Appendix "A"

Denial by the Court of Appeals on petition for rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40897

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

WILLIAM ERIC TAYLOR,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

Before DENNIS, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

This panel previously dismissed the appeal for lack of jurisdiction. The panel has considered Appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

Appendix "B"

Denial of COA by the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40897

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

WILLIAM ERIC TAYLOR,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

Before DENNIS, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). Pursuant to 28 U.S.C. § 2107(b) and Federal Rule of Appellate Procedure 4(a)(1)(B), the notice of appeal in a civil action in which the United States is a party must be filed within sixty days of entry of the judgment or order from which appeal is taken. A motion brought under 28 U.S.C. § 2255 is a civil action to which the sixty day appeal period applies. *United States v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir. 1988).

In this 28 U.S.C. § 2255 proceeding, the final judgment was entered and certificate of appealability was denied on March 12, 2018. Petitioner filed a

motion to set aside the order of dismissal which the district court denied on May 17, 2018. Accordingly, the final day for filing a timely notice of appeal was July 16, 2018. The defendant's pro se notice of appeal is dated September 15, 2018 and it was filed on September 20, 2018. Because the notice of appeal is dated September 15, 2018, it could not have been deposited in the prison's mail system within the prescribed time. *See* FED. R. APP. P. 4(c)(1) (prisoner's pro se notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for filing). When set by statute, the time limitation for filing a notice of appeal in a civil case is jurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*,138 S. Ct. 13, 17 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The lack of a timely notice mandates dismissal of the appeal. *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985).

A True Copy
Certified order issued Oct 31, 2018

Tyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

Appendix "C"

Order by the District Court denying 28 U.S.C. § 2255

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

WILLIAM ERIC TAYLOR, #19751-078	§	
	§	
verses	§	CIVIL ACTION NO. 4:15CV014
	§	CRIMINAL ACTION NO. 4:12CR062(1)
UNITED STATES OF AMERICA	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Kimberly C. Priest Johnson. The Report and Recommendation of the Magistrate Judge (#14), which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and no objections having been timely filed, the Court concludes that the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court.

It is accordingly **ORDERED** that Movant's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#1) pursuant to 28 U.S.C. § 2255 is **DENIED** and this case is **DISMISSED** with prejudice. All motions by either party not previously ruled upon are **DENIED**.

SIGNED at Beaumont, Texas, this 12th day of March, 2018.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

WILLIAM ERIC TAYLOR, #19751-078	§	
	§	
verses	§	CIVIL ACTION NO. 4:15CV014
	§	CRIMINAL ACTION NO. 4:12CR062(1)
UNITED STATES OF AMERICA	§	

FINAL JUDGMENT

Having considered Movant's case and rendered its decision by opinion issued this same date, it is **ORDERED** that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#1) pursuant to 28 U.S.C. § 2255 is **DISMISSED** with prejudice.

SIGNED at Beaumont, Texas, this 12th day of March, 2018.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Appendix "D"

Justice Alito's grant of an extension of time

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 4, 2019

Mr. William Eric Taylor
Prisoner ID #19751-078
FCI Coleman Low
P.O. Box 1031
Coleman, FL 33521-1031

Re: William Eric Taylor
v. United States
Application No. 18A1020

Dear Mr. Taylor:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on April 4, 2019, extended the time to and including June 6, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob A. Levitan
Case Analyst

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

WILLIAM ERIC TAYLOR, #19751-078	§	
	§	
VS.	§	CIVIL ACTION NO. 4:15cv014
	§	CRIMINAL ACTION NO. 4:12cr062(1)
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Movant William Eric Taylor filed the above-styled motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

On March 6, 2012, a Collin County Sheriff's Deputy arrested Movant for assault and family violence. Movant had assaulted his wife, Traci Taylor (hereinafter, "Mrs. Taylor"). Mrs. Taylor saw a video that Movant made of his sexual assault against Movant's nine-year-old daughter, and confronted Movant. Mrs. Taylor recorded the conversation with Movant when an altercation ensued. Mrs. Taylor was transported to the hospital for her injuries, and Movant was placed under arrest.

Upon her release from the hospital, Mrs. Taylor was interviewed by law enforcement, and she reported she had been married to Movant for fourteen years. According to Mrs. Taylor, Movant had an affair with an Audrey McDaniel (hereinafter, "McDaniel"), who resided in Indiana. Mrs. Taylor reported that, sometime between January and early February, 2012, she received an

email from McDaniel with a video attached. Mrs. Taylor stated that the video showed Movant sexually assaulting their daughter while she was asleep. Reportedly, upon confrontation, Movant began crying, claiming that the incident had occurred while he was on drugs, and that it would never happen again. Movant also claimed that it had only happened the one time. Movant was interviewed by law enforcement while in jail and confirmed that he touched his daughter inappropriately. When contacted by law enforcement, McDaniel confirmed that she had sent the email to Mrs. Taylor. Movant's daughter was interviewed, and she stated that Movant sexually assaulted her on one other occasion.

