APPENDIX A:

Petitioner's Ron Collins' Application for a Certificate of Appealability, Denied.

(Attached to Appendix A is 1 page)

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 31, 2017
Decided August 11, 2017

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 16-3606

RON COLLINS,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:14-cv-09245

Virginia M. Kendall,
Judge.

ORDER

Ron Collins has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). The district court correctly concluded that Collins's trial counsel was not ineffective. Similarly, Collins's claims that 21 U.S.C. §§ 841 and 846 are unconstitutional and that he was subject to vindictive and selective prosecution are procedurally barred.

Accordingly, the request for a certificate of appealability is DENIED. Collins's motion to proceed in forma pauperis is DENIED.

CERTIFIED COPY
A True Copy.
Teste: _____
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX A-1:

The Court denies Petitioner Ron Collins' Rehearing En Banc.

(Attached to Appendix A-1 is 1 page)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 26, 2017

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 16-3606

RON COLLINS,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:14-cv-09245

Virginia M. Kendall, *Judge.*

ORDER

No judge of the court having called for a vote on the Petition For Panel Rehearing or Rehearing En Banc, filed by Petitioner-Appellant on October 11, 2017, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition For Panel Rehearing or Rehearing En Banc is DENIED.

APPENDIX B:

Memorandum Opinion and Order of the United States Court of Appeals for the Seventh Circuit, *United States v. Collins*, No. 14 C 9245, 2016 WL 1435698 (N.D. Ill. Apr. 12, 2016).

(Attached to Appendix B are 9 pages)

 APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 14 C 9245
v.	)	Judge Virginia M. Kendall
RON COLLINS,	)	

MEMORANDUM OPINION AND ORDER

Petitioner Ron Collins moved under 28 U.S.C. § 2255 for the Court to vacate, set aside, or correct his conviction or sentence. He is currently serving a sentence of three hundred sixty months imprisonment after a jury convicted him of conspiring to possess with intent to distribute and to distribute cocaine. In his Section 2255 petition, Collins asserts that (1) the law he was convicted under is unconstitutional; (2) the Government engaged in selective and vindictive prosecution; and (3) his attorney was ineffective for failing to object to the admission of tape recordings and testimony about coded drug language, failing to explain the legal concept of conspiracy, failing to request a *Sears* instruction, failing to cross examine Flores, and failing to investigate. For the reasons expressed therein, the Court denies Collins's motion for relief under Section 2255. (Dkt. No. 1.)

BACKGROUND

On August 6, 2009, a grand jury issued an indictment against Collins for one count of conspiracy to possess with intent to distribute and to distribute five or more kilograms of

cocaine. (R. at 1.)[1] On June 7, 2011, a jury found Collins guilty of the one count in the indictment. (R. at 141.) The Court sentenced Collins to three hundred sixty months imprisonment on September 7, 2011. (R. at 161.) Collins appealed his sentence arguing that the Court erred by admitting evidence of tape recordings, allowing an expert to testify regarding coded drug-dealing language on the tapes, and finding that he was a manager or supervisor at sentencing. *See United States v. Collins*, 715 F.3d 1032 (7th Cir. 2013). On July 16, 2013, the Seventh Circuit issued its opinion affirming Collins's conviction and sentence on all three issues. *Id.* Collins filed a petition for certiorari with the Supreme Court which was denied. He subsequently filed this motion to vacate, set aside, or correct his sentence or conviction under 28 U.S.C. § 2255. (Dkt. No. 1.)

