires Movant to demonstrate counsel's actions were unreasonable or fell below prevailing professional norms. *See Strickland*, 466 U.S. at 688. The *Strickland* deficiency prong does not require a showing of what the best or "most good lawyers" would have done, but rather whether "[s]ome reasonable lawyer at trial the trial could have acted as defense counsel acted in the trial at issue and not what 'most good lawyers' would have done." *Dingle v. Sec'y, Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004)). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Id.* (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir.1983)). *Strickland*'s prejudice prong requires Movant to establish that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. If Movant cannot meet one of *Strickland*'s prongs, the Court need not address the other prong. *See id.* at 697; *Brown v. United States*, 720 F.3d 1316, 1326 (11th Cir. 2013). Bare and conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1332–33 (11th Cir. 2012). Movant, not the Government, bears the burden of proof to establish that vacatur of the judgment is appropriate. *See Beeman v. United States*, 899 F.3d 1218, 1220–21 (11th Cir. 2018) (*en banc*).

III. DISCUSSION

A. Prosecutorial Misconduct Claim.

In claim 1, Movant asserts the Government engaged in prosecutorial misconduct by: (1) withholding evidence that could be used to impeach government witnesses at trial and at sentencing; (2) soliciting perjurious testimony at trial that the victims were sexually assaulted "several times, at the same time;" and (3) inflaming the jury's passion and misleading the jury regarding "a sexual assault that never existed" with improper remarks during closing argument. (DE 23-1 at 4; DE 23-2 at 1–3).

1. Procedural Default Defense.

The Government correctly argues the prosecutorial misconduct claim is procedurally defaulted because it could have been but was not raised on direct appeal. (DE 25 at 8–9). As cause to excuse the procedural default, Movant argues in his reply that counsel was ineffective for failing to pursue the issue on appeal. (DE 26 at 2). A claim of ineffective assistance of counsel may constitute cause for a procedural default. *See Murray*, 477 U.S. at 488. However, only a meritorious claim of ineffective assistance of counsel can constitute "cause," which occurs when "[t]he arguments the defendant alleges his counsel failed to raise were significant enough to have affected the outcome of his appeal." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (citing *Miller v. Dugger*, 858 F.2d 1536, 1538 (11th Cir. 1988)).

As discussed below, movant has not demonstrated that counsel was ineffective, much less that had his prosecutorial misconduct claim been raised on direct appeal, his convictions and sentences would have been reversed, therefore, the claim is procedurally defaulted. *McKay*, 657 F.3d at 1196. Moreover, Movant has also not shown that a fundamental miscarriage of justice exception applies to excuse the procedural default as he has not demonstrated actual innocence of

the charges for which he was convicted. *McKay*, 657 F.3d at 1196 (citing *Dretke v. Haley*, 541 U.S. 386, 388 (2004)). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citation omitted). Movant has not demonstrated that reasonable jurists would have found he was factually innocent of the charged offenses and the record proves otherwise. *See Mize v. Hall,* 532 F.3d 1184, 1195 (11th Cir. 2008) (habeas petitioner bears the burden of "establish[ing] actual innocence under the fundamental miscarriage of justice exception to the procedural default doctrine."). Consequently, the Movant's prosecutorial misconduct claim is procedurally defaulted from review in this Section 2255 proceeding.

2. Merits Discussion.

a. *Government Violated Brady.*

Movant claims the Government committed a *Brady* violation when it failed to provide potentially exculpatory and impeaching evidence—specifically, the sworn declarations of Souza and Pacheco—which could have been used at trial and sentencing. (DE 23-1 at 4; DE 23-2 at 2).[9] Movant contends Souza and Pacheco falsely testified that he sexually assaulted them "several times during the course of their stay in the Bahamas." (*Id.*). In their sworn declarations, Movant

[9] First, it is far from clear whether, in fact, the Government failed to provide Movant with the Pacheco and Souza statements prior to trial and prior to sentencing. The Government's Amended Second Response to the Standing Discovery Order (DE 101) reveals that Movant's attorneys, Atty Solomon and Atty Kaufman were both provided with law enforcement reports, ***statements***, immigration documents, photographs, NCIC reports, and sheriff video recordings. (CDE 101) (emphasis added). Moreover, the in the Second Motion in Limine Concerning the Admissibility of Other Bad Acts of the Defendant, the Government made clear that, on January 26, 2019 (a few days prior to trial), it had interviewed several migrant witnesses, including Pacheco and Souza, who indicated that they were repeatedly raped by the Movant while he was acting as their coyote in the Bahamas. (CDE 114). On this record, Movant has not met his burden of demonstrating that the statements were suppressed, as alleged. Even if suppressed, Movant has not shown a *Brady* violation.

maintains Pacheco "[n]ever mentioned being raped" and Souza "[m]ade it clear . . . she was raped two (2) times by a man named Marvin 'prior' to meeting movant."[10] (*Id.*). Movant further alleges the Government failed to provide sentencing counsel, Atty Della Fera, with Pacheco's statement so that she could be impeached at sentencing. (*Id.*).

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). "[A] defendant need not request favorable evidence from the [Government] to be entitled to it." *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009) (citing *United States v. Agurs*, 427 U.S. 97, 103–07 (1976)). The duty to disclose "encompasses impeachment material as well as exculpatory evidence." *See Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1309 (11th Cir. 2005) (citing *Strickler v. Greene,* 527 U.S. 263, 280 (1999)).

To establish a *Brady* violation, Movant must demonstrate that "(1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the [Government], either willfully or inadvertently; and (3) the [Movant] incurred prejudice." *Wright v. Sec'y, Dep't of Corr.*, 761 F.3d 1256, 1278 (11th Cir. 2014); *see also Maharaj,* 432 F.3d at 1309. "A defendant cannot meet the second prong when, prior to trial, [he] had within [his] knowledge the information by which [he] could have ascertained the alleged *Brady* material." *Wright*, 761 F.3d at 278 (alteration in original) (internal quotations and citation omitted). The prejudice prong, "[a]lso referred to as the materiality prong, is met when

[10] Movant further states that, although the Government listed the statements in their exhibit list, they never introduced them at trial, withholding the evidence from the jury's consideration. (DE 23-2 at 2).

there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (internal quotations and citation omitted).

Under the first component of a *Brady* claim, the Court must determine whether the statements by Pacheco and Souza were exculpatory or impeaching. Movant claims they were both exculpatory and impeaching because the Pacheco and Souza statements did not mention that he sexually assaulted them while they were in the Bahamas. I find the Pacheco[11] and Souza[12]

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[11] In Pacheco's October 31, 2013 sworn credible fear interview with asylum officials, Pacheco stated in August 2013, she was threatened while in the Bahamas by Marcos, a coyote who smuggles individuals into the United States. (DE 184-1 at 3). Pacheco stated she paid Marcos $15,000, but he told a friend of hers that she still owed him money. (*Id.*). Pacheco believed if she returned to Brazil, Marcos would harm, torture, and/or kill her. (*Id.* at 4). Pacheco's October 21, 2014 Affidavit corroborates her credible fear interview that Marco, the coyote who assisted with her entry into the United States, threatened her life through family members, Facebooks, and continues to search for her to cause her harm. (*Id.* at 9).

[12] In her April 11, 2018 statement, Souza explained the arrangements she made with Matteus and others to travel from Brazil to the Bahamas and then the United States. (CDE 159 at 7). According to Souza, Silas, the ringleader of the smuggling organization, instructed that, upon her arrival in the Bahamas, Souza's brother would be required to wire transfer $6,000 to one of Silas's partners, and the rest of the monies owed would be paid upon her arrived in the United States. (*Id.*). Gary, one of Silas's men, informed Souza that the captain of the vessel that would smuggle her to the United States required $10,000.00 which would have to be paid by each passenger, resulting in an additional $1,000 to $5,000 payment by each migrant. (*Id.* at 8). To obtain the funds to pay her share of the captain's fee, Souza states she called her brother, who then wired the money to Vantuir, Silas's partner in the United States. (*Id.* at 8–9). Because the transport was delayed, Souza was required to pay an additional $2,000 to Maria, Silas's coyote, for room and board at a motel and for transport to the vessel. (*Id.* at 9). Souza further stated, Marvin, the migrant transport van driver repeatedly raped her while she was in the Bahamas. (*Id.* at 10). Eventually, Souza explained she and others were transported to Movant's home, where there were a mix of Haitians, Ecuardorians, and Colombian migrants waiting to be smuggled into the United States. (*Id.* at 11). Movant demanded $4,000 per person to pay-off the police and denied Souza and the others food and water until the money was paid. (*Id.*). As a result, Souza stated she contacted her brother, who wire transferred the money. (*Id.*). On October 11, 2013, four months after she left Brazil, Souza claims she finally left the Bahamas and arrived in Miami. (*Id.* at 12). Upon arrival, Souza claims the boat captain pushed her and the others off the boat and left them on the beach. (*Id.*). Within ten minutes, Souza claims she and three other Brazilian women were found by police. (*Id.*). When interviewed by immigration officials, Souza states she identified the captain from a photograph. (*Id.*). Several months later, Souza claims her sister began receiving threatening phone calls from Silas and his coyotes. (*Id.*). When her sister tried to report the threats to the Brazilian authorities, Souza claims

statements do not offer exculpatory or impeachment evidence. *See* (CDE 184-1; CDE 159 at 7–13).

At trial, Pacheco and Souza both testified for the Government that, with the help of coyotes, including the Movant they entered the United States illegally. (CDE 216 at 32–33; CDE 217 at 20–21, 39–40). Pacheco testified she tried to escape because she feared Movant, and she and Souza "[w]ere being abused by [Movant]" and "couldn't take it anymore." (CDE 217 at 45). Both testified they traveled to the Bahamas where they were only permitted to remain for ten (10) days while their passport stamps were still valid.[13] (*Id.* at 48). Souza, Pacheco and other migrants, were moved from one location to another, eventually ending up with the Movant several months later. (*Id.* at 51–62, 65). Souza and Pacheco explained that Movant kept them in a house for approximately three weeks, where they were not free to leave, unless they were accompanied by him. (CDE 216 at 67, 112-20; CDE 217 at 44, 74–75). During that time, Movant sexually assaulted[14] Pacheco and Souza. (CDE 216 at 68–71, 107–08, 117–20, 129; CDE 217 at 45–46, 52–53, 76, 77–78). Pacheco and Souza both testified that, on the night before they were to be smuggled into the United States both Movant and Mackey Cooper sexually assaulted them together. (CDE 216 at 69–69; CDE 217 at 52–53, 76). Souza testified Movant abused her approximately five times, and on one occasion he did so with Nick, the captain of the vessel who smuggled her

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she was discouraged from doing, and again threatened as they too were part of Silas's criminal network. (*Id.* at 12–13).

[13] Pacheco and Souza paid Movant thousands of dollars to smuggle them into the United States. (CDE 216 at 64–65; CDE 217 at 50, 75).

[14] During cross-examination, it was Movant who first elicited testimony from Pacheco and Souza regarding the sexual nature of the assault. (CDE 216 at 117–19, 122–23, 125, 128; CDE 217 at 76).

and the others out of the Bahamas. (CDE 216 at 68–69, 71, 129). Souza[15] also testified that Movant abused Pacheco. (*Id.*).

