IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12184-K

OMAR WEISE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Omar Weise moves for a certificate of appealability to appeal the district court's denial of his 28 U.S.C. §2255 motion. To merit a certificate of appealability, Weise must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Weise has failed to make the requisite showing, the motion for a certificate of appealability is DENIED. Weise's motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:16-CV-24453-KMM

OMAR WEISE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court upon *pro se* Petitioner Omar Weise's ("Petitioner") Motion for Reconsideration pursuant to Federal Rule of Civil Procedure Rule 59(e). ("Mot. for Recons.") (ECF No. 35). On December 2, 2018, the Court entered an Order adopting Magistrate Judge McAliley's Report and Recommendation ("R&R") (ECF No. 24) and denying Petitioner's § 2255 Petition. ("Order") (ECF No. 34). Petitioner now moves the Court to reconsider its Order. *See* Mot. for Recons.[1]

"Reconsideration is an extraordinary remedy to be employed sparingly." *Holland v. Florida*, CASE NO. 06-20182-CIV-SEITZ, 2007 WL 9705926, at *1 (S.D. Fla. June 26, 2007)

[1] Although Petitioner seeks relief pursuant to Federal Rule of Civil Procedure 59(e), any relief under Rule 59(e) would be denied as untimely because the Motion was filed on January 16, 2019, more than twenty–eight days after the Court's Order, entered on December 2, 2018. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."). However, "*[p]ro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). Accordingly, the Court construes the Motion for Reconsideration as seeking relief under Federal Rule of Civil Procedure 60(b).

Appendix B

(internal quotation marks and citation omitted). Under Rule 60(b), the moving party must demonstrate why the Court should reconsider its prior decision and set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision. *See Regions Bank v. Old Jupiter, LLC*, 449 F. App'x 818, 820 (11th Cir. 2011) (internal citation omitted). Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 295 (M.D. Fla. 1993) (internal citations omitted).

Petitioner asserts the following arguments within his Motion for Reconsideration: (1) the Court improperly denied his motion to amend his habeas petition; (2) the Government committed "misconduct" by failing to ensure that a particular witness was available to testify at trial; (3) the Court improperly held that Petitioner's motivation in punching his victim was irrelevant to the inquiry at hand; and (4) the Court's jury instructions constructively amended the Indictment. *See* Mot. for Recons. at 1–5. However, Petitioner already raised these arguments within his Petition (ECF No. 1), Reply to the Response to the Petition (ECF No. 16), Motion for Leave to Amend Petition (ECF No. 19), and Objections to the R&R (ECF No. 33). The Court declines to consider, as part of a motion for reconsideration, arguments already raised before the Court. *See Managed Care Sols. v. Essent Healthcare, Inc.*, No. 09–60351–CIV., 2010 WL 3522566, at *1 (S.D. Fla. Sept. 7, 2010) ("A motion to reconsider is not a vehicle for rehashing arguments the Court has already rejected or for attempting to refute the basis for the Court's earlier decision.") (internal citation and quotation marks omitted); *Knighten v. Palisades Collections, LLC*, No. 09–CIV–20051–LENARD., 2011 WL 835783, at *2 (S.D. Fla. Mar. 4. 2011) (holding that the plaintiff's

"reiteration of arguments that he has already presented . . . do not establish, or even allege, any clear error or manifest injustice.").

Petitioner's remaining argument–that trial counsel was ineffective for failing to "move[] for a jury instruction to request a lesser-included offense instruction consistent with [Petitioner's] theory of the defense"–is a new argument not raised by Petitioner prior to the Motion for Reconsideration. Mot. for Recons. at 3. However, Petitioner fails to explain why this argument could not have been raised prior to the entry of judgment. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (stating that motions for reconsideration "cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment. This prohibition includes new arguments that were previously available, but not pressed.") (internal quotation marks and citations omitted). The Court therefore also declines to address Petitioner's newly raised argument. *CC-Aventura, Inc. v. Weitz Co.*, LLC, CASE NO. 06-21598-CIV-HUCK/O'SULLIVAN, 2009 WL 10668319, at *2 n.1 (S.D. Fla. Mar. 17, 2009) (declining to address new argument in reconsideration motion because it was "available to, but not raised by" the party seeking reconsideration prior to judgment).

Because Petitioner fails to explain why the Order amounts to a "clear error or manifest injustice," instead recycling arguments already made before the Court and raising a new argument that should have been raised earlier in the proceedings, the Court declines to disturb its prior Order denying Petitioner's habeas petition. *See Cover*, 148 F.R.D. at 295.

Accordingly, UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, Petitioner's Motion for Reconsideration (ECF No. 35) is hereby DENIED. The case remains CLOSED. The Clerk of Court is instructed to mail a copy of the instant Order to Petitioner's address of record.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of April, 2019.

K. Michael Moore

Digitally signed by K. Michael Moore
DN: cn=K. Michael Moore, o=Southern District of Florida, ou=United States District Court, email=k_michael_moore@flsd.uscourt.gov, c=US
Date: 2019.04.16 11:30:20 -04'00'

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-24453-KMM

OMAR WEISE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Petitioner Omar Weise's ("Petitioner") Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 ("Petition") (ECF No. 1) and Motion for Leave to Amend Petition ("Motion") (ECF No. 19). The Court referred the Petition and Motion to the Honorable Chris McAliley, United States Magistrate Judge, who issued a Report and Recommendation ("Report") (ECF No. 24) recommending that the Court deny the Petition and Motion. Petitioner filed objections. Objections (ECF No. 29). The United States of America ("Respondent") filed a Response. Response (ECF No. 33). The matter is now ripe for review.

The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3). Pursuant to Federal Rule of Civil Procedure 72(b)(3), the Court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). However, if the objections are improper, in that they are "conclusory or general" or "simply rehash or reiterate the original briefs to the magistrate judge," *Rodriguez v.*

Colvin, No. 12-CV-3931 (RJS)(RLE), 2014 WL 5038410, at *3 (S.D.N.Y. Sept. 29, 2014), that will not suffice to invoke a district court's *de novo* review of the magistrate judge's recommendations. Thus a court need only review the magistrate's report for clear error. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987); *Faucette v. Comm'r of Soc. Sec.*, No. 13-CV-4851 (RJS) (HBP), 2015 WL 5773565, at *2 (S.D.N.Y. Sept. 30, 2015); *see also Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005); *Marlite, Inc. v. Eckenrod*, No. 10-23641-CIV, 2012 WL 3614212, at *5 (S.D. Fla. Aug. 21, 2012) (It is improper for an objecting party to . . . submit[ ] papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge.) (quoting *Camardo v. Gen. Motors Hourly Rate Emps. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992)). This level of review is warranted as "parties are not to be afforded a 'second bite at the apple' when they file objections to a [Report]." *Camardo*, 806 F. Supp. at 382.

Petitioner raises multiple arguments in opposition to the Report, only two of which were not previously raised before Magistrate Judge McAliley.[1]

First, Petitioner argues that his trial counsel was ineffective for failing to object to the Court's allegedly improper admission of evidence of one victim's broken jaw. Objections at 2. Petitioner claims that by admitting this evidence, the Court permitted the jury to engage in a "retrospective" analysis of why Petitioner used force, as opposed to a "prospective" analysis of

1 The Court will not consider "the same arguments and positions" already raised before the Magistrate Judge. *See Eckenrod*, 2012 WL 3614212, at *5. Petitioner's Objections concerning (1) ineffective assistance of counsel for failing to call a particular witness; (2) unconstitutional consideration of acquitted conduct at sentencing; and (3) Magistrate Judge McAliley's denial of the Motion, recycle the same arguments and positions already raised in the Petition, Motion, and Reply to the Response to the Petition (ECF No. 16). Accordingly, the Court declines to consider arguments already raised before, and considered by, Magistrate Judge McAliley.

whether such force will cause a victim to engage in a commercial sex act. *Id.* Petitioner's objection is without merit. Nothing within the federal statute prohibiting sex trafficking of a minor, 18 U.S.C. § 1591, requires a jury to analyze "prospectively" or "retrospectively" how force is used in the commission of a sex trafficking offense and Petitioner does not point the Court to any authority to the contrary. The broken jaw incident was both relevant and probative of whether "Defendant regarded . . . women as his employee sex workers, that it was his job to keep the women in line and productive, and that he was using force or coercion to keep control over his sex workers." *United States v. Weise*, Case No. 13-cr-20092-KMM, 2013 WL 11318867, at *2 (S.D. Fla. Sept. 4, 2013). The Court properly admitted such evidence, and Petitioner's trial counsel was under no duty to raise a meritless objection. Report at 9 (internal citation omitted).

Second, Petitioner cites *United States v. Opager*, 589 F.3d 799, 804 (5th Cir. 1979), for the contention that the Government's failure to make Samantha Snyder, an allegedly exculpatory witness, available for trial warrants a reversal of Petitioner's conviction. However, the issues in *Opager* were brought on direct appeal, and Petitioner himself concedes to not raising the Government's alleged error on direct appeal. *Opager*, 589 F.3d at 804; Objections at 5. The Court agrees with Magistrate Judge McAliley that, as a result of Petitioner's failure to raise this issue on direct appeal, Petitioner procedurally defaulted on this claim. Report at 16 n. 5.

Petitioner's remaining claims are denied for the reasons stated in Magistrate Judge McAliley's thorough Report.

Accordingly, UPON CONSIDERATION of the Petition, the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, Magistrate Judge McAliley's Report and Recommendation (ECF No. 24) is hereby ADOPTED and the Petition for

Habeas Corpus (ECF No. 1) and Motion for Leave to Amend (ECF No. 19) are DENIED. The Court further DENIES, for the reasons stated in the Report, (i) Petitioner's request for an evidentiary hearing and (ii) a certificate of appealability.