On March 15, 2012, a one-count indictment charged Movant with Production of Child Pornography, in violation of 18 U.S.C. §§ 2251(a) and (e). On March 27, 2012, Movant pleaded guilty before United States Magistrate Judge Amos L. Mazzant, III.[1] On January 15, 2013, United States District Judge Marcia A. Crone sentenced Movant to a term of imprisonment of three hundred months, and a supervised release term of five years. Judgment was entered on January 22, 2013. On appeal, the United States Court of Appeals for the Fifth Circuit dismissed the appeal as frivolous, affirming the judgment of the District Court on November 18, 2013.

On January 5, 2015, Movant filed the instant § 2255 motion. Movant presents four claims of ineffective assistance of trial and appellate counsel,[2] alleging counsel was ineffective by:

1. failing to suppress statements made to investigators in violation of Movant's *Miranda* rights;
2. failing to argue or otherwise address mitigating psychological evidence during sentencing;
3. failing to argue leniency in sentencing due to Movant's status as a first-time offender; and
4. failing to challenge the sentencing court's use of the guidelines as mandatory and

[1] The Honorable Amos L. Mazzant, III, has since been elevated to United States District Judge.
[2] While Movant does not specifically allege appellate counsel was ineffective for each alleged failing, the Court construes Movant's filing to include appellate counsel within those allegations.

not address the factors under 18 U.S.C. § 3553(a).

The Government filed a response, asserting that Movant failed to substantiate his claims and show prejudice, and that the claims are otherwise without merit. Movant filed a reply.

FEDERAL HABEAS CORPUS PROCEEDINGS

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). Pursuant to 28 U.S.C. § 2255, a defendant may move to vacate, set aside, or correct his sentence if: (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the district court was without jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). The nature of a § 2255 collateral challenge is extremely limited, being reserved for instances of constitutional or jurisdictional magnitude. *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). A "distinction must be drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-1301 (5th Cir. 1992) (citations omitted). If an error is not of constitutional magnitude, the movant must show that the error could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Smith*, 32 F.3d 194, 196 (5th Cir. 1994).

INEFFECTIVE ASSISTANCE OF COUNSEL

Movant claims he is entitled to relief based on ineffective assistance of counsel at trial and on appeal.

A. Legal Standard

The "Sixth Amendment guarantees a[ll] defendant[s] the right to have counsel present at

all 'critical' stages of the criminal proceedings" instituted against them. *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (citing *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009)). Critical stages include not only trial, but also pretrial proceedings—including the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 168-70 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373, (2010); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing is also constitutionally impermissible. *Lafler*, 566 U.S. at 169.

In *Strickland v. Washington*, the Supreme Court announced that to succeed on an ineffective assistance of counsel claim, a defendant must show both: (1) that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) "the deficient performance prejudiced the defense," and show "errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *see also Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). Under this standard, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687. As it is easy to second-guess counsel's performance after a conviction or adverse sentence, a fair assessment of performance requires reconstructing the circumstances of counsel's conduct from his perspective at the time rather than looking towards the "distorting effects of hindsight." *Id.* at 689. As such, counsel is strongly presumed to have performed adequately, and made decisions using reasonable professional judgment. *Id.* at 690. Additionally, the sufficiency of counsel's representation may be determined,

and indeed substantially influenced, by the defendant's own statements and actions. *Id.* at 691. As stated by the Supreme Court, an attorney's actions are usually based on information supplied by the defendant, and, for example, investigative decisions or potential lines of defense are followed based upon what the client has said. *Id.* Counsel's conversations with the defendant may then be critical to properly assessing his actions in the course of litigation. *Id.*

The movant "must [also] 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." *Id.* at 694. Movant must "affirmatively prove," not just allege, prejudice. *Id.* at 693. Courts need not address both inquiries if the defendant does not sufficiently support one prong; nor must the court address the test in the same order. *Id.* at 697. If he fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.*

The Fifth Circuit has held that to prevail on a claim of ineffective assistance of counsel on appeal, the petitioner must make a showing that, had counsel performed differently, there would have been revealed issues and arguments of merit on the appeal. *Sharp v. Puckett*, 930 F.2d 450, 453 (5th Cir. 1991) (*citing Strickland*, 466 U.S. at 687). In a counseled appeal after conviction, the key is whether the failure to raise an issue worked to the prejudice of the defendant. *Sharp*, 930 F.2d at 453. This standard has been affirmed by the Supreme Court. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that the petitioner must first show that his appellate attorney was objectively unreasonable in failing to find arguable issues to appeal, and also a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief raising these issues, he would have prevailed on his appeal); *see also Williams v. Taylor*, 529 U.S. 362 (2000); *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001). Furthermore, an appellate counsel's failure to raise

certain issues on appeal does not deprive an appellant of effective assistance of counsel where the petitioner did not show trial errors with arguable merit. *Hooks v. Roberts*, 480 F.2d 1196, 1198 (5th Cir. 1973). Appellate counsel is not required to consult with his client concerning the legal issues to be presented on appeal. *Id.* at 1197. An appellate attorney's duty is to choose among potential issues, using professional judgment as to their merits–every conceivable issue need not be raised on appeal. *Jones v. Barnes*, 463 U.S. 745, 749 (1983).

