APPENDIX

"A"

(Order in the United States Court of Appeals
For the Eleventh Circuit (July 22, 2024))

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10962

TODD ERLING BECKER,

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. 2:21-cv-14254-DLG

ORDER:

In order to appeal the denial of his *pro se* 28 U.S.C. § 2255 motion, Todd Becker moves this Court for a certificate of appealability ("COA"), permission to include excess words and pages in his COA motion, and leave to proceed *in forma pauperis* ("IFP"). Becker's request to include excess words and pages in his COA motion is GRANTED. Becker's COA motion is DENIED on all claims because he has failed to show that the district court was incorrect in its procedural ruling and make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His IFP motion is DENIED AS MOOT.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

APPENDIX

"B"

(Order Denying Motion for Reconsideration
September 30, 2024)

App. 3

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10962

TODD ERLING BECKER,

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. 2:21-cv-14254-DLG

App. 4

Before ROSENBAUM and LUCK, Circuit Judges.

BY THE COURT:

Pursuant to 11th Cir. R. 22-1(c) and 27-2, Todd Becker moves for reconsideration of this Court's July 22, 2024, order which, *inter alia*, denied him a certificate of appealability and leave to proceed *in forma pauperis*, on appeal from the denial of his *pro se* 28 U.S.C. § 2255 motion. He also requests leave to correct his reconsideration motion, which is GRANTED. However, upon review, Becker's reconsideration motion is DENIED because he offers no new evidence or meritorious arguments as to why this Court should reconsider its previous order.

APPENDIX

"C"

(Order Denying Motion to Vacate Pursuant to 28 U.S.C. § 2255 (February 2, 2024))

App. 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 21-CV-14254-GRAHAM
Case No. 16-CR-14009-MIDDLEBROOKS (GRAHAM)

TODD ERLING BECKER

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

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

THIS CAUSE comes before the Court on Movant's "Amended Motion to Vacate Pursuant to 28 U.S.C. § 2255" (the "Motion") [CV ECF No. 10] attacking the constitutionality of his convictions and sentences for Hobbs Act conspiracy, three counts of Hobbs Act robbery, and, with respect to each of those robbery counts, knowingly using, carrying, and brandishing a firearm during and in relation to a crime of violence, entered following a jury verdict in Case No. 16-CR-14009-MIDDLEBROOKS (GRAHAM).

THE COURT has considered the record, the Motion [CV ECF No. 10], the Government's Response [CV ECF No. 18] with supporting exhibits [CV ECF No. 18-1–18-32], Movant's Reply [CV ECF No. 25], Movant's First and Second Supplemental Pleadings [CV ECF Nos. 27, 34, 36-1], the Government's Responses to Movant's Supplemental Pleadings [CV ECF Nos. 29, 35, 37], and the relevant pleadings filed in the underlying criminal case, of which the Court takes judicial notice pursuant to Fed. R. Evid. 201 and *Nguyen v. United States,* 556 F.3d 1244, 1259 n.7 (11th Cir. 2009) (citing *United States v. Glover,* 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)), and is

App. 6

otherwise fully advised in the premises. For the reasons set forth below, Movant's Amended § 2255 Motion is **DENIED**.

I. BACKGROUND

The following description of law enforcement's investigation into Movant is taken from the trial court's Order Denying Movant's Motion to Suppress. [CR ECF No. 87]. In February 2015, Federal Bureau of Investigation ("FBI") Special Agent David Kadela was investigating Movant for multiple burglaries committed outside the State of Florida. [*Id.* at 2]. Agent Kadela determined that Movant performed burglaries "in the same manner using the same tools[,]" including "masks, gloves, bolt cutters, pry bars, cutting saws, and two-way radios." [*Ibid.*]. Movant "would often use rental vans or SUV's for removal of the stolen property" and "return[ed] to Florida with the stolen property in the rental vehicles." [*Ibid.*]. On February 5, 2016, officers with Saint Lucie County Sheriff's Office ("SLCSO") were surveilling Movant's Florida residence pursuant to an outstanding warrant for Movant's female acquaintance, Vickey Jones, who resided there with Movant. [*Ibid.*]. Officers observed Movant and Jones depart the residence in a vehicle driven by Movant. [*Ibid.*]. Officers stopped the vehicle to execute an arrest warrant on Jones. [*Ibid.*].