The Clerk of Court is directed to CLOSE this case. All pending motions, if any, are DENIED AS MOOT.

Done and ordered in Chambers at Miami, Florida, this 2nd day of December, 2018.

K. Michael Moore

Digitally signed by K. Michael Moore
DN: cn=K. Michael Moore, o=Southern District of Florida, ou=United States District Court, email=k_michael_moore@flsd.uscourt.gov, c=US
Date: 2018.12.02 12:37:39 -05'00'

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-24453-CIV-MOORE/MCALILEY

OMAR WEISE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATIONS

Petitioner, Omar Weise, has filed a Motion to Vacate or Set Aside Conviction and Correct Sentence Pursuant to 28 U.S.C. § 2255. [DE 1]. The government filed a Response, and Weise a Reply.[1] [DE 12, 16]. Several months after this matter was fully briefed, Weise filed a Motion for Leave to Amend his Motion to Vacate to add an additional claim. [DE 19]. The government filed a Response. [DE 19, 21]. The Honorable K. Michael Moore referred both motions to me. [DE 6]. For the reasons set forth below, I recommend that the Court deny both Weise's Motion to Vacate and his Motion for Leave to Amend.

I. Procedural History

In 2013, a federal grand jury charged Weise by Indictment with two counts of engaging in sex trafficking of a minor by force, threats of force and coercion, in violation

[1] Weise also filed two exhibits and a Notice of Supplemental Authority in support of his Motion, [DE 13, 22], which I have considered.

of Title 18, United States Code, Sections 1591(a)(1), (b)(1), (b)(2). [CR DE 3].[2] Count One addressed Weise's conduct with a minor identified as "S.L." and Count Two concerned minor "A.R.E." [*Id.*]. Weise had a trial before a jury, which found him guilty of Count One and acquitted him of Count Two. [CR DE 33]. The Court sentenced Weise to 360 months' imprisonment, a sentence at the low end of the advisory Sentencing Guidelines range. [CR DE 57 at p.2; CR DE 65 at pp. 33-34]. Weise is serving that sentence.

Weise timely appealed his conviction and sentence to the Eleventh Circuit Court of Appeals. His appeal included these arguments that bear on the Motion now before the Court: (1) the evidence at trial was insufficient to sustain his conviction, (2) the government improperly asserted facts not in evidence when it impeached its own witness, Alexandrea Snapp, and this amounted to prosecutorial misconduct that deprived Weise of a fair trial, and (3) the Court miscalculated his guideline range by considering conduct that related to minor A.R.E., for which he had been acquitted. *See United States v. Weise*, 606 Fed. Appx. 981 (11th Cir. 2015).

The Eleventh Circuit affirmed Weise's conviction and sentence. *Id.* With respect to his challenge to the sufficiency of the evidence, the Eleventh Circuit found that a reasonable jury could have concluded that victim S.L. reasonably believed that she must continue engaging in sex work for Weise so she could avoid serious harm, and that Weise's actions were in, or affected, interstate or foreign commerce. *Id* at 985. The

[2] Docket entries in Weise's criminal case, 13-20092-KMM, are cited as "CR DE."

Eleventh Circuit further concluded that the prosecutor's questioning of witness Snapp "reflect[ed] textbook use of prior inconsistent statements to impeach a witness" and therefore was permissible. *Id.* at 986.

As for the last challenge, the Eleventh Circuit found no clear error in this Court's finding that the government proved, by a preponderance of the evidence, that Weise knew A.R.E. was a minor, which the court relied on to hold Weise responsible for his conduct with A.R.E. – a second violation of 18 U.S.C. § 1591 – for sentencing purposes. *Id.* at 988. The Eleventh Circuit did not reach Weise's argument that this Court did not have sufficient evidence that he forced A.R.E. to engage in sex acts, because even if the Court did not, the error would have been harmless, as the Court's reliance on Weise's conduct with A.R.E. did not alter what would have otherwise been Weise's sentencing guideline range. *Id.* at 988-89.

Weise timely filed his Motion to Vacate or Set Aside Conviction and Correct Sentence. [DE 1]. After the parties fully briefed that Motion, Weise filed a Motion for Leave to Amend his Motion to Vacate to raise an additional claim. [DE 19]. I address both motions below.

II. Analysis

Weise urges this Court to grant his Motion to Vacate for a host of reasons that can be grouped into two categories: (1) a series of errors that his trial attorney allegedly made that amount to the ineffective assistance of counsel, and (2) multiple errors by the government and the Court, pretrial, at trial, and at sentencing, that violated his constitutional rights.

With respect to the first category, Weise asserts that his trial counsel was ineffective because he failed to: (i) file dispositive pretrial motions and motions to exclude certain trial testimony, (ii) conduct an adequate pretrial investigation, (iii) call any defense witnesses at trial, (iv) make certain objections during trial, (v) file a sentencing memorandum, (vi) call any witnesses at the sentencing hearing and (vii) provide any mitigation evidence "to humanize" Weise at his sentencing. [DE 1 at pp. 17-29].

With respect to the second category of alleged errors, Weise contends that his constitutional rights were violated because: (i) the government delayed filing an indictment for almost four years, (ii) the Court fashioned its sentence by relying on Weise's acquitted conduct with A.R.E., (iii) the crime of his conviction, 18 U.S.C. § 1591, is unconstitutionally vague as applied to the conduct for which Weise was convicted, (iv) his sentence constitutes cruel and unusual punishment, (v) the government failed to provide Weise with material information with which Weise could have impeached A.R.E., and (vi) the government did not give Weise contact information for a potentially exculpatory witness. [DE 1 at pp. 29-55].

The government disputes Weise's claims. As for his claims of ineffective assistance of counsel, it contends Weise has failed, in each instance, to establish both the performance and prejudice prongs of a successful section 2255 claim. [DE 12 at pp. 22-40]. The government argues that Weise procedurally defaulted his constitutional claims when he did not raise them on direct appeal, and he has not overcome this default by showing good cause for his failure to do so, along with actual prejudice, or that he is

actually innocent. [DE 41-52]. The government contends that if Weise's constitutional claims are not procedurally barred, they nonetheless fail on the merits. [*Id.*].

In his Motion for Leave to Amend, Weise asks to add a claim that his Fifth Amendment rights were violated when the Court constructively amended the Indictment with its instructions to the jury. [DE 19 at pp. 3-7]. The government argues that amendment is untimely, as he relies on information he knew when he filed his Petition, and Weise has not justified his failure to include this claim in his Petition. Moreover, this is a new claim based on different facts than those raised in the Motion to Vacate; it does not "relate back" to the Petition and was filed outside the one year statute of limitations. [DE 21 at pp. 3-7]. The government also argues that amendment is futile because Weise's proposed claim is barred under the procedural default rule, as he did not raise the alleged error on direct appeal. [DE 21 at pp. 7-8].

For the reasons that follow, I conclude that Weise's claims of ineffective assistance of counsel fail, and that he has procedurally defaulted his constitutional claims, along with the claim Weise asks to add to his Motion by amendment.

A. Motion to Vacate

I turn first to Weise's claims of ineffective assistance of counsel.

1. Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, a petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It requires the petitioner to show that: (1) his counsel's performance was deficient because

it "fell below an objective standard of reasonableness" and (2) that deficient performance prejudiced the defense. *Id.* at 687-88.

When a court evaluates trial counsel's performance, there is a "strong presumption" that an attorney's conduct falls within a "wide range of reasonable professional assistance." *Id.* at 689. The petitioner must prove by a preponderance of the evidence that his attorney's performance was unreasonable. *Streeter v. United States*, 335 Fed. Appx. 859, 863 (11th Cir. 2009). That burden "is a heavy one," *Fugate v. Head*, 261 F.3d 1206, 1217 (11th Cir. 2001), and "judicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. at 689. "In order to show that counsel's performance was unreasonable, the petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Fugate*, 261 F.3d at 1217 (quotation marks and citation omitted). Criticisms which "amount to second guesses of the attorney's judgments and tactical decisions" are "not the stuff of a sixth amendment claim." *Jones v. Kemp*, 678 F.2d 929, 932 (11th Cir. 1982).

To establish prejudice, the petitioner "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. The standard is demanding, and the petitioner must demonstrate that "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." *Id.* at 686.

With these principles in mind, I consider each of Weise's arguments.

a. Failure to File Pretrial Motions

Weise claims that his trial counsel was ineffective for not filing these motions: (i) a motion to dismiss the Indictment due to the government's pre-indictment delay; (ii) a motion for new trial based on the government's alleged failure to provide *Brady* and *Giglio* material; (iii) a motion to suppress Weise's statement to Key West police officers; and (iv) a motion *in limine* to bar from evidence testimony and photographs of S.L.'s broken jaw. [DE 1 at pp. 17-20]. With respect to the last matter, Weise also argues his counsel was ineffective for failing to object to that testimony. [DE 1 at p. 18-20].

Weise offers no analysis to support his argument that his lawyer was ineffective when he failed to file motions to dismiss, for new trial and to suppress. Rather, he simply states his conclusion that his lawyer was ineffective because he did not file those motions. [DE 1 at p. 17]. He also does nothing to demonstrate that he suffered any prejudice. This is fatal to his claim as "[c]ounsel cannot be ineffective for failing to file a motion that would not have been successful." *Pittman v. State of Florida*, No. 8:05-CV-1700-T-30MAP, 2008 WL 2414027 at * 8 (M.D. Fla. June 11, 2008) (citation omitted).

Weise does address why he believes his lawyer was ineffective for failing to try to exclude from evidence photographs of, and testimony about, S.L.'s broken jaw. He argues that his trial counsel should have objected to this evidence based on Rules 402 and 403 of the Federal Rules of Evidence because "they had absolutely no connection to the commercial sex acts performed by [S.L.]." [DE 1 at p. 18]. Rule 402 provides that relevant evidence is generally admissible, and Rule 403 allows the Court to exclude relevant evidence if its probative value is "substantially outweighed" by the danger of

unfair prejudice, confusion, misleading the jury, undue delay, waste of time or needlessly cumulative evidence. *See* Fed. R. Evid. 402, 403.

To support his argument, Weise relies upon this statement the Court made when it denied Weise's motion for partial judgment of acquittal: "I don't know how . . . [the government] can expect 12 jurors to unanimously conclude that this force was in relationship to engaging in the commercial sex acts." [CR DE 39-2 at p. 5]. Weise, however, overlooks the Court's later discussion of the relevance of the evidence regarding S.L.'s broken jaw. When it denied Weise's renewed motion for partial judgment of acquittal, the Court wrote:

> As to the broken jaw incident, the evidence does not precisely delineate whether Defendant hit S.L. because of a date gone awry, to break up a dispute between S.L. and [another sex worker] Roxy, or some combination thereof. However, it is not necessary to determine Defendant's exact motivations. If the Jury determined that the attack was due to a problem with the date or insufficient payment, *this would support the theory that Defendant used force to punish his sex workers for poor performance.* If the Jury determined that the attack was to break up a fight between two sex workers, *it would support the proposition that Defendant regarded both women as his employee sex workers, that it was his job to keep the women in line and productive, and that he was using force or coercion to keep control over his sex workers.*

[CR DE 51 at p. 4] (emphasis supplied). The Court denied Weise's renewed motion, in part because the broken jaw incident "support[s] the government's Force theory." [*Id.* at p. 5].

The Court plainly found that evidence of S.L.'s broken jaw was relevant, and there is no reason to think that the Court would have sustained an objection to the introduction

of that evidence under Rules 402 or 403. His assertion that evidence of S.L.'s broken jaw "ha[s] a special tendency to prejudice the jurors...because they have *no other probative value other than [sic] to show a gruesome injury...*" [DE 1 at p. 19] (emphasis supplied), is contradicted by the Court's analysis of that evidence. [*See* CR DE 51].

In sum, Weise has failed to show that his attorney was ineffective for not objecting to evidence regarding S.L.'s broken jaw because "counsel has no duty to raise meritless objections." *Petit-Homme v. McNeil*, No. 08-61019-CIV, 2009 WL 1884399 at *11 (S.D. Fla. June 30, 2009) (quotation marks and citation omitted). Even if Weise could show deficient performance, he has not shown that this prejudiced him. He makes only the conclusory statement that "this failure to move for exclusion prejudiced Mr. Weise." [DE 1 at p. 19]. "Conclusory allegations of ineffective assistance are insufficient" to warrant relief. *Smith v. United States*, Case No. 16-14111-E, 2017 WL 2819723 at *1 (11th Cir. Jan. 9, 2017) (citation omitted).

b. Failure to Conduct Adequate Pretrial Investigation

Weise complains that his attorney did not conduct an adequate pretrial investigation because he failed to interview certain witnesses. [DE 1 at pp. 20-23]. "[A] habeas petitioner who alleges a failure to investigate on the part of his counsel must state with specificity what the investigation would have revealed and how it would have changed the outcome of his trial." *Maurino v. United States*, No. 11-21909-Civ-Altonaga, 2011 WL 13175607 at *21 (S.D. Fla. Dec. 20, 2011) (*report and recommendation adopted*, 2012 WL 12950639 (S.D. Fla. Feb. 7, 2012) (citations omitted). Weise makes no effort to meet this standard.

Weise gives the names of some people who he says "on information and belief" his lawyer did not interview, and makes the general claim that his lawyer should have interviewed unidentified "persons in positions of management at various strip club establishments. . . ." [*Id.* at p. 22]. Weise does not offer evidence of their expected testimony, much less show that this testimony would have been exculpatory. *See Maurino*, 2011 WL 13175607 at *22 (claim that attorney failed to conduct adequate pretrial investigation "provides no basis for a claim of ineffective assistance" where movant did not identify "what [potential witnesses'] testimony might have been, or how it would have been helpful or exculpatory in his case."). He ends his discussion with the conclusory statement that "counsel's failure to investigate prejudiced Mr. Weise at trial." [*Id.* at p. 23]. "[C]onclusory allegations of failure to investigate do not suffice on a claim of ineffective assistance," *Maurino*, 2011 WL 13175607 at *21 (citations omitted), and this is all we have here.

c. Failure to Call Witnesses

Weise asserts that his counsel was ineffective in failing to call any defense witnesses at trial or sentencing. [DE 1 at pp. 24-26, 29]. Weise argues that his attorney should have called witnesses Shateka Simmons and Tamiah Powers at trial who, according to Weise, "could have testified about Mr. Weise' [sic] lack of violent history and his character for peacefulness and to the fact that he was not engaged in any form of sex trafficking." [*Id.* at p. 24]. He also contends that his attorney should have called witness Samantha Snyder because she "could have provided testimony to undermine the Government's Force theory...at trial." [*Id.*]. With respect to sentencing, Weise asserts

that his attorney should have called Weise's sister, Amanda Weise, as a witness. [*Id.* at p. 29].

