[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-13254

Non-Argument Calendar

WILLIS MAXI,

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. 1:19-cv-24209-DLG

Before JILL PRYOR, NEWSOM, and ANDERSON, Circuit Judges.

PER CURIAM:

Willis Maxi, proceeding *pro se*, appeals the district court's denial of his 28 U.S.C. § 2255 motion. He asserts that he was denied a full and fair suppression hearing when his prior attorney failed to call him to the stand to establish that he had not voluntarily consented to police entering the stash house where he was arrested.[1] He also argues that he was entitled to a post-conviction evidentiary hearing because his assertions were not patently frivolous, affirmatively contradicted by the record, or impermissibly generalized. After careful consideration, we affirm the district court's denial.

I

The issues presented in this appeal stem from the search of a Florida residence at which Maxi was present. Police received a tip that the residence was being used as a "stash house." Officers approached the house and knocked. The officers contend that no one announced "police." Maxi, who was in the house at the time, immediately opened the door. The officers questioned Maxi, who

[1] Maxi also complains that his counsel failed to include the allegations from his affidavit in his motion to suppress. But because this Court's certificate of appealability covers only the question whether Maxi's counsel was deficient for failing to elicit testimony from him at the suppression hearing, we do not address the affidavit issue. *See Rhode v. United States*, 583 F.3d 1289, 1290–91 (11th Cir. 2009).

stated he did not live at the residence. Later, a search warrant was obtained and evidence seized from the house. Maxi was taken into custody and informed of his *Miranda* rights. He then confessed to working for the drug-trafficking organization as a "cut man." Ultimately, a jury convicted Maxi of four counts of drug-trafficking and firearms offenses, and the district court sentenced him to a total term of 312 months' imprisonment.

Before trial, Maxi moved to suppress physical evidence seized following a warrantless entry into the residence on the ground that the police lacked probable cause or exigent circumstances. The denial of that motion is the basis of the § 2255 motion at issue here. Maxi filed a *pro se* motion to vacate his 312-month sentence, arguing that his prior counsel was ineffective for failing to elicit testimony from him that he did not voluntarily consent to law enforcement's entry into the stash house where he was arrested.

At the hearing, Maxi's counsel cross-examined the government's witnesses and called four officers as witnesses. Maxi testified on his own behalf. His testimony centered around his association with the stash house and the scope of his access to the house. Based on testimony from the other witnesses showing the number of officers present at the scene and that their guns were drawn, Maxi's lawyer argued that Maxi's consent was not voluntary. The magistrate judge issued a report and recommendation that the motion be denied, finding that Maxi opened the door to the stash house voluntarily and not under a show of police authority.

In the district court, Maxi argued that his counsel was ineffective because counsel failed to question Maxi during the suppression hearing about his observations at the time of the arrest and search. In support of his argument, Maxi presented an affidavit stating that sometime "prior to trial" he gave information to his lawyer about the encounter with police at the stash house that should have been presented in the hearing.[2]

The government responded that Maxi's prior counsel's failure to call him to testify did not rise to the level of constitutionally ineffective assistance of counsel because his would-be testimony was not persuasive and in fact could have been harmful to him. The government argued that Maxi's testimony would be tempered by self-interest and that two witnesses contradicted his version of events. Therefore, the government argued, it was reasonable for Maxi's counsel to conclude that the testimony was not helpful.

The district court issued an order denying Maxi's § 2255 motion, stating that he was not entitled to relief because he could not show that any deficiency in his lawyer's performance prejudiced him. And the district court denied Maxi's request for an evidentiary hearing on the ground that he did not demonstrate that he was entitled to one. The district court declined to issue a certificate of appealability. Maxi filed a motion for reconsideration, which the

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[2] For example, Maxi claims he told counsel that he "heard a loud pounding at the door," and that when he looked through the peephole, he saw "several officers" with "guns drawn" and heard "about 10 police" screaming "This is the police! Open the door so we can talk to you."

district court also denied. Maxi appealed, and a member of this Court granted him a certificate of appealability on the issue before us now.

II

In a proceeding on a § 2255 motion, we review the district court's factual findings for clear error and the legal issues *de novo*. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). We review a district court's denial of an evidentiary hearing on a § 2255 motion for an abuse of discretion. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Id.* (quotation marks omitted).

