IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

MICHAEL PARNELL,	:	
	:	
Petitioner,	:	**Criminal Case No.**
	:	1 : 13-CR-12-002 (WLS)
	:	
VS.	:	**28 U.S.C. § 2255 Case No.**
	:	1 : 19-CV-35 (WLS)
	:	
UNITED STATES OF AMERICA,	:	
	:	
	:	
Respondent.	:	

RECOMMENDATION

Petitioner's Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255, filed on November 13, 2019 (Doc. 674), is before this Court for the issuance of a recommendation of disposition pursuant to the Rules Governing Section 2255 Proceedings for the United States District Courts. Petitioner is represented by retained counsel.

Procedural History

Petitioner was charged by means of an Indictment filed on February 15, 2013 with Conspiracy, Introduction of Adulterated Food into Interstate Commerce with intent to defraud or mislead, Introduction of Misbranded Food into Interstate Commerce with intent to defraud or mislead, Mail Fraud, and Wire Fraud. (Doc. 1). Three (3) other Defendants were

also charged in the Indictment. *Id.* Petitioner was represented at trial by retained counsel Ed Tolley and Devin Smith.

Following a thirty-four (34) day jury trial for all three (3) Defendants[1] in July, August and September 2014, Petitioner was found guilty of Conspiracy to Commit Mail Fraud and Wire Fraud, Conspiracy to Introduce Misbranded Food into Interstate Commerce, multiple counts of Introduction of Misbranded Food into Interstate Commerce, multiple counts of Mail Fraud, and multiple counts of Wire Fraud. (Doc. 285). Petitioner was acquitted of all counts charging him with the introduction of adulterated food into interstate commerce. *Id.*

Petitioner filed a post-trial Motion for New Trial on October 6, 2014, alleging that juror misconduct prejudiced his right to a fair trial. (Doc. 308). In part, Petitioner alleged that jury members discussed salmonella-related deaths allegedly caused by Petitioner's company, and that Juror 34 showed juror bias. *Id.* The Court held two (2) hearings, calling in every selected juror for individual questioning at the second hearing. (Doc. 397). One juror testified that other jurors had conducted their own research over the course of the trial and discovered that the Defendants "killed nine people". *Id.* at p. 14. This juror did not bring this alleged misconduct to the attention of any Defendant or Defendants' counsel until after the trial had concluded. *Id.* After a detailed review of juror testimony, the Court found that "[v]iewing the totality of the circumstances, the Court finds that there is no indication that any juror concealed harbored bias from the Court or the Defendants. . . [and] the Court finds that the

[1] The fourth Defendant named in the Indictment, Samuel Lightsey, entered a guilty plea prior to trial.

Defendants failed to demonstrate that any juror failed to honestly answer any question during voir dire." *Id.* at p. 20.

In regard to whether the jury was exposed to prejudicial extrinsic information, the Court found that three (3) jurors stated that deaths were discussed in the jury room, but that "the discussion of deaths arose from a misperception or incorrect recollection of the trial testimony or evidence [that deaths were caused], not from extrinsic source." *Id.* at p. 21. The Court denied Defendants' Motion for New Trial. *Id.* at p. 25.

Petitioner was sentenced on September 21, 2015 to 240 months imprisonment followed by three (3) years of supervised release. (Docs. 486, 500). The judgment was amended by Order dated April 6, 2016 to reflect that Defendants were not ordered to pay restitution. (Docs. 619, 624).

Petitioner appealed his conviction. *United States v. Parnell, et al.,* 723 F. A'ppx 745 (11th Cir. 2018); (Doc. 505). On appeal, Petitioner again argued that he was entitled to a new trial based on the jury's alleged exposure to extrinsic evidence that people died as a result of the salmonella outbreak, that the district court erred in allowing testimony from former operating managers as to business records, and that the government's evidence of loss was not sufficiently specific or reliable. (Doc. 640). The Eleventh Circuit assumed that "at least several of the jurors who sat on the case were exposed to extrinsic evidence", but that the extrinsic evidence did not influence or contribute to the jury verdict. *Id.* The Eleventh Circuit further found that the former operating managers had ample knowledge from which to testify and that there was no error in admitting this testimony, and that any remand for recalculation

of the loss amount was futile and any errors in the district court's calculation were harmless. *Id.* Petitioner's 28 U.S.C. § 2255 Motion to Vacate was filed with the Court on November 13, 2019. (Doc. 674).[2]

In his § 2255 motion, Petitioner sets out four (4) main grounds for relief, raising the following ineffective assistance of counsel claims pertaining to his retained trial representation:

1. Counsel provided ineffective assistance in failing to seek a change of venue due to pretrial publicity and pervasive hostility toward Peanut Corporation of America ("PCA").

2. Counsel provided ineffective assistance in failing to move to strike for cause jurors with knowledge of deaths related to the salmonella outbreak.

3. Counsel failed to independently investigate juror prejudice once improper influence became known post-trial.

4. Counsel failed to investigate and call witnesses who would have materially discredited the government's lay witnesses and challenged sentencing enhancements.

Legal Standards

Section 2255 provides that:

> a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

[2] Petitioner, proceeding *pro se*, filed his first Motion to Vacate pursuant to § 2255 on March 5, 2019, but ultimately voluntarily dismissed the Motion. (Docs. 647, 660). Petitioner's counsel subsequently filed the pending Motion to Vacate on behalf of Petitioner.

28 U.S.C. § 2255.

If a prisoner's § 2255 claim is found to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.*

In order to establish that his counsel's representation was constitutionally defective, the Petitioner must show (1) that his counsel's representation was deficient, and (2) that the Petitioner was prejudiced by his counsel's alleged deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith v. Wainwright*, 777 F.2d 609, 615 (11th Cir. 1985).

"Our role in collaterally reviewing [] judicial proceedings is not to point out counsel's errors, but only to determine whether counsel's performance in a given proceeding was so beneath prevailing professional norms that the attorney was not performing as 'counsel' guaranteed by the sixth amendment." *Bertolotti v. Dugger*, 883 F.2d 1503, 1510 (11th Cir. 1989).

The *Strickland* court stated that "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

> [A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. . . . *It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . [rather][t]he defendant must show that there is a reasonable probability that, but for counsel's*

> *unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome*. . . . In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

Strickland, 466 U.S. at 693-694, *emphasis added*.

In evaluating whether Petitioner has established a reasonable probability that the outcome would have been different absent counsel's alleged errors, a court "must consider the totality of the evidence before the judge or jury." *Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002).

"As to counsel's performance, 'the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Reed v. Sec'y. Fla. Dep't. of Corr.*, 593 F.3d 1217, 1240 (11th Cir. 2010) (quoting *Bobby v.Van Hook*, 130 S.Ct. 13, 17 (2009)). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). In order to find that counsel's performance was objectively unreasonable, the performance must be such that no competent counsel would have taken the action at issue. *Hall v. Thomas*, 611 F.3d 1259, 1290 (11th Cir. 2010). "The burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable." *Chandler v. U.S.,* 218 F.3d 1305, 1313 (11th Cir. 2000).

Evidentiary Hearing

Petitioner bore the burden of establishing that an evidentiary hearing is needed to dispose of his § 2255 motion. *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984). "A federal habeas corpus petitioner is entitled to an evidentiary hearing if he alleges facts which, if proven, would entitle him to relief." *Futch v. Dugger*, 874 F.2d 1483,1485 (11th Cir. 1989).

The Court found that the record did not conclusively show that Petitioner's claims fail, and that Petitioner was entitled to an evidentiary hearing on his claims. (Doc. 706). The Court held an evidentiary hearing on May 26 and 27, 2021. (Docs. 775-76). Both parties have filed post-hearing briefs in support of their positions. (Docs. 788, 794).

Facts

The Eleventh Circuit found that

> Defendant-Appellant Stewart Parnell is the former president of the Peanut Corporation of America ("PCA"). Defendant-Appellant Michael Parnell, Stewart's brother, managed PCA's sale of peanut paste to the Kellogg Company. . . Until 2009 PCA made and sold peanut products to food producers across the United States. In 2009, federal authorities identified PCA's production plant in Blakely, Georgia as the source of a nationwide salmonella outbreak. . . Following a four year investigation, Appellant[] [and his co-defendants] were indicted for their conduct regarding food safety at PCA and during the FDA's investigation.
>
> During a seven-week jury trial, the Government presented evidence that Stewart and Michael conspired with senior management at PCA to defraud its customers regarding the safety of its products. . . At Stewart's direction, PCA retested product that tested positive for salmonella until it obtained a negative result, shipped product before receiving the test results

> for the product, and even shipped product after receiving confirmed positive test results.
>
> The Government also presented evidence regarding a scheme that Stewart, Michael, and other senior management designed to help PCA meet production demands for the Kellogg's account. Specifically, in September 2007, PCA began assigning future lot numbers to samples of peanut paste that it sent for testing. It used those test results to create [Certificates of Analysis] for new lots of peanut paste that it shipped to Kellogg's. Thus beginning in September 2007, the COAs for Kellogg's orders contained test results for a sample pulled from a previous lot. The lot being shipped had not been tested. PCA took samples from the new lot, assigned future lot numbers to those samples, and sent them for testing to keep the practice going. PCA did not inform Kellogg's if test results for a lot that had already been shipped came back positive. Eventually, PCA assigned multiple future lot numbers to product from the same lot in order to decrease the number of lots that it tested. Between January 2008 and January 2009, more than 60% of paste lots for Kellogg's did not undergo any microbiological testing.
>
> All Appellants knew that PCA had received positive salmonella test results before the salmonella outbreak. But they were not forthcoming with the FDA during its investigation.
>
> . . .
>
> The jury found Stewart and Michael guilty of several counts of fraudulently introducing misbranded food into interstate commerce, interstate shipment and wire fraud, and conspiring to commit these offenses.

(Doc. 640, pp. 2-4).

I. Ineffective assistance: change of venue

In Ground 1 of his Motion to Vacate, Petitioner Michael Parnell alleges that he received ineffective assistance of trial counsel in that counsel failed to seek a change in venue based on adverse pretrial publicity and hostility toward PCA. Petitioner asserts that the

pretrial publicity regarding PCA's involvement in the 2008 salmonella outbreak and the pervasive hostility toward PCA in Blakely and the surrounding area presumptively prejudiced Petitioner. Petitioner contends that counsel was ineffective in failing to file a motion to change venue under Rule 18 and Rule 21 of the Federal Rules of Criminal Procedure.

Testimony at the evidentiary hearing

In support of his Motion to Vacate, Petitioner called as witnesses two (2) of the four (4) attorneys who were retained to represent his co-Defendant and brother, Stewart Parnell, on his criminal charges, in addition to the two (2) attorneys retained to represent Petitioner Michael Parnell on his criminal charges.

Attorney Kenneth Hodges[3] was hired by Petitioner Michael Parnell's co-Defendant and brother, Stewart Parnell, to serve as local counsel in his criminal proceedings. (Doc. 775, p. 7). At the time of the evidentiary hearing, Attorney Hodges had more than thirty (30) years of experience as an attorney. *Id.* at pp. 5-6. Attorney Hodges testified that his role in representing Stewart Parnell was limiting to jury selection, voir dire, and handling a few witnesses. *Id.* at p. 8. Attorney Hodges stated that he was not part of the discussions about venue held among counsel for Stewart Parnell, but that counsel's consensus was that such a motion would not be granted. *Id.* at p. 12. Hodges recalled that the issue of changing venue within the district was "probably talked about", and that he now believes the "correct thing" would have been to move for a change of venue, and if the motion had been denied, the issue

[3]At the time of Petitioner's trial, Kenneth Hodges was a practicing attorney. Subsequent to trial, Attorney Hodges was elected to the Georgia Court of Appeals.

would have been preserved for appeal. *Id.* at pp. 17, 31-32. On cross-examination, Attorney Hodges admitted that the issue of venue was not his focus, and the process of juror selection was orderly and efficient, with the Court having a very active role. *Id.* at pp. 37, 39. According to Attorney Hodges, the decision not to file a motion to change venue was a strategic deliberate decision made by counsel. *Id.* at p. 40.

Attorney Thomas Bondurant served as lead counsel for Stewart Parnell. *Id.* at p. 68. Attorney Bondurant testified to over forty (40) years of legal experience, twenty-nine (29) of those as an attorney in the U.S. Attorney's office. *Id.* at pp. 67-68. Attorney Bondurant testified that he monitored and was aware of media attention regarding the salmonella outbreak and its connection to PCA, stating that media attention increased at the time of the outbreak, died off, and picked up again with the indictment in this case. *Id.* at pp. 74-75.

As to venue, Attorney Bondurant testified that counsel discussed seeking a change of venue, but determined that keeping the trial in the Albany division was preferred based on the inevitable evidence of unsanitary conditions at the PCA plant and the defense team's reliance on community sentiment of government overreach. *Id.* at pp. 90-91. In regard to conducting surveys of community opinion toward the Parnells, Bondurant stated that funding such surveys was an issue, as Stewart Parnell's counsel were not being paid after a certain point in the proceedings. *Id.* at p. 91-92. Attorney Bondurant did not recall whether counsel had a specific discussion regarding seeking a change of venue within the Middle District of Georgia. *Id.* at p. 93. "[W]hat we had at the time, I think we made the absolute right decision to keep venue where it was and that was a long thought-out process". *Id.* at p. 107.

According to Attorney Bondurant, counsel for the Parnell brothers "acted like we did [have a joint defense agreement] . . . and worked together as a joint defense." *Id.* at p. 109.

Attorney Devin Smith was part of the team, headed by Attorney Ed Tolley, retained to represent Petitioner Michael Parnell at trial. (Doc. 776, pp. 5-6). In her testimony at the § 2255 evidentiary hearing, Attorney Smith testified that she has been practicing law since 2010, and assisted Attorney Tolley in representing Michael Parnell. *Id.* at pp. 4-6. According to Attorney Smith, the firm collected and reviewed media coverage of the case, but she did not recall specific articles. *Id.* at pp. 9, 12. Attorney Smith deferred to Attorney Tolley regarding a motion to change venue and consideration thereof, although she stated that there were benefits to having the trial in the Albany Division, including jurors with agriculture experience and understanding of the realities of food production. *Id.* at pp. 15, 37-38. In regard to a joint defense agreement, Attorney Smith testified that this included counsel for the three (3) co-Defendants, who discussed and coordinated on strategy and the filing of motions. *Id.* at pp. 34-35.

> Q. And your view that Albany would be a good venue for your client[,] that was informed by investigation efforts by other lawyers in the joint defense agreement as well, correct?
>
> A. Correct. Mr. Tolley's experience in the venue as well as Mr. Hodges who was from that area and had been the district attorney in Dougherty County for many years.

Id. at p. 39.

Attorney Smith testified to there being only one (1) juror, an "outlier", who exhibited hostility, and whose views were not representative of the jury. *Id.* at pp. 40-41.

Finally, Petitioner called Attorney Ed Tolley as a witness, who was the lead attorney representing Petitioner at trial. Attorney Tolley testified to having over forty-five (45) years of legal experience, with a significant number of those spent as a criminal defense attorney. *Id.* at pp. 61-62. Attorney Tolley began his representation of Petitioner Michael Parnell at Michael Parnell's Initial Appearance on the Indictment, and continued this representation through the trial. *Id.* at p. 66. In preparation for trial, Attorney Tolley and his team compiled a file for each of 160 plus potential witnesses, and reviewed the e-discovery provided by the government. *Id.* at pp. 69-71. Regarding media coverage, Attorney Tolley had a file of newspaper articles that predated the Indictment, and he moved to Blakely, Georgia on a temporary basis before the trial. *Id.* at p. 75. Attorney Tolley knew of some national reporting on the case, but stated that the media coverage was not an "absurd . . . media crush". *Id.* at pp. 75, 77, 78, 171.

Attorney Tolley testified to having used polling firms in past cases, but mainly in civil cases, given the additional attention by courts to jury selection and control that he perceived took place in criminal cases. *Id.* at p. 81. Tolley stated that the area from which a jury was selected in this case was too large to make polling meaningful. *Id.* at pp. 82-83. Tolley's team conducted social media background checks on each juror. *Id.* at p. 82. Tolley confirmed that a joint defense agreement had been in place. *Id.* at p. 85.

Attorney Tolley testified that the closing of PCA in Blakely negatively impacted people in the community and engendered anger against the federal government. *Id.* at p. 92. As to a change in venue, Tolley "just didn't think we could meet the test", and he did not

believe that the necessary "extraordinary circumstances" were present to have venue changed. *Id.* at pp. 94, 163. "I just didn't think we met the standard is the reason why I didn't file one." *Id.* at 162. He did not "see any basis to move it" in regard to a division transfer, and noted that "the goal is to try a case in the division where the event occurs", although he was aware of the possibility of transferring a case to another division. *Id.*at pp. 97, 119.

Based on review of media coverage and social media, as well as consideration of strategic concerns as to the benefits of keeping the trial in the Albany Division, Attorney Tolley and his fellow attorneys did not perceive a level of prejudicial media that would prevent a fair trial, and they made a strategic decision not to file a motion to change venue. *Id.* at pp. 169-70, 172, 175. Although the case was a matter of interest in the community, Attorney Tolley noted that the law does not require "an empty headed juror". *Id.* at p. 172. Tolley perceived the one hostile venire member to be an "outlier". *Id.* at p. 175.

Evidence introduced and referenced by Petitioner

Petitioner attached excerpts from various newspaper and internet articles to the brief supporting his Motion to Vacate. (Doc. 674-3). Specifically, Petitioner sets out portions of media coverage of events leading up to the trial from National Public Radio on January 26 and February 10, 2009, one article from the Albany Herald published on March 21, 2010, and articles published in the Blakely, Georgia newspaper in January 2009, February 2009 and on July 30, 2014. *Id.* These articles discussed the salmonella outbreak, related deaths and illnesses, the investigation of the outbreak that led to the closure of PCA plants in Blakely and elsewhere, and the effects of these events on Blakely and the surrounding communities,

particularly on the peanut industry. *Id.* At the evidentiary hearing, Petitioner did not introduce any exhibits into evidence.

In order to prove ineffective assistance of counsel based upon a failure to move for a change of venue, a petitioner must show, "at a minimum, [that] there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if counsel had presented such a motion to the court." *Chandler v. McDonough,* 471 F.3d 1360, 1362 (11th Cir. 2006).

A. Rule 21

The Sixth Amendment guarantees a criminal defendant the right to trial by an impartial jury, and to have said trial take place in the state and district where the crimes were committed. U.S. CONST. amend. VI. Transfer of a criminal trial to another venue is possible at a defendant's request "if extraordinary local prejudice will prevent a fair trial – a basic requirement of due process." *Skilling,* 531 U.S. at 378. Rule 21 (a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21.

"A defendant is entitled to a change of venue if he can demonstrate either 'actual prejudice' or 'presumed prejudice'". *Meeks v. Moore,* 216 F.3d 951, 961 (11th Cir. 2000). Petitioner urges the Court to find both that a presumption of prejudice was in place, based on pretrial publicity and pervasive hostility toward PCA, and that actual prejudice existed.

Presumption of prejudice

"Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." *Coleman v. Kemp,* 778 F.2d 1487, 1490 (11th Cir. 1985). However, "[p]rominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*. A presumption of prejudice, our decisions indicate, attends only the extreme case." *Skilling,* 531 U.S. at 381.

As set out in *Skilling*, the Court's determination of whether prejudice is presumed to exist is guided by consideration of certain factors, including (1) the size and characteristics of the community in which the crime occurred; (2) whether news stories about the allegations in the indictment contained blatantly prejudicial information of the type readers or viewers "could not reasonably be expected to shut from sight"; (3) whether the level of media attention diminished preceding the trial; and (4) whether the verdict undermined the supposition of juror bias. *Id.*

Petitioner notes that the Albany Division contains eighteen (18) counties with an approximate population of 320,000 at the time of Petitioner's trial. (Doc. 788, p. 15). Thus, although Blakely, Georgia, the location of the PCA plant, is a small town, the population of the division from which the jury was taken was much larger and contains areas considered to be more urban in comparison.

As in *Skilling*, none of the excerpts from news stories provided by Petitioner contain a confession from Petitioner, and none of the excerpts presented by Petitioner specifically mention Petitioner, or any of his co-Defendants, by name.[4] None of the excerpts contain inflammatory information, such as details of horrific conditions or details of deaths. All of the excerpts contain largely factual recitations of the events at issue, the connection of the salmonella outbreak to PCA, and the impact of the outbreak and negative media attention on Blakely and the farming community. Although, as noted by Petitioner, some of the articles refer to deaths, possible deaths, and "severe" effects on the community and farming sector, these references do not rise to the level of inflammatory and "blatantly prejudicial" information that would have required the Court to presume prejudice had a motion to change venue been filed. As in *Skilling*, "[n]o evidence of the smoking-gun variety invited prejudgment of [Petitioner's] culpability." *Id.* at 383. Importantly, as set out by Petitioner, "Michael Parnell was not affiliated with the most salacious news accounts", and there is no indication that persons viewing or reading the accounts specifically connected him with the allegations. (Doc. 788, p. 16). Although Petitioner makes this assertion to support his argument that any connection between him and the news coverage was prejudicial, there is no evidence of such connection having been made by potential jurors or the relevant population prior to the trial.

[4] The Court notes that Petitioner has provided only excerpts of media coverage in support of his § 2255 Motion, which do not reflect any mention of Petitioner by name. Petitioner mentions one additional article in his post-hearing brief which allegedly names Petitioner as the vice-president of PCA and discusses the then-upcoming trial, but he has not provided this document to the Court, nor was it introduced into evidence or discussed at the evidentiary hearing. (Doc. 788, p. 16).

The news coverage presented by Petitioner focused on the impact of the salmonella outbreak on the community of Blakely, both in terms of farming and the closing of PCA itself, and the unfolding investigation. As noted by the government, a good portion of the news coverage presented by Petitioner concerned negativity and blame directed towards the media itself and the government for their handling of the matter. *Cf. Sheppard v. Maxwell,* 384 U.S. 333, 354, 358 (1966) (pretrial media coverage consisted of "months [of] virulent publicity about Sheppard and the murder [of his pregnant wife]" and a "carnival atmosphere" pervaded the trial). Even though witnesses testified to the news coverage being largely unfavorable to the peanut industry, PCA, and the area, "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Skilling,* 561 U.S. at 384, *quoting Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976). As found by the Eleventh Circuit, "[p]rejudice against a defendant cannot be presumed from pretrial publicity regarding peripheral matters that do not relate directly to the defendant's guilt for the crime charged. In fact, we are not aware of any case in which any court has ever held that prejudice can be presumed from pretrial publicity about issues other than the guilt or innocence of the defendant." *U.S. v. Campa,* 459 F.3d 1121, 1144 (11th Cir. 2006).

Moreover, Petitioner has only shown diminished media coverage of the salmonella outbreak and Petitioner's trial during the five (5) years between the initial outbreak events in 2009 and the trial in 2014. Petitioner did not show that media coverage either stayed the same or increased during the five (5) year interval. Petitioner has not come forth with evidence of any media coverage after 2009 and before 2014. *See Murphy v. Florida*, 421 U.S. 794, 802 (1975) (finding no inflamed community atmosphere when news articles

appeared seven (7) to twenty (20) months before the jury was selected and were largely factual in nature).

Additionally, Petitioner was found not guilty on twelve (12) of the forty-three (43) counts in the Indictment, and his acquittal on twelve (12) counts shows a significant level of undermining of any "supposition of juror bias". (Docs. 500, 624); *Skilling*, 561 U.S. at 383. In *Skilling*, the defendant was charged in thirty-five (35) counts and was acquitted on nine (9) of the counts. *See United States v. Skilling*, 554 F.3d 529, 542 (5th Cir. 2009), *vacated in part on other grounds by Skilling v. U.S.*, 561 U.S. 358 (2010). "The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues and reinforces our belief and conclusion that the media coverage did not lead to the deprivation of [the] right to an impartial trial." *Skilling*, 561 U.S. at 384, *quoting United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 (5th Cir. 1989).

Based on a consideration of the factors set forth in *Skilling*, the Court finds that no presumption of prejudice was present in this case. Petitioner has failed to show that sufficiently prejudicial pretrial publicity saturated the Middle District of Georgia, the community where the trial was held or the division from which the jury panel was pulled, such that prejudice would have been presumed by the trial court. *See Bundy v. Dugger,* 850 F.2d 1402 (11th Cir. 1988) (Defendant failed to establish presumed prejudice, as media coverage of prior trial was largely factual and not designed to inflame or prejudice the public, and defendant's well-publicized criminal record did not establish that the community was so predisposed to defendant's guilt as to establish presumed prejudice).

To the extent that Petitioner asserts that his counsel was ineffective in failing to conduct polls or surveys to uncover the level of public knowledge of the case, Attorney Tolley testified that his experience was that polling and jury consultants were not dependable or useful, and that counsel was fully aware of the media coverage that had taken place. (Doc. 776, pp. 73-76, 79-81, 170). Petitioner, without any support, states that "[i]n cases with a high degree of community impact and disproportionately high pretrial media coverage, it is routine for defense counsel to employ polling, survey [sic], or jury consultants." (Doc. 788, p. 13). Petitioner provides no indication of what information polling or consultants would have revealed, and provides no support for the argument that failure to employ such means was ineffective assistance of counsel. To the extent that these assertions are part of his ground challenging counsel's failure to file a motion to change venue, Petitioner has failed to establish that counsel's decisions regarding these issues were patently unreasonable so that no competent attorney would have made the same decision, or that there is a reasonable probability that the outcome of the trial would have been different absent the alleged errors.

To the extent that Petitioner argues that jurors' preconceived notions about the case created a presumption of prejudice, he has not shown that such preconceived notions rose to the level of creating prejudice such that a Rule 21 motion to change venue would have been granted. The Court thoroughly questioned all potential jurors who stated they had some level of knowledge about the case, and established that those seated on the jury could remain impartial. Petitioner has not shown that jurors with connections to farming or the peanut industry in general established community prejudice that would have supported a change of

venue under Rule 21. As in *Skilling*, voir dire was "well suited to [identifying and inspecting prospective jurors' connections], and the Court clearly and thoroughly examined the panel to uncover any potential bias. *Skilling*, 561 U.S. at 384. As noted below, Petitioner has not established actual prejudice on the basis of jurors' alleged bias.

Actual prejudice

The record does not contain evidence of actual prejudice. "To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not have laid aside these preformed opinions and rendered a verdict based on the evidence presented in court." *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983).

In regard to a showing of actual prejudice that would have supported a motion to change venue, Petitioner has failed to show that any of the jurors chosen to decide the case believed Petitioner was guilty before hearing the evidence, and that these jurors could not have laid aside this belief, such that a motion to change venue would have been granted based on a finding of actual prejudice. Although Petitioner repeatedly points to jurors' alleged knowledge of deaths and to the entry of extrinsic information regarding deaths related to the salmonella outbreak into jurors' considerations, knowledge of deaths alone does not mean jurors had decided Petitioner was guilty of the crimes charged before hearing the evidence. "Jurors . . . need not enter the box with empty heads in order to determine the facts impartially." *Skilling,* at 398.

Moreover, the Courts' voir dire of potential jurors was thorough and provided assurance of jurors' impartiality. *See Campa,* 459 F.3d at 1148 ("[T]he court's careful and thorough voir dire rebutted any presumption of prejudice."). Voir dire took place over a period of two (2) days, and was led by the Court, with follow-up questions from counsel. The Court specifically found after its post-trial hearings that "there is no indication that any juror concealed harbored bias from the Court or the Defendants . . . [and] the Court finds that the Defendants failed to demonstrate that any juror failed to honestly answer any question during voir dire." (Doc. 397, p. 20).

The Court notes that Petitioner's counsel and counsel for his co-Defendant Stewart Parnell testified to the decision regarding a motion to change venue being a matter of strategy, made after weighing and considering possible options and outcomes, primarily considering that their defense theories of government overreach and inevitable evidence of conditions in the plant would play better with a jury from the region. Counsel also testified to their belief that the granting of such a motion was unlikely given the circumstances of the case. Petitioner's counsel, and counsel for Stewart Parnell, had a significant amount of legal experience, and the experience of counsel strengthens the presumption that counsel's decisions were reasonable. *Raheem v. GDCP,* 995 F.3d 895, 910 (11th Cir. 2021).

"To give trial counsel proper deference, this circuit presumes that trial counsel provided effective assistance. And it is the petitioner's burden to persuade us otherwise." *Harvey v. Warden, Union Correctional Institution*, 629 F.3d 1228, 1245 (11th Cir. 2011). "An attorney's actions are sound trial strategy, and thus effective, if a reasonable attorney could have taken the same actions." *Id.* at 1243.

Petitioner has not refuted the testimony from his counsel that the decision not to file a motion to change venue was sound trial strategy. Such strategic choices are "virtually unchallengeable". *Strickland*, 466 U.S. at 690. Even if certain counsel later deemed the decision to be incorrect, "the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983). Petitioner has clearly failed to satisfy this burden regarding counsel's strategic decision not to file a motion to change venue, and has failed to establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Considering the totality of the evidence before the jury, and as found by the Eleventh Circuit, "the evidence of guilt was overwhelming". (Doc. 640, p. 10).

B. Rule 18

In his post-hearing brief, Petitioner argues for the first time that "[t]here is a reasonable probability that the trial court should have granted a motion for a change of venue to another division within the Middle District of Georgia", and that this satisfies the prejudice prong of *Strickland*. Petitioner maintains that a motion to transfer the case under Rule 18 of the Federal Rules of Criminal Procedure would "have forced the Court [to] engage in [the Rule 18] process and give due regard to the factors in Rule 18", which Petitioner contends weighed heavily in favor of an "intradistrict transfer". (Doc. 788, p. 8). [5]

Pursuant to Rule 18, entitled "Place of Prosecution and Trial",

[5] The government does not object to any delay in Petitioner's raising of this argument.

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Fed. R. Crim. P. 18.

As noted by the Respondent, Petitioner misstates the standard for showing prejudice regarding a motion to change venue under *Strickland*. Contrary to Petitioner's statement of the law, the full quote from caselaw concerning this issue is that

> [i]n order to satisfy the prejudice prong of *Strickland's* ineffective assistance analysis, [Petitioner] must establish that there is a reasonable probability that, but for his counsel's failure to move the court for a change of venue, the result of the proceeding would have been different. ***This requires, at a minimum,*** that [Petitioner] bring forth evidence demonstrating that there is a reasonable probability that the trial court could have, or at least should have, granted a motion for change of venue if [Petitioner's] counsel had presented such a motion to the court.

Meeks, 216 F.3d 951, 961 (11th Cir. 2000), *emphasis added*.

Thus, any conclusion that the trial court would have granted a motion to change venue is only a starting point, a minimum requirement rather than a deciding factor.

Moreover, the evidence before the Court does not support a finding that the trial court would, or should have, granted a motion to change venue brought under Rule 18. "[T]he fixing of the place of trial within a district is within the discretion of the trial judge [and] in the exercise of that discretion he is to give due regard (1) to the convenience of the defendant, (2) to the convenience of witnesses and (3) to the prompt administration of

justice. . . [T]he court is not authorized to fix the place of trial on the basis of other considerations to the exclusion of these." *U.S. v. Burns,* 662 F.2d 1378, 1382 (11th Cir. 1981)*; see also U.S. v. Merrill,* 513 F.3d 1293, 1304 (11th Cir. 2008). Thus, although as Petitioner asserts, the Court *may* consider the factor of pretrial publicity in any Rule 18 consideration, it may not do so to the exclusion of consideration of convenience to defendant and witnesses and the prompt administration of justice. "The court must balance not only the effect the location of the trial will have upon the defendants and their witnesses, but it must also weight the impact the trial location will have on the timely disposition of the instant case and other cases." *Merrill,* 513 F.3d at 1304, *quoting In re Chesson,* 897 F.2d 156, 159 (5th Cir. 1990).

Under a Rule 18 analysis, any convenience to Petitioner to have the trial in another division would have been outweighed by considerations of convenience to witnesses, with a substantial amount of testimony coming from witnesses residing in the Albany Division, and the prompt administration of justice. Petitioner, a resident of Virginia at the time of trial, was one of three (3) co-Defendants, one of whom resided in the Albany Division, and any move of the trial to another division would have seriously delayed the prompt administration of justice. This case already involved the passage of almost eighteen (18) months between Indictment and trial, multiple motions to continue, and designation of the case as complex. Although Petitioner asserts that local publicity rose to a level that would have weighed in favor of an intra-district transfer, the evidence before the Court, which consists only of approximately a dozen media reports primarily from 2009, does not establish the presence of

such pervasive publicity that would have outweighed the other factors that the Court was required to consider. *See U.S. v. Lipscomb,* 299 F.3d 303, 346 (5th Cir. 2002) ("No case of ours . . . stands squarely for the proposition . . . that for purposes of a defendant's initial trial, pretrial publicity alone would permit the trial court, *sua sponte* and without a supporting record, to order an intradistrict transfer to a division entirely unrelated to the offense conduct".).

Inasmuch as Petitioner has not established that the Court would or should have granted a motion for an intra-district transfer, he has failed to show that counsel was deficient in failing to file such a motion and has failed to show that he was prejudiced by counsel's inaction. To the extent that Petitioner asserts that "Mr. Tolley failed to recognize that Rules 18 and 21 maintain different standards for review", the testimony to which Petitioner cites in no way supports this assertion, and there is no evidence before the Court of any confusion on the part of Mr. Tolley as to the differing standards. *See* Doc. 776 at p. 97; *cf.* Doc. 776 at pp. 97, 119. Moreover, the Court recognizes that there can be some level of consideration of Rule 21 factors in determining Rule 18 motions. *See e.g. Lipscomb,*299 F.3d at 344-345. Finally, Petitioner provides nothing more than speculation that this case would have most likely been transferred to the Macon Division if a Rule 18 motion had been filed and granted.

II. Ineffective assistance: motion to strike jurors

In his second ground for relief, Petitioner asserts that his counsel provided ineffective assistance in failing to move to strike venirepersons who had heard about deaths attributed to the salmonella outbreak. Two (2) of these venirepersons were ultimately seated on the jury.

In his § 2255 Motion, Petitioner contends that counsel's decision not to move to have these jurors struck was not a strategic decision, but was based on their erroneous belief that the Court had removed all of the jurors with knowledge of deaths for cause.

To the extent that Petitioner challenges counsel's failure to file motions to strike venire-persons who were ultimately *not* seated on the jury, he has not identified any prejudice suffered as a result of counsel's alleged inadequate representation in this regard.

As part of the voir dire process, the Court asked the jury panel whether anyone had personal knowledge, defined as "your own direct knowledge about any of the matters in this case". (Doc. 554, p. 2). The Court, with counsel and Defendants present, then questioned jurors who claimed to have personal knowledge about the case in chambers, individually. Each juror was asked to describe his/her personal knowledge, the source of the knowledge, whether he/she had begun to form any opinion about the case or a defendant's guilt, and if so, whether he/she could set that aside. *Id.* at pp. 5-6. Counsel was allowed to ask follow-up questions. Certain jurors were excused for cause.

In regard to the two (2) jury members who stated they had some knowledge of death, one of these jurors stated during voir dire that he/she was told by a relative that the salmonella outbreak had "killed some people in Americus", but that he/she could base his/her opinion only on the evidence before him/her. *Id.* at pp. 46-47. No motion was made by counsel for any of the Defendants to strike this juror. The second juror with knowledge of deaths stated he/she thought he/she had heard on television that somebody had died, but he/she had not formed any opinion regarding the case or Defendants' guilt and would be able

to put aside the news story and decide the case on the evidence presented in the courtroom only. *Id.* at pp. 109-111. Attorney Hodges questioned one of the jurors further, but no motion was made by counsel to strike this juror.

Testimony at the evidentiary hearing

In regard to any motion to strike jurors, Attorney Hodges, who was primarily responsible for voir dire for Petitioner's co-Defendant Stewart Parnell, testified at the § 2255 evidentiary hearing that Attorney Tolley was ultimately responsible for handling voir dire on behalf of Petitioner. (Doc. 775, p. 18). However, Attorney Hodges led most of the voir dire that was conducted by counsel as opposed to that led by the Court, with Attorney Tolley asking or suggesting any follow-up questions he deemed appropriate. *Id.* at pp. 18-19. Attorney Hodges testified that the decision not to move to strike for cause jurors who knew about deaths was the "[w]rong decision", but that jury selection was not a science, and that each juror selected to sit in this matter swore that he or she could be impartial. *Id.* at pp. 34, 41, 43. Attorney Hodges testified that at the time of jury selection, there was no reason to doubt the truth of jurors' statements. *Id.* at p. 43. According to Attorney Hodges,

> we . . . made strategic decisions not to make motions that we thought we would get adverse rulings on . . . I think most jurors are honest . . . [and] they had said the magic words to Judge Sands so that he would have been fully justified in denying our motion to strike for cause. . . We wouldn't want to leave anyone that we thought was biased on the panel but we only have, you know, a limited number of strikes. . . [I]t's a triage, you have to rank them in order of who you think is better or worse based on the information that you have.

Id. at pp. 44-45, 47-48.

Attorney Hodges acknowledged that counsel made a strategic decision not to make a motion to strike for cause as to those jurors with knowledge of death who ended up on the jury. *Id.* at p. 51.

Attorney Thomas Bondurant testified that counsel believed jurors with knowledge of deaths related to the salmonella outbreak could put that knowledge aside, and that mere knowledge of deaths was not a disqualifier to serve on the jury. *Id.* at p. 96. Counsel believed that the two (2) jurors in question could be impartial, as they had testified. *Id.* at p. 123.

Devin Smith, who worked with Ed Tolley as counsel for Petitioner at trial, testified that they relied on Attorney Tolley's experience in selecting the jury. (Doc. 776, pp. 26-27). She recalled one juror who was particularly hostile toward the Parnells in general, and that this juror was struck for cause. *Id.* at p. 27. Attorney Smith and Attorney Tolley considered many different factors in selecting jurors. *Id.* at pp. 43-44, 48. Attorney Smith did not believe that the mere knowledge of deaths would render a juror incapable of being impartial, and she had no reason to doubt jurors' testimony that they could be impartial. *Id.* at p. 49.

Ed Tolley testified that the voir dire process was used to determine whether jurors could be impartial. *Id.* at p. 96. Attorney Tolley stated that

> if a juror when they come into the courtroom agrees that they can put any prejudice aside and render a verdict based only on the evidence as it comes from the witness stand and if a juror has only a passing knowledge of media coverage and/or can agree that media coverage can be set aside in their mind and then they otherwise take an oath to be fair and impartial, that's all you can hope for in the American justice system.

Id. at p. 104.

According to Attorney Tolley, the Judge conducted voir dire, and all of the attorneys were given the opportunity to ask follow up questions. *Id.* at p. 108-109. Tolley did not remember anyone testifying to having heard media reports just prior to the trial, but if that had happened, the Court would have followed up with additional questioning. *Id.* at p. 112. Tolley "did not witness or feel any personal displays of hostility toward either of the Parnells until sentencing. The sentencing was brutal." *Id.* at pp. 112-113. Tolley stated that "[w]e struck as many people as we had strikes to keep the jury as clean as we could in terms of their knowledge of what happened down there in Blakely, and that [] was [the] goal." *Id.* at p. 117. Attorney Tolley testified that mentioning deaths in a trial context was different from generalized knowledge of possible deaths, and that some characteristics of potential jurors compete against each other. *Id.* at pp. 177, 178. Tolley did not believe that the jurors were biased against Petitioner, and stated that "[m]ost good judges say why should I contaminate my trial with somebody that's suspect. It's just easier to get rid of them and [in] my mind that's what Judge Sands did." *Id.* at pp. 181, 185.