B. Failing to Suppress Statements Made to Investigators

Movant asserts that his attorneys were ineffective for failing to argue for the suppression of his allegedly coerced confession. Movant states that investigators unlawfully elicited testimony from Movant in violation of his constitutional rights, and this testimony was used to procure an indictment against Movant. Movant, however, does not provide factual support for his allegations. For example, Movant fails to identify the allegedly unlawful tactics investigators used in violation of his rights. Movant also fails to provide factual support regarding his attorneys' knowledge of this issue, apart from a conclusory allegation that his attorneys were aware that these statements were elicited in violation of his rights. *See Smallwood v. Johnson*, 73 F.3d 1343, 1351 (5th Cir. 1996) (holding mere conclusory allegations are not sufficient to raise a constitutional issue in habeas proceedings). Finally, even assuming there was a constitutional violation, Movant alleges only that these statements were made to procure an indictment against him. Inadmissible testimony or evidence may be used against a defendant in grand jury proceedings. *See United States v. Calandra*, 414 U.S. 338 (1974). For these reasons, Movant has not shown that his attorneys were ineffective for failing to argue that his pre-trial statement should be suppressed. *See Strickland*, 466 U.S. at 687; *Sharp*, 930 F.2d at 453.

C. Failing to Argue Available Psychological Evidence as a Mitigating Factor in Sentencing

Movant claims that his attorneys provided ineffective assistance by failing to argue that the District Court should have considered the presentencing psychological evidence as a mitigating factor in sentencing. Specifically, Movant argues that a presentencing treatment provider's report should have been presented to the court. That report, Movant states, discussed the various treatment programs Movant participated in since his arrest, and stated that he was unlikely to recommit an offense. Movant's trial counsel did, in fact, present this evidence and argued that Movant's sentence should be reduced below the applicable guideline range in light of the report. Therefore, Movant's attorneys were not ineffective in their presentation of mitigating evidence during sentencing and on appeal. *See Strickland*, 466 U.S. at 687; *Sharp*, 930 F.2d at 453.

D. Failing to Argue First-Time Offender Status as a Mitigating Factor in Sentencing

Movant argues that his attorneys provided ineffective assistance by failing to argue that Movant was a first-time offender. A review of the record shows that Movant's trial counsel mentioned Movant was a first-time offender multiple times, and that the district court should consider this fact when sentencing Movant. Therefore, Movant's attorneys were not ineffective by failing to present that Movant was a first-time offender. *See Strickland*, 466 U.S. at 687; *Sharp*, 930 F.2d at 453.

E. Failing to Argue Against Court's Use of Guidelines as Mandatory and Court's Failure to Consider § 3553(a) Factors

Movant argues that the District Court used the sentencing guidelines as mandatory and failed to consider the factors contained in § 3553(a) when it sentenced Movant. Movant further argues that his attorneys were ineffective in failing to object or otherwise argue against the District Court's alleged use of the sentencing guidelines as mandatory and its failure to consider the

§ 3553(a) factors. Movant, however, provides no factual support for his allegations. Federal courts do not "consider a habeas petitioner's bald assertions on a critical issue in his *pro se* petition . . . mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Smallwood v. Johnson*, 73 F.3d 1343, 1351 (5th Cir. 1996) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983)). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d 285, 288 (5th Cir. 1989); *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982)

Moreover, the District Court specifically discussed its consideration of the factors contained in §3553(a) when announcing Movant's sentence. Finally, the District Court adopted the Presentence Report, which included discussions concerning Movant, the numerous factual aspects of the crime, and other facts of significance gathered by both his trial counsel and the Government. For this reason, the District Court did not err, and Movant's attorneys did not provide ineffective assistance of counsel in regard to Movant's claim. *See Strickland*, 466 U.S. at 687; *Sharp*, 930 F.2d at 453.

CONCLUSION

Movant fails to show that trial or appellate counsel performed deficiently in each of his claims. *See Sharp*, 930 F.2d at 453; *Strickland*, 466 U.S. at 687. Moreover, Movant fails to show that, but for counsels' alleged deficient performances, he would have prevailed at trial or on appeal. *See Sharp*, 930 F.2d at 453; *Strickland*, 466 U.S. at 687. The § 2255 motion should be denied.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully

recommended that the court, nonetheless, address whether Movant would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a [movant] relief is in the best position to determine whether the [movant] has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the movant must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the movant shows, at least, that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Movant's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the court find that Movant is not entitled to a certificate of appealability as to his claims.

RECOMMENDATION

It is recommended Movant's § 2255 motion be denied and dismissed with prejudice. It is further recommended a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

SIGNED this 25th day of January, 2018.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE