APPENDIX A

5th Circuit Opinion Denying Right

To Appeal (4 pages total)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40925

A True Copy
Certified order issued Jul 09, 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID ALAN VOGEL, also known as David Allan Vogel,

Defendant-Appellant

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

O R D E R:

David Alan Vogel, federal prisoner # 09472-049, was convicted by a jury in 2010 of one drug conspiracy count (21 U.S.C. § 846), one money laundering conspiracy count (18 U.S.C. § 1956(h)), and two substantive counts of money laundering (18 U.S.C. § 1957), and he was sentenced to 60 months, 240 months, and 120 months respectively, to run concurrently for a total of 240 months of imprisonment, and three years of supervised release. Vogel seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion.

We must consider whether the district court had jurisdiction to rule on Vogel's Federal Rule of Civil Procedure 59(e) motion, or whether the motion should have been construed as a second or successive § 2255 motion. *See Williams v. Thaler*, 602 F.3d 291, 303-05 (5th Cir. 2010) (28 U.S.C. § 2254 case). District courts do not have jurisdiction to entertain a second or successive § 2255 motion until the movant obtains from the appropriate court

of appeals an order authorizing the district court to consider the motion. § 2255(h); 28 U.S.C. § 2244(b)(3)(A). A Rule 59(e) motion is construed as a second or successive § 2255 motion where it (1) presents a new claim for relief, (2) presents new evidence in support of a claim already litigated, (3) asserts a change in the substantive law governing the claim, or (4) attacks the district court's previous resolution of a claim on the merits. *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005); *Williams*, 602 F.3d at 304 (applying *Gonzalez* to Rule 59(e) motions). When a movant does not attack the substance of the district court's resolution of a claim on the merits, but rather a procedural determination by the court which precluded a merits determination, the motion is not construed as a second or successive § 2255 motion. *Williams*, 602 F.3d at 302-03 and n.4 (noting that *Gonzalez* framework applies in a § 2255 case); *United States v. Hernandes*, 708 F.3d 680, 681 (5th Cir. 2013) (applying *Gonzalez* to a § 2255 motion).

Vogel's Rule 59(e) motion attacked the district court's resolution of the merits on several of his claims. Therefore, the Rule 59(e) motion was a second or successive § 2255 motion to that extent. *Gonzalez*, 545 U.S. at 531-32. However, Vogel also argued that the district court failed to address one of the claims he raised and erroneously denied an evidentiary hearing, which we have determined are arguments appropriate for Rule 59(e) motions. *See United States v. Brown*, 547 F. App'x 637, 641-42 (5th Cir. 2013) (claim that district court failed to grant evidentiary hearing and failed to consider a claim is an attack on integrity of § 2255 proceeding and is not successive); *Uranga v. Davis*, 893 F.3d 282, 284 (5th Cir. 2018) (claim that district court denied § 2254 application prematurely by failing to rule on motion for leave to amend is not a successive § 2254 application), *cert. denied*, 139 S. Ct. 1179 (2019). To that extent, Vogel's motion for reconsideration was a true Rule 59(e) motion.

In his notice of appeal, Vogel states that he "appeals from final judgment entered by the District Court named above on September 6, 2018." That is the order denying the motion for reconsideration, not the underlying order denying his § 2255 motion. We conclude that Vogel did not appeal from the original judgment denying § 2255 relief but from the denial of his Rule 59(e) motion only. *See United States v. McDaniels*, 907 F.3d 366, 369 n.3 (5th Cir. 2018), *cert. denied*, 2019 WL 2059624, (U.S. June 10, 2019) (No. 18-9160).[1]

The district court here was without jurisdiction to hear the substantive claims attacking the district court's previous ruling on the merits because they constituted a successive habeas application. *See Gonzalez*, 545 U.S. at 531-32; *McDaniels*, 907 F.3d at 369-70. Likewise, all of Vogel's arguments in his COA brief are an attack on the district court's previous resolution of his claims on their merits and constitute a successive § 2255 motion, which we do not have jurisdiction to consider. *Gonzalez*, 545 U.S. at 531-32; *McDaniels*, 907 F.3d at 369-70. Vogel does not make any argument regarding the lack of an evidentiary hearing, nor does he make any argument regarding the ground for relief that he complained the district court failed to address, which were the only proper subjects of his Rule 59(e) motion. Indeed, his COA brief explains that he "requests a certificate of appeal ONLY on five issues"—none of which falls under Rule 59(e)'s purview.

Because Vogel declined to brief his proper Rule 59(e) issues, and because all of his arguments amount to an attack on the district court's previous ruling on the merits, we are without jurisdiction to consider his substantive claims, and a COA is DENIED. *See Martin v. Cain*, 246 F.3d 471, 475 n. 1 (5th Cir.

[1] We remind habeas petitioners, "many of whom are without counsel, of the risk that if a Rule 59 motion is found to be a successive writ application and they do not file a notice of appeal from an initial judgment, they can lose their right to appeal both from the initial judgment and from the denial of reconsideration." *McDaniels*, 907 F.3d at 369 n.3.

14 - IN WRIT

2001) (issues not briefed will not be considered); *McDaniels*, 907 F.3d at 369-70. Vogel's motion for IFP is DENIED as unnecessary.

STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

page 16 in WRIT

APPENDIX B

5th Circuit Opinion Denying

Reconsideration/Rehearing

(1 Page Total)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40925

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DAVID ALAN VOGEL, also known as David Allan Vogel,

Defendant - Appellant

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

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability and further denied as unnecessary the motion to proceed in forma pauperis. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

DAVID ALAN VOGEL	§	
vs.	§	**CIVIL ACTION NO. 4:13CV323**
		Criminal Case No. 4:08cr224(1)
UNITED STATES OF AMERICA	§	

FINAL JUDGMENT

CONSIDERING the Report and Recommendation entered herein on June 7, 2016 (docket # 34), which is hereby adopted by the Court, and objections to which the Court overrules for the reasons stated in its Order Adopting Report and Recommendation of United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that Petitioner's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and that the case is hereby **DISMISSED WITH PREJUDICE**. It is further

ORDERED that any motion not previously ruled on is **DENIED.**

SIGNED at Beaumont, Texas, this 6th day of August, 2016.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

DAVID ALAN VOGEL	§	
vs.	§	**CIVIL ACTION NO. 4:13CV323**
		Criminal Case No. 4:08cr224(1)
UNITED STATES OF AMERICA	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE[1]

The Report and Recommendation of the Magistrate Judge, which contains his findings, conclusions, and recommendation for the disposition of this action, has been presented for consideration. The Magistrate Judge has recommended that Vogel's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 be denied and that the case be dismissed with prejudice. Vogel has filed written objections. Having made a *de novo* review of the objections filed by Vogel, the Court adopts the recommendation of the Magistrate Judge.

I. Ineffective assistance of counsel claims reviewed by the Magistrate Judge

The Court first considers Vogel's objections to the Magistrate Judge's resolution of his ineffective assistance of counsel claim, insofar as it arises from defense counsel's failure to: (1) present evidence of the *Last Acts Partnership/Pain Policies Studies Group at the University of Wisconsin* (hereinafter "Study"), which, according to Vogel, would have validated the opioid prescribing criteria at issue in this case; (2) present evidence of a written policy statement, which

[1] The trial transcript is referred to herein by volume and then page number (e.g., "Tr. 1 at 50). Pertinent records kept in the District Court's criminal case file (Criminal Case No. 4:08cr224(1)) are referred to by docket number (e.g., "Dkt. #456).

Vogel contends was published by the Texas Medical Board (TMB) in 1993 and addressed methods of treating intractable pain, including opioid therapy (hereinafter "Policy Statement"); (3) effectively cross-examine of expert witnesses Dr. John C. Nelson and Dr. Jon Paul Harmer; (4) object to the prosecutor's use of exhibits during closing arguments; (5) object to the prosecutor's alleged false statements during closing arguments; and (6) request a jury instruction that would require the jury to acquit if it found that Vogel and his company, the Madison Pain Clinic ("MPC"), had complied with state law regarding the prescribing of opioid drugs.

The Sixth Amendment accords criminal defendants the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984). "The Sixth Amendment does not guarantee criminal defendants the right to error-free representation." *See Emery v. Johnson*, 139 F.3d 191, 197 (5th Cir. 1997). "Rather, a criminal defendant is entitled to counsel 'reasonably likely to render and rendering reasonably effective assistance' given the totality of the circumstances." *Hayes v. Maggio*, 699 F.2d 198, 201 (5th Cir. 1983) (citation omitted).

In determining whether counsel's performance was ineffective, courts apply the familiar *Strickland* test. "On a claim of ineffective assistance of counsel, the defendant bears the burden of demonstrating that (1) counsel's performance fell below an objective standard of reasonableness and that (2) but for counsel's deficient performance, the result of the proceeding would have been different." *United States v. Bishop*, 629 F.3d 462, 469 (5th Cir. 2010) (citing *Strickland*, 466 U.S. at 697).

Application of *Strickland*'s first prong involves a strong legal presumption that counsel's performance was reasonable: "Judicial scrutiny of counsel's performance must be highly deferential ... [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, defendant must overcome

presumption that, under those circumstances, challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. "Thus, a court deciding an ... 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." *Id.* at 690. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011).

To satisfy *Strickland*'s second prong, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of a criminal trial]." *Id.* "This is a heavy burden which requires a 'substantial,' and not just a 'conceivable,' likelihood of a different result." See *United States v. Wines*, 691 F.3d 599, 605 (5th Cir. 2012) (citing *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011); *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011).)

Conclusory allegations of ineffective assistance that are unsupported by the record do not raise a constitutional issue in a federal habeas proceeding. *See Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). On review of a motion for vacating a sentence pursuant to 18 U.S.C. § 225, contested fact issues may not be decided on affidavits alone. *Owens v. United States*, 551 F.2d 1053, 1054 (5th Cir. 1977).

a. In support of his claim that counsel was ineffective for failure to introduce evidence of the Study, Vogel has offered only conclusory allegations, which cannot sustain a constitutional challenge in a federal habeas proceeding

In both his Petition and his Objections, Vogel contends that defense counsel rendered deficient performance when he failed to introduce evidence of the Study, either through cross-

examination of the government's witnesses or through defense expert testimony. In his Objections he adds that the Study contained evidence that would have refuted the government's position that the prescribing criteria employed by Vogel and MPC were not outside the usual course of practice and were, instead, "proper medical practice." Objections at 3-4.

Although Vogel has repeatedly affirmed that the Study existed, was available to defense counsel at the time of trial and was, in substance, consistent with his statements to the Court, he has offered no record or extrinsic evidence to corroborate his claims. He has not submitted a paper or electronic copy of the Study for this Court's review. In his Petition, he cited a web address at which the Study was purportedly available:

www.painfoundation.org/enews2004/0904/PainMedLegalFaq.pdf.

But navigation to the URL does not produce the document in question. Instead, the URL leads to a single web page for an organization identified as the American Pain Foundation, which, according to the website, dissolved and ceased to exist in May 2012. Vogel has also claimed that the Study was "originally published on the DEA's website." Petition at 6; Objections at 3. But he has cited no navigable URL for this website and has not provided any indication as to the date of publication or specific page location within the DEA's multi-page website.

Because the only indications of the existence or substance of the Study before the Court are Vogel's own assertions in his moving papers and affidavit, the Court concludes that Vogel's claim is too uncertain and speculative to support an ineffective assistance of counsel claim. *See Miller*, 200 F.3d at 282; *Owens*, 551 F.2d at 1054.

b. In support of his claim that counsel was ineffective for failure to introduce evidence of the Policy Statement, Vogel has offered only conclusory allegations, which cannot sustain a constitutional challenge in a federal habeas proceeding

Vogel also contends that defense counsel rendered deficient performance when he failed to introduce evidence of the Policy Statement to rebut the government's claims that prescribing criteria employed by Vogel and MPC doctors were outside the usual course of medical practice. The Magistrate Judge correctly observed that "beyond Vogel's bare assertions that the "policy statement" exists, he has failed to produce any evidence of its existence or availability to counsel at the time of trial." Report and Recommendation at 8-9. The Court agrees with the Magistrate Judge's assessment that this unsupported argument is too uncertain and speculative to support an ineffective assistance of counsel claim. *See Miller*, 200 F.3d at 282; *Owens*, 551 F.2d at 1054.

c. Vogel's speculative and conclusory allegations do not demonstrate that defense counsel's cross-examination of Drs. Nelson and Harmer was deficient, or that he was prejudiced by counsel's performance

Next, Vogel argues that counsel rendered deficient performance by failing to challenge adequately the testimony of the government's expert witnesses, Dr. John C. Nelson and Dr. Jon Paul Harmer, through cross-examination. Although his Petition states, generally, that "Counsel did not cross examine government medical experts," he clarifies in his Objections that he takes issue with the quality of counsel's examination, conceding that the witnesses were in fact cross-examined at length, as the Magistrate Judge noted in his Report and Recommendations. Petition at 8; Objections at 4.

Vogel's claim again suffers from speculation. In his Objections, he ventures that, upon further cross-examination, the witnesses would have provided testimony to rebut claims that his prescribing criteria were outside the usual course of medical practice. But he offers neither explanation of the precise testimony that additional cross-examination would have elicited, nor

any basis for concluding that such testimony would have been forthcoming. Vogel points to more extensive argument on this point in his Reply Brief, in which he recalled, without citation to any transcript of witness testimony:

> Movant Vogel vividly remembers one glaring account of conflicting testimony that defense counsel did not pick up on due to his sparse knowledge of the forensic issues in this case. Dr. Nelson testified that the dosage units prescribed by [MPC] doctors were not appropriate. Dr. Harmer on the other hand testified at one point that clinic doctors could have prescribed "one pill instead of twelve" to cover the daily dose a pain patient needed.

Reply at 29. But the Court finds, based on Vogel's own account of the witness testimony, that there was no inherent conflict between the two experts' opinions. By Vogel's account, each expert testified that MPC doctors generally prescribed more pills than were appropriate under the circumstances. Vogel's contention that additional cross-examination would have produced testimony to rebut this notion is entirely unsupported by record evidence.

Given the absence of evidence to support Vogel's allegation of inadequate performance during cross-examination and the fact that the argument set forth in his moving papers is admittedly based on "his notes and memory" rather than the factual record, the Court finds that Vogel's argument is conclusory and does not permit the Court to examine whether counsel's alleged failure prejudiced him. Accordingly, he has shown no entitlement to habeas relief. *See Day v. Quarterman*, 566 F.3d 527, 540 (5th Cir. 2009) (denying ineffective assistance claim on habeas review based on counsel's alleged failure to properly cross-examine the State's expert witnesses where petitioner offered no "concrete explanation of the testimony that alleged proper **cross-examination** would have elicited"); *United States v. Irby,* 103 F.3d 126 (5th Cir.1996) (unpublished) (denying ineffective assistance claim based on counsel's failure "to adequately cross-examine a number of government witnesses" because petitioner "fail[ed] to set forth ... the possible impact of any additional cross-examination"); *Lincecum v. Collins,* 958 F.2d 1271, 1279

(5th Cir.1992) (denying habeas relief where petitioner "offered nothing more than the conclusory allegations in his pleadings" to support claim that counsel was ineffective for failing to investigate and present evidence); *Miller*, 200 F.3d at 282; *Owens*, 551 F.2d at 1054.

d. Defense counsel's failure to raise a meritless objection to the prosecutor's use of exhibits during closing arguments was not deficient performance

Next, Vogel renews his argument that defense counsel was ineffective for failing to object to the prosecutor's use of exhibits during closing arguments. During closing, the government referenced several exhibits to reinforce its argument and various themes central to its case. Rather than refer to the exhibits themselves, the prosecutor showed the jury several PowerPoint slides, which each contained images of the exhibits themselves, as well as a textual heading that was not part of the exhibit. One slide, in particular, contained a complete copy of government's exhibit 199A along with the text "be wicked smart" in bold letters. Vogel contends that the added text was objectionable misconduct and that he was prejudiced by defense counsel's failure to object to the slide.

Vogel cites no authority for the proposition that use of the phrase "be wicked smart" is inherently prejudicial or otherwise amounted to prosecutorial misconduct. And, although Vogel implies the prosecutor's use of the phrase "be wicked smart" was not related to the legitimate presentation of evidence and argument in this case, it is clear from the record that the phrase is lifted directly from Vogel's own email account, bewickedsmart@yahoo.com, and several email messages from the account which had been admitted in evidence. *See, e.g.*, Tr. 6 at 1376, 1379. In this context, the Court finds that the government's use of the phrase "be wicked smart" was not impermissible.

Because there was no basis for defense counsel to object to the slide, counsel cannot be deemed deficient for failure to do so. *See Clark v. Thaler*, 673 F.3d 410, 429 (5th Cir. 2012),

("failure to assert a meritless objection cannot be grounds for a finding of deficient performance"); *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) ("failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness").

e. **Vogel's claim that the prosecutor made false statements during closing arguments is conclusory and unsupported by the record; it cannot sustain his ineffective assistance of counsel claim on habeas review**

In his Objections, Vogel contends that defense counsel was ineffective for failing to object to the prosecutor's alleged false statements during closing arguments. We note that Vogel did not raise this issue in his Petition, which alleged prosecutorial misconduct arising from the alleged misuse of government exhibit 199A, as discussed above, but not from false statements. Petition at 14. Vogel contends that he addresses the issue in his Reply Brief, however the Court is unable to locate any such argument therein. In any event, a claim raised for the first time in a Reply Brief need not be considered on federal habeas review. *See Marroquin v. United States,* Civil Action No. 3:08-CV-0489-G-(BH), 2009 WL 89242, at *4 (N.D. Tex. Jan. 12, 2009) ("Rule 2(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts requires that motions filed pursuant to 28 U.S.C. § 2255 'specify all the grounds for relief available to the moving party.' Claims raised for the first time in a reply brief need not be considered by the Court... *See United States v. Barrett,* 178 F.3d 34, 57 (1st Cir.1999) ('Informal reference to a new claim in a reply brief will not suffice to raise a claim if the district court does not address that claim in its order.'). 'A reply brief is intended only to provide an opportunity to respond to the arguments raised in the response brief and is not ordinarily a forum to raise new issues.' *United States v. Keyes,* Nos. 07–3453, 03–487–03, 2008 WL 2736392, at *3 n. 3 (E.D.Pa. July 11, 2008)").

Moreover, Vogel offers no more than the conclusory assertion that the prosecutor made false statements in its closing argument. He does not identify any specific offending statements and he cites no evidence to support his claims of falsehood. Even if he had properly raised the issue in his Petition, such unsubstantiated allegations are insufficient to raise a constitutional issue on federal habeas review. *See Miller*, 200 F.3d at 282; *Owens*, 551 F.2d at 1054.

f. Vogel fails to show that he was prejudiced by defense counsel's failure to request his proposed jury instruction

Vogel renews his argument that he was entitled to a jury instruction stating that the jury must acquit him of the CSA violation if it found that he had complied with state law governing the prescription of opioid drugs. He objects to the Magistrate Judge's conclusion that defense counsel's failure to request such an instruction was not ineffective assistance. Specifically, Vogel objects to the Magistrate Judge's reasoning that he "has offered no legal or factual basis entitling him to such an instruction and the record supports none," and therefore, he cannot show that counsel's failure to request the instruction was deficient performance. Report and Recommendation at 13-14. On *de novo* review, the Court concludes that even if, as Vogel asserts, failure to request the instruction was deficient performance, he has presented insufficient evidence to support a finding of prejudice.

To establish prejudice as required in an ineffective assistance of counsel claim, a "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." *Strickland,* 466 U.S., at 694, 104 S.Ct. 2052. In assessing prejudice, courts "must consider the totality of the evidence before the judge or jury." *Id.*, at 695, 104 S.Ct. 2052.

Review of the record in this case reveals only one witness, healthcare attorney Susan Hendricks, whose testimony could even remotely be construed as supporting the view that Vogel

and MPC were operating in compliance with Texas law governing the prescription of opioid drugs. However, her testimony was far from a ringing endorsement of Vogel and MPC's practices. Hendricks testified that "in [her] opinion, the protocol they were following, if it was followed as described, would not violate Texas law that I am aware of." Tr. 6 at 1547. It is clear from the qualified nature of Hendricks' testimony that she was uncertain whether MPC doctors actually followed the protocol she had in mind. Indeed, she ultimately conceded that she had no personal knowledge of MPC's actual operations and "knew just basically what they told me." Tr. 6 at 1545.

On the other hand, the evidence at trial indisputably established that MPC's protocol was not always followed. Defense counsel freely admitted this in closing arguments, stating: "I'll acknowledge the protocol was violated. We're not going to stand here and argue that it wasn't." Tr. 8 at 1784. Thus, the primary condition Hendricks placed on her opinion about whether MPC was operating in accordance with state law ("if [the protocol] was followed as described") was definitively shown to not be present.

Hendricks' testimony was further undermined by evidence of correspondence between Vogel and a co-conspirator, in which Vogel laments Hendricks' unwillingness to give a written legal opinion that MPC complied with Texas law:

> [S]he already stated that her opinion is not law and that her opinion is not necessarily indicative of anything, unfortunately. Very blatantly putting it, after speaking with her, she has no definitive answers for me. She did state that in her opinion if we did have every patient come into our clinic for an examination with our in-house physician, that the in-house examination should establish the doctor-patient relationship.

GX197; Tr. 8 at 1775.

The Court finds that, given the totality of the evidence in the case, there is no reasonable probability that the jury would have found Vogel and MPC were operating in compliance with Texas law. Accordingly, any deficient performance related to defense counsel's failure to request Vogel's suggested jury instruction did not prejudice Vogel and, thus, did not amount to ineffective assistance of counsel.

II. The Court need not review claims not timely raised in Vogel's Petition, pursuant to Rule 2(b)

Next, the Court considers Vogel's contention that the Magistrate Judge overlooked his argument that defense counsel was ineffective for failing to engage a handwriting expert. Vogel's Petition contains the following enumerated grounds for review:

1. Counsel was ineffective by his lack of understanding of key forensic issues, not introducing exculpatory forensic evidence, and not hiring proper experts to testify at trial
2. Counsel was ineffective by not introducing exculpatory rebuttal evidence to three of the prosecution's exhibits
3. Counsel waived attorney-client privilege without Vogel's consent and, furthermore, did not properly prevent certain privileged documents from coming into evidence by making proper objections
4. Counsel was ineffective by not objecting to multiple examples of the prosecution "vouching" of evidence and the prosecution's improperly framed questions to witnesses
5. Counsel was ineffective by not noticing and taking action regarding a serious incident of prosecutorial misconduct of trial
    a. The prosecution's substantive misconduct was so serious and grave that it warrants vacation of Vogel's conviction
6. Counsel was ineffective by conceding during closing arguments that the jury must either convict Vogel of all charges or acquit him of all charges
7. Counsel was ineffective for failing to prepare Vogel to testify
8. The Cumulative Effect of counsel's ineffective assistance rendered Vogel's conviction unconstitutional
9. Counsel was ineffective for failing to argue before trial and on appeal that in the absence of a national standard for prescribing opiate therapy for pain management, application of the Controlled Substances Act ("CSA") in this case violated the Tenth Amendment
    a. As applied in this case, the CSA violates the Tenth Amendment

10. Counsel was ineffective by not requesting a jury instruction that would require acquittal if the jury found Vogel complied with state law regarding prescription of opioid drugs
11. Vogel was sentenced in violation of the Sixth Amendment
12. Vogel's sentence was unconstitutional because it was unconscionably higher than his Rule 11 plea bargain offer

Petition at 6-22. The Court finds that the Report and Recommendation reflects the Magistrate Judge's review of these enumerated issues along with the numerous sub-issues identified in Vogel's Petition. Vogel correctly observes that the Magistrate Judge did not review his claim that counsel failed to engage a handwriting expert. However, because the claim was asserted in Vogel's Reply, not in his Petition, the Magistrate Judge had no obligation to do so.

As discussed above, pleadings under 28 U.S.C. § 2255 are governed by Rule 2(b) of the Rules Governing Section 2255 Proceedings for the United States District Court. Rule 2(b) provides that a motion under 28 U.S.C. § 2255 must "(1) specify all the grounds for relief which are available to the moving party; [and] (2) state the facts that support each ground[.]"

Vogel's claim regarding failure to engage a handwriting expert was not properly asserted under this provision. Vogel's Petition, under "Ground One," assigns error to counsel's alleged failure to "hire a proper **forensic** expert to testify that Opiate Therapy as prescribed by Mr. Vogel's medical clinic was proper medicine." Petition at 7 (emphasis added). But Vogel did not assert counsel's failure to engage a **handwriting** expert as a ground for relief anywhere in the Petition. Instead, he raised that argument for the first time in his Reply brief. Reply at 30. Accordingly, under Rule 2(b), he has waived the right to federal habeas review of the claim.

III. Vogel's Tenth Amendment challenge to his conviction under the CSA

Finally, the Court considers Vogel's objection to the Magistrate Judge's conclusion that he is not entitled to habeas relief on the basis that his conviction under the CSA violated the Tenth Amendment and counsel's failure to challenge the law on that basis during pretrial

proceedings and on direct appeal constituted ineffective assistance. Vogel challenges both the Magistrate Judge's conclusion that his arguments are procedurally barred and that, substantively, his claims lack merit. First, the Court notes that Vogel correctly observes that defense counsel raised only a Fifth Amendment challenge to the CSA in pretrial proceedings and on direct appeal. His Tenth Amendment challenge was not asserted at those stages. However, the Court agrees with the Magistrate Judge's assessment that Vogel's Tenth Amendment challenge to the CSA and his related ineffective assistance of counsel claim lack merit.

The CSA imposes criminal penalties for the knowing or intentional delivery, distribution, or dispensation of a controlled substance by means of the Internet without a "valid prescription," which the statute defines as a "prescription issued for a legitimate medical purpose in the usual course of professional practice by—(i) a practitioner who has conducted at least 1 in-person medical evaluation of the patient; or (ii) a covering practitioner." RYAN HAIGHT ONLINE PHARMACY CONSUMER PROTECTION ACT OF 2008, § 2, § 311, PL 110–425, 122 Stat 4820 (2008) (current version at 21 U.S.C. 829 (e)(2), 21 U.S.C. 841(h)(1)(A)-(B), (2)(B)). The statute therefore sets forth what Vogel characterizes as a "'national' standard of care," which practitioners must adhere to when prescribing controlled substances for medicinal purposes. Petition at 18. Vogel maintains that Congress has no constitutional authority to regulate the prescription of controlled medicinal substances, such as the opioid drugs at the center of this case. Accordingly, he contends that power to regulate in this area is reserved to the states under the Tenth Amendment and his alleged compliance with Texas laws governing opioid prescription shields him from any criminal liability.

The United States Supreme Court rejected a similar argument in *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195 (2005). In *Gonzalez*, several California residents had manufactured

and/or possessed small amounts of marijuana for intrastate, personal, medical use, in full compliance with California's Compassionate Use Act. *Id.* This activity undisputedly violated the CSA, but, like Vogel, the respondents argued that as applied to them, the CSA was beyond the scope of Congress' constitutional authority. *Id.* at 8. The Court considered whether Congress' commerce power permitted it to regulate such purely local activity.

The Court reasoned that, although the intrastate growth and use of marijuana for medical purposes, as otherwise authorized by California law was a purely local activity, it was, nonetheless, part of an economic class of activities that has substantial effect on interstate commerce. *Id.* at 17. Citing longstanding precedent, the Court noted that the Commerce Clause grants Congress power to regulate such activities. *Id.* And state action cannot circumscribe Congress' plenary commerce power over such activities. *Id.* at 29-33. The Court concluded that application of the CSA to the intrastate growth and use of marijuana for medical purposes was rationally related to the regulation of interstate commerce in marijuana and, therefore, within Congress' commerce power.

Vogel and MPC's prescription of opioid drugs, purportedly for medical use, is analogous to the growth and use of medical marijuana at issue in *Gonzales.* Following the Supreme Court's rationale in that case, even if Vogel and MPC prescribed opioid drugs entirely within the state of Texas to citizens of that state—and the record does not establish that their activity was so limited—this purely local activity is, nonetheless, part of an economic class of activities that has substantial effect on interstate commerce in opioid drugs. Thus, it is subject to federal regulation under Congress' commerce power. Moreover, even if Vogel and MPC complied with Texas law governing the prescription of opioid drugs—which the record does not conclusively demonstrate—the state's regulatory action does not circumscribe Congress' authority to legislate

on such matters. To the extent Texas law on the subject conflicts with the CSA, "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Id.* at 29.

The Court concludes that CSA is a valid exercise of federal power, even as applied in Vogel's case. Accordingly, his conviction under the CSA was not contrary to the Tenth Amendment. The Court also finds that, because Vogel's Tenth Amendment argument is meritless, defense counsel's failure to assert an objection or appeal based on the argument does not amount to deficient performance. *See Clark*, 673 F.3d at 429 ("failure to assert a meritless objection cannot be grounds for a finding of deficient performance"); *Green,* 160 F.3d at 1037 ("failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness").

IV. Conclusion

The Court finds that Vogel's objections are without merit and will be overruled. The Court adopts the findings and conclusions of the Magistrate Judge to the extent they are not inconsistent with this order.

In light of the foregoing, it is

ORDERED that Petitioner's objections are hereby **OVERRULED**. It is further

ORDERED that Petitioner's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and that the case is hereby **DISMISSED WITH PREJUDICE**. It is further

ORDERED that any motion not previously ruled on is **DENIED.**

SIGNED at Beaumont, Texas, this 8th day of August, 2016.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

DAVID ALAN VOGEL	§	CIVIL ACTION NO. 4:13CV323 Criminal Case No. 4:08cr224(1)
v.	§	
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Movant David Vogel filed the above-styled and numbered motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The motion was referred to the court for findings of fact, conclusions of law and recommendations for the disposition of the case.

Background[1]

On June 30, 2010, Vogel was convicted of one count of drug conspiracy in violation of 21 U.S.C. §§ 841 and 846, one count of money laundering conspiracy in violation of 18 U.S.C. § 1956(h), and two counts of substantive money laundering in violation of 18 U.S.C. § 1957. Dkt. #1, 374. His conviction stems from a scheme to illegally manufacture and distribute millions of specially compounded hydrocodone pills nationwide via an internet pharmacy, the Madison Pain Clinic ("MPC"), which was owned and operated by Vogel in Dallas, Texas. Dkt. #1.

Under the scheme, drug-seeking customers all over the U.S. participated in MPC's "opioid therapy program," whereby they could obtain prescriptions for hydrocodone and other drugs without ever seeing a doctor face-to-face, being physically examined, undergoing

[1] The trial transcript is referred to herein by volume and then page number (e.g., "Tr. 1 at 50). Pertinent records kept in the District Court's criminal case file (Criminal Case No. 4:08cr224(1)) are referred to by docket number (e.g., "Dkt. #456).

diagnostic testing and evaluation, or other prerequisites to establish a bona fide doctor-patient relationship. *Id.* at 4. . In order to participate in the program, customers paid membership and consulting fees, as well as drug costs, directly to MPC. *Id.* at 8. Subsequently, MPC split the fees with associated doctors and pharmacies. *Id.* This enterprise generated about $26 million in illicit proceeds, $8 million of which went to Vogel. *Id.* at 11; Dkt. # 456 at 3.

MPC provided prescriptions based on customers' answers to an online questionnaire and review of customer-supplied medical information, the accuracy and veracity of which MPC did not attempt to verify. *Id.* MPC physicians wrote prescriptions for hydrocodone and other controlled substances for these internet customers, which were filled by pharmacists working in conjunction with MPC. *Id.* at 5. The pharmacists filled prescriptions for customers in states where they did not maintain licenses to practice medicine or pharmacy and were not otherwise authorized to manufacture, distribute, or dispense controlled substances. *Id*

Following investigation into MPC's practices, Vogel and several co-conspirators were indicted on federal drug and money laundering charges. Vogel elected to go to trial and the District Court appointed an attorney to represent him. Dkt. # 70. Later, that attorney was allowed to withdraw due to irreconcilable conflict with Vogel. *See* Dkt. #70. The court appointed Scott Smith as new trial counsel. Dkt # 72. Thereafter, Smith succeeded in getting a second attorney, Brett Smith, appointed as co-counsel for the defense. *See* Dkt. #146, 149.

Trial lasted eight days, during which the parties presented evidence supporting two competing narratives. The Government claimed Vogel knew MPC had been breaking the law by issuing prescriptions outside the usual course of professional medical practice and without a legitimate medical purpose, that he deliberately hired doctors and employees who would not challenge him, that he ignored the law violations in the interest of turning a profit, and that he

used MPC to support his own drug addiction. Dkt. #456 at 3. The defense argued Vogel lacked the culpable mental state required for conviction, portraying him as a well-intentioned entrepreneur led astray by an unclear regulatory scheme and bad advice from doctors and lawyers. *Id.*

The jury found Vogel guilty on all counts, awarded forfeiture of $4.3 million in drug proceeds, and granted a money judgment against Vogel in the amount of $24.7 million. Dkt. # 374, 375. The District Court sentenced Vogel to 240 months of incarceration, the maximum available penalty under the applicable statutes. Dkt. #416.

Vogel appealed his conviction and sentence on 14 separate grounds. Dkt. # 456. On January 31, 2012, the Fifth Circuit affirmed, rejecting each of Vogel's claims on appeal. Dkt. #456. Vogel filed a petition for rehearing en banc, which the Fifth Circuit denied. Vogel then filed a petition for certiorari with the Supreme Court, which was also denied, as was his petition for rehearing by the Supreme Court. Dkt. #457. Vogel filed this motion seeking post-conviction relief on June 10, 2013, asserting ineffective assistance of counsel and several substantive constitutional claims.

Authority

A § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir.1996) (citations and quotation marks omitted). "A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude, [citation], and may not raise an issue for the first time

on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (citations omitted).

Cause may be established by a showing that the defendant received ineffective assistance of counsel in violation of the Sixth Amendment is generally cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986). When a petitioner fails to show actual prejudice, the court need not address whether he established cause. *See United States v. Frady*, 456 U.S. 152, 168 (1982).

A district court should conduct an evidentiary hearing only if the defendant produces "independent indicia of the likely merit of [his] allegations." *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006) (quotation marks and citation omitted); *see also United States v. Auten,* 632 F.2d 478, 480 (5th Cir.1980) (noting that mere conclusory allegations are not sufficient to support a request for an evidentiary hearing).

Discussion and Analysis

Vogel raises numerous grounds for relief, encompassing dozens of sub-issues, most of which are styled as ineffective assistance of counsel claims. He also asserts three substantive constitutional claims. For the reasons discussed herein, each claim lacks merit.

I. Vogel Fails to Establish Ineffective Assistance of Counsel

The Sixth Amendment accords criminal defendants the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984). "The Sixth Amendment does not guarantee criminal defendants the right to error-free representation." *See Emery v. Johnson*, 139 F.3d 191, 197 (5th Cir. 1997). "Rather, a criminal defendant is entitled to counsel

'reasonably likely to render and rendering reasonably effective assistance' given the totality of the circumstances." *Hayes v. Maggio*, 699 F.2d 198, 201 (5th Cir. 1983) (citation omitted).

In determining whether Counsel's performance was ineffective, courts apply the familiar *Strickland* test. "On a claim of ineffective assistance of counsel, the defendant bears the burden of demonstrating that (1) counsel's performance fell below an objective standard of reasonableness and that (2) but for counsel's deficient performance, the result of the proceeding would have been different." *United States v. Bishop*, 629 F.3d 462, 469 (5th Cir. 2010) (citing *Strickland*, 466 U.S. at 697).

Application of *Strickland*'s first prong involves a strong legal presumption that counsel's performance was reasonable: "Judicial scrutiny of counsel's performance must be highly deferential ... [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. A defendant must overcome this presumption. See *Id.* "Thus, a court deciding an ... 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." *Id.* at 690. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011).

To satisfy *Strickland*'s second prong, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of a criminal trial]." *Id.* "This is a heavy burden which requires a 'substantial,' and not just a 'conceivable,' likelihood of a different

result." See *United States v. Wines*, 691 F.3d 599, 605 (5th Cir. 2012) (citing *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011); *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011).)

Conclusory allegations of ineffective assistance that are unsupported by the record do not raise a constitutional issue in a federal habeas proceeding. See *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

As noted above, Vogel alleges numerous acts and omissions by trial counsel that, in his opinion, constituted ineffective assistance of counsel. Each will be addressed in turn.

a. Counsel's Alleged Failure to Understand Forensic Issues, Introduce Exculpatory Forensic Evidence, or Engage Experts to Rebut Forensic Evidence

Vogel claims that "Counsel was ineffective by his lack of understanding of key forensic issues, not introducing exculpatory forensic evidence, and not hiring proper experts to testify at trial." Petition at 6. He notes five omissions by trial counsel in support of this claim:

1. Counsel failed to admit into evidence or use at trial a particular university study about the treatment of chronic pain;
2. Counsel failed to research the Veteran Administration's use of opioids to treat veterans;
3. Counsel failed to hire a proper expert to testify that opioid therapy was "proper medicine";
4. Counsel failed to cross-examine the Government's expert witnesses or introduce into evidence the Texas Medical Board's policy statement regarding the Texas Intractable Pain Act, which recognizes opioids as a viable treatment for those with chronic pain; and
5. Counsel failed to make clear to the jury that the Government's expert witnesses were contradictory "on certain key points."

Id. None of the alleged omissions amounts to deficient performance under *Strickland.*

With respect to the first two omissions, Vogel attempts to fault defense counsel for failing to present evidence or elicit testimony that showed opioid therapy is readily and lawfully used by members of the medical community at large as a method of chronic pain management. But this issue was neither material nor disputed at trial. Accordingly, counsel's failure to address the issue is not a valid basis for an ineffective assistance claim. *See Felder v. Johnson*, 180 F.3d

206, 214 (5th Cir. 1999) (failure to present immaterial evidence is not prejudicial under *Strickland*).

Omissions three and four both arise from defense counsel's engagement and examination of expert witnesses in the case. First, Vogel asserts that counsel failed to engage Dr. John Campbell as an expert for the defense. But, Vogel has cited no evidence demonstrating that Dr. Campbell would have testified favorably to the defense. The Fifth Circuit has explained that such a claim, which is based on pure speculation about what a witness would have said on the stand, is too uncertain to support an ineffective assistance claim. *See Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010) ("Claims that counsel failed to call witnesses are not favored on federal habeas review because the presentation of witnesses is generally a matter of trial strategy and speculation about what witnesses would have said on the stand is too uncertain."); *accord Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). Moreover, in this case counsel's Affidavit establishes that although he did attempt to engage Dr. Campbell as Vogel requested, the doctor refused to assist the defense. Affidavit at 5. Counsel cannot be deemed ineffective for failing to retain an unwilling expert. *See Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007).

Next, Vogel claims that counsel did not cross-examine the Government's two expert witnesses, Dr. John C. Nelson and Dr. Jon Paul Harmer. This claim is simply not born out by the record. No less than 70 pages of the trial transcript are devoted to counsel's vigorous cross-examination of the two witnesses. *See* Tr. 4 at 975-988; Tr. 5 at 996-1009, 1019-25, 1082-1121, & 1124-26.

Vogel also claims that counsel failed to admit into evidence a "policy statement" about treatment of intractable pain purportedly published by the Texas Medical Board (TMB) in 1993. Yet, beyond Vogel's bare assertions that the "policy statement" exists, he has failed to produce

any evidence of its existence or availability to counsel at the time of trial. The Fifth Circuit has long held that "speculative and conclusory allegations ... are insufficient to raise a constitutional issue." *United States v. Hall*, 455 F.3d 508, 522 (5th Cir.2006) (quotation marks and citation omitted). Moreover, as the standards applicable to the TMB's administrative disciplinary proceedings in 1993 have no demonstrable bearing on the standards applicable in Vogel's 2010 criminal trial, the "policy statement" is also immaterial to any disputed issue in this case. Counsel's failure to admit such evidence cannot be deemed prejudicial. *See Felder*, 180 F.3d at 214.

Lastly, Vogel challenges counsel's failure to "make clear to the jury that the complicated forensic testimony of two government experts [was], on certain key points, contradictory." Petition at 9. He does not identify the "key points" and contradictions at issue. This claim is too vague and conclusory to raise a constitutional issue. *See Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998).

b. Counsel's Alleged Failure to Admit Evidence Regarding the Status of Vogel's Employee-Doctor's Medical License

Vogel challenges counsel's alleged failure to offer in evidence a certain email between Vogel and a former MPC employee "showing that Dr. Samblanet was clear [*sic*] of any wrongdoing." Petition at 10. Vogel asserts this was "a crucially important email" that rebutted an email the Government used to show Dr. Samblanet had been told by the TMB to stop writing prescriptions for MPC. *Id.* Vogel offers nothing beyond his bare assertion that the rebuttal email exists. He asserts that "this email was part of the Discovery package the prosecution provided to defense Counsel." Petition at 10. However, Vogel does not cite any point in the voluminous record where the alleged email might be found. And review of the record does not uncover it.

Moreover, even if the purported email existed and, as Vogel asserts, it "stated that 'Dr. Sam[blanet] [wa]s back with all his licenses in order," ascertaining the precise meaning of this language and predicting witness testimony in response are exercises in pure speculation. Petition at 10. Because Vogel's ineffective assistance claim is entirely speculative and conclusory, he fails to raise a constitutional issue. *See Hall*, 455 F.3d at 522.

c. Counsel's Advice-of-Counsel Theory of the Case and Waiver of Attorney-Client Privilege

In Vogel's third ground for relief he asserts three instances of deficient performance arising from counsel's waiver of the attorney-client privilege as part of Vogel's advice-of-counsel defense at trial. He contends that defense counsel "embarked on an 'advice of Counsel' defense" without adequately discussing with him "the pros and cons of waiving attorney-client privilege before arbitrarily, without written consent, waiving the privilege." Petition at 12.