DISCUSSION

I. Procedural Default

The Court is construes Collins's motion for collateral relief liberally because he is pro se. *See Smith v. Dart*, 803 F.3d 304, 311 (7th Cir. 2015). Collins first argues that the drug conspiracy federal law, 21 U.S.C. 846 under which he was convicted is unconstitutional, and secondly, that the Government engaged in selective and vindictive prosecution. Collins contends that 21 U.S.C. § 846 is vague and includes elements that determine the maximum sentencing range which were not submitted to the jury. He further argues that the Government committed selective and vindictive prosecution because it prosecuted him but not Pedro Flores. Yet, Collins did not submit these attacks to 21 U.S.C. § 846 or his claims of selective and vindictive prosecution in his appeal to the Seventh Circuit on direct appeal; accordingly, unless he can demonstrate cause and prejudice, or that a fundamental miscarriage of justice will result if the

[1] Citations to Collins's criminal case (09 CR 673) are referred to as "R." followed by the docket number. Citations to this civil case are referred to as "Dkt. No." followed by the docket number.

Court does not consider these claims, he procedurally defaulted these arguments. *Bousley v. United States*, 523 U.S. 614, 622 (1998)("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") (internal citations omitted) *See also United States v. Fleming*, 676 F.3d 621, 625 (7th Cir. 2012); *Torzala v. United States*, 545 F.3d 517, 522 (7th Cir. 2008) ("A claim that has been procedurally defaulted ordinarily may only be raised in a § 2255 proceeding if the defendant demonstrates that he is 'actually innocent,' or that there is 'cause' and actual prejudice.").

In his brief, Collins failed to explain why he did not make these arguments on direct appeal and failed to present any reason for his failure to raise them on direct appeal. Even if he could show cause as to why he failed to allege them on appeal, he has failed to show how he was actually prejudiced from the failure to appeal these two issues. He further does not allege that failure to allow him to present these claims would result in a fundamental miscarriage of justice or that he is actually innocent. As a result, Collins has failed to show cause and prejudice, miscarriage of justice, or actual innocence and so his claim attacking the constitutionality of 21 U.S.C. § 846 and his claim of selective and vindictive prosecution are barred.

II. Ineffective Assistance of Counsel

Collins suggests that his trial counsel was ineffective because he failed to explain to him the law about conspiracy, did not object to testimony about coded drug language, did not move for a *Sears* instruction, failed to object to the admission of tape recordings, did not cross examine Flores, and did not sufficiently investigate. Although Collins did not assert his ineffective assistance of counsel claims on appeal, they may be brought for the first time on a Section 2255 motion because they often involve evidence outside the trial record. *See Massaro v. United*

States, 538 U.S. 500, 504 (2003) ("We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."); *United States v. Flores*, 739 F.3d 337, 341 (7th Cir. 2014). Nonetheless, "issues raised on direct appeal may not be reconsidered on a § 2255 motion absent changed circumstances." *Vinyard v. United States*, 804 F.3d 1218, 1227 (7th Cir. 2015) (quoting *Varela v. United States*, 481 F.3d 932, 935 (7th Cir. 2007)).

Under *Strickland v. Washington*, a defendant's Sixth Amendment right to counsel is violated when (1) counsel's performance was deficient, meaning "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment"; and (2) counsel's deficient performance prejudiced the defendant such that but for the deficiency, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. 668, 687 (1984). For the performance prong, the "[C]ourt must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and presume that it is a "sound trial strategy." *Id.* at 689; *see Menzer v. United States*, 200 F.3d 1000, 1003 (7th Cir. 2000). A defendant must identify specific acts or omissions by counsel that constitute ineffective assistance, and the Court then determines whether they are outside the wide range of professionally competent assistance based on all the facts. *See Menzer*, 200 F.3d at 1003. The Court must resist the urge to "Monday morning quarterback" by questioning counsel's decisions with the benefit of hindsight, but rather evaluate counsel's performance based on her perspective at the time. *See Strickland*, 466 U.S. at 690; *Harris v. Reed*, 894 F.2d 871, 877 (7th Cir. 1990). The strong presumption in favor of finding counsel's performance competent grants the greatest protection to "strategic choices made after

thorough investigation of law and facts relevant to plausible options[.]" *Strickland*, 466 U.S. at 690.