Petitioner has failed to establish that counsel's failure to move to strike jurors with knowledge of deaths related to the salmonella outbreak was an act that no competent counsel would have taken. *Chandler,* 218 F.3d at 1314. "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy". *Id.*

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence . . . A fair

> assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . [A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

Strickland, 466 U.S. at 689-690.

"Counsel is also accorded particular deference when conducting *voir dire*. An attorney's actions during *voir dire* are considered to be matters of trial strategy. A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Hughes v. U.S.,* 258 F.3d 453, 457 (11th Cir. 2001). The jurors in question did not in fact express any doubt as to their impartiality, and the Eleventh Circuit specifically found that it could not conclude "that the exposure of several jurors [during the trial] to the fact that several people also died from the outbreak was highly prejudicial". (Doc. 640, p. 9).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. . . The affirmative of the issue [regarding the nature and strength of the opinion formed] is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside.

Irvin v. Dowd, 366 U.S. 717, 723 (1961).

Even if the identified jurors had expressed some doubt as to their abilities to be impartial, "[a] juror's express doubt as to her own impartiality on *voir dire* does not necessarily entail a finding of actual bias." *Hughes,* 258 F.3d at 458. Counsel's testimony establishes that the decision not to move to strike jurors with knowledge of deaths was a strategic decision, supported by a determination that the seated jurors testified to their abilities to be impartial.

To the extent that Petitioner asserts that counsel's failure to move to strike jurors with knowledge of related deaths resulted in prejudice to Petitioner by virtue of failing to preserve the issue for appeal, "when the claimed error of counsel occurred at the guilt stage of trial (instead of on appeal) we are to gauge prejudice against the outcome of the trial: whether there is a reasonable probability of a different result at trial, not on appeal." *Purvis v. Crosby,* 451 F.3d 734, 739 (11th Cir. 2006). Petitioner has not shown that he suffered prejudice as a result of counsel's decision not to move to strike jurors with knowledge of deaths, in that he has failed to show that absent this alleged error, there was a reasonable probability that the outcome of the trial would have been different.

Petitioner relies heavily on his interpretation of counsel's Motion in Limine seeking to exclude evidence of deaths allegedly related to the salmonella outbreak. Contrary to Petitioner's characterization of the outcome of this motion, the evidence was not ruled "so unfairly prejudicial that it has been excluded"; rather, the government simply agreed not to introduce any evidence of deaths. Thus, the government's concession removed any need for a ruling on whether such evidence, when introduced and developed by the government,

would be prejudicial. To the extent that Petitioner initially asserted in his § 2255 Motion that counsel thought jurors with knowledge of deaths had been struck, Petitioner does not point to any testimony at the evidentiary hearing that supports this assertion.

Finally, the Court will not revisit the Order denying Petitioner's Motion for a New Trial. That Order stands as issued, and Petitioner's attempt to challenge such Order in these proceedings is without merit and inappropriate.

Structural error argument

To the extent that Petitioner characterizes both Grounds 1 and 2 as counsel's failure to secure an impartial jury, and argues that the grounds represent structural errors that do not require a separate showing of prejudice, Petitioner has failed to establish that the alleged errors of counsel actually resulted in a jury that was not impartial and that the structural error analysis is applicable to this case. "The Supreme Court instructed us in *Strickland* that aside from . . . three exceptions – actual or constructive denial of counsel altogether, certain types of state interference with counsel's assistance, and conflicts of interest – prejudice must be shown". *Purvis*, 451 F.3d at 741-742 ("the law of this circuit [is] that an ineffective assistance of counsel claim based on the failure to object to a structural error at trial requires proof of prejudice".).

III. Ineffective assistance: failure to investigate jurors post-trial

In Ground 3 of his Motion to Vacate, Petitioner asserts that counsel was ineffective in failing to independently investigate juror prejudice once improper influence became known post-trial. Petitioner maintains that after allegations of juror prejudice were raised post-trial,

counsel should have investigated the claims, rather than rely on the investigative efforts of counsel for co-Defendants.[6]

By Order dated October 7, 2014, the Court noted that "[o]n [Monday] October 6, 2014, certain allegations were made by one or more Defendants . . . that one or more jurors engaged in misconduct." (Doc. 311). The Court specifically ordered all jurors, including alternates, not to speak to any person or make any statement regarding deliberations or any stage of the trial, including the jury selection process. *Id.*

According to the testimony of Attorney Smith, after she and Attorney Tolley were notified about the possible issue with jury prejudice, they did not have direct contact with the jurors or co-Defendant Wilkerson, through whom the information had been passed. (Doc. 776, pp. 30-31). As noted by Attorney Smith, Local Rule 48.3 prohibits attorneys, parties, or anyone acting on behalf of parties from contacting any juror without permission from the Court. Local Rule M.D.Ga. 48.3. Aware of this rule, neither Attorney Smith nor Attorney Tolley contacted the jurors allegedly involved in the improper conduct, and immediately informed the Court. (Doc. 776, pp. 31, 121). Smith and Tolley relied on co-counsel's information and the Court's investigation regarding the juror deliberations. *Id.* According to Attorney Tolley, "Judge Sands took very firm control of the process, and we took each juror individually in his conference room and he initiated the questioning . . . he wanted to get to the bottom of it." *Id.* at pp. 123-124.

[6] Although Respondent asserts that this claim is actually a claim that the Court should have considered additional evidence, and is procedurally barred, Petitioner brings this ground as a claim of ineffective assistance of counsel, and the Court finds no basis to disturb this characterization. *See U.S. v. Nyhuis,* 211 F.3d 1340 (11th Cir. 2000).

Petitioner has not come forth with any form of additional information that he believes his counsel might have uncovered with additional investigation of the juror misconduct issue. Counsel immediately informed the Court of the situation, and the Court immediately took action, enforcing the no contact rule as to jurors and directing the investigation of the allegations. Moreover, counsel for a co-Defendant had already undertaken further investigation, without Court permission, and counsel for Petitioner was provided the results of this investigation. Petitioner has not come forth with sufficient evidence to establish deficient performance on behalf of counsel or of prejudice to Petitioner as a result of any alleged lack of investigation.

IV. Ineffective assistance: failure to investigate and call witnesses to challenge government witnesses and sentencing enhancements

In his final numbered ground for relief, Petitioner alleges that counsel failed to investigate and call witnesses who would have discredited the government's witnesses. Petitioner names a Mr. Kimbrell and Joseph Sams, and asserts that counsel failed to call witnesses that would have affected sentencing, on issues of the cause of deaths of victims and managerial role enhancement. Petitioner believes that Kimbrell's testimony would have undermined the testimony of government witness Samuel Lightsey, as Kimbrell held the position of production manager at PCA prior to Lightsey. Petitioner also alleges that counsel failed to review the Presentence Report with him and failed to object to sentencing enhancements based on the number of victims, guideline loss calculations, and managerial role.

In his post-hearing brief, Petitioner limits his argument on this ground to counsel's alleged failure to negate the government's loss calculations and failure to rebut or challenge the enhancement for number of victims and risk of death or serious bodily injury.

In his testimony at the evidentiary hearing, Attorney Tolley testified that he attempted to contact one witness suggested by Petitioner without success, and that any proposed testimony would have proven irrelevant to the issues in the trial. (Doc. 776, pp. 129-131). As to Kimbrell, Tolley interviewed him and believed Kimbrell to be an "unindicted conspirator who had been thoroughly vetted by the FBI and he wasn't going to help Michael Parnell". *Id.* at p. 133.

> If he had testified I had some questions that I think might have tangentially helped Mike, but he didn't testify. But, Hardrick did testify and that did help Michael, same testimony. Hardrick provided the same testimony.

Id. at p. 136.

As to loss amount, Attorney Tolley testified that the loss amount drove most of the sentencing guideline determinations. *Id.* at p. 143. Tolley called witnesses and presented various arguments to try to reduce the loss amount. *Id.* at pp. 143-144. Tolley objected to evidence and testimony regarding victim deaths, and argued against deaths being connected to Petitioner. *Id.* at pp. 145-149. Tolley pointed out that

> they weren't trying to prove that he killed anybody, they didn't argue that, but he was convicted of the conspiracy, and that's how they got to him in sentencing . . . Since they weren't alleging that Michael killed anybody, calling an expert to testify that he didn't kill anybody where the government wasn't alleging it doesn't seem to me to make sense. What I did do was to call, I called Jean Parnell to talk about the company and Michael's involvement in that. I relied on Hardrick's testimony

> about Michael because I objected to his classification as a manager and . . . the enhancement for that. I objected to loss calculations.

Id. at pp. 149-150.

Tolley believed that the cross examination and existing trial testimony established a rebuttal to the loss amount requested by the government. *Id.* at p. 151. Tolley reviewed the Presentence Report with Petitioner, called all of the witnesses at sentencing that Petitioner requested, and did not believe that additional witnesses were necessary. *Id.* at pp. 151-152, 190. Tolley outlined his arguments and objections to the Presentence Report. *Id.* at p. 155.

The Eleventh Circuit has held that "[w]hich 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." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995). "[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978). Additionally, "[t]he movant cannot show prejudice if the omitted [witness testimonial] evidence is aggravating, cumulative, or incompatible with the defense strategy." *Thomas v. U.S.*, 596 F. A'ppx 808, 811 (11th Cir. 2015).

A review of the Final Presentence Report for Petitioner reveals that Attorney Tolley objected to the leadership role enhancement, the loss amount calculation, and the risk of death or serious bodily injury enhancement. (Doc. 469-1). Petitioner's arguments do not reveal what additional manner of objection counsel could or should have pursued. Petitioner does not assert how additional objection or questioning regarding the sentence enhancements would have

benefitted him, but rather argues against the sentencing determination made by the Court. Petitioner has not shown that counsel's representation was inadequate in terms of the arguments made. The Court notes that Petitioner stated at his sentencing hearing that he was aware certain objections had been raised and was not aware of any other objections, and did not raise any objection to counsel's statement to the Court that they had each read the Final Presentence Report. (Doc. 602, pp. 162-163).

V. Additional grounds

In an attachment to his Petition, Petitioner touches on several other issues that could be construed as raising separate grounds for relief. (Doc. 674-1). Although Petitioner did not develop these issues at the evidentiary hearing or in his post-hearing brief, the government has not raised an objection to these issues as grounds for relief, and the Court will address the issues out of an abundance of caution. *See Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (district court must resolve all claims for relief raised in petition for writ of habeas corpus; "[a] claim for relief . . . is any allegation of a constitutional violation"); *Rhode v. U.S.*, 583 F.3d 1289, 1291 (11th Cir. 2009) (applying *Clisby* to § 2255 Motion to Vacate).

Petitioner alleges that Attorney Tolley failed to call Jeff McFay as a witness, who Petitioner labels an "unindicted coconspirator" with knowledge of fraudulent COAs. (Doc. 674-1). Petitioner also contends that Attorney Tolley failed to present evidence regarding the validity of information in emails introduced into evidence, specifically regarding peanut meal, that Tolley failed to introduce evidence regarding salmonella and the cause of death of certain individuals, and failed to contact and/or call other witnesses. *Id.* Petitioner also presents his rebuttal to information presented at trial.

All of these claims can be summarized as allegations that counsel failed to develop defense theories as espoused by Petitioner. Petitioner's primary argument in these claims is that he was not responsible for the criminal activity with which he was charged and convicted, and that counsel failed to show this. As to these claims, Petitioner has not shown "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[, or that the alleged] deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687. Petitioner has not overcome the presumption that counsel's decisions regarding which witnesses to call and which evidence to introduce and/or attack was a matter of sound trial strategy. *Id.* at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. A review of Attorney Tolley's testimony at the evidentiary hearing and the trial record reveals that Tolley vigorously represented Petitioner, cross-examining the government witnesses and calling several witnesses on Petitioner's behalf at trial and at sentencing. Petitioner has not disturbed the presumption that counsel acted within the bounds of sound trial strategy.

To the extent that Petitioner raises a claim alleging that Attorney Tolley prevented him from testifying, Petitioner signed a form that appears in the record, wherein his right to testify is set out and Petitioner waives his right to testify. (Doc. 297). This document is also signed by Attorney Tolley and witnessed by Senior U.S. District Judge Sands. *Id.* Petitioner has not offered any support for the allegation that counsel prevented or prohibited him from testifying.

Conclusion

Petitioner has failed to establish by a preponderance of the evidence trial counsel's ineffective assistance. WHEREFORE, it is recommended that Petitioner Michael Parnell's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge shall make a de novo determination as to those portions of the Recommendation to which objection is made; all other portions of the Recommendation may be reviewed by the District Judge for clear error.

Objections

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

The undersigned finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is recommended that the Court deny a certificate of appealability in its Final Order. If the

Petitioner files an objection to this Recommendation, he may include therein any arguments he wishes to make regarding a certificate of appealability.

SO RECOMMENDED, this 7th day of April, 2022.

s/ ***Thomas Q. Langstaff***
UNITED STATES MAGISTRATE JUDGE