To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. Deficient performance occurs when counsel's representation falls below an objective standard of reasonableness, and a defendant is prejudiced when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). A court reviewing an ineffective-assistance claim need not address both components of the inquiry if the defendant fails to show one of them. *Id.* at 697. A petitioner cannot establish an ineffective-assistance claim by merely pointing to additional evidence that

could have been presented. *Rhode v. Hall*, 582 F.3d 1273, 1284 (11th Cir. 2009). And generally, a determination about which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess. *See Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ."); *Sanchez v. United States*, 782 F.2d 928, 935 (11th Cir. 1986) ("When a lawyer makes an informed choice between alternatives, his tactical judgment will almost never be overturned on habeas corpus."). A petitioner is entitled to an evidentiary hearing if he alleges reasonably specific, non-conclusory facts that, if true, would entitle him to relief. *Winthrop-Redin*, 767 F.3d at 1216. "However, a district court need not hold a hearing if the allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record." *Id.* (quotation marks omitted)

Here, the district court did not err in finding that Maxi failed to establish that his prior counsel was ineffective. Maxi argues that his counsel should have elicited more testimony from him—but Maxi cannot establish an ineffective-assistance claim merely by pointing to additional evidence that could have been presented. *Rhode*, 582 F.3d at 1284. And counsel's strategic decision about whether to question Maxi about his observations during the police search was within the range of reasonable strategic decisions. Maxi failed to establish that his lawyer's decision not to have him testify fell below an objective standard of reasonableness, given that his testimony would have been contradicted by two other witnesses.

See Rhode, 582 F.3d at 1284; *Strickland*, 466 U.S. at 687–88. Moreover, Maxi failed to show that he was prejudiced by his counsel's decision, given that his lawyer had already argued that Maxi was afraid and intimidated by police into opening the door, which is the same thing to which Maxi would have testified. The magistrate judge rejected this argument, and Maxi has not shown how his testimony would have changed the judge's view of the case.

Maxi's separate argument that he was entitled to an evidentiary hearing fails because the testimony he sought to introduce was affirmatively contradicted by two witnesses. *See Winthrop-Redin*, 767 F.3d at 1216.

AFFIRMED.

Appx. "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-24209-CV-GRAHAM
Case No. 14-20104-CR-GRAHAM

WILLIS MAXI,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

THE CAUSE came before the Court on Movant Willis Maxi's ("Movant") *pro se* 28 U.S.C. § 2255 Motion to Vacate ("Motion") with supporting Memorandum and Affidavit, raising two claims challenging counsel's effectiveness, two *Rehaif*[1] claims, and an independent claim of actual innocence regarding his conviction as to Count 3 for possession of a firearm in furtherance of a drug trafficking crime. [CV ECF No. 1; CV ECF No. 3 at 3-11; CV ECF No. 4]. The Government argues the claims are either procedurally defaulted or meritless. [CV ECF No. 12]. Movant disagrees. [CV ECF No. 16].

THE COURT has considered the record in this case, together with the relevant pleadings filed in the underlying criminal case.[2]

[1] *Rehaif v. United States*, 139 S.Ct. 2191 (2009).

[2] The Court takes judicial notice of its own dockets 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).

I. BACKGROUND

A. Criminal Case No. 14-CR-20104-ROSENBERG (GRAHAM)

On February 20, 2014, in *United States v. Blanc*, No. 14-CR-20104-ROSENBERG (GRAHAM) (S.D. Fla. 2014), Movant was charged by Indictment with conspiracy to possess with intent to distribute twenty-eight grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(B)(iii), and § 846 (Count 1), possession with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(C), and 18 U.S.C. § 2 (Count 2), possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 3), and felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e) (Count 4). [CR ECF No. 32].[3] Before trial, Movant moved to suppress physical evidence seized following a warrantless entry into Movant's home without probable cause or exigent circumstances; and, any post-*Miranda* statements based on the "fruit of the poisonous tree" doctrine. [CR ECF No. 208]. Following an evidentiary hearing, a Report recommending that the suppression motion be denied was adopted by Order entered on April 13, 2015. [CR ECF Nos. 242, 350 at p. 5]. Movant proceeded to trial and was found guilty as charged, following a jury verdict. [CR ECF No. 278]. Movant was adjudicated guilty and sentenced to 312 months of imprisonment. [CR ECF Nos. 278, 336].

Movant appealed, challenging the denial of his motion to suppress and the admission at trial of evidence and his statements to police. *See United States v. Maxi*, 886 F.3d 1318, 1322,

[3] Co-conspirators Wisvelt Voltaire ("Voltaire"), Kervens Lalanne ("Lalanne"), Alex Bermudez ("A. Bermudez"), Sanders Bermudez (S. Bermudez"), Meluin Jermaine Braynen ("Braynen"), and Espere Desmond Pierre ("Pierre") all pleaded guilty prior to Movant's trial. *See* [CR ECF Nos. 113, 136, 137, 145, 159, 180, 182, 250, 294, 333, 367, 411]. Only Movant and coconspirator Markentz Blanc ("Blanc") proceeded to trial.

1325-30 (11th Cir. 2018); [CR ECF No. 548]. On April 5, 2018, the appellate court affirmed Movant's judgment and the denial of the suppression motion in a published opinion. *See Maxi*, 886 F.3d at 1330; [*Id.*]. Certiorari review was denied on October 9, 2018. *See Maxi v. United States*, 139 S.Ct. 351 (2018); [CR ECF No. 553].

B. § 2255 Motion

Movant timely[4] filed this Motion on October 9, 2019.[5] [CV ECF No. 1 at 14].

Construed liberally, as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)(per curiam), Movant raises the following five grounds:

1. Counsel failed to include any facts within the suppression motion regarding Movant's observations at the time of the unlawful warrantless search. [CV ECF No. 3 at 3-5].

2. Pursuant to *Rehaif*, his conviction for being a felon in possession of a firearm (Count 4) must be vacated. [CV ECF No. 3 at 6-7].

3. His conviction for being a felon in possession of a firearm (Count 4) must be vacated because the Indictment failed to charge a critical element of the offense. [CV ECF No. 3 at 8].

4. Counsel failed to challenge the unlawful Indictment for the reasons set forth in claims 2 and 3. [CV ECF No. 3 at 9].

5. Movant is actually innocent of his conviction as to Count 3 for possession of a firearm in furtherance of a drug trafficking offense. [CV ECF No. 3 at 10-11].

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[4] Movant filed this Motion within one year of when his conviction became final after the Supreme Court denied certiorari review. *See* 28 U.S.C. § 2255(f)(1); *Gonzalez v. Thaler*, 565 U.S. 134, 149-50 (2012); *Phillips v. Warden*, 908 F.3d 667, 672 (11th Cir. 2018).

[5] Under the prison mailbox rule, absent evidence to the contrary, like prison logs or other records, 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)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."); *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001)(per curiam).

II. DISCUSSION

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

Collateral review is not a substitute for direct appeal, and the grounds for post-conviction review of a final judgment under 28 U.S.C. § 2255 are extremely limited. 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). 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 from the error; or, (2) where there has been a miscarriage of justice, also known as the "actual innocence" exception. *See McKay*, 657 F.3d at 1196. A claim of ineffective assistance of counsel may constitute cause for a procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, only a meritorious claim of ineffective assistance of counsel may constitute cause, which occurs where "the 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).

If a § 2255 claim is meritorious, the court must vacate and set aside the judgment, discharge the prisoner, grant a new trial, or correct the sentence. *See* 28 U.S.C. § 2255. The burden of proof is on Movant, not the Government, to establish that vacatur of the conviction or sentence is required. *See Beeman v. United States*, 871 F.3d 1215, 1221-1222 (11th Cir. 2017), *rehearing en banc denied by, Beeman v. United States*, 899 F.3d 1218 (11th Cir. 2018), *cert. denied by, Beeman v. United States*, 139 S.Ct. 1168 (2019).

B. **Ineffective Assistance of Counsel Principles**

A movant 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). Deficient performance requires Movant to demonstrate counsel's actions were unreasonable or fell below prevailing professional competence demanded of defense attorneys. *Strickland*, 466 U.S. at 688. The *Strickland* deficiency prong does not require a showing of what the best or good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle v. Sec'y, Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). Even with the benefit of hindsight, where counsel's decision appears unwise, it will only be ineffective if it was so unreasonable no attorney would have chosen it. *Id.* at 1099. *Strickland*'s prejudice prong requires Movant to establish that, but for counsel's deficiency, there is a reasonable probability that 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. *Id.* at 697; *Brown v. United States*, 720 F.3d 1316, 1326 (11th Cir. 2013).

The *Strickland* standard governing ineffective assistance of trial counsel claims also governs ineffective appellate counsel claims. *See Corales-Carranza v. Sec'y, Fla. Dep't of Corr.*, 768 F. App'x 953, 957 (11th Cir. 2019)(per curiam). Counsel, however, has no duty to raise non-meritorious claims. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014). Also, 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, 1333-34 (11th Cir. 2012).

C. Discussion of Claims

1. Ineffective Assistance Re Motion to Suppress. In **claim 1,** Movant asserts counsel failed to introduce facts by questioning Movant during the suppression hearing regarding Movant's observations at the time of the unlawful, warrantless search and the fact that Movant never voluntarily opened the door nor consented to entry of police onto the residence. [CV ECF No. 3 at 3-5]. Movant has provided a self-serving Affidavit stating he looked through the peephole of the front door, and observed "several officers," "some with guns drawn." [CV ECF No. 4 at 1]. While looking through the peephole, Movant states he could see about ten police officers and heard them screaming, "police ... open the door so we can talk to you." [*Id.*]. Movant alleges he only opened the wooden front door because he was intimidated and frightened by the presence of law enforcement, believing he might be shot if he did not comply with orders to open the door. [*Id.* at 1]. Movant maintains he intended to step back and close the door, but stayed where he was because Ogden threatened to shoot him. [*Id.* at 2].

Even if Movant would have testified he was intimidated and frightened, and that Detective Ogden could not have seen into the residence because of the angle of the door, Movant is not entitled to relief on this claim because he cannot satisfy *Strickland*'s prejudice prong. Movant cannot maintain an ineffective assistance of counsel claim by pointing to additional evidence or testimony that could have been presented at the suppression hearing. *See Van Poyck v. Dep't of Corr.*, 290 F.3d 1318, 1324 (11th Cir. 2002)(per curiam).

As will be recalled, Movant called Officer Gustavo Carreras, Officer Raul Cardeso ("Cardeso"), Lieutenant Luis Almaguer ("Almaguer"), and Officer Christopher Garcia ("Garcia") to testify as to how the events transpired on July 9, 2012 at the 132 N.E. 64th Street residence ("64th Street Residence"). [CR ECF Nos. 242, 248]. The Government called Detective Steve

Ogden ("Ogden") and Sergeant Janel Ruiz ("Ruiz"). [Cr ECF No. 248}. Movant testified on his own behalf, offering contradictory testimony. [CR ECF No. 242]. First, Movant stated he had been residing at the 64th Street Residence for approximately three to six months, and knew the identity of the owner, but only had access to the living room and bathroom because the rest of home was inaccessible and locked. [*Id.* at 1-6]. Later, he stated he had only been living there "off and on" for approximately three days prior to his arrest. [*Id.* at 6-8]. Although he had personal property, including his identification and wallet at the 64th Street Residence, Movant denied keeping any clothing there, explaining his clothes were at his father's residence. [*Id.* at 6-8]. Movant also testified he lied to police, stating he had no key to open the front gate when, in fact, there was a key to open the gate on the inside wall by the door. [*Id.*]. During cross-examination, Movant offered equivocal testimony suggesting he lived at both his father's residence and at the residence where he was arrested, but then claimed to have been "kicked out" of his father's residence. [*Id.* at 8-9].

Ogden testified that they set up surveillance at the residence located at the 64th Street Residence and after seeing two males leave the residence in a black truck, they conducted a vehicular traffic stop. [CR ECF No. 242 at 2]. The individuals were released and returned to the residence, but before they reached the door to the residence, one of the individuals fled. [*Id.*]. Ogden also testified he did not recall anyone yelling "police" after he knocked on the door.[6] [*Id.*]. Ogden testified that the wooden front door was immediately opened by Movant, at which time Ogden observed a mixing blow containing packaged crack cocaine and a plate with naked crack

[6] "Evidence was also presented that the windows were covered so Mr. Maxi could not have seen the police outside." *See United States v. Maxi*, 886 F.3d at 1329.

cocaine and a razor blade located directly behind the Movant. [*Id.* at 3]. Although Movant attempted to "fade out" of Ogden's view, he came back into view, and in response to questioning, stated he did not know who owned or lived at the residence. [*Id.*]. Movant was told he was under arrest and ordered to step outside. [*Id.*]. Movant responded he did not have a key to unlock the security gate. [*Id.*]. Ogden, concerned with the destruction of evidence, believe it was necessary to gain entry into the home as soon as possible. [*Id.*]. As a result, the security gate was forced open, and Movant removed from the residence. [*Id.*]. In the interest of officer safety, a security sweep was conducted, lasting about two minutes, during which law enforcement observed more packaged crack cocaine, a semiautomatic handgun, and four rifles. [*Id.* at 3-4].

Following an evidentiary hearing, a Report was entered recommending that Movant's suppression motion be denied on the following findings: "(1) Defendant opened the door voluntarily and not under a show of authority from officers; (2) officers were permitted to conduct a protective sweep of the property immediately adjacent to the area of arrest and as necessary to dispel the police-created exigency; however, the subsequent "walk-through" violated the Fourth Amendment; and, (3) notwithstanding the impermissible "walk-through," the crack cocaine observed by Ogden in plain view upon the opening of the wooden door provided an "independent source" of probable cause in support of the warrant." [CR ECF No. 242]. On April 13, 2015, an Order was entered adopting the Report and denying Movant's suppression motion. [CR ECF No. 258].

Movant challenged the denial of his motion on appeal. *See United States v. Maxi*, 886 F.3d 1318, 1325-30 (11th Cir. 2018). Although the Eleventh Circuit found the law enforcement actions did not qualify as a "knock and talk," the Court determined the constitutional violation did not result in the production of evidence. *United States v. Maxi*, 886 F.3d at 1327-28. In so ruling, the

appellate court determined there was "no evidence to suggest that anything would have turned out differently" if Ogden would have walked up the path to the door alone, knocked, and waited briefly to be received, because "Mr. Maxi opened the door almost immediately after Detective Ogden knocked and seemed entirely unaware of the scene developing outside." *Id.* at 1328. The appellate court found Movant's "surprise at seeing police and his immediate attempt to move out of view also support a finding that he did not expect the police to be at the door." *Id.* at 1329. Next, the Eleventh Circuit held the officers "had probable cause to believe Mr. Maxi committed a crime, and it was objectively reasonable for them to think exigent circumstances existed to justify their entry and arrest without a warrant." *Id.* at 1329 (citations omitted). Finally, the appellate court determined that, even if the protective sweep and walk-through were illegal, the evidence found inside the duplex was admissible under the independent source doctrine, especially where Movant "voluntarily opened the front door," and as a result, "Ogden saw crack rocks and a bowl of packaged drugs five to ten feet behind Mr. Maxi." *Maxi*, 886 F.3d at 1330.

On this record, Movant has not demonstrated *Strickland* prejudice arising from counsel's failure to question Movant during the suppression proceeding regarding his observations and the reasons why he opened the front door. In fact, doing so may have hurt, rather than aided Movant's defense, exposing Movant to further cross-examination and possible impeachment. Such testimony could have been used against Movant if he had then chosen to testify at trial. Instead, counsel effectively challenged the credibility of law enforcement and their motive and actions relating to the manner in which they entered the curtilage, approached the residence, announced their presence, arrested Movant, and searched the premises. Consequently, the Court finds Movant has not shown that counsel's decision not to question Movant regarding his perception of the

events and how they unfolded was not so unreasonable that no defense attorney would have chosen it. *Dingle*, 480 F.3d at 1099. Therefore, the claim is DENIED.

2. Claims 2 and 3 Regarding Rehaif. In **claims 2 and 3,** Movant asserts that his conviction as to Count 4, for being a felon in possession of a firearm, must be vacated under *Rehaif* because the Government neither charged nor proved an essential element of the offense--that he knew of his felon status. [ECF No. 3]. In related **claim 4,** Movant asserts counsel failed to pursue claims 2 and 3. [*Id.* at 9]. Respondent argues that Movant's claims are procedurally defaulted, without merit, and should be denied. [CV ECF No. 12]. As discussed below, this Court agrees.

Rehaif was decided in 2019, after Movant's conviction became final in 2018. *Rehaif* does not apply retroactively to cases on collateral review because it did not announce a new rule of constitutional law, but rather clarified the requirements of 18 U.S.C. § 922(g) and § 924(a)(2). *See United States v. Finley*, 805 F. App'x 823, 826 (11th Cir. 2020)(per curiam)(citing *In re Palacios*, 931 F.3d 1314, 1315 (11th Cir. 2019)).

In *Rehaif*, the United States Supreme Court clarified that, in a prosecution under 18 U.S.C. § 922(g) and 18 U.S.C. § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons--convicted felons--barred from possessing a firearm. *Rehaif*, 139 S. Ct. at 2200. Here, although Movant is correct that the Indictment did not allege he was aware of his convicted felon status, Movant did

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[7] This claim is procedurally defaulted as it could have been, but was not raised on direct appeal. *See Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004)(per curiam); *Massaro v. United States*, 538 U.S. 500, 504 (2003). To excuse the procedural default, in claim 4 Movant faults counsel for failing to pursue the *Rehaif* claim. A claim of ineffective assistance of counsel can constitute cause for failing to pursue a claim. *Nyhuis*, 211 F.3d at 1344. However, Movant, must also demonstrate prejudice in order to circumvent the default. *Id.* He can also circumvent the default by showing actual innocence. *See Lynn*, 365 F.3d at 1234.

not preserve an objection regarding the lack of knowledge element either pre-trial, at trial, or on appeal. Thus, Movant procedurally defaulted these claims, and they "may not be raised on collateral review." *Massaro,* 538 U.S. at 504; *Wainwright v. Sykes,* 433 U.S. 72, 85-86 (1977)(claim defaulted when no contemporaneous objection was lodged at trial); *Murray v. Carrier,* 477 U.S. 478, 490-92 (1986)(claim not raised on direct appeal is procedurally defaulted).

However, Movant may overcome the procedural default of the claims by showing both "cause" for the default and "actual prejudice", or that he is actually innocent. *Bousley v. United States,* 523 U.S. 614, 622 (1998)(citations omitted). In related **claim 4,** Movant acknowledges that the legal principles in *Rehaif* were not novel, having been presented in the appellate courts for more than thirty years prior to his indictment and conviction. [CV ECF No. 3 at 9]. Thus, he claims counsel was ineffective for failing to seek dismissal of the Indictment based on the principles in *Rehaif.* [*Id.*]. A meritorious claim of ineffective assistance of counsel can constitute cause. *See Nyhuis,* 211 F.3d at 1344 (citations omitted).

Even where, as here, Movant's suggests counsel was ineffective as cause for his procedural default, Movant must still demonstrate actual prejudice, not merely "'the possibility of prejudice.'" *See United States v. Bane,* 948 F.3d 1290, 1297 (11th Cir. 2020)("To establish prejudice, they would have to prove that they suffered actual prejudice, not merely 'the possibility of prejudice.'")(quoting *Fordham v. United States,* 706 F.3d 1345, 1350 (11th Cir. 2013)). Actual prejudice requires proof that "the error worked to [the petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *See Fordham,* 706 F.3d at 1350 (citing *Ward v. Hall,* 592 F.3d 1144, 1179 (11th Cir. 2010))(alteration and quotation marks omitted).

Further, actual innocence is an additional "narrow exception" to the procedural default rule and requires a showing of factual, as opposed to, legal innocence. *See Fordham*, 706 F.3d at 1350 (citing *McKay*, 657 F.3d at 1198); *Bousley*, 523 U.S. at 615 ("Actual innocence means factual innocence, not mere legal insufficiency."). For the actual innocence exception to apply, Movant "must show that he is factually innocent of the conduct or underlying crime that serves as the predicate for the enhanced sentence." McKay, 657 F.3d at 1199 (emphasis removed).

Movant has not met this burden. There was sufficient evidence in the record that Movant knew of his status as a convicted felon when he possessed the firearms and ammunitions as charged in Count 4. Prior to trial, the Government filed a notice of its intent to introduce evidence of Movant's prior convictions under Fed. R. Evid. 404(b) for the limited purpose of establishing Movant's knowledge and intent regarding the narcotics he was charged with conspiring to distribute, and to possess with the intent to distribute.[8] *See* [CR ECF No. 160]. The Government also filed a notice of its intent to seek an enhanced sentence under 21 U.S.C. §§ 841(b)(1) and 851 if Movant was convicted at trial, based on the following prior convictions: (1) Miami-Dade County Circuit Court, No. F06-4611C, for possession intent to sell/manufacture/deliver cocaine and possession with intent to sell/manufacture/deliver cannabis; (2) Broward County Circuit Court, Case No. 06-021649CF10A, for possession of cocaine; and, (3) Miami-Dade County Circuit Court, Case No. F11-2409-B, for possession with intent to sell/manufacture/deliver cocaine.

[8] In its Rule 404(b) notice, the Government listed Movant's prior convictions in: (1) Miami-Dade County Circuit Court, Case No. F05-4611C for possession of cocaine and marijuana with intent to sell/deliver/manufacture; (2) Broward County Circuit Court, Case No. 06-021469CF10A, for possession of cocaine; and, (3) Miami-Dade County Circuit Court, Case No. F11-2409B, for possession of cocaine with intent to sell/deliver/manufacture.

At trial, the Government introduced Exhibit 179, a Judgment entered in *State of Fla. v. Maxi*, Case No. F11-002409B, adjudicating Movant guilty of second degree sale/manufacture/delivery of cocaine. [CR ECF No. 345 at p. 43; CR ECF Nos. 274, 537]. Thus, a jury could have inferred that Movant knew he was a felon based on the evidence presented. *See Cf., Reed*, 941 F.3d at 1022.

Further, the Presentence Investigation Report identified Movant had three prior felony convictions, punishable by a term of imprisonment exceeding one year prior to possessing the firearms and ammunitions as charged in Count 4 of the Indictment, as follows: (1) robbery with a weapon (Case No. 01-16955CF10A); (2) sell/delivery of cocaine (Case No. F05-4611C); (3) sale/delivery of cocaine (Case No. F11-2409A). [PSI ¶¶ 45, 49-50, 56]. In Objections, Movant did not dispute the probation officer's determination that Movant qualified for an enhanced sentence as a career offender. [CR ECF No. 322]. Instead, Movant moved for a downward departure, claiming that his prior controlled substance convictions involved only a small amount of drugs. [*Id.*]. Given the foregoing, this is "powerful evidence" that Movant knew he was a felon. *See United States v. Innocent*, 977 F.3d 1077, 1082 (11th Cir. 2020) (concluding that defendant failed to show a *Rehaif* error affected his substantial rights where defendant had four prior felony convictions, noting that "[m]ost people convicted of a felony know that they are felons" and that "someone who has been convicted of felonies repeatedly is especially likely to know he is a felon.").

Movant also does not allege he was unaware of being a convicted felon, but instead argues he is entitled to relief because the Government failed to prove this element and counsel was ineffective for failing to pursue the issue. However, Movant cannot demonstrate that a reasonable probability exists that but for the *Rehaif* error, the outcome of the trial would have been different.

He has not demonstrated that the error affected the fairness, integrity, or public reputation of his trial. Moreover, the indictment is not jurisdictionally defective where, as here, it fails to include that Movant knowingly committed the crime, but otherwise clearly alleges the unlawful conduct that Movant is accused of committing. *See United States v. McLellan*, 958 F.3d 1110, 1118 (11th Cir. 2020).

Finally, even if, as suggested in related **claim 4,** counsel had pursued the issue prior to trial, the Government could have obtained leave to file a Superseding Indictment to add the additional knowing element. Had counsel attempted to raise the issue during trial, the Government would have been permitted to introduce further evidence of Movant's other prior felony drug trafficking convictions which could have hurt rather than aided the defense. Thus, counsel's decision not to object or raise the issue should not be second-guessed here. *See Strickland*, 466 U.S. at 690-91 ("Strategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

Since Movant has not demonstrated cause and prejudice, much less that a fundamental miscarriage of justice will result if his *Rehaif* claims, the claims remain procedurally defaulted from review in this proceeding. In any event, the *Rehaif* claims fail on the merits, and Movant's ineffective claim fails for failing to establish *Strickland*'s prejudice standard. Moreover, Movant's claims are one of legal sufficiency not actual, factual innocence.[9] Since Movant cannot establish he is entitled to prevail on the merits, failing to establish prejudice to excuse the procedural default,

[9] "Actual innocence" means factual innocence, not mere legal insufficiency. *Bousley*, 523 U.S. at 623; al, *Mills v. United States*, 36 F.3d 1052, 1055-56 (11th Cir.1994)(citing *Murray*, 477 U.S. at 490-92).

he also cannot establish "actual innocence" of the charged offense. *See Fordman*, 706 F.3d at 1349–50; *Bousley*, 523 U.S. at 622. Therefore, he is not entitled to relief on **claims 2, 3, and 4.**

3. Claim 5 Regarding Actual Innocence. In claim 5, Movant asserts he is actually innocent of his 18 U.S.C. § 924(c)(1)(A)(i) conviction for possession of a firearm in furtherance of a drug trafficking offense as charged in Count 3. [CV ECF No. 3 at 10-11]. He relies upon the United States Supreme Court's decision in *United States v. Davis*, 139 S.Ct. 2319 (2019), claiming the "in furtherance of" portion of the statute is unconstitutionally vague. [CV ECF No. 3 at 10-11; CV ECF 16 at 4].

First, Movant's conviction is unaffected by *Davis* because the United States Supreme Court left undisturbed those convictions predicated on drug trafficking crimes, as defined under § 924(c). *See United States v. Duhart*, 803 F. App'x 267, 271 (11th Cir. 2020)(citing *In re Navarro*, 931 F.3d 1298, 1302–03 (11th Cir. 2019)(per curiam)(holding that § 924(c) conviction "fully supported by [] drug-trafficking crimes" are "outside the scope of *Davis*")). Movant's § 924(c) conviction was predicated on a drug trafficking offense. Therefore, he is not entitled to *Davis* relief.

Second, his argument that the "in furtherance of" prong is unconstitutionally vague also fails. A conviction under § 924(c)(1)(A) requires proof that a defendant used or carried a firearm during and in relation to any crime of violence or drug trafficking crime, or possessed a firearm "in furtherance of" of a crime of violence or drug trafficking offense. In 1997, Congress added the "in furtherance of" language to § 924(c) to reverse the restrictive effect of the United States Supreme Court's decision in *United States v. Bailey*, 516 U.S. (1995). *See United States v. Timmons*, 283 F. 3d 1246, 1252 (11th Cir. 2002)(citing H.R. Rep. 105-344, at 6 (1997)).

The Eleventh Circuit does not appear to have addressed the specific issue raised by Movant regarding whether the "in furtherance of" language is void for vagueness, but it has made clear

that, because the statute does not define "in furtherance of," it must be given its plain meaning. *Id.* at 1252. The "plain meaning of 'furtherance' is consistent with the legislative intent of the [post-Bailey] amendment and not in violation of the canons of statutory construction." *Id.* (citing *United States v. Ceballos-Torres*, 218 F. 3d 409, 415 (5th Cir. 2000) and *United States v. Mackey*, 265 F. 3d 457, 461 (6th Cir. 2001)).

Thus, in a § 924(c) prosecution, the "in furtherance of" requirement means the Government must "establish that 'the firearm helped, furthered, promoted, or advanced the drug trafficking.'" *See United States v. Dixon*, 901 F.3d 1322, 1340–41 (11th Cir. 2018)(quoting *United States v. Mercer*, 541 F.3d 1070, 1076 (11th Cir. 2008)(quoting *Timmons*, 283 F.3d at 1252)). Consequently, the Government must prove "some nexus between the firearm and the drug selling operation." *Id.* (quoting *Timmons*, 283 F.3d at 1253). Such evidence may include "the kind of drug activity ... being conducted, accessibility of the firearm, the type of firearm, whether the firearm is stolen, the status of the possession (legitimate or illegal), whether the firearm is loaded, proximity of the firearm to the drugs or drug profits, and the time and circumstances under which the firearm is found." *Id.* (quoting *Mercer*, 541 F.3d at 1076–77).

Here, the jury was entitled to find Movant possessed a firearm in furtherance of a drug trafficking offense. The evidence, as succinctly summarized by the Eleventh Circuit Court of Appeals, reveals as follows:

> On June 9, 2012, the Miami-Dade Police Department received a tip from a confidential informant that a person known as "Papa D" engaged in drug activity and kept firearms at one unit of a duplex located at 132 NE 64th Street in Miami. Detective Scott Ogden and another officer met with the informant and drove him to the duplex. The informant identified the back unit as the one where guns and drugs would be found.
>
> Officers began surveilling the property. One officer set up to watch the house and others were positioned nearby. "[M]aybe ten or [fifteen] minutes or less" after

setting up, officers saw two men leave the duplex and get into a truck. Officers stopped the truck about a quarter mile from the duplex and asked the men for identification. Mr. Blanc was the driver and Mr. Pierre was the passenger. After a search revealed no contraband, the officers let the men leave. The truck then returned back toward the duplex.

When he was told the truck was returning to the duplex, Detective Ogden ordered all the officers in the area to go there as well. ... Seeing the police approach, Mr. Blanc "took off running and was apprehended shortly after." ...

Four or five police officers ran to the door of the back unit while remaining officers covered other strategic positions surrounding the duplex. The back unit's door was not visible from the street. ... At least one officer who approached the door had his gun drawn and held in a "low, ready position." ...

...Detective Ogden reached through the bars and knocked on the wooden door. Detective Ogden testified he was "pretty sure" no one announced "police" when he knocked.

Mr. Maxi opened the wooden interior door very soon after Detective Ogden knocked. Detective Ogden testified that "[d]irectly behind Mr. Maxi, [he] could see a clear mixing bowl as well as a white plate, with the plate having naked crack rocks, and the clear mixing bowl having packaged crack cocaine and a razor blade on the plate and a scrap piece of paper...."

...Upon questioning, Mr. Maxi said he didn't live at the duplex and didn't know who did. Detective Ogden asked Mr. Maxi to step outside, but Mr. Maxi said he couldn't because the metal security gate was locked and he didn't have a key. Detective Ogden asked Mr. Maxi if he was burglarizing the residence, and Mr. Maxi responded, "oh, I will go for burglary." At some point, Detective Ogden told Mr. Maxi he was under arrest.

The officers decided to force the security gate open. Detective Ogden testified he was concerned Mr. Maxi would destroy evidence. Once the gate was pried open, Detective Ogden pulled Mr. Maxi out of the building, and handcuffed him. Approximately five officers conducted a protective sweep of the unit, which Detective Ogden said took about two minutes. Detective Ogden testified that during the sweep, he saw more packaged crack cocaine, a semiautomatic handgun, four rifles, and a stack of money. After the sweep, the officers left the unit and applied for a search warrant....

Once the search was over, Mr. Maxi was advised of his *Miranda* rights in the back of a police car. An officer also told Mr. Maxi the police had seen guns and drugs in the house. Several hours later, Mr. Maxi signed a formal waiver of his *Miranda* rights and was interviewed. He told police he worked as a "cut man" for "Papa D."

> He said he cut up and bagged crack cocaine, provided security, and resupplied other locations with crack cocaine....

United States v. Maxi, 886 F.3d at 1322-23. Thus, there was ample evidence to support the charged offense as it furthered the purpose of the drug trafficking organization. By Movant's own admissions, he was a "cut man" and provided security for the organization. Movant's conviction was not unconstitutionally vague as suggested.

Moreover, other courts have rejected the constitutional challenge to the "in furtherance of" argument raised here. *See United States v. Helton*, 86 F. App'x 889 (6th Cir. 2004)(quoting *United States v. Mackey*, 265 F.3d 457 (6th Cir.2001)(finding 18 U.S.C. § 924(c)'s use of "in furtherance of" is neither unconstitutionally vague nor overbroad)); *United States v. Eller*, 670 F.3d 762, 765 (7th Cir. 2012); *United States v. Pearson*, No. 4:15CR39/MW/MAF, 2020 WL 5606923, at *4 (N.D. Fla. Aug. 13, 2020), *report and recommendation adopted* by, No. 4:15CR39-MW/MAF, 2020 WL 5604036 (N.D. Fla. Sept. 17, 2020)(collecting cases).

D. Request for an Evidentiary Hearing

Movant's request for an evidentiary hearing [CV ECF No. 3 at 1] is DENIED. Movant has the burden of establishing the need for a federal evidentiary hearing by showing that his allegations, if proven, would establish his right to collateral relief. *See Schriro v. Landrigan*, 550 U.S. 465, 473-75 (2007)(holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing); *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989)(holding that § 2255 does not require that the district court hold an evidentiary hearing every time a § 2255 petitioner simply asserts a claim of ineffective assistance of counsel, finding "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where

the petitioner's allegations are affirmatively contradicted by the record."). Movant has not demonstrated that he is entitled to an evidentiary hearing, and the record proves otherwise.

E. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his § 2255 motion to vacate has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. § 2255(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009); *Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017)(per curiam). This Court should issue a Certificate of Appealability only if the Movant makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). Where a district court has rejected the 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, a 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." *Id.* Upon consideration of the record as a whole, a Certificate of Appealability shall not issue. Movant fails to make "a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). Accordingly, upon consideration of the record as a whole, a Certificate of Appealability shall not issue.

III. CONCLUSION

For the reasons discussed above, Movant's claims are either not supported by the record or the law to justify granting a motion to vacate. Therefore, it is hereby

ORDERED AND ADJUDGED as follows:

1. Movant's Motion [CV ECF No. 3] is DENIED;
2. Final Judgment is entered in favor of Respondent;
3. No Certificate of Appealability shall issue;
4. All pending motions are DENIED, as moot; and,
5. The case CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of September, 2021.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

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