The prejudice prong of *Strickland* requires the defendant to prove that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *United States v. Starnes*, 14 F.3d 1207, 1210 (7th Cir. 1994) (quoting *United States v. Moralez*, 964 F.2d 677, 683 (7th Cir. 1992)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In determining this probability, the Court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

A. Failure to Object to Admission of Tape Recordings and Testimony about Coded Drug Language

Collins contends that his counsel was ineffective for failing to object to the admission of tape recordings and testimony about coded drug language. The Government asserts that the Court cannot consider these arguments in Collins's Section 2255 petition because he is procedurally barred from bringing them before this Court since he already submitted them to the Seventh Circuit on appeal. But Collins's claims here are not identical to those submitted on appeal because on appeal, Collins argued that the Court erred in admitting the tape recordings and testimony about coded drug language whereas here Collins brings an ineffective assistance of counsel claim. *See Collins*, 715 F.3d at 1035-38. This distinction does not save Collins's arguments, however, because under the performance prong of *Strickland* Collins must establish that his attorney's failure to object to admission of the tape recordings and testimony about coded drug language was outside the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689. The Seventh Circuit's finding that the Court properly admitted this

evidence confirms that Collins's attorney made a reasonable professional decision to not object to their admission. The Court therefore finds that Collins's counsel did not violate his right to effective assistance of counsel by failing to object to admission of the tape recordings and testimony regarding coded drug language.[2]

B. Failure to Explain Law of Conspiracy

Next, Collins opines that his attorney was ineffective because he failed to explain the law of conspiracy to Collins. Collins purports that he would have pleaded guilty if his attorney had provided him notice of the legal definition of conspiracy but cites to no evidence in support of this proposition. Even if Collins put forth evidence that his attorney's performance was deficient because he failed to advise him about the law of conspiracy, "[i]n the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012). Specifically, "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court,...that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 1385. Collins presented no such evidence but only baldly claimed that he would have pled guilty after his attorney had described to him the legal concept of conspiracy, which is insufficient to establish that he was prejudiced by his attorney's allegedly deficient performance. As such, the Court holds that even if Collins's attorney's performance was deficient because he did not advise him about the legal meaning of conspiracy, Collins has failed to demonstrate that the potential deficiency prejudiced Collins and thus no Sixth Amendment violation occurred.

[2] The Court adds that to the extent Collins reasserts his arguments about whether the tape recordings and testimony about coded drug language should have been admitted, he is barred from doing so because the Seventh Circuit already addressed them. *See Vinyard*, 804 F.3d at 1227.

C. Failure to Request a *Sears* Instruction

Collins claims that his attorney deprived him of effective assistance of counsel because he did not request a *Sears* jury instruction with respect to Collins's conversations with Pedro Flores, a government informant. But as the Government correctly points out, a *Sears* instruction would have been inappropriate. A *Sears* instruction "informs the jury that a defendant's agreement with a government agent cannot support a charge of criminal conspiracy." *United States v. Tanner*, 628 F.3d 890, 906 (7th Cir. 2010). It is "appropriate whenever a jury might find a conspiracy between a defendant and a government agent, however short the period of time in which the agent worked for the government." *Id.* Collins was charged with conspiring "[b]eginning in or about 2005, and continuing until at least in or about November 2008" to possess with intent to distribute and to distribute cocaine. (R. at 1.) Flores began cooperating with the Government in the fall of 2008. *Collins*, 715 F.3d at 1034. After meeting with a DEA agent on November 6, 2008, Flores recorded conversations between himself and Collins per the agent's instructions. *Id.* In short, Collins was convicted of conspiring before Flores began cooperating with the Government. A *Sears* instruction therefore was unnecessary because Collins's conversations with Flores were not part of the charged conspiratorial conduct, and Collins's attorney made a reasonable professional decision to not request a *Sears* instruction because it would have been improper. The Court thus holds that Collins's attorney did not deprive him of effective assistance of counsel for failing to request a *Sears* instruction.

D. Failure to Cross Examine Flores

According to Collins, his counsel was ineffective because he did not cross examine Flores and consequently deprived Collins of his Sixth Amendment right to confront Flores. The Government did not call Flores as a witness so Collins had no opportunity to cross examine him.

Moreover, the decision by Collins's attorney not to call Flores as an adverse witness is a reasonable strategic decision that is protected from Sixth Amendment attacks under *Strickland* because Flores was cooperating with the Government and Collins provides no evidence of what Flores would have testified to, let alone how his testimony would have aided Collins's defense. *See Strickland*, 466 U.S. at 689; *United States v. Muehlbauer*, 892 F.2d 664, 669 (7th Cir. 1990) (attorney did not perform deficiently for failing to call witness because there was no evidence of what witness's testimony would have been). A party is further barred from calling a witness solely to impeach that witness. *See United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); *see, e.g., United States v. Finley*, 708 F.Supp. 906, 909 (N.D. Ill. 1989). The Court thus rejects Collins's argument that his counsel violated his Sixth Amendment right to effective assistance of counsel by failing to cross examine Flores who was never called as a witness against him in his trial.

E. Failure to Investigate

Collins's final ineffective assistance of counsel argument proposes that his attorney violated his Sixth Amendment right by failing to investigate. He claims that his attorney "simply failed to investigate" the evidence involved in his case, but offers no evidence that his attorney would have uncovered had he investigated and does not explain how that new evidence would have helped him at trial. "[A] petitioner alleging that counsel's ineffectiveness was centered on a supposed failure to investigate has the burden of providing the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced." *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003) (quotation omitted). Collins failed to satisfy this burden as he has produced nothing to the Court that his attorney

would have discovered upon investigation. The Court therefore finds that Collins's claim that his attorney was ineffective for failing to investigate fails.[3]

CONCLUSION

For the reasons stated above, the Court denies Collins's motion to vacate, set aside, or correct his sentence or conviction under 28 U.S.C. § 2255. (Dkt. No. 1.)

Virginia M. Kendall
United States District Court Judge
Northern District of Illinois

Date: 4/12/2016

[3] In his reply, Collins argues that his counsel was ineffective for failing to object to the drug amount and explain the sentencing enhancement under U.S.S.G. § 3B1.1. (Dkt. No. 13.) Collins waived these arguments because he raised them for the first time in his resply. *See Gonzales v. Mize*, 565 F.3d 373, 382 (7th Cir. 2009); (Dkt. No. 14) (interpreting Dkt. No. 13 at Collins's reply).

APPENDIX C-1:

The Court denies Petitioner Ron Collins's first and second motions to reconsider the denial of his motion to vacate, set aside, or correct his conviction or sentence.

(Attached to Appendix C-1 are 3 pages)

APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
Plaintiff,	)	No. 14 C 9245
	)	
v.	)	Judge Virginia M. Kendall
	)	
Ron Collins	)	
	)	
	)	
Defendants.	)	

ORDER

The Court denies Petitioner Ron Collins's motion to reconsider the denial of his motion to vacate, set aside, or correct his conviction or sentence. (Dkt. No. 18).

BACKGROUND

On August 6, 2009, a grand jury issued an indictment against Collins for one count of conspiracy to possess with intent to distribute and to distribute five or more kilograms of cocaine. (R. at 1.)[1] On June 7, 2011, a jury found Collins guilty of the one count in the indictment. (R. at 141.) The Court sentenced Collins to three hundred sixty months imprisonment on September 7, 2011. (R. at 161.) Collins appealed his sentence arguing that the Court erred by admitting evidence of tape recordings, allowing an expert to testify regarding coded drug-dealing language on the tapes, and finding that he was a manager or supervisor at sentencing. *See United States v. Collins*, 715 F.3d 1032 (7th Cir. 2013). On July 16, 2013, the Seventh Circuit issued its opinion affirming Collins's conviction and sentence on all three issues. *Id.* at 1040. Collins's petition for certiorari with the Supreme Court was denied.

On November 17, 2014, Collins filed a motion to vacate, set aside, or correct his sentence or conviction under 28 U.S.C. § 2255. (Dkt. No. 1.) The Court denied his petition on April 12, 2016. *United States v. Collins*, No. 14 C 9245, 2016 WL 1435698 (N.D. Ill. Apr. 12, 2016). Collins now moves for reconsideration of the Court's denial of his petition. (Dkt. No. 18.)

DISCUSSION

A district court may reconsider a prior decision when there has been a significant change in the law or facts since the parties presented the issue to the court, when the court misunderstands a party's arguments, or when the court overreaches by deciding an issue not properly before it.

[1] Citations to Collins's criminal case (09 CR 673) are referred to as "R." followed by the docket number. Citations to this case are referred to as "Dkt. No." followed by the docket number.

United States v. Ligas, 549 F.3d 497, 501 (7th Cir. 2008). A motion for reconsideration may be filed pursuant to Federal Rule of Civil Procedure 60(b). "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). For purposes of Rule 60(b), a party may be entitled to relief from the entry of final judgment if that party presents "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Rule 60(b) provides "an extraordinary remedy and is granted only in exceptional circumstances." *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680, 690 (7th Cir. 2014) (quoting *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997)).

Rule 60(b) relief is available to a petitioner seeking to reopen a previously dismissed action under Section 2255 if the motion is a genuine Rule 60(b) motion that attacks "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. In contrast, when a Rule 60(b) seeks relief based "*on the merits* of a claim for relief should be treated as a successive habeas petition." *Id.* at 534. The Court "look[s] at the substance of a motion rather than its title to determine whether it is a successive collateral attack." *Hare v. United States*, 688 F.3d 878, 880 n.3 (7th Cir. 2012). 28 U.S.C. § 2255(h) states that "[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals[.]" "Unless and until the movant seeks and obtains permission from the court of appeals to file such a motion, the district court is without jurisdiction to entertain his request." *United States v. Carraway*, 478 F.3d 845, 849 (7th Cir. 2007). Therefore, if a petitioner styles a motion as under Rule 60(b) and does not present an argument for Rule 60(b) relief but instead argues the merits of the habeas petition, the Court dismisses the motion as a successive motion filed without permission from the court of appeals. *See id.*; *see, e.g., York v. United States*, 55 F.Supp.3d 1028; 1031 (treating 60(b) motion to reconsider a Section 2255 petition under the Rule 60(b) standard because it argued a procedural mistake under Rule 60(b)(1)).

First, Collins argues that he was denied effective assistance of counsel because his attorney failed to investigate whether Flores engaged in criminal activity after becoming a Government informant. (Dkt. No. 18 at 2.) In support, Collins points to Elliott Buckner's plea agreement that he acknowledges he attached to his reply to the Government's response to his Section 2255 petition. *Id.* This is not newly discovered evidence considering that it was before the Court at the Section 2255 phase. Furthermore, the appropriate court did not grant Collins leave to file a successive motion under Section 2255(h). Therefore, the Court dismisses this argument as an improper successive motion under Section 2255(h). *See Gonzalez*, 545 U.S. at 534.

Second, Collins claims that Terrence Brown's plea agreement[2] and affidavit constitute new evidence demonstrating that the Flores brothers engaged in drug trafficking while they were Government informants in violation of the DEA Manual. (Dkt. No. 18 at 4.) Collins contends that they constitute newly discovered evidence that warrant reconsideration of the Court's finding that Collins's right to effective assistance of counsel was not violated, which reflects a proper basis for relief under Rule 60(b)(2) and therefore the Court addresses it as such. *See Gonzalez*, 545 U.S. at 532. Neither Brown's plea agreement nor affidavit is newly discovered

[2] Brown's plea agreement as provided by Collins is an unsigned draft. (Dkt. No. 18 at 10-27.)

evidence because Collins falls short of proving that they contain evidence "that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Brown emphasizes that these documents state that the Flores brothers engaged in drug trafficking from August to December 2008 which Collins claims was while they acted a Government informants. Such information could have been discovered with reasonable diligence in time to move for a new trial under Rule 59(b) and therefore is not newly discovered under Rule 60(b)(2). As a result, the Court denies Collins's motion to reconsider its denial of his habeas corpus petition.[3]

Lastly, Collins's asserts that the Court should reconsider its order because his attorney provided ineffective assistance of counsel by failing to impeach DEA agents about possible violations of the DEA Manual. (Dkt. No. 18 at 7-8.) The Court treats this argument as a successive collateral motion because it pertains to merits of Collins's habeas petition and dismisses it under Section 2255(h) as Collins did not receive permission to file such a motion from the court. *See Gonzalez*, 545 U.S. at 534; *Carraway*, 478 F.3d at 849.

CONCLUSION

The Court denies Collins's motion to reconsider the denial of his motion to vacate, set aside, or correct his sentence or conviction. (Dkt. No. 21.)

Date: 8/3/2016

Virginia M. Kendall
U.S. District Court Judge

[3] Collins also highlights statements made by Assistant United States Attorneys as further evidence of the Flores brothers' drug activity while they were Government informants. These statements were made in the presence of Collins's attorney during the trial and therefore are not newly discovered evidence under Rule 60(b)(2).

APPENDIX C-2:

The Court denies Petitioner Ron Collins's second motions to reconsider the denial of his motion to vacate, set aside, or correct his conviction or sentence.

(Attached to Appendix C-2 are 4 pages)

APPENDIX C-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
Plaintiff,	)	No. 14 C 9245
	)	
v.	)	Judge Virginia M. Kendall
	)	
Ron Collins	)	
	)	
	)	
Defendants.	)	

ORDER

Petitioner Ron Collins's second Motion to Reconsider [24] and Motion to Proceed *In Forma Pauperis* on Appeal [25] are denied. Collins's request *sub silentio* for a Certificate of Appealability is also denied.

STATEMENT

I. Motion to Reconsider

Pro se petitioner Collins requests again[1] that this Court reconsider its Order denying his motion to vacate, set aside, or correct his conviction or sentence. Collins's motion is governed by Federal Rule of Civil Procedure 60(b) as it was served more than ten days after the final judgment was entered. *See, e.g., U.S. ex rel. Washington v. Gramley*, No. 97 C 3270, 1998 WL 409404, at *1 (N.D. Ill. July 16, 1998) (citing *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995)). "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). For purposes of Rule 60(b), a party may be entitled to relief from the entry of final judgment if that party presents "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Rule 60(b) relief is available to a petitioner seeking to reopen a previously dismissed action under Section 2255 if the motion is a genuine Rule 60(b) motion that attacks "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532.

Collins asserts that the Court erred in five separate ways. First, he argues that the Court erred by failing to address his request for an evidentiary hearing. (Dkt. No. 24 at 3.) Collins argues that there is a factual dispute regarding whether his attorney, Frank Rubino, explained the law of conspiracy to him. (*Id.* at 4.) The Court specifically addressed this issue in its Order denying

[1] The Court already denied Collins's first motion to reconsider. (*See* Dkt. No. 21.)

Collins's underlying motion. (*See* Dkt. No. 17 at 6 ("even if Collins's attorney's performance was deficient because he did not advise him about the legal meaning of conspiracy, Collins has failed to demonstrate that the potential deficiency prejudiced Collins and thus no Sixth Amendment violation occurred.").) Nothing in Collins's reconsideration motion addresses that conclusion and the mere fact the Court did not explicitly state that his request for an evidentiary hearing is denied is not a grounds for reconsideration, particularly because "[a] full evidentiary hearing on a § 2255 motion is not required when the record conclusively demonstrates that petitioner is entitled to no relief." *See, e.g., United States v. Autullo*, No. 88 CR 91-4, 1993 WL 453446, at *1 (N.D. Ill. Nov. 4, 1993), *aff'd*, 81 F.3d 163 (7th Cir. 1996) (citing *Politte v. U.S.*, 852 F.2d 924, 931 (7th Cir. 1988)).

Second, Collins contends that he is entitled to relief because the Court did not explicitly state "upon the record that 'the motions, files and records of the case conclusively show that movant is not entitled to relief.'" (*See* Dkt. No. 24 at 5.) There exists no requirement that a district court must formulaically state that it reviewed the motions, files, or records in denying a movant's petition. Rather, a court is simply oblige to review the record before denying a petition, which the Court clearly did here. (*See generally* Dkt. No. 17.) *United States v. Marr*, 856 F.2d 1471 (10th Cir. 1988), which Collins cites to in support of his position, does not require any specific recitation, but only that a district court's order indicate that the Court reviewed the relevant files. Given that the Court's Order meets this requirement, Collins's second ground for relief is denied.

Collins next argues that the Court erred by failing to construe his *pro se* pleadings liberally. (*See* Dkt. No. 24 at 6.) Not only did the Court's Order specifically state that the Court construed Collins's motion "liberally because he is *pro se*," *see* Dkt. No. 17 at 2, but the Court's analysis itself also indicates that the Court gave Collins's the benefit of the doubt because of his status. (*See e.g., id.* at 3 (addressing failure to show prejudice requirement even though Collins's claim failed on procedural grounds).) Given that Collins does not provide any meaningful evidence in support of his assertion, his contention is denied. *Gonzalez*, 545 U.S. at 528.

Fourth, Collins argues that the Court misconstrued his ineffective assistance of counsel claim in that its Order did not to address his contention that Rubino failed to cross examine Pedro Flores regarding the tape recording, thus denying Collins his Sixth Amendment right to confrontation. (*See* Dkt. No. 24 at 11); *see Crawford v. Washington*, 541 U.S. 36 (2004). Despite his assertion, the Court addressed the issue directly and found that (1) Collins had no opportunity to cross examine Flores because he was not called as a witness, (2) Collins's decision to not call Flores as an adverse witness was a reasonable strategic legal decision, and (3) Collins could not call Flores simply to impeach him. (*See* Dkt. No. 17 at 8.) Collins fails to acknowledge, much less challenge, any of those findings in his present motion. Even more, Collins fails to provide any analysis in his underlying motion or supporting memorandum explaining how he was prejudiced by the alleged constitutional violation. (*See* Dkt. No. 3 at 17-22 (simply asserting that "Petitioner never waived the right to confront the witness or his accusers. Rubino's actions have prejudiced Petitioner's defense.")); *United States v. Starnes*, 14 F.3d 1207, 1210 (7th Cir. 1994).

Fifth, Collins contends that he is entitled to relief because the Court failed to "issue or deny a certificate of appealability." (Dkt. No. 24 at 7.) However, Collins did not request a Certificate

of Appealability ("COA") in his original motion, and therefore the Court was not obliged to consider it. As such, the Court did not err in resolving an issue not presented to it.

Perhaps recognizing this flaw, Collins sets forth, for the first time, arguments as to why a COA should be granted in his present motion. (*See* Dkt. No. 24 at 7-10.) Because Collins has filed a Notice of Appeal (subsequent to his reconsideration motion), the Court is now obliged to determine whether Collins should receive a COA. *See* Fed. R. App. P. 22(b)(1) ("If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue."); *see, e.g., United States v. Elizalde-Adame*, No. 01 C 6534, 2002 WL 31163667, at *1 (N.D. Ill. Sept. 27, 2002) ("The filing of a Notice of Appeal presents Petitioner's request *sub silentio* for a Certificate of Appealability."). A district court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "When a district court has denied a petitioner's constitutional claims on the merits, '[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *See, e.g., Elizalde-Adame*, 2002 WL 31163667, at *2 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Collins first argues that a COA should be issued because it is debatable whether Rubino explained the law of conspiracy to him. (*See* Dkt. No. 24 at 7-9.) However, as explained above, the Court specifically addressed this issue and found that Collins failed to provide any argument or facts in support of his claim. (*See also* Dkt. No. 17 at 6 ("Collins presented no such evidence but only baldly claimed that he would have pled guilty after his attorney had described to him the legal concept of conspiracy, which is insufficient to establish that he was prejudiced by his attorney's deficient performance.").) Collins presents no additional arguments here, and therefore there is no debatable issue upon which a COA may be granted. Collins's second contention fails for the same reason. Collins asserts that there is a debatable issue as to whether his Sixth Amendment rights were violated when Rubino failed to cross examine Pedro Flores regarding the tape recording. Yet, as noted above, the Court directly addressed the issue and found that was no bases to find a constitutional violation. In addition, Collins does not provide any analysis regarding prejudice he allegedly suffered from Rubino's alleged failure to examine Flores. *Cf. Elizalde-Adame*, 2002 WL 31163667, at *2 (Court granting COA for ineffective assistance of counsel claim where, unlike here, the Court was able to explore the "details" of the claim's prejudice prong.). Third, Collins argues that a COA should be issued because Rubino failed to adequately (1) investigate the circumstantial evidence supporting the conspiracy, (2) investigate whether Flores was still criminally involved in the drug trafficking business, and (3) prepare for the jury trial. (Dkt. No. 24 at 11.) But, similar to his underlying motion, Collins again offers no evidence regarding what new evidence would have been found and how that evidence would have helped him at trial. *See Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003) ("As we have stated, a petitioner alleging that counsel's ineffectiveness was centered on a supposed failure to investigate has the burden of providing the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced.") (citation and internal quotations omitted). As such, because no reasonable jurist could disagree with the Court's assessment, Collins's request *sub silentio* for a COA is denied.

II. IFP on Appeal

Collins also seeks leave to proceed *in forma pauperis* for his appeal. (Dkt. No. 10.) A party may commence an appeal without prepayment of fees under 28 U.S.C. § 1915(a) if he is indigent and the appeal is taken in good faith. To establish indigency under § 1915(a)(1), a party must submit an affidavit including a statement of all assets which demonstrates that he is unable to pay the filing fee. The affidavit must also "state the nature of the ... appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1). Federal Rule of Appellate Procedure 24 sets forth similar requirements. Pursuant to Rule 24(a)(1), a party who wishes to proceed *in forma pauperis* on appeal must attach an affidavit that (1) shows that the party cannot pay the filing fee; (2) "claims an entitlement to redress;" and (3) "states the issues that the party intends to present on appeal." *Id.* To establish good faith, which is also required by § 1915(a)(3) and Rule 24(a)(4)(B), a party seeking leave to appeal *in forma pauperis* must demonstrate to the district court that "a reasonable person could suppose that the appeal has some merit." *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000); *see also Lee v. Clinton*, 209 F.3d 1025, 1026 (7th Cir. 2000).

Although Collins has provided a financial affidavit and claims entitlement to redress, *see* Dkt. No. 29, he has not satisfied Rule 24(a)(4)(B) because his appeal is not taken in good faith. *Id.* While Collins presents seven separate "questions" for appeal purposes, *see* Dkt. No. 29 at 7-9, this Court has previously analyzed and rejected all seven grounds. Collins has presented no argument or evidence in his underlying motion and two motions for reconsideration indicating that any of his arguments have merit. Because Collins fails to set forth any viable legal or factual bases for his appeal, the Court cannot conclude that the appeal is in good faith because no "reasonable person could suppose that the appeal has some merit." *Walker*, 216 F.3d at 632. Collins's application is denied.

Collins's second Motion to Reconsider [24] and Motion to Proceed *In Forma Pauperis* on Appeal [25] are denied. Collins's request *sub silentio* for a Certificate of Appealability is also denied.

Date: 11/14/2016

Virginia M. Kendall
United States District Court Judge
Northern District of Illinois

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