To the extent that Vogel challenges the advice-of-counsel theory advanced by counsel, this conduct cannot be deemed deficient because it was reasonable trial strategy under the circumstances. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690–91. In this case, the key to Vogel's criminal liability was whether he had specific intent to violate the law. Counsel recognized this and focused defense efforts on showing that Vogel acted innocently, arguing that the law was vague and confusing, that Vogel did his best to comply with the law, and that Vogel relied in good faith on the advice of lawyers and doctors who told him MPC was operating legally. *See* Affidavit at 2-3, 5-6. And, according to counsel's affidavit, he pursued this strategy with Vogel's advice and consent. *Id.* This strategy is reasonable in light of the laws and facts at issue in this case. Thus, it cannot be deemed deficient performance under *Strickland.*

Vogel also fails to establish prejudice as required by *Strikcland.* He offers no explanation as to how additional consultation would have changed the outcome of his trial. And counsel's affidavit demonstrates that additional consultation would have had little effect. According to counsel, Vogel was very engaged in trial preparations. Affidavit at 1. This engagement included the regular exchange of correspondence, much of which related specifically to the risks and rewards of an advice-of-counsel defense and the attendant waiver of privilege. *See* Affidavit at 1, 4 (Ex. M, G, H, I). Vogel was also provided copies of all documents in the case, including several filings related to Vogel's intended pursuit of an advice-of-counsel defense and its attendant waiver of the attorney-client privilege, along with related defense filings. *See, e.g.,* Dkt. #256, #258, #265, #288, & #310. Vogel's argument that he was prejudiced by lack of consultation lacks merit is undermined by the clear record of regular and open communications between attorney and client regarding the advice-of-counsel defense.

d. Counsel's Alleged Failure to Object to Government's Characterization of Law and Evidence

Next, Vogel claims "Counsel was ineffective by not objecting to multiple examples of the prosecution 'vouching' of evidence and the prosecution's improperly framed questions to witnesses." Petition at 12. More specifically, he asserts that counsel:

1. "Did not object when Prosecutor Stevan Buys told the jury that violating a civil policy or rule of the Texas Medical Board is a felony";
2. "Did not object to the prosecutior [*sic*] characterizing the pain pills in this case as 'strong,' 'potent,' and/or 'super-pills,' when in fact no foundation for these descriptions was developed"; and
3. "Generally did not object to the prosecutor's erroneous conclusions of law when framing questions."

Id. Vogel does not identify any particular instance in which the Government described violation of a Texas Medical Board rule or policy as a felony or failed to lay a foundation for referring to MPC's pills as "potent," "strong," or "super pills." The record discloses none. And his complaint

of counsel's "general" failure to object to unspecified conclusions of law is too vague to address. Because Vogel's claims are wholly conclusory and unsupported by the record, they cannot sustain an ineffective assistance claim. *See Hall*, 455 F.3d at 522.

e. Counsel's Alleged Failure to Object to the Government's Use of Exhibits During Closing Arguments

Vogel also claims counsel was ineffective "by not noticing and taking action regarding a serious incident of prosecutorial misconduct at trial." Petition at 14. Specifically, Vogel claims the Government committed a "grave ethical violation" during closing argument by altering Government Exhibit 199A to add the words "be wicked smart" to the document "in big bold letters." *Id.* According to Vogel, the Government thereby "created fictional documentary evidence." *Id.* The argument lacks merit.

In its closing argument, the Government presented copies of several exhibits admitted in evidence as PowerPoint slides. Each slide contained a heading. The offending text appears in one such heading on a slide that contained Government Exhibit 199A, unaltered and in its entirety. *See* Response, Attachment B. Contrary to Vogel's assertions, there was no objectionable alteration of the exhibit itself. And it is clear from the record that the phrase "be wicked smart" relates to evidence admitted at trial involving Vogel's email account: bewickedsmart@yahoo.com. *See, e.g.*, Tr. 6 at 1376, 1379. Vogel offers no authority for the proposition that the phrase "be wicked smart" is inherently prejudicial and, in context, the court finds no basis for such a conclusion.

The Fifth Circuit has repeatedly observed that, "'[f]ailure to raise meritless objections is not ineffective lawyering; it is the very opposite.'" *Wood v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) (internal citation omitted); *see also Clark v. Thaler*, 673 F.3d 410, 429 (5th Cir. 2012), ("failure to assert a meritless objection cannot be grounds for a finding of deficient

performance"); *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) ("failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness"). In this case, because there was no legal basis for objection to the slide, counsel was not deficient for failing to do so.

f. Counsel's Purportedly Deficient Jury Charge

Vogel claims "Counsel was ineffective by conceding during closing arguments that the jury must either convict Mr. Vogel of all charges or acquit him of all charges." Petition at 15. More specifically, he claims that counsel wrongly told the jury that if it elected to convict him on the drug charge it should also find him guilty of the money laundering charges. His claims are not borne out by the record.

Under *Strickland*, counsel's remarks must be "considered in context with the remainder of defense counsel's closing argument" and in light of the "totality of the evidence before the judge or jury." *Rushing v. Butler*, 868 F.2d 800, 805-806 (5th Cir. 1989); *see also Strickland*, 466 U.S. at 700 (attorney performance evaluated by reference to "all the circumstances").

In this case, counsel made the following remarks to the jury:

> And let me just say this about the counts. **If you find that he's not guilty on Count 1, which is the drug distribution, the money laundering, same thing.** You've got to find the money laundering is proceeds of an illegal activity. **So, if the first one is not guilty, the rest are easy.** I think we agree on that. They're going to go one way or the other, and they're going to be the same. So, let me just say that.

Tr. 8 at 1799 (emphasis added). In context, counsel was clearly instructing the jury it would have to acquit Vogel on the money laundering counts if they acquitted him on the drug count, not that they would automatically have to convict on the money laundering counts if they convicted on the drug count. This is a correct statement of the law. Thus, Vogel fails to establish that counsel's jury charge was deficient.

Moreover, any prejudice resulting from counsel's alleged improper comments was cured by the District Court's subsequent instruction to the jury. The District Court instructed:

> A separate crime is charged in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

Tr. 8 at 1714. The District Court also instructed the jurors that they were to follow the law as the Court explained it, that they were to rely solely on the evidence presented at trial, and that statements and arguments made by the lawyers are not evidence. *See* Tr. 1 at 4; Tr. 8 at 1704, 1706. And, the District Court properly instructed the jury on all the elements they had to find before Vogel could be convicted of either the drug or money charges. *See* Tr. 8 at 1719 & 1744-45.

Vogel concedes that the jury was properly instructed (*see* Petition at 15) by the District Court and the law "presume[s] that the jury follows the instructions of a trial court unless there is an overwhelming probability that the jury will be unable to follow the instruction and there is a strong probability that the effect of [improper argument] is devastating." *United States v. Tomblin*, 46 F.3d 1369, 1390 (5th Cir. 1995) (internal quotes and citation omitted). Vogel does not show any such probability. Thus, he cannot show that "but for" counsel's alleged error there is a substantial likelihood that he would have been acquitted of one or more of the charged crimes. *See Strickland*, 466 U.S. at 687, 698-99.

Vogel also claims "Counsel was ineffective by not requesting a jury instruction that would require the jury to acquit Mr. Vogel if it found that he complied with state law regarding the prescribing of opiod [*sic*] drugs." Petition at 20. He has offered no legal or factual basis entitling him to such an instruction and the record supports none. *See United States v. Duvall*, 846 F.2d 966, 971 (5th Cir. 1988) (holding that a requested instruction must be supported by

evidence in the record that would lead to acquittal); *United States v. Natel*, 812 F.2d 937, 942 (5th Cir. 1987) (holding that a requested jury instruction must contain a correct statement of the law). Accordingly, counsel cannot be found deficient for failing to request the instruction. *See Koch*, 907 F.2d at 527 (finding a defendant fails to demonstrate trial counsel was deficient in failing to request what would have been a frivolous jury instruction); *Buxton v. Collins*, 925 F.2d 816, 825 (5th Cir. 1991) (concluding counsel did not act ineffectively in not objecting to a jury instruction that was not erroneous).

g. Counsel's Alleged Failure to Prepare Vogel to Testify

Next, Vogel claims "Counsel was ineffective because no time was spent preparing Mr. Vogel to testify at this trial." Petition at 16. More specifically, he asserts counsel was deficient because:

1. Vogel's "decision not to testify was based on the fact that lead Counsel Scott Smith told him that if he testified he would do so with zero preparation"; and
2. "Counsel NEVER [*sic*] visited Mr. Vogel at the County Jail."

Id.

Contrary to Vogel's conclusory assertions, the record indicates that counsel did not refuse to prepare Vogel to testify. Rather, counsel made a strategic decision that Vogel would not make a good witness and would not help his case should he take the stand. Thus, no preparation was necessary. In his affidavit, counsel affirmed:

> Mr. Vogel attributes a statement to me that if he testified he would do so with zero preparation. I emphatically deny having told Mr. Vogel that, or any other client I have ever represented. The fact of the matter was that both Counsel believed that it would not be in Mr. Vogel's best interest to testify, and came to that opinion very early. Mr. Vogel could not control himself during the trial, constantly reacting to testimony. He would not have made a good witness.

Affidavit at 7.

This estimation was amply supported by Vogel's outbursts and inability to control himself at trial, which became so distracting at one point that the Government stopped its examination of a witness, requested a side bar, and asked the Court to admonish Counsel to have Vogel be more quiet. *See* Tr. 3 at 524-25. The Court agreed, noting: "I can hear him too. It's not good.... It's driving me crazy." *Id.* at 525. Counsel acknowledged the problem, stating: "I have admonished him already. I will do it again." *See* Tr. 3 at 524-25.

Counsel also affirmed:

> In my notes that I maintained immediately post-trial, I recorded the following information: .... We discussed [Vogel's] testimony, and because he could not manage to keep control of himself, we had grave concerns about his ability to stand up during cross-examination. Doug Grover also told us that David should not testify, referencing his decision not to have David testify as an expert witness in his coin case. ***David Agreed.*** The jury expressed concern that David was reacting to everything. They didn't like his constant activity, and we cautioned him many times during the trial to not show his reactions to testimony, good and bad.

Affidavit at 2 (emphasis added).

The record indicates that, not only was counsel's strategic determination that Vogel should not testify a sound one, but it was a decision that Vogel agreed with. Under the circumstances, this was a reasonable, strategic choice that does not amount to deficient performance under *Strickland*, 466 U.S. at 690-91.

h. Counsel's Failure to Raise a 10th Amendment Challenge to the Controlled Substances Act

Next, Vogel claims counsel was ineffective for failing to challenge the Controlled Substances Act ("CSA") based on alleged violation of the Tenth Amendment. The record shows that counsel did, in fact, raise a Tenth Amendment challenge to the CSA, both at trial and on direct appeal. *See* Dkt. #144 & #456. Thus, Vogel's claim is not supported by the record.

Moreover, Vogel's Tenth Amendment argument is legally frivolous. The Fifth Circuit has repeatedly held that laws like the CSA are a proper exercise of congressional power under the Commerce Clause and do not violate the Tenth Amendment. *See Thompson v. Holder*, 480 Fed.Appx. 323, 325 (5th Cir. 2012) ("Texas is subject to the jurisdiction of the United States for purposes of the CSA and the CSA does not violate the Tenth Amendment."); *United States v. Evans*, WL 156317 at *1 (5th Cir. 1998) (claims that 21 U.S.C. §§ 841(a)(1) and 846 violate the Tenth Amendment "are foreclosed by this court's precedent" which holds that the CSA is a valid exercise of Congress' commerce power); *United States v. Owens*, 996 F.2d 59, 60-61 (5th Cir.1993) (if the challenged statute is a proper exercise of congressional power under the Commerce Clause, the statute does not violate the Tenth Amendment); *see also Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) ("state action cannot circumscribe Congress' plenary commerce power"); *United States v. Lo*pez, 2 F.3d 1342, 1367 n. 50 (5th Cir. 1993) (reaffirming that all drug trafficking, intrastate as well as interstate, is subject to regulation under the Commerce Clause). Counsel could not be considered ineffective for failing to raise this meritless argument. *See Wood*, 503 F.3d at 413.

a. Cumulative Effect of Alleged Errors

In a final attempt to establish ineffective assistance of counsel, Vogel asserts that "the cumulative effect of the multiple examples of ineffective assistance of Counsel cited herein renders Mr. Vogel's conviction unconstitutional." Petition at 17. But, "ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions." *Hall*, 455 F.3d at 520 (citations omitted); *see also United States v. Cervantes*, 706 F.3d 603, 619 (5th Cir. 2013) ("Allegations of non-errors do not play a role in cumulative error analysis since there is

nothing to accumulate."). Because Vogel has failed to establish any prejudicial error by counsel, the court need not engage in cumulative error analysis.

II. Vogel's Substantive Challenges are Procedurally Barred

In addition to his ineffective assistance of counsel claims, Vogel's petition raises three[2] substantive constitutional challenges. He argues: (1) the Controlled Substances Act is an violation of states' rights under the 10th Amendment; (2) the Government's use of the heading "be wicked smart" on a PowerPoint slide during closing arguments constituted prosecutorial misconduct that denied him a fair trial; and (3) his sentence was unconstitutional because it was "unconscionably [*sic*] higher than his Rule 11 plea bargain offer." Petition at 21. His arguments are procedurally barred.

Vogel unsuccessfully raised his first argument in both the District Court and the Fifth Circuit. *See* Dkt. 144, 456. He is not entitled to raise the issue again on collateral review. *See United States v. Johnston*, 127 F.3d 380, 392-93 (5th Cir. 1997) (issues considered on direct appeal will not be reconsidered in a § 2255 motion.)

Arguments two and three are also procedurally barred because Vogel failed to raise the issues on direct appeal. "If a § 2255 movant failed to raise a claim on direct appeal, he may not raise it on collateral review unless he shows cause and prejudice or that he is actually innocent." *United States v. Scruggs*, 691 F.3d 660, 666 (5th Cir. 2012). Vogel has not made the requisite showing.

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. §

[2] Vogel raised a fourth constitutional challenge to his sentence, arguing that under *Alleyne v. United States*, 133 S.Ct. 2151 (2013), his sentence was unconstitutional. Petition at 21. In his Reply brief, he concedes that *Alleyne* is inapposite and withdraws the argument. Accordingly, the court does not consider the issue herein.

2253(c)(1)(B). Although Vogel has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2). "In order to make a substantial showing, a petitioner must demonstrate that 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003) (quoting *Slack*, 529 U.S. at 484). "When the district court has denied a claim on procedural grounds, however, the petitioner must also demonstrate that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Id.* (quoting *Slack*, 529 U.S. at 484).

In this case, it there is no likelihood that reasonable jurists could not debate the denial of Vogel'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 Vogel is not entitled to a certificate of appealability as to his claims.

Recommendation

It is recommended that the above-styled motion to vacate, set aside or correct Vogel's sentence pursuant to 28 U.S.C. § 2255 be denied and that the case be dismissed with prejudice. It is further recommended that 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). In order 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 Services Automobile Ass'n*, 79 F.3d 1415, 1417 (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 to fourteen days).

SIGNED this 7th day of June, 2016.

Don D. Bush

DON D. BUSH
UNITED STATES MAGISTRATE JUDGE