As Jones was being arrested, SLCSO Deputy Sheriff Bolonka observed a sledgehammer and crowbar in plain view through the vehicle's rear window. [*Id.* at 3.] Movant was detained, taken to the Saint Lucie County Jail, and charged with possession of burglary tools. [*Ibid.*]. In custody, Movant was twice read his Miranda rights. [*Ibid.*]. Movant then gave a videotaped interview confession to Deputy Bolonka, Special Agent Kadela, and other law enforcement officials. [*Ibid.*].

On March 24, 2016, Movant was charged by superseding indictment with conspiracy to commit Hobbs Act robberies affecting interstate commerce in Indian River and Martin Counties

App. 7

in the Southern District of Florida, and elsewhere, between on or about November 12, 2013, and August 21, 2014, in violation of 18 U.S.C. § 1951(a) (Count 1); three counts of robbery affecting interstate commerce, in violation of 18 U.S.C. §§ 1951(a) (Counts 2, 4, and 6); and, with respect to each of those robbery counts, knowingly using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts 3, 5, and 7). [CR ECF No. 26]. Prior to trial, Movant filed a motion to suppress the evidence obtained from the search and seizure of Movant and the vehicle he was driving at the time he was stopped and subsequently arrested on February 5, 2016, and to suppress the statement Movant made to SLCSO Deputies and Special Agents from the FBI on the same date. [CR ECF No. 52]. In his motion to suppress, defense counsel argued that SLCSO Deputies lacked probable cause to arrest Movant, the search of Movant's vehicle was illegal, and SLCSO Deputies and Special Agents with the FBI coerced Movant into waiving his Fifth Amendment right to remain silent.

The Court conducted a hearing on July 11 and September 1, 2016, hearing testimony from numerous witnesses and reviewing the video recording of Movant's statement. [CR ECF No. 66, 81, 86]. The parties filed written closing arguments. [CR ECF No. 73, 77]. The trial court denied Movant's motion to suppress, finding that there was probable cause to arrest Movant and to search the car he was driving, and further finding that Movant's *Miranda* waiver was knowing and voluntary. [CR ECF No. 87]. Movant proceeded to trial and, on November 21, 2016, was found guilty of all counts. [CR ECF No. 142]. At sentencing, Movant was sentenced to a total term of 794 months of imprisonment. [*Id.*] The written Judgment was entered on February 21, 2017. [*Id.*]

Movant appealed, raising five claims: (1) trial court error in denying Movant's motion to suppress, (2) Movant's *Miranda* waiver was rendered involuntary due to the statements made by FBI agents during Movant's interrogation, (3) Movant's convictions for Hobbs Act robbery do not

App. 8

qualify as "crime[s] of violence" under 18 U.S.C. § 924(c)(3)(A); (4) the Government's comments in closing violated Movant's right to remain silent; and (5) Movant's sentence was grossly disproportionate to the offense conduct. *See United States v. Becker*, 762 F. App'x 668, 670 (11th Cir. 2019). On February 19, 2019, the Eleventh Circuit Court of Appeals affirmed Movant's judgment in a published opinion. *Ibid.* According to a letter dated April 10, 2020, from the Supreme Court to the Eleventh Circuit, Movant's Petition for Writ of Certiorari was filed in the Supreme Court and placed on the docket on May 14, 2020. [CV ECF No. 18-18]. Certiorari review was denied on June 22, 2020. *See Becker v. United States*, 141 S. Ct. 145 (2020).

Movant filed his initial § 2255 Motion on June 21, 2021. [CV ECF No. 1].[1] An order was entered striking Movant's § 2255 Motion because it was not filed on this District's form for § 2255 actions, and because it was excessively long and not in compliance with Rule 4(b), Rules Governing § 2255 Cases. [CV ECF No. 4]. Movant filed his Amended Motion on September 20, 2021, raising four grounds for relief: (1) ineffective assistance of trial counsel for not arguing that officers violated Movant's right to counsel in his motion to suppress; (2) ineffective assistance of trial counsel for not arguing that officers violated Movant's right to silence in his motion to suppress; (3) ineffective assistance of counsel for not calling Movant as a witness during his motion to suppress, and (4) Government misconduct throughout the trial by withholding favorable evidence. [CV ECF No. 10]. The court granted Movant's motion to correct text inadvertently omitted from his Amended 2255 Motion. [CV ECF Nos. 11, 12]. In its response, the Government argues that Movant is not entitled to relief on any of the claims presented. [CV ECF No. 18].

[1] Under the prison mailbox rule, absent evidence to the contrary, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. *See* Fed. R. App. P. 4(c)(1); *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam).

App. 9

Movant disagreed. [CV ECF No. 25]. On October 17, 2022, Movant filed his First Supplemental Pleading, asserting that his "convictions under 18 U.S.C. § 924(c) are no longer supported by a valid predicate crime of violence" after the Supreme Court's decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022). [CV DE No. 27]. Movant filed his Second Supplemental Pleading on August 25, 2023, asserting that his "Hobbs Act Robbery convictions are categorically overbroad with respect to § 924(c)(3)(A) and cannot serve as a predicate crime of violence[.]" [CV ECF No. 36-1 at 1].

II. LEGAL STANDARDS

A. 28 U.S.C. § 2255 Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides extremely limited grounds for collateral attack on final judgments under 28 U.S.C. § 2255. A prisoner is entitled to relief under § 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F. 3d 1190, 1194 n.8 (11th Cir. 2011). Relief under § 2255 is reserved for transgressions of constitutional rights, and for that narrow compass of other injury that could not have been raised on 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) (per curiam) (citing *United States v. Frady*, 456 U.S. 152, 165 (1982)).

B. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to assistance of counsel during criminal proceedings. *See Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). This includes not just the right to the presence of counsel, but also "the

App. 10

right to the effective assistance of counsel." *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). When assessing counsel's performance under *Strickland*, the Court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]" *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (alterations added; citation omitted).

To prevail on a claim of ineffective assistance of counsel, a movant must demonstrate both (1) that counsel's performance was deficient; and (2) a reasonable probability that the deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687–88. To establish deficient performance, the movant must show that, considering all the circumstances, "counsel's conduct fell 'outside the wide range of professionally competent assistance.'" *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690). And "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690 (alteration added).

C. Harmless Error Review

The harmless error standard recited in *Brecht v. Abrahamson* applies to the collateral review of federal convictions. *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002) (citing 507 U.S. 619, 636–38 (1993)); *see also Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (noting that harmless, rather than structural error, is the correct standard to review a jury's instruction on multiple theories of guilt where one of the theories of guilt is invalid). Thus, in addition to the requirements imposed by AEDPA, relief cannot be granted on collateral review unless there is "grave doubt" that the error "had substantial and injurious effect or influence" on the outcome of the underlying proceedings. *Smith v. Singletary*, 61 F.3d 815, 818–19 (11th Cir. 1995) (quoting

App. 11

Brecht, 507 U.S. at 636).

D. Procedural Considerations

The Government asserts that the Motion is untimely because it was filed more than one year after Movant's judgment and conviction became final. [CV ECF No. 18 at 9]. *See* 28 U.S.C. § 2255(f)(1) (the one-year limitations period runs from the latest of four dates, including the date on which the judgment of conviction becomes final). The Government also asserts that Movant's First and Second Supplemental Pleadings are untimely. [CV ECF No. 35 at 1–2]. Finally, the Government argues that the First and Second Supplemental Pleadings should be dismissed as procedurally defaulted because Movant failed to raise the arguments on direct appeal. [CV ECF No. 37]. In the interests of judicial economy, the Court declines to analyze timeliness and procedural default and instead dismisses the Motion and Supplemental Pleadings on the merits. *See Day v. McDonough*, 547 U.S. 198, 208 (2006) (holding that district courts are permitted to "exercise [ ] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition") (cleaned up); *Adamson v. McNeil*, 353 F. App'x 238, 241 (11th Cir. 2009) ("The district court did not err by considering the merits of Adamson's claims [in his § 2254 petition] before addressing whether Adamson's petition was time-barred."); *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011). ("When relief is due to be denied even if claims are not procedurally barred, we can skip over the procedural bar issues[.]").

III. DISCUSSION

A. First Supplemental Pleading

In his First Supplemental Pleading, Movant asserts that his § 924(c) convictions and sentences are unlawful because aiding and abetting Hobbs Act robbery no longer qualifies as a

App. 12

"crime of violence" after the Supreme Court's decision in *Taylor*. [CV-DE 27 at 3]. This argument is foreclosed by binding precedent. Hobbs Act robbery is a "crime of violence" under the "elements clause" of § 924(c)(3)(A). *United States v. St. Hubert*, 909 F.3d 335, 351–53 (11th Cir. 2018). Aiding and abetting a Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016). The Eleventh Circuit considered and rejected the exact argument that Movant raises in his First Supplemental Pleading. *See United States v. Wiley*, 78 F.4th 1355, 1364 (11th Cir. Aug. 29, 2023) (noting that the holding in *Taylor* "was limited to attempted Hobbs Act robbery" and did not overturn "our established precedent that aiding and abetting completed Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)."); *Henderson v. United States*, No. 21-11740, WL 1860515, at *3 (11th Cir. Feb. 9, 2023) (rejecting challenge to *Colon* based on *Taylor*). Because *Colon* has not been overruled by the United States Supreme Court or by the Eleventh Circuit sitting en banc, its holding that aiding and abetting Hobbs Act Robbery constitutes a crime of violence under § 924(c)(3)(A) is binding. *In re Hubert*, 909 F.3d 335, 346 (11th Cir. 2018); *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009). Accordingly, Movant's First Supplemental Pleading is **DENIED** as meritless. No evidentiary hearing is required. *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989) (quotation omitted) ("A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations.").

B. Second Supplemental Pleading

In his second Supplemental Pleading, Movant contends that the jury instructions for Hobbs Act Robbery given in his case were "categorically overbroad" such that Movant's Hobbs Act Robbery convictions should not count as crime of violence convictions under § 924(c)(3)(A). [CV DE 34 at 3]. Specifically, Movant argues that the Hobbs Act Robbery jury instruction provided

App. 12

App. 13

was "categorically overbroad" because it referenced "fear of physical violence." [*Id.* at 2 (citing *United States v. Louis*, No. 21-CR-20252, 2023 WL 2240544, at *2 (S.D. Fla. Feb. 27, 2023)]. The Hobbs Act Robbery jury instruction given at Movant's trial provided, *inter alia*—

> (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future [ ]
>
> . . .
>
> "Fear" . . . includes the fear of financial loss as well as fear of physical violence.

[CV DE 29-3 at 15].

Movant's Second Supplemental Pleading fails because it does not demonstrate actual prejudice from this instruction. *Hedgpeth*, 555 U.S. at 58. The record does not provoke grave doubt about whether Movant's § 924(c) convictions rested on invalid grounds. *See Granda v. United States*, 990 F.3d 1272, 1294 (11th Cir. 2021) ("[I]t is proper to look at the record to determine whether the invalid predicate actually prejudiced the petitioner – that is, actually led to his conviction – or whether the jury instead (or also) found the defendant guilty under a valid theory."). The "crime of violence" for purposes of § 924(c) that the indictment alleged Movant aided and abetted was Hobbs Act Robbery, 18 U.S.C. § 1951(a) and 2. Trial testimony established that Movant aided and abetted a gun being pointed directly at each of the robbery victims. [CR DE 151 at 47 ("He was pointing the gun at me and when I was walking down the hall, he was following me, he was pointing the gun at me and talking to me very loudly."), 89 ("[O]ne guy have [sic] a gun, the other a crowbar, I didn't have a choice, I show them the money. It was my life, so I had no choice"), 172 ("[H]e said that I was moving and then he came back to me and said, If you keep moving, I'll shoot you"), 179 ("[H]e was very belligerent and yelling very loudly and waving his firearm")]. Given this testimony, there is not a grave doubt in the Court's mind that Movant's § 924(c) convictions were based on the jury's finding that Movant aided and abetted another in

App. 14

causing the victims to fear physical violence, as opposed to fear of financial loss only. *See, e.g.*, *United States v. Gibbs-King*, 808 F.App'x 738, 744 (11th Cir. 2020) ("[B]ecause Gibbs-King continued to participate in the robberies after seeing and knowing his confederates planned to use a gun in committing the robberies, he aided and abetted the § 924(c) offenses"). Thus, Movant's Second Supplemental Pleading is **DENIED** as meritless. No evidentiary hearing is required. *Holmes*, 876 F.2d at 1553.

C. Ground 1

In Ground 1 of his Motion, Movant asserts that counsel ineffectively litigated Movant's motion to suppress because counsel failed to argue that Agent Kadela and SLCSO officers violated Movant's right to counsel. [CV ECF No. 10 at 11–16.] Specifically, Movant contends that he invoked his right to counsel after being stopped on February 5, 2016 when Agent Kadela asked Movant if he had "been to Georgia lately?" [*Id.* at 12.][2] Movant claims:

> Movant responded, "I want to cooperate with you through my attorney, but he said that he hasn't heard back from you." Kadela then replied "I can't talk to you, you have an attorney." But Movant wanted his attorney involved with any further questioning and directed Kadela to "call [his] attorney right now." However, Kadela answered Movant in the negative, telling him "I'm not calling your attorney … I'm not making any calls it's late on a Friday."

[*Id.* at 12–13]. Movant asserts that SLCSO officers and FBI agents violated Movant's right to

[2] Movant states that he met Agent Kadela previously:

> Movant first encountered Kadela on March 6, 2015, after being stopped in a rented minivan containing a stolen safe from a Latin establishment in South Carolina. At that time, instead of taking Movant to jail, Kadela allowed Movant to remain at liberty pending the conclusion of the FBI's investigation into his illegal activities. Also at that time, Movant provided Kadela with contact information for his already retained attorney, Adam Farkas[.] . . . . Following his release of Movant, Kadela contacted Farkas on multiple occasions and learned Movant wanted to cooperate with the FBI's investigation, but only through Farkas.

[CV ECF No. 10 at 12–13].

App. 15

counsel later that day when they interrogated Movant at the Saint Lucie County Jail without his attorney present. [*Id.*] In response, the Government argues that Movant was not in custody at the time Agent Kadela asked Movant whether he had been to Georgia, and that Movant could not "effectively invoke his *Miranda* rights prior to the commencement of custodial interrogation." [CV ECF No. 18 at 16] (citing *United States v. Grimes*, 142 F.3d 1342,1348 (11th Cir. 1998)). The Court finds that counsel performed effectively because the argument Movant faults counsel for not raising was without merit. *See Boldender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance.").

The Supreme Court has held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). However, the Fifth Amendment does not demand that "police must cease all further communication with a detained individual in the absence of an attorney after he invokes his right to counsel." *Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1245–46 (11th Cir. 2015) ("Consistent with *Edwards*, the officers did not resume questioning of Everett until after Everett both voluntarily initiated further discussion and voluntarily waived his previously invoked right to counsel.").

Assuming Movant invoked his right to counsel at the scene of his arrest, the record shows that Movant voluntarily waived his *Miranda* rights and initiated contact with law enforcement subsequent to this invocation. The Eleventh Circuit affirmed the trial court's finding that Movant's *Miranda* waiver was voluntary and knowing. *Becker*, 762 F. App'x at 674.[3] "[S]ubsequent

[3] The Eleventh Circuit noted:

App. 16

administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Oregon v. Elstad*, 470 U.S. 298, 314 (1985). The Eleventh Circuit noted that Movant's statements "showed that his decision to confess was largely due to his desire to remain in federal custody and to avoid dealing with state authorities. *Becker*, 762 F. App'x at 673–74.

The record reflects that Movant voluntarily spoke with law enforcement in an attempt to avoid dealing with state authorities and that Movant's confession followed his knowing and voluntary *Miranda* waiver. *See Everett*, 779 F.3d at 1245–46. Thus, defense counsel had no meritorious argument to suppress Movant's confession on the basis of Movant's purported prior invocation of his right to counsel. Accordingly, Movant has not shown that counsel's conduct was "outside the wide range of professionally competent assistance" in litigating the motion to suppress. *Strickland*, 466 U.S. at 690. Ground One is DENIED.

D. Ground 2

In Ground 2, Movant asserts that counsel performed ineffectively in litigating Movant's motion to suppress because he failed to argue that Movant invoked his right to remain silent during his interrogation at the Saint Lucie County Jail. [CV ECF No. 10 at 4]. Specifically, Movant argues that he unambiguously invoked his right to remain silent by stating, "[o]f course, I do not know what you all know, and I would not want to make a statement without ya know and then say, oh

---

> Becker was given two separate Miranda warnings, was a self-described law clerk with ten years of legal experience, and advised that the "number one sin" was to talk to law enforcement without an attorney present, all of which indicated that he was aware of his rights and the risks of waiving them. Becker also made several statements that showed that his decision to confess was largely due to his desire to remain in federal custody and to avoid dealing with state authorities.

Becker, 762 F. App'x at 673–74.

App. 17

well, we already got that person or . . . ." [*Id.* at 17]. In response, the Government contends that Movant's statement was "extremely ambiguous" and "not an affirmative and unequivocal invocation of his right to remain silent." [CV ECF No. 18 at 17]. This Court agrees.

When a person undergoing a custodial interrogation "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966). However, the Supreme Court has elaborated that the suspect "must articulate his desire . . . sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). "[T]he same rule should apply to a suspect's ambiguous or equivocal references to the right to cut off questioning as to the right to counsel." *Coleman v. Singletary*, 30 F.3d 1420, 1424 (11th Cir. 1994) (citation omitted).

In this case, Movant did not invoke his right to remain silent with the requisite clarity. *Davis*, 512 U.S. at 459. A reasonable officer under the circumstances would not have understood Movant to be clearly invoking his right to remain silent when he stated "[o]f course, I do not know what you all know, and I would not want to make a statement without ya know and then say, oh well, we already got that person or . . . ." [CV ECF No. 10 at 17]; *see, e.g., Owen v. Fla. Dep't. of Corr.*, 686 F.3d 1181, 1194 (11th Cir. 2012) (holding that defendant's statements that he did not want to "talk about it" was not an unequivocal invocation of his right to remain silent); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir. 1992) (holding that a suspect's statement "I don't know if I need a lawyer, maybe I should have one, but I don't know if it would do me any good at this point" was not an invocation of right to counsel.) Because Movant did not unequivocally invoke his right to silence during his custodial interrogation, officers were entitled to continue to interrogate him. Defense counsel would not have had a meritorious argument to

App. 18

suppress Movant's confession on this basis and was not ineffective for failing to raise this meritless argument. *See Boldender*, 16 F.3d at 1573. Ground 2 is DENIED.

E. Ground 3

In Ground 3, Movant asserts that counsel performed ineffectively in litigating Movant's motion to suppress because he failed to call Movant as a witness to testify that "Kadela's sudden presence [in the interrogation room] and pre-*Miranda* remarks led Movant to believe the agents intended to question him without involving his attorney." [CV ECF No. 10 at 19]. Movant also claims that Special Agent Sypniewski "led Movant to believe his non-cooperation with the agents at that particular moment would lead to harsher treatment from the sentencing court[.]" [*Id.* at 20]. In response, the Government argues that Movant's asserted facts do "not amount to intimidation, coercion or deception that would have rendered Movant's waiver involuntary." [CV ECF No. 18 at 18].

Ground 3 impermissibly raises an argument that Movant asserted on direct appeal. *See Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014) ("Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255.") (quoting *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000)). The Eleventh Circuit upheld the trial court's finding that Movant voluntarily and knowingly waived his *Miranda* rights and explicitly rejected the argument that Movant now brings. *Becker*, 762 F. App'x at 673. The court of appeals found that agents did not coercively promise assistance to Movant. *See ibid.* Therefore, there was no basis for Movant to testify at the motion to suppress. Because the Eleventh Circuit decided the arguments in Ground 3 adversely to Movant on direct appeal, Ground 3 is

App. 19

DENIED. *Stoufflet*, 757 F.3d at 1239.

F. Ground 4

In Ground 4, Movant alleges that "misconduct of the Government prosecutors . . . including violating rules of discovery, suppressing favorable evidence, making false and misleading statements to the Court, and knowingly using unconstitutionally obtained evidence at trial . . . rendered Movant's trial fundamentally unfair . . . under the Fifth, Sixth and Fourteenth Amendment." [ECF No. 10 at 7.] The Government contends that Ground 4 should be dismissed because it consists of "conclusory, unsupported allegations" that do not meet the heightened pleading standards for motions to vacate brought pursuant to 28 U.S.C. § 2255. [CV ECF No. 18 at 19–20] (citing *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011)).

The Court agrees that Ground 4 is due to be dismissed because it does not present "reasonably specific, non-conclusory facts that, if true, would entitle [Movant] to relief." *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (quoting *Holmes v. United States*, 876 F.2d 1545, 1552 (11th Cir. 1989)). The conclusory allegations in Ground 4 fall far short of raising a legally sufficient cause of action under *Brady v. Maryland*, 373 U.S. 83 (1963) or *Giglio v. United States*, 405 U.S. 150 (1972). "*Brady* requires the prosecutor to turn over to the defense evidence that is favorable to the accused[.]" *United States v. Jordan*, 316 F.3d 1215, 1251 (11th Cir. 2003). A *Giglio* violation is a "species of *Brady* error that occurs when 'the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury.'" *Ventura v. Att'y Gen., Fla.*, 419 F.3d

App. 19

App. 20

1269, 1277 (11th Cir. 2005) (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)).[4]

Ground 4 does not state a cause of action because Movant does not identify what favorable evidence the Government withheld or what false testimony the Government presented to the court; nor does Movant assert that the Government knew that favorable evidence was being withheld or that the testimony was false. *See Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011) (outlining elements of *Giglio* claim). Movant also fails to allege that the evidence was "material" under either under the *Giglio* or *Brady* materiality standards. *Ventura*, 419 F.4d at 1278. This Court advised Movant in its Order on August 31, 2021 that "Movant is subject to a heightened pleading standard in this proceeding." [CV ECF No. 8 at 4] (citing *Borden*, 646 F.3d at 810). The Court informed Movant that "failure to meet that heightened pleading requirement results in a litigant's failure to plead sufficient facts to support their legal claims" and may result in dismissal. [*Ibid.*] Because Movant failed to adequately plead a claim for relief, Ground 4 is DENIED. *See Borden*, 646 F.3d at 810.

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 must obtain a Certificate of Appealability ("COA") to do so. *See Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017) (citing 28 U.S.C. § 2253(c)(1)); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). This Court should issue a COA only if Movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where

[4] The materiality standard for a *Brady* violation is different than the standard for a *Giglio* violation. *See, e.g., Ventura*, 419 F.4d at 1278. "[F]or *Brady* violations, the defendant must show a reasonable probability the results would have been different, but for *Giglio* violations, the defendant has the lighter burden of showing that there is any reasonable likelihood that the false testimony could have affected the jury's judgment." *Trepal v. Sec'y, Fla. Dept. of Corr.*, 684 F.3d 1088, 1108 (11th Cir. 2012).

App. 21

a district court has rejected Movant's constitutional claims on the merits, a movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel,* 539 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, 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,* 539 U.S. at 484. Here, Movant has not made a substantial showing of the denial of a constitutional right; nor has Movant raised issues that reasonable jurists would find debatable. Upon consideration of the record as a whole, a certificate of appealability shall not issue.

V. CONCLUSION

For the reasons discussed above, Movant's claim is not supported by the law to justify granting a motion to vacate. Thus, it is hereby:

ORDERED AND ADJUDGED that

1. Movant's Amended § 2255 Motion [CV ECF No. 10] and supplemental pleadings [CV ECF Nos. 27, 34] are DENIED;

2. Final Judgment is entered in favor of Respondent;

3. No Certificate of Appealability shall issue;

4. All pending motions, if any, are DENIED, as moot; and,

5. The case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of February 2024.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

App. 21

App. 22

cc:

Todd Erling Becker
10385-078
Lee-USP
United States Penitentiary
Inmate Mail/Parcels
Post Office Box 305
Jonesville, VA 24263
PRO SE

Daniel E. Funk
United States Attorney's Office
Southern District of Florida
101 S. U.S. Highway 1
Fort Pierce, FL 34950
Daniel.funk@usdoj.gov

Noticing 2255 US Attorney
usafls-2255@usdoj.gov

App. 22