In October 2021, Souza and Pacheco testified Movant turned them over to a boat captain with instructions to give them life vests, but when they neared the U.S. shoreline to have the migrants remove their vests. (CDE 216 at 77; CDE 217 at 57). Souza and Pacheco, along with nine other migrants boarded the vessel, and as they neared the Florida shores, the captain pushed Souza and the others off the boat. (CDE 216 at 84). Souza, who struggled to swim, was assisted to shore by one of the other migrants, and was unconscious, having taken in a lot of water. (*Id.* at 85–86). Pacheco and two other women stayed with Souza on the beach, where they were discovered by law enforcement. (*Id.* at 86–87). Other migrants were discovered further down the beach. (CDE 217 at 87).

Given the evidence adduced at trial, there is nothing in the record, other than Movant's assertions, to support a finding that the Government's purported suppression of the Souza and Pacheco statements were exculpatory or impeaching evidence. To the contrary, as discussed above, the statements offer nothing of value to exonerate Movant of the charged offenses. Because the evidence at issue is not exculpatory or impeaching, Movant fails to satisfy the first component of a *Brady* violation. *See Wright*, 761 F.3d at 1278.

Second, Movant has not demonstrated that the Pacheco and Souza statements were knowingly withheld prior to trial or sentencing, and the record proves otherwise. Movant does not dispute that Souza's "sworn declaration" was provided as Exhibit 24.3 on the first day of trial as

[15] Souza explained she did not mention Movant's abuse in her asylum application because she was afraid of the Movant and his connections in the United States. (*Id.* at 73–74, 118–20). Souza denied being promised anything to testify in court. (*Id.* at 125).

part of the Government's binder containing all marked exhibits for identification, but then never entered into evidence. (DE 23-2 at 2). Movant claims, however, that Pacheco's credible fear statement was withheld from Atty Della Fera who could have used it to impeach Pacheco at sentencing. (DE 23-2 at 2). This argument is refuted by the record which reveals that Atty Della Fera had a copy of Pacheco's statement and used it to cross examine Pacheco during sentencing. (CDE 278 at 58–60).

Based on the foregoing, I find Movant has not demonstrated a *Brady* violation arising from the purported suppression of the Souza and Pacheco statements either prior to trial or at sentencing because they were neither exculpatory nor impeaching. Consequently, Movant has not demonstrated *Strickland* prejudice arising from the purported suppression of this evidence. Because Movant has not demonstrated that a reasonable factfinder would have found him not guilty of the charged offenses had the alleged suppressed evidence been presented or used at trial and sentencing, Movant's claim fails on the merits. *See id.*

b. *Government Suborned Perjury.*

Movant next claims the Government suborned perjury by permitting Pacheco and Souza to testify falsely regarding Movant's alleged abuse. (DE 23-1 at 4; DE 23-2 at 3). Movant claims Pacheco and Souza never mentioned in their statements to investigators that Movant had sexually assaulted them, therefore, their testimony at trial and sentencing regarding this fact was false. (DE 23-2 at 3).

Success on a claim of prosecutorial misconduct requires a showing that the conduct infected the trial with unfairness so as to make the resulting conviction a denial of due process. *Greer v. Miller,* 483 U.S. 756, 765 (1987) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). The Supreme Court has stated that "[t]he touchstone of due process analysis in cases of

alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219 (1982). Thus, a federal habeas court must determine whether the prosecutor's actions were so egregious that his misconduct amounted to a denial of constitutional due process. *Id.* Of course, a defendant is denied due process when the Government knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States,* 405 U.S. 150, 153 (1972); *Napue v. Illinois,* 360 U.S. 264, 269 (1959).

I find the record does not support a finding that Pacheco and Souza testified falsely regarding their recollection of events. Further, during direct examination, the Government, consistent with the Court's pretrial ruling, did not elicit testimony from these witnesses regarding the nature of the Movant's assault. It was Movant, during cross-examination, that questioned the witnesses regarding the sexual nature of the assault. *See* (CDE 217 at 79–80). I also find nothing in the record to support a finding that the Government knowingly engaged in prosecutorial misconduct at trial or sentencing. Even if so, Movant has not demonstrated that the Government's actions infected the trial or sentencing proceeding with unfairness, therefore, no due process violation has been established.

c. *Improper Closing Argument by Government.*

Next, Movant claims the Government engaged in prosecutorial misconduct during closing argument by inflaming the jury's passion and misleading the jury about the non-existent sexual assault of Souza and Pacheco. (DE 23-1 at 4; DE 23-2 at 3). Specifically, Movant objects to the prosecutor's argument that the women from Brazil—Pacheco and Souza—stuck in the Bahama for months, were being abused by Movant and others. (DE 23-2 at 3 [citing CDE 224 at 77]). Movant reiterates that the allegations of the sexual assaults were false, and the prosecution used this to play "[o]n the emotions of the jury in order to secure an unjust verdict." (*Id.*).

The Eleventh Circuit has made clear that "[i]mproper assertions meant to mislead the jury are forbidden in closing arguments." *United States v. Sapp*, 2023 WL 2160134, *2 (11th Cir. Feb. 22, 2023) (citing *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009)). To be entitled to relief on a prosecutorial misconduct claim during closing argument, Movant must demonstrate that the remarks were improper and that they prejudicially affected his substantial rights. *Id.* (citing *Lopez*, 590 F.3d at 1256). However, a prosecutor is not limited to the fact and may comment on the evidence. *United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984). Further, "[u]nder the doctrine of fair response, a prosecutor may make a rebuttal to the arguments raised by defense counsel in closing." *Id.* (citing *United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014)).

Movant has made no showing of prosecutorial misconduct during closing argument. The issue of credibility of the Government witnesses was central to the case, and the prosecutor's remarks were proper as a response to the defense's repeated attacks on the credibility of its witnesses. *See Johns*, 734 F.2d at 663 (noting that the prosecution may present its contention as to the conclusions the jury should draw from the evidence).

Even if the prosecutor's comments were improper, closing arguments "[v]iolate the Constitution only if [the comments] so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Parker v. Matthews*, 567 U.S. 37, 45 (2012). Improper argument rises to the level of a denial of due process "[w]hen there is reasonable probability that, but for the prosecutor's offending remarks, the outcome of the proceeding would have been different." *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991). To decide whether the outcome would have been different absent the misconduct, this Court considers "[t]he degree to which the challenged remarks have a tendency to mislead the jury and prejudice the accused, whether they are isolated or extensive, whether they were deliberately or accidentally placed

before the jury," and the strength of the evidence of conviction. *Id.* When viewing the prosecutor's closing arguments in relation to the evidence adduced at trial, I find the prosecutor's statements did not render Movant's trial fundamentally unfair. The prosecutor's comments were tied to a summary of the evidence presented at trial, inferences derived therefrom, and a discussion of the applicable law; plus, the comments were in direct response to Movant's defense and closing arguments. *See Darden v. Wainwright*, 477 U.S. 168, 181–82 (1986). There is plainly nothing in the record to suggest that the prosecutor made improper statements which had the effect of distracting the jury or misleading them as to issues of guilt or innocence. *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995) ("Claims of prosecutorial misconduct are fact specific inquiries which must be conducted against the backdrop of the entire record.") (citations omitted).

Further, any potential prejudice was diminished by the trial court's clear and correct instructions to the jury regarding the criminal offenses charged, the burden of proof, and the reliability of the evidence. (CDE 139). The court further instructed the jury that it could believe or disbelieve all or any part of the evidence presented or the testimony of any witness. (*Id.*). Finally, the court instructed the jury that argument by the lawyers is not evidence in the case. (CDE 224 at 56–57). It is generally presumed that jurors follow the court's instructions. *See, e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Accordingly, there is no reasonable probability that the result of the trial would have been different if the now challenged comments had not occurred.

Given the foregoing, including the substantial evidence of Movant's guilt, it is apparent that the prosecutor's statements were at worst no more than harmless error, if there was error at all. *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting, *Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (a petitioner is entitled to federal habeas corpus relief only if the

constitutional error from his trial had substantial and injurious effect or influence in determining the jury's verdict)). Accordingly, Movant is not entitled relief on this claim.

B. Ineffective Assistance of Trial Counsel Claims.

In claim 2, Movant asserts that trial counsel was ineffective for failing to challenge the Indictment on the basis that it failed to state an offense and violated congressional intent as to Counts 25 through 47, was jurisdictionally defective, and violated Movant's double jeopardy rights. (DE 23-1 at 5; DE 23-2 at 3–4).

A defendant has a Sixth Amendment right to self-representation, but once proceeding *pro se* "a defendant . . . cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). In *Faretta*, the Supreme Court noted that trial courts can appoint standby counsel to assist a *pro se* defendant. *Id.* However, there is no constitutional right to standby counsel. *See McKaskie v. Wiggins*, 465 U.S. 168, 183 (1984) (noting "*Faretta* does not require a trial judge to permit 'hybrid' representation."). If there is no constitutional right to standby counsel, Movant cannot claim standby counsel was ineffective. *See Faretta*, 422 U.S. at 835 n.46) (holding "a defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of 'effective assistance of counsel.'"). Consequently, Movant is not entitled to relief on his claims of ineffective assistance of standby counsel at trial as Movant proceeded *pro se*.[16]

[16] In his Second Amended Motion (DE 23-1) and Second Amended Memorandum (DE 23-2), Movant does not identify which trial counsel was ineffective for failing to pursue challenges to the Indictment as alleged. However, for the first time in his Reply, Movant alters the claim, alleging that Atty Kaufman was ineffective for failing to pursue the issues prior to being discharged by Movant. (DE 26 at 3–4). I need not consider the arguments raised by Movant for the first time in his Reply. *See Herring v. Secretary, Dep't of Corrections,* 397 F.3d 1338, 1342 (11th Cir. 2005) ("As we have repeatedly admonished, arguments raised for the first time in a reply brief are not

C. Ineffective Assistance of Appellate Counsel Claims.

In claims 3 and 4, Movant asserts that appellate counsel was ineffective for failing to challenge on appeal that: (a) there was insufficient evidence to support his conviction as to Counts 25 through 46; and (b) the trial court erred in imposing a twelve-level enhancement to his base offense level in violation of *Apprendi*. (DE 23-1 at 4–8; DE 23-2 at 1–8).

1. Sufficiency of the Evidence as to Counts 25 through 46 of the Indictment.

In claim 3, Movant asserts that appellate counsel failed to challenge on appeal that there was insufficient evidence to support his convictions as to Counts 25 through 46 of the Indictment. (DE 23-1 at 6; DE 23-2 at 7). Movant maintains Counts 25 through 46 were not tied to the conspiracy, and the Government failed to demonstrate Movant accompanied the aliens to the United States to support a finding that movant "brought or attempted to bring illegal aliens to the United States." (DE 23-2 at 7).

When reviewing a sufficiency of the evidence claim, I must consider the evidence adduced at trial in the light most favorable to the Government and draw all reasonable inferences and credibility choices in favor of the jury's verdict. *United States v. Trujillo*, 146 F.3d 838, 845 (11th Cir. 1998) (citations omitted). "'[E]vidence is sufficient to support a conviction if a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt.'" *United*

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properly before a reviewing court."); *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003) ("Because he raises that argument for the first time in his reply brief, it is not properly before us."); *F.T.C. v. IAB Mktg. Associates, LP*, 972 F. Supp. 2d 1307, 1311 (S.D. Fla. 2013) ("[T]hese arguments are forfeited because they were raised for the first time in a reply brief."); *Foley v. Wells Fargo Bank, N.A.*, 849 F. Supp. 2d 1345, 1349 (S.D. Fla. 2012) ("Because it is improper for Defendant to raise this new argument in its Reply brief, the argument will not be considered."); *Willis v. DHL Global Customer Solutions (USA), Inc.*, 2011 WL 4737909, at *3 (S.D. Fla. Oct. 07, 2011) (collecting cases stating that it is inappropriate to raise new arguments in a reply brief and stating that courts in this district generally do not consider these arguments).

States v. Estrada, 969 F.3d 1245, 1265–66 (11th Cir. 2020) (quoting *United States v. Williams*, 527 F.3d 1235, 1244 (11th Cir. 2008) (internal quotation marks omitted).

Counts 25-46 of the Indictment charged movant with bringing or attempting to bring an alien[17] into the United States "[f]or commercial advantage and private financial gain, knowing and in reckless disregard of the fact that such alien had no received prior official authorization to come to, enter, and reside in the United States, regardless of any official action which might later be taken with respect to each such alien . . . . in violation of Title 8, United States Code, Section 1324(a)(2)(B)(ii) and Title 18, United States Code, Section 2." (CDE 1 at 3–4).

To establish a violation of § 1324(a)(2),[18] the Government must demonstrate that Movant brought or attempted to bring the illegal aliens to the United States. *See Estrada*, 969 F.3d at 1266 (citations omitted). "A conviction under § 1324(a) can be sustained on an aiding-and-abetting theory." *Id.* (first citing *United States v. Dominguez*, 661 F.3d 1051, 1065 (11th Cir. 2011) and then citing 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces[,] or procures its commission, is punishable as a principal.")). "To prove a substantive smuggling offense under the theory of aiding and abetting, under 18 U.S.C. § 2 'the evidence must establish that (1) the substantive offense was committed by someone; (2) the defendant committed an act which contributed to and furthered the offense; and (3) the

[17] The Indictment alleged the charged offenses occurred on October 10, 2013 and December 9, 2012 and listed the names of the aliens who Movant attempted to smuggle into the United States. (CDE 1 at 3–4).

[18] Title 8 U.S.C. § 1324(a)(2) punishes "[a]ny person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States . . . such alien."

defendant intended to aid in its commission.'" *Id.* (quoting *Dominguez*, 661 F.3d at 1065) (internal quotation marks omitted).

As discussed below, Movant cannot demonstrate deficiency or prejudice under *Strickland* arising from appellate counsel's failure to pursue this nonmeritorious claim on appeal. The evidence adduced at trial was more than sufficient to prove that Movant aided and abetted bringing illegal aliens to the United States, in violation of § 1324(a)(2). The Government established that Silas and his coyotes, including the Movant, were paid by Souza, Pacheco, and others, to illegally smuggle them from the Bahamas into the United States in 2012 and 2013. In exchange for the monies paid by the migrants, Movant arranged for their housing in the Bahamas, made transportation arrangements to get the migrants to the vessel that was to carry them to the United States, and paid the boat captain for the transport. Movant also specifically instructed the boat caption to make certain that the illegal aliens removed their life vests as they neared the United States shoreline so they would be inconspicuous to law enforcement officials upon approach. On this record, the jury's verdict as to Counts 25 through 46 is supported by the evidence under either a principal or as one who aided and abetted the smuggling operation, coordinating events once the aliens arrived in the Bahamas. Thus, Movant has not shown *Strickland* deficiency.

Even if appellate counsel was deficient for failing to pursue the issue, Movant has not shown *Strickland* prejudice. The omitted claim, one of sufficiency of the evidence as to Counts 24 to 46, had no reasonable probability of success on appeal, therefore, Movant was not prejudiced by counsel's failure to pursue the issue. *See Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001) (The prejudice prong requires that "the omitted claim would have had a reasonable probability of success" on appeal.). Moreover, the sentence imposed as to the offenses were ordered to run concurrent with the sentences on the other counts, therefore, for this alternative reason, Movant

has not demonstrated *Strickland* prejudice. Consequently, Movant is not entitled to relief on this claim.[19]

2. *Lawfulness of Twelve-level Enhancement to Base Offense Level.*

In claim 4, Movant asserts that appellate counsel was ineffective for failing to challenge the twelve-level enhancement to his base offense level because it was based on facts not charged in the indictment nor proven by the jury, in violation of *Apprendi v. New Jersey*, 530 U.S, 466 (2000). (DE 23-1 at 4–8; 23-2 at 7–8). Movant is not entitled to relief on this claim.

Contrary to Movant's allegations, the advisory guideline sentence yielded a guideline range of life imprisonment which was then reduced to 5,520 months in prison because the statutory maximum sentences were less than the minimum applicable guideline range pursuant to U.S. Sentencing Guidelines § 5G1.2. (PSI ¶ 172). As to Counts 1 and 2, Movant faced a statutory maximum of ten years in prison for each offense; as to Counts 3 through 24 and 27 through 46, Movant faced a maximum of five years in prison; as to Counts 25, 26, and 47, Movant faced ten years in prison; and as to Counts 27 through 46, he faced fifteen years in prison. (PSI ¶ 171). I ultimately sentenced Movant below the appliable guideline range to a total of 262 months in prison. *See* (CDE 260; CDE 278 at 111–13, 115–18).

It is well settled that a sentence which falls at or below the statutory maximum is not subject to reversal due to *Apprendi*, regardless of whether the sentence was increased due to an uncharged fact. *See United States v. Sanchez*, 269 F.3d 1250, 1294 (11th Cir. 2001) *abrogated on other grounds by*, *United States v. Duncan*, 400 F.3d 1297, 1308 (11th Cir. 2005); *United States v. Shepard*, 235 F.3d 1295, 1297 (11th Cir. 2000) (there is no error, plain or otherwise, under *Apprendi* where the term of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity). More importantly, the Eleventh Circuit has made clear that *Apprendi* does not apply to judge-made determinations pursuant to the federal sentencing guidelines. *See, e.g.*, *United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000) ("The Sentencing Guidelines are not subject to the *Apprendi* rule."); *United*

[19] To the extent Movant means to argue that he was prejudiced because a special assessment was imposed as to these counts, Movant has not shown error in the assessment imposed, therefore, counsel had no duty to raise this meritless argument on appeal.

States v. Harris, 244 F.3d 828, 829-30 (11th Cir. 2001) (holding that *Apprendi* does not apply to the relevant conduct provision of the Sentencing Guidelines); *see also United States v. Diaz*, 248 F.3d 1065, 1105 (11th Cir. 2001)(noting that "[S]entencing Guideline issues are not subject to the *Apprendi* rule and, thus, there is no requirement that sentencing facts be submitted to a jury and found beyond a reasonable doubt"). Under these circumstances, I find no deficient performance or prejudice pursuant to *Strickland* has been established arising from counsel's failure to pursue this nonmeritorious claim on appeal.

IV. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his § 2255 motion has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. *See Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017) (citing 28 U.S.C. § 2253(c)(1)). This Court should issue a certificate of appealability only if Movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). If the constitutional claims are rejected on the merits, the movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). If the district court rejects a claim on procedural grounds, the movant must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Upon consideration of the record as a whole, a certificate of appealability shall not issue.

V. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that:

1. Movant's Second Amended Motion (DE 23-1) is **DENIED**;
2. Judgment in favor of the Government will be entered by separate order;
3. All pending motions not otherwise ruled upon are **DISMISSED, as moot**; and

4. No certificate of appealability shall issue.

SIGNED in Chambers at West Palm Beach, Florida, this 15th day of December, 2023.

Donald M. Middlebrooks
United States District Judge

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