Weise does not offer any affidavits from these potential witnesses setting forth the testimony they would have provided. Instead, he offers his own affidavit and a written statement that Ms. Snyder provided years before. [DE 1-2, 13]. This evidence is insufficient to carry his burden of proof.

"Evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable. . . ." *Burton v. United States*, No. 6:10-cv-1041-Orl-28DAB, 2012 WL 3779055 at *3 (M.D. Fla. Aug. 31, 2012) (citations omitted). The affidavit must be "from the potential witnesses stating what testimony they would have provided." *Id.*; *see also Streeter*, 335 Fed. Appx. at 864. Weise fails to provide this evidence.

The affidavit Weise submits is inadequate because it is from him, not the potential witnesses; he provides no evidence that Ms. Snyder would have testified as he states. [*See* DE 1-2]. The statement of Ms. Snyder is likewise insufficient because it is not sworn and does not say that she would have testified as Weise claims she would. [*Compare* DE 1 at p. 24 *with* DE 13]. Lastly, Weise provides no evidence regarding the proposed testimony of Ms. Simmons, Ms. Powers and Ms. Weise. Weise's conclusory allegations and self-serving speculation does not sustain his ineffective assistance claim.

d. Failure to Object During Trial

Weise complains that his attorney failed to make "numerous objections" during trial. [DE 1 at pp. 26]. As an initial mater, assuming that those objections had merit, Weise overlooks the fact that his attorney may have chosen not to object as a matter of trial strategy, which this Court "must not second-guess." *Chandler v. United States*, 218 F.3d 1305, at 1314 n. 14 (11th Cir. 2000). Weise must show more to succeed here, namely that his attorney's decision was objectively unreasonable such that "no competent counsel would have taken the action that his counsel did take." *Id.* at 1315. He fails to do this.

Weise summarily identifies these objections in a bullet point list that includes record citations to the allegedly objectionable testimony. [DE 1 at pp. 26-27]. He does not explain the significance of the evidence cited or explain why it is objectionable. Having failed to demonstrate a valid legal basis for a meritorious objection, Weise is not entitled to relief. *See Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (counsel not ineffective for failing to raise a non-meritorious objection); *United States v. Dohan*, Case No. 3:00cr48/LC/CJK, 3:09cv192/LC-CJK, 2013 WL 1276549 at * 90 (N.D. Fla. Feb. 6, 2013) ("counsel does not render ineffective assistance for failing to raise objections or pursue motions of dubious merit.") (citations omitted).

Despite his failure to offer any analysis, I have carefully reviewed the portions of the transcripts that Weise has cited and find that evidence either was not objectionable or its objectionable nature is not self-evident. "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption" that counsel acted

reasonably. *Chandler v. United States*, 218 F.3d at 1314 n. 15. Even if certain evidence that Weise cites may have been objectionable, he fails to demonstrate that the Court would have sustained the objection or that the jury would have reached a different verdict if the Court had excluded the evidence. Therefore, Weise cannot establish prejudice arising from his counsel's failure to object.

Weise provides more information about two other objections he contends his attorney should have made. First, he argues his lawyer should have objected during the government's closing argument when the prosecutor stated that S.L. "testified that the reason she was punched in the face . . . was because of a prostitution date that went awry." [DE 1 at p. 27]. Weise asserts that the prosecutor misstated the evidence. The Court need not decide whether Weise's attorney acted unreasonably because Weise plainly failed to show that he suffered any prejudice.

He makes no claim of prejudice in either the single paragraph he devotes to this argument, or in his reply memorandum. [DE 1 at pp. 27-28; DE 16]. This may be because the Court instructed the jury that they "must consider only the evidence that [the Court] admitted in the case" and "anything the lawyers say is not evidence and isn't binding on you." [CR DE 31 at p. 4]. "The Eleventh Circuit has long held that a prejudicial remark may be rendered harmless by a curative instruction." *Dohan*, 2013 WL 1276549 at *89 (citations omitted). Although highly prejudicial evidence may not be rendered harmless by a curative instruction, *id.*, Weise has not shown that the prosecutor's statement was "so highly prejudicial as to be incurable by the trial court's admonition." *Id.* In sum, Weise is not entitled to relief on this claim because he has failed to demonstrate a

reasonable probability that, but for the prosecutor's statement, the outcome of his trial would have been different.

Last, Weise asserts that this attorney should have objected to an exchange between the government and witness Alexandrea Snapp on redirect, which Weise argues constitutes improper impeachment. [DE 1 at p. 28]. The Eleventh Circuit considered – and rejected – this argument on direct appeal. *See Weise*, 606 Fed.Appx. at 986. The Eleventh Circuit found that the exchange "reflect[s] textbook use of prior inconsistent statements to impeach a witness." *Id.* at 986. Weise's claim fails because counsel has no duty to raise meritless objections. *See Chandler v. Moore,* 240 F.3d at 917; *Dohan*, 2013 WL 1276549 at * 90.

e. Errors at Sentencing

In an entirely conclusory way, Weise contends that his lawyer was ineffective at sentencing because he "fail[ed] to file a sentencing memorandum" and "fail[ed] to provide the type of mitigation evidence to humanize Mr. Weise before the Court at sentencing including evidence of sentences received by more egregious offenders violating the same or similar statutes."[3] [DE 1 at p. 29]. Weise says nothing about what should have been in the sentencing memorandum, and he does not identify the "humanizing" evidence his attorney should have presented. His one example (that his attorney should have argued for a lesser sentence by contrasting Weise with "more egregious offenders"), is an argument that his lawyer did make at sentencing.

[3] Weise also states that his attorney was ineffective for "failing to introduce any witnesses" but that argument fails for the reasons set forth in subsection c. above.

Specifically, Weise's counsel argued that Weise's behavior, when compared to other pimps, was not that bad, which he argued supported a sentence below the guideline range. [CR DE 65 at pp. 26-29]. So, Weise plainly has failed to demonstrate that his lawyer's performance was deficient in this regard. He also has not established prejudice; specifically, that there is a reasonable probability that a sentencing memorandum, or other unidentified "humanizing" evidence would have resulted in a lower sentence. Indeed, the Court sentenced Weise at the low end of the advisory guidelines range.

For all these reasons, Weise has not demonstrated that he received the ineffective assistance of counsel.

2. Constitutional Claims

Weise also argues that his constitutional rights were violated in these ways: (1) the government delayed filing an indictment for almost four years; (ii) this Court considered and sentenced Weise based upon acquitted conduct involving A.R.E.; (iii) the statute at issue in his criminal proceeding, 18 U.S.C. § 1591, is unconstitutionally vague as applied to the conduct for which Weise was convicted; (iv) his sentence constitutes cruel and unusual punishment; (v) the government did not provide Weise with material impeachment information regarding A.R.E.; and (vi) the government did not provide Weise with the contact information of a potentially exculpatory witness, Samantha Snyder. [DE 1 at pp. 29-55].

Weise did not raise any of these alleged errors on direct appeal, except for his argument that the Court erred by considering acquitted conduct involving A.R.E. during sentencing. On appeal, Weise challenged this with his claim that the trial court lacked

sufficient evidence to consider that acquitted conduct. As noted, the appellate court rejected that argument.[4] *Weise*, 606 Fed. Appx. at 988-89. Now, Weise presents a new argument to challenge this Court's consideration of the acquitted conduct: that in doing so, this Court violated Weise's Sixth Amendment right to trial by jury. Weise recharacterizes a claim he already made, and he cannot split his challenges to the Court's sentencing process in this way. "A rejected claim does not merit rehearing on a different, but previously available, legal theory." *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000). "Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255." *Id.*

Weise's remaining alleged constitutional errors do not provide a basis for relief because they are procedurally defaulted.[5] "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted). Actual innocence means "factual innocence, not mere legal insufficiency." *Id.* at 623. "To establish actual innocence, [the] petitioner must demonstrate that, in light of all the

[4] It further found that even if the trial court had erred, any error was harmless.

[5] Weise admits that he did not raise these errors on direct appeal, with the exception of his claim relating to the government's failure to provide Ms. Snyder's contact information. [DE 16 at pp. 4-5]. Weise contends he did not procedurally default those claims because his counsel raised the issues at trial. [*Id.* at p. 4]. It is not enough to raise a challenge at the trial level; the defendant must raise the challenge on direct appeal to avoid procedural default. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) ("Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding.").

evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* Weise makes no attempt to satisfy this standard.

Rather than demonstrating how he falls within an exception to the procedural default rule, Weise invites the Court to ignore the rule with this conclusory statement: "the procedural default doctrine should not be employed here to prevent this Court from hearing legitimate constitutional claims as denial of relief would work a miscarriage of justice." [DE 16 at p. 5].

Weise appears to be invoking the actual innocence exception to the procedural default rule, but he does so without giving this Court any basis to find this exception applies. "In order to establish a miscarriage of justice based on actual innocence, a petitioner must support allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial, which establishes that it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt." *Claritt v. Kemp*, 336 Fed. Appx. 869, 870 (11th Cir. 2009) (citation omitted). Weise offers no supporting evidence, much less any "new reliable evidence" that establishes factual innocence.

3. Evidentiary Hearing

Weise asks the Court to hold an evidentiary hearing on his Petition. [DE 1 at p. 57, ¶ 8. A habeas petitioner seeking an evidentiary hearing must set forth specific factual allegations which, if true, would entitle the petitioner to relief. *Chavez v. Secretary Fla. Dept. of Corrections*, 647 F.3d 1057, 1060-61 (11th Cir. 2011); *see also Hilaire v. United*

States, Case No. 14-21736-CIV-ALTONAGA, 2015 WL 12780605 at * 2 (S.D. Fla. May 18, 2015) ("A section 2255 petitioner seeking an evidentiary hearing must allege reasonably specific, non-conclusory facts with respect to his claim of ineffective assistance of counsel.") (citation omitted). As detailed throughout this Report, Weise has not made those specific allegations. *See Chavez*, 647 F.3d at 1061 ("Conclusory allegations are simply not enough to warrant a hearing."). In fact, this record conclusively shows that Weise is not entitled to relief, and he therefore is not entitled to an evidentiary hearing. *See* 28 U.S.C. §2255(b); *see also See Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) (citation omitted) ("A district court, however, need not conduct an evidentiary hearing if it can be conclusively determined from the record that petitioner was not denied effective assistance of counsel.").

4. Certificate of Appealability

Title 28 U.S.C. section 2253 provides that a certificate of appealability must issue before an appeal may be taken of the denial of a section 2255 petition. 28 U.S.C. § 2253(c)(1)(B). Either the District Court, or the Court of Appeals, may issue such a certificate, but only if the petitioner has "made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). The standard for issuing a certificate of appealability depends upon whether the Court denies the petition on the merits or on procedural grounds.

When a court denies a habeas petition on the merits, the petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In contrast, when a court denies a habeas petition on procedural grounds, without reaching the merits of the underlying constitutional claim, the court should issue a certificate of appealability if the petitioner shows that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and .... the district court was correct in its procedural ruling." *Id.* at 484. Both standards apply here, as I found that Weise's claims of ineffective assistance of counsel fail on the merits and his claims of constitutional errors during trial fail because they are procedurally defaulted.

For the reasons discussed above, jurists of reason would not debate the correctness of the Court's assessment that Weise has failed to show his trial counsel was ineffective. With respect to Weise's claims of constitutional errors during trial, Weise has made absolutely no showing that he falls within the exceptions to the procedural default rule. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Slack*, 529 U.S. at 484. Weise has failed to show that jurists of reason would debate the correctness of the Court's procedural ruling.

For the foregoing reasons, I recommend that the Court deny a certificate of appealability. Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If Weise disagrees with my assessment, he should present his reasons to the Court why it

should issue a certificate of appealability, and do so during the objection period for this Report and Recommendation.

B. Motion for Leave to Amend

Weise seeks leave to file an amended Motion to Vacate to include a claim that the Court constructively amended the Indictment when it instructed the jury, in violation of the Fifth Amendment Grand Jury clause. [DE 19 at pp. 3-7]. The Court is mindful that it should "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, leave to amend is not guaranteed and the decision whether to grant a motion to amend is within the sound discretion of the trial court. *Pines Properties, Inc. v. American Marine Bank*, 156 Fed. Appx. 237, 240 (11th Cir. 2005) (citation omitted). In determining whether to exercise its discretion, "a court should consider whether there has been undue delay in filing, bad faith or dilatory motives, prejudice to the opposing parties, and the futility of the amendment." *Scopellitti v. City of Tampa*, 677 Fed. Appx. 503, 509 (11th Cir. 2017) (citation omitted).

Weise's proposed claim is based on an alleged constitutional error that occurred during trial. Weise did not raise that alleged error during direct appeal and, therefore, it is procedurally defaulted unless Weise establishes one of the exceptions to the procedural default rule. He has not. Specifically, Weise makes no attempt to set forth cause for failing to raise this argument in his appeal or demonstrate actual prejudice resulting therefrom, nor does he make any attempt to demonstrate actual innocence. "A proposed amendment may be denied for futility when the complaint as amended would still be properly dismissed." *Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir.

2010). Weise's proposed claim does not provide a basis for relief because it is procedurally defaulted. As such, amendment is futile because his proposed claim would be subject to denial even if the Court permitted amendment. I therefore recommend that the Court deny Weise's Motion for Leave to Amend.

III. Recommendation

For the forgoing reasons, I **RECOMMEND** that the Court **DENY** Weise's Motion for Leave to Amend Motion to Vacate [DE 19], and his Motion to Vacate or Set Aside Conviction and Correct Sentence Pursuant to 28 U.S.C. § 2255 [DE 1]. I further **RECOMMEND** that the Court **NOT ISSUE** a certificate of appealability.

IV. Objections

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable K. Michael Moore, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), 28 U.S.C. § 636(b)(1); Fed.R.Crim.P. 59(b), 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in chambers at Miami, Florida, this 4th day of September, 2018.

CHRIS McALILEY
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable K. Michael Moore
Counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12184-K

OMAR WEISE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Omar Weise has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's October 8, 2019, order denying him a certificate of appealability from the district court's denial of his 18 U.S.C. § 2255 motion, and leave to proceed on appeal *in forma pauperis*. Upon review, Weise's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix C