# United States Court of Appeals for the Fifth Circuit

No. 19-50996

UNITED STATES OF AMERICA,

*Plaintiff—Appellee*,

*versus*

DAVID MAURICE MILNER, *also known as* "D", *also known as* DAVID MILNER,

*Defendant—Appellant*.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:19-CV-110

ORDER:

IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED.

Edith H. Jones

EDITH H. JONES
*United States Circuit Judge*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**



| | | |
|---|---|---|
| **DAVID MAURICE MILNER,** | § | |
| **Reg. No. 65274-380,** | § | |
| **Movant,** | § | |
| | § | **EP-19-CV-110-FM** |
| **v.** | § | **EP-15-CR-1699-FM-1** |
| | § | |
| **UNITED STATES OF AMERICA,** | § | |
| **Respondent.** | § | |

**ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT**

David Maurice Milner moves the Court, pursuant to Federal Rule of Civil Procedure 59(e), to reconsider its final judgment denying his motion to vacate his sentence under 28 U.S.C. § 2255. Rule 59(e) Mot., ECF No. 99.[1] Milner asserts "two clear errors . . . result[ed] in a miscarriage of justice." *Id.*, at 2. For the reasons discussed below, the Court will dismiss the motion. The Court will additionally deny Milner a certificate of appealability.

**BACKGROUND**

Milner pleaded guilty, pursuant to a plea agreement, to conspiracy to traffic persons in violation of 18 U.S.C. § 1594(c). J. Crim. Case, ECF No. 74. The probation officer determined, based upon a total offense level of 40 and a criminal history category of V, that Milner's guideline imprisonment range was 360 months to life imprisonment. PSR ¶ 142, ECF No. 71. The plea agreement contained a non-binging sentencing recommendation, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), of 120 months' incarceration. Plea Agreement 3, ECF No. 56. But the Court found the recommended sentence was "not adequate to address

[1] "ECF No." refers to the Electronic Case Filing ("ECF") number for documents docketed in EP-15-CR-1699-FM-1. Where a discrepancy exists between page numbers on filed documents and page numbers assigned by the ECF system, the Court will use the latter page numbers.

all the factors that the law requires [the Court] to address in this case." Sentencing Tr. 30, ECF 82. Still, the Court departed well below the guideline range and sentenced Milner to 180 months' imprisonment. J. Crim. Case, ECF No. 74.

In his § 2255 motion, Milner asserted two claims. First, he argued his trial counsel provided constitutionally ineffective assistance when she failed to object to (1) the consideration of the conspiracy to sex traffic a minor victim, J.G., for private financial gain in determining his sentencing guidelines range, and (2) what he described as the unwarranted cross references to victims in the presentence investigation report. Mem. in Supp. 12, 17, ECF No. 93. He then argued his appellate counsel provided constitutionally ineffective assistance when she failed to raise the same claims in his direct appeal. *Id.*, at 24. He asked the Court to resentence him. Mot. to Vacate 12, ECF No. 92.

The Court thoroughly addressed—and rejected—Milner's ineffective assistance of trial counsel claims. Mem. Op. & Order 10–16, ECF No. 95. Consequently, the Court also rejected Milner's ineffective assistance of appellate counsel claim. And the Court denied Milner's § 2255 motion.

Milner now asserts in his Rule 59(e) motion that the Court erroneously concluded he could not establish prejudice from his counsel's failure to object to "various guideline errors" in the presentence investigation report. Mot. 2, ECF No. 99. He also asserts Court completely misconstrued his ineffective assistance of appellate counsel claim, which he explains "was based on appellate counsel's failure to present the same guideline objections as grounds for appeal." *Id.*, at 2–3.

## APPLICABLE LAW

The Rules Governing Section 2255 Proceedings for the United States District Courts permit the application of Rule 59(e) and the other Federal Rules of Civil Procedure in collateral proceedings under 28 U.S.C. § 2255—but only "to the extent that they are not inconsistent with any statutory provisions" or the 2255 Rules. 28 U.S.C. foll. § 2255 R. 12. Consequently, to prevent conflicts between the strict limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on second-or-successive § 2255 motions and the more lenient restrictions in Rule 59(e) on motions for relief from final judgments, federal courts examine Rule 59(e) motions to determine whether they are, in fact, second-or-successive habeas petitions in disguise." *In re Jasper*, 559 F. App'x 366, 370–71 (5th Cir. 2014).

Hence, a prisoner may prevail on a Rule 59(e) motion for relief from a judgment denying a § 2255 motion when he "attacks, not the substance of the court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceeding." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). In other words, a petitioner may succeed on a Rule 59(e) motion "when he . . . asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4. But a movant may not prevail on a Rule 59(e) motion which (1) presents a new claim, (2) attacks the federal court's previous resolution of a claim on the merits, or (3) presents new evidence or new law in support of a claim already litigated. *Id.* at 531–32.

**ANALYSIS**

Milner claims the Court erred when it concluded he could not establish prejudice from his counsel's failure to object to "various guideline errors" in the presentence investigation report. Mot. 2, ECF No. 99. He further claims the Court completely misconstrued his ineffective assistance of appellate counsel claim, which, he explained, was based on his appellate counsel's failure to present the same guideline objections as grounds for appeal. *Id.*, at 2–3.

The Court will first address whether it has jurisdiction to consider Milner's Rule 59(e) motion.

If an application is a "second or successive petition" under § 2255, the Court cannot consider it without authorization from the Fifth Circuit Court of Appeals in accordance with 28 U.S.C. § 2255(h)(2). *See also* 28 U.S.C. § 2244(b)(3). A Rule 59(e) motion is considered "successive" when it raises new claims or "attacks the federal court's previous resolution of a claim on the merits." *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005). A Rule 59 motion directed to a procedural ruling that barred consideration of the merits, such as a procedural default, is not considered a "successive" petition and is properly brought as a Rule 59 motion. *Id.* (citing *Gonzalez v. Crosby*, 545 U.S. 524, 533 (2005)).

Milner does not object to a procedural ruling. Instead, he asks to relitigate the merits of his claims. Consequently, because Milner's Rule 59(e) motion merely attacks the Court's previous resolution of his claims, the Court must scrutinize them in the same fashion it would a second or successive § 2255 motion. *See Davis v. Fechtel*, 150 F.3d 486, 487 (5th Cir.1998) (stating that a district court "may liberally construe a pro se petitioner's pleading and treat it as a habeas corpus petition, where appropriate").

Congress enacted the AEDPA in part to make it "significantly harder for prisoners filing second or successive federal habeas applications . . . to obtain hearings on the merits of their claims." *Graham v. Johnson*, 168 F.3d 762, 772 (5th Cir. 1999). Before a movant may proceed with a second or successive § 2255 motion, *a court of appeals panel* must first certify that it (1) contains "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(emphasis added); *see also* 28 U.S.C. § 2244(b)(2); *Gonzalez*, 545 U.S. at 529–30. These restrictions eliminate "the need for the district courts to repeatedly consider challenges to the same conviction unless an appellate panel first f[in]d[s] that those challenges ha[ve] some merit." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citing *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)).

Because Milner's Rule 59(e) motion attacks the Court's previous resolution of his claims on their merits—and there is nothing in the record to indicate that Milner sought and received the appropriate certification from the Fifth Circuit Court of Appeals prior to filing his Rule 59(e) motion—the Court finds it is without jurisdiction to entertain it. *See In re Tatum*, 233 F.3d 857, 858 (5th Cir. 2000) ("Before a successive 28 U.S.C. § 2255 motion may be filed in district court, the movant must obtain authorization from this court for the district court to consider the movant's successive § 2255 motion."); *Key*, 205 F.3d at 774 ("§ 2244(b)(3)(A) acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition until this court has granted the petitioner permission to file one."); *United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998) (upholding dismissal of § 2255 motion where movant had not

sought or acquired certification from the Fifth Circuit to file a second or successive § 2255 motion).

In light of this finding, the Court need not address the merits of Milner's claims. The Court will consequently dismiss Milner's Rule 59(e) motion for lack of jurisdiction. W.D. Tex. Local Rule CV-3(b)(6). This dismissal, however, is without prejudice to Milner's right to submit to the Fifth Circuit a motion for leave to file a second or successive § 2255 motion. *Id.*

**CERTIFICATE OF APPEALABILITY**

The AEDPA also requires a certificate of appealability before an appeal may proceed in this matter. *See Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997) (noting that appeals of causes initiated under either 28 U.S.C. §§ 2254 or 2255 require a certificate of appealability). "This is a jurisdictional prerequisite because the statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing 28 U.S.C. § 2253(c)(1)). A circuit justice or judge will not issue a certificate of appealability unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (internal quotations and citations omitted).

Here, reasonable jurists could not debate the dismissal of Milner's Rule 59(e) motion for lack of jurisdiction. *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court will not issue a certificate of appealability. *See* 28 U.S.C. foll. §

2255 R. 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.").

**CONCLUSIONS AND ORDERS**

For these reasons, the Court concludes it lacks the jurisdiction to address Milner's claims in his Rule 59(e) motion. The Court further concludes Milner is not entitled to a certificate of appealability. The Court, accordingly, enters the following orders:

**IT IS ORDERED** that David Maurice Milner's "Motion to Alter or Amend Judgment" (ECF No. 99) is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.

**IT IS FURTHER ORDERED** that David Maurice Milner is **DENIED** a certificate of appealability.

**IT IS FINALLY ORDERED** that all pending motions, if any, are **DENIED.**

**SIGNED** this 25 day of July 2019.

**FRANK MONTALVO**
**UNITED STATES DISTRICT JUDGE**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

| | | |
|---|---|---|
| **DAVID MAURICE MILNER,** | § | |
| **Reg. No. 65274-380,** | § | |
| **Movant,** | § | |
| | § | **EP-19-CV-110-FM** |
| **v.** | § | **EP-15-CR-1699-FM-1** |
| | § | |
| **UNITED STATES OF AMERICA,** | § | |
| **Respondent.** | § | |

## MEMORANDUM OPINION AND ORDER

Movant David Maurice Milner challenges the sentence imposed by the Court in cause number EP-15-CR-1699-FM-1 through a motion under 28 U.S.C. § 2255 (ECF No. 92).[1] For the reasons discussed below, the Court will deny Milner's motion. The court will additionally deny Milner a certificate of appealability.

## BACKGROUND AND PROCEDURAL HISTORY

On January 9, 2015, Homeland Security Investigations special agents received a report of a possible sex trafficking victim in the custody of the Juvenile Probation Department in El Paso, Texas.[2] The agents met with J.G., the sixteen-year-old victim. J.G identified Milner as her pimp. J.G. claimed Milner advertised her services on an internet website, paid for the hotel room where she lived and met her customers, and provided her with food and clothing. J. G. also claimed Milner kept all the money from her prostitution.

Further investigation led the agents to J.V., a former dancer at an adult club in El Paso, Texas. J.V. claimed she worked for Milner for about three months as a prostitute because she

---

[1] "ECF No." refers to the Electronic Case Filing number for documents docketed in EP-15-CR-1699-FM-1. Where a discrepancy exists between page numbers on filed documents and page numbers assigned by the ECF system, the Court will use the latter page numbers.

[2] *See* Plea Agreement (Factual Summary), ECF No. 56, and Presentence Investigation Report (PSR) ¶¶ 10–63, ECF No. 71 (providing a more complete factual summary).

needed the money. J.V. told the agents Milner advertised her services on an internet website, arranged for her customers, and drove her to appointments at various hotels in El Paso. J.V. claimed Milner shared the money from her prostitution for the first month, but later kept it all for himself. J.V. reported she witnessed Milner physically abuse another woman, C.P., who also worked for Milner as a prostitute. J.V. insisted she was frightened when she saw Milner hit C.P., and she remained afraid of him throughout the rest of their relationship. J.V. asserted when she wanted to leave, Milner threatened to post humiliating pictures and videos of her on the internet. J.V. recalled Milner had videos of her engaging in sexual activities with him.

The agents also located and interviewed C.P. C.P. admitted she worked as a prostitute for Milner. C.P. claimed she and Milner rented a hotel room for J.G. so she could work as a prostitute for them. C.P. maintained Milner was reluctant to prostitute J.G., but J.G. was willing. So he let J.G. work anyway and kept her earnings. C.P. admitted she argued with Milner, but it was not until J.G. started working for Milner that he became physically violent. C.P. claimed on one occasion, Milner pushed her so hard she fell backward and broke her wrist in two places.

Milner was named in a four-count superseding indictment alleging he engaged in sex trafficking by force, fraud, and coercion, in violation of 18 U.S.C. §§ 1591(a)(1), (a)(2), and (b)(1) (counts one and two); sex trafficking of children, in violation of 18 U.S.C. §§1591(a)(1), (a)(2), (b)(2), and (c) (count three); and conspiracy to traffic persons, in violation of 18 U.S.C. § 1594(c) (count four). Superseding Indictment, ECF No. 39.

Milner's counsel negotiated a plea agreement. Plea Agreement, ECF No. 56. Under its terms, Milner agreed to plead guilty to count four—the conspiracy to traffic persons count. Milner also acknowledged the conspiracy included the following objects:

> a) To knowingly, in and affecting interstate commerce, recruit, entice, harbor, transport, provide, obtain and maintain persons, knowing or in reckless disregard of the fact that means of force, threats of force, fraud, and coercion, or any combination thereof, would be used to cause the person to engage in a commercial sex act, in violation of Title 18, United States Code, Sections 1591(a)(1) and (b)(1);
>
> b) To knowingly benefit, financially or by receiving anything of value, from participation in a venture which has engaged in recruiting, enticing, harboring, transporting, providing and maintaining persons, in and affecting interstate commerce, knowing or in reckless disregard of the fact that means of force, threats of force, fraud, and coercion, or any combination thereof, would be used to cause the person to engage in a commercial sex act, in violation of Title 18, United States Code, Sections 1591(a)(2) and (b)(1).

*Id.* at 1–2. In exchange for Milner's plea, the Government agreed to dismiss the remaining counts of the superseding indictment and all the counts of a prior indictment. *Id.* at 2.

The parties also agreed, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), to make a non-binding sentencing recommendation to the Court:

> to impose a sentence of one hundred and twenty (120) months incarceration. The parties agree not to advocate the imposition of any different sentence than recommended herein. . . . The parties acknowledge that the recommended sentence may be outside of the Advisory Federal Sentencing Guideline calculations for the instant offense, but the parties stipulate that the requested sentence is reasonable under the circumstances of the case. Specifically, this plea would alleviate the need for the victims to testify at trial. Defendant understands that this Non-Binding Sentencing Recommendation is only a recommendation by the parties and the Court is not required to follow said recommendation. Finally, Defendant also understands and agrees that this agreement confers no right to challenge the agreement and confers no remedy upon the Defendant in the event the Court elects not to follow the parties' Non-Binding Sentencing Recommendation.

*Id.* at 3.

Sentencing Guideline §1B1.2(d) instructed the Court "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." U.S. Sentencing Guidelines Manual §1B1.2(d) (U.S. Sentencing Comm'n 2016). Consequently, the probation officer who prepared the presentence investigation report (PSR) on Milner recommended holding him accountable for all acts alleged in the superseding indictment. PSR ¶¶ 78–80, ECF No. 71. This resulted in three "groups" of offenses—one for each of Milner's three victims. *Id.* at ¶ 80.

"Group I" concerned the conspiracy to sex traffic victim J.V. by force. *Id.* at ¶¶ 81–86. The probation officer applied Sentencing Guideline § 2A3.1(a)(2), which established a base offense level at 30. *Id.* at ¶ 81. He added four levels, pursuant to § 2A3.1(b)(1), because the offense against J.V. involved aggravated sexual abuse by force or threats. *Id.* at ¶ 81. This result in an adjusted offense level of 34. *Id.* at ¶ 86.

"Group II" concerned the conspiracy to sex traffic victim C.P. for private commercial gain, *Id.* at ¶¶ 87–93. The probation officer applied the same guideline calculations as for Group I, but added an additional two-level enhancement, pursuant to Sentencing Guideline § 2A3.1(b)(4)(B), because C.P. sustained a serious bodily injury—a broken wrist—at the hands of Milner. *Id.* at ¶ 89. This resulted in an adjusted offense level of 36. *Id.* at ¶ 93.

"Group III" concerned the conspiracy to sex traffic a minor victim, J.G., for private financial gain. *Id.* at ¶¶ 94–101. The probation officer applied Sentencing Guideline § 2G1.3(a)(1), which established a base offense level at 34. *Id.* at ¶ 94. He added a two-level enhancement, under § 2G1.3(b)(1), based on a finding J.G. was under Milner's custody and care;

another two-level enhancement, under § 2G1.3(b)(3), based on a finding Milner used a computer to advertise J.G.'s services; and a final two-level enhancement, under §2G1.3(b)(4), based on a finding the offense involved the commission of sex acts, sexual contact, and commercial sex acts. *Id.* at ¶¶ 95–97. This resulted in an adjusted offense level of 40. *Id.* at ¶ 101.

The probation officer recommended adding three levels, pursuant to the grouping rules under Sentencing Guideline § 3D1.4, for a total offense level of 43. *Id.* at ¶¶ 102–104. He also recommended a three-level downward adjustment, under §§ 3E1.1(a) and (b), for acceptance of responsibility. *Id.* at ¶¶ 107–108. This resulted in a total offense level of 40. *Id.* at ¶ 109. He determined, based upon a total offense level of 40 and a criminal history category of V, Milner's guideline imprisonment range was 360 months to life imprisonment. *Id.* at ¶ 142.

Milner's counsel objected to the two-level enhancement, under § 2G1.3(b)(1), based on the finding J.G. was under Milner's custody and care. She argued "[i]n this case, Mr. Milner was neither a teacher, day care provider, baby-sitter, or other temporary caretaker of the minor J.G. As such, both the Government and defense counsel agree that this application does not apply." Def.'s Obj. 2, ECF No. 71-3. She also objected to the two-level enhancement, under §2G1.3(b)(4), based on a finding the offense involved the commission of sex acts, sexual contact, and commercial sex acts. *Id.* She argued the increase resulted in an unintentional double counting:

> While 18 U.S.C. § 1591(b)(1) nominally applies to offenses not involving sexual contact or sex acts, the reality is that virtually every offense punished under that statute does involve sexual contact or a sexual act as it did in this case. The way the Government virtually always proves the intent that the victim engages in the sex act is through proving that the victim did engage in sex acts or at a minimum

> sexual contact. Accordingly, the base offense level of 34 already takes this into account. The high base offense level (only 4 levels below that for second degree murder) tends to corroborate that this section almost invariably involves sexual contact: Level 34 would be inordinately high for an unconsummated prostituting conspiracy with no actual victims of sex trafficking.

*Id.* at 2–3.

The probation officer disagreed with Milner's counsel. Addendum to PSR 4, ECF No. 4. He explained "Milner was taking all of Victim J.G.'s money [and] she was not able to provide for herself. As such, . . . J.G. was under the custody, care and supervisory control of Milner. Therefore, the two level adjustment pursuant to USSG §2G1.3(b)(B) is warranted." *Id.* He further explained "Milner was convicted of conspiracy to sex traffic persons, in which the offense involved the commission of sex acts, sexual contact and commercial sex acts. As such, the two-level enhancement pursuant to USSG §2G1.3(b)(4) is warranted." *Id.*

The Court did not rely on the Sentencing Guidelines to fashion Milner's sentence. It looked to the non-binding sentencing recommendation in the plea agreement. But the Court found the recommendation for 120 months' imprisonment was "not adequate to address all the factors that the law requires [the Court] to address in this case." Sentencing Tr. 30, ECF 82. Still, the Court departed well below the guideline range and sentenced Milner to 180 months' imprisonment—or half of the bottom of the guidelines range. J. Crim. Case, ECF No. 74.

Milner appealed. Notice of Appeal, ECF No. ECF No. 78. His appellate counsel "moved for leave to withdraw and . . . filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Flores*, 632 F.3d 229 (5th Cir. 2011)." *United States v. Milner*, No. 17-50185 (5th Cir. June 12, 2018), ECF No. 91. The Fifth Circuit Court of Appeals granted the motion and dismissed the appeal. *Id.*

In his § 2255 motion, Milner asserts two claims. First, he argues his trial counsel provided constitutionally ineffective assistance when she failed to object to (1) the inclusion of Group III in determining his sentence, and (2) the unwarranted cross references in the PSR. Mem. in Supp. 12, 17, ECF No. 93. Then he argues his appellate counsel provided constitutionally ineffective assistance when she failed to raise the same claims in his appeal. *Id.* at 24. He asks the Court to resentence him. Mot. to Vacate 12, ECF No. 92.

## APPLICABLE LAW

### A. 28 U.S.C. § 2255

A court is normally "entitled to presume that the defendant stands fairly and finally convicted" after the defendant has been convicted and exhausted or waived any right to appeal. *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001) (citing *United States v. Frady*, 456 U.S. 152, 164 (1982)). It may, however, consider a defendant's collateral attack on a federal sentence through a § 2255 motion. *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000); *Cox v. Warden*, 911 F.2d 1111, 1113 (5th Cir. 1990)). And it may grant a defendant relief under § 2255 for errors which occurred at trial or at sentencing. *Ojo v. INS*, 106 F.3d 680, 683 (5th Cir. 1997).

But a § 2255 motion is not a substitute for a direct appeal. *Frady*, 456 U.S. at 165; *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991). It "'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) (emphasis added) (quoting *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994)).

The movant ultimately bears the burden of establishing his claims of error by a preponderance of the evidence. *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) (citing *United States v. Kastenbaum*, 613 F.2d 86, 89 (5th Cir. 1980)). A movant must show that: (1) his sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentencing court was without jurisdiction to impose the sentence; (3) the sentence was more than the maximum authorized by law; or (4) the sentence was otherwise subject to collateral attack. *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995) (citations omitted).

When a court finds that the movant is entitled to relief, it "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). Thus, a court has "'broad and flexible power . . . to fashion an appropriate remedy.'" *United States v. Stitt*, 552 F.3d 345, 355 (4th Cir. 2008) (quoting *United States v. Hillary*, 106 F.3d 1170, 1171 (4th Cir. 1997)); *see also Andrews v. United States*, 373 U.S. 334, 339 (1963) ("[T]he provisions of the statute make clear that in appropriate cases a § 2255 proceeding can also be utilized to provide a . . . flexible remedy."); *United States v. Torres-Otero*, 232 F.3d 24, 30 (1st Cir. 2000) ("As an initial matter, we note the broad leeway traditionally afforded district courts in the exercise of their § 2255 authority. . . . This is so because a district court's power under § 2255 'is derived from the equitable nature of habeas corpus relief.'") (quoting *United States v. Handa*, 122 F.3d 690, 691 (9th Cir. 1997)).

A court may, however, deny a § 2255 motion without a hearing if "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b) (2012); *see also United States v. Drummond*, 910 F.2d 284, 285 (5th Cir. 1990) ("Faced squarely

with the question, we now confirm that § 2255 requires only conclusive evidence—and not necessarily direct evidence—that a defendant is entitled to no relief under § 2255 before the district court can deny the motion without a hearing."). Indeed, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party." *See* 28 U.S.C. foll. § 2255 Rule 4(b).

**B. Ineffective Assistance of Counsel**

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel—including when entering a guilty plea. *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017). A court will analyze an ineffective assistance of counsel claim presented in a § 2255 motion under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). To prevail, a movant must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689–94.

To show deficient performance, a movant must establish his counsel's performance fell below an objective standard of reasonable competence. *Lockhart v. Fretwell*, 506 U.S. 364, 369–70 (1993). To establish prejudice where the movant pleaded guilty, the movant must demonstrate "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In addition, the movant must show that going to trial "would have given him a reasonable chance of obtaining a more favorable result," such as an acquittal or an aggregate

sentence less than that imposed by the Court. *United States v. Batamula*, 823 F.3d 237, 240 (5th Cir.) (en banc), *cert. denied*, 137 S. Ct. 236 (2016). *See also Missouri v. Frye*, 566 U.S. 146–47 (2012) (stating that, to establish prejudice, the defendant must "show a reasonable probability that the end result of the criminal process would have been more favorable," but for the ineffective assistance of counsel).

The burden of proof is on the movant alleging ineffective assistance. *United States v. Chavez*, 193 F.3d 375, 378 (5th Cir. 1999). If the movant fails to prove one prong, it is not necessary to analyze the other. *See Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one"); *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir.1997) ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim.").

## ANALYSIS

### A. Ground One: Milner was denied the effective assistance of counsel during the sentencing hearing as a result of counsel's failure to propound objections in preparation for Milner's sentencing

Milner asserts his trial counsel provided constitutionally ineffective assistance when she failed to object to the inclusion, pursuant to Sentencing Guideline §1B1.2(d), of Group III in the calculation of his sentence. He explains Group III held him accountable for conspiracy to sex traffic a minor, J.G., which "triggered an advisory Guidelines range of 360 months to life in prison." *Id.* at 11; PSR ¶¶ 72–80, 94–101, ECF No. 71. Relying in part on the language in the plea agreement concerning the object of the conspiracy, he asserts he did not plead guilty to conspiracy to commit commercial sex trafficking by a person under 18 years of age. Mem. in Supp. 7, 13, ECF No. 93; Plea Agreement 1–2, ECF No. 56. He argues:

> Minimally competent counsel would have objected to this erroneous inflation of Mr. Milner's guidelines range on grounds that "Group III" was based on a crime for which Mr. Milner had not been convicted and which he had not admitted to conspiring to commit in his plea colloquy or in his plea agreement, which is the threshold requirement under [Sentencing Guideline] § 1B1.2(d).

Mem. in Supp. 15, ECF No. 93.

Milner also asserts his trial "counsel was constitutionally deficient for failing to object to the inadequately supported cross-references to § 2A3.1 recommended for 'Group I' and 'Group II.'" *Id.* at 21. He argued he did not engage in sexual acts with the victims and the PSR erroneously inflated his offense level:

> Minimally competent counsel would have objected to the recommended cross-reference on the basis that Mr. Milner had not committed criminal sexual abuse as defined in §2241, by virtue of the reality that he had not committed a sex act with the victims. Thus, Mr. Milner's base offense level for all groups involved in his offense of conviction, a conspiracy to sex traffic persons, in violation of 18 U.S.C. § 1594(c), should have been set at 14. See U.S.S.G. § 2G1.1(a). Counsel was constitutionally deficient for failing to object to the erroneously inflated base offense levels contained in the PSR and for failing to advance such argument at sentencing.

*Id.* at 21.

To prevail on an ineffective assistance of counsel claim, a movant must show his counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689–94. In the context of sentencing, the movant must demonstrate a reasonable probability that, but for counsel's errors with respect to sentencing, he would have received less time in prison. *Glover v. United States*, 531 U.S. 198, 203 (2001).

**(1) The Court sentenced Milner based on the non-binding recommendation in the plea agreement, not the Sentencing Guidelines**

Milner's counsel successfully negotiated a plea agreement with the Government. Plea Agreement, ECF No. 56. Under its terms, Milner agreed to plead guilty to count four—the conspiracy to traffic persons count—in exchange for the Government moving to dismiss the remaining counts. *Id.* at 1. The parties also agreed, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B), to make a non-binding sentencing recommendation to the Court "to impose a sentence of one hundred and twenty (120) months incarceration." *Id.* at 3.

Rule 11(c)(1)(B) states that an attorney for the government may "recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate." Fed. R. Crim. P. 11(c)(1)(B). The rule goes on to explain that "such a recommendation or request does not bind the court." *Id.* (emphasis added); *United States v. Carpenter*, 359 F. App'x 553, 556 (6th Cir. 2009). "Rule 11(c) take[s] precedence [over the Sentencing Guidelines], and . . . a sentencing court may accept plea agreements in which the parties stipulate to sentences, or sentencing factors, that would otherwise contravene the sentencing guidelines." *United States v. Bernard*, 373 F.3d 339, 345 (3d Cir. 2004).

Consequently, the Court was free to ignore the non-binding sentencing recommendation in Milner's plea agreement and rely on the sentencing recommendation in the PSR. *United States v. Lovelace*, 565 F.3d 1080, 1088 (8th Cir. 2009) (citing *United States v. Gillen*, 449 F.3d 898, 900–02 (8th Cir. 2006) (holding that the district court was free to adopt a higher base offense level than that identified in a Rule 11(c)(1)(B) plea agreement); *United States v. Martinez-Noriega*, 418 F.3d 809, 811 (8th Cir. 2005) (noting that a Rule 11(c)(1)(B) plea

agreement does not bind the district court)). But the Court chose to rely on the non-binding sentencing recommendation in the plea agreement. The Court found the recommendation for 120 months' imprisonment was "not adequate to address all the factors that the law requires [the Court] to address in this case." Sentencing Tr. 30, ECF 82. Still, the Court departed well below the guideline range and sentenced Milner to 180 months' imprisonment—or half of the bottom of the guidelines range. J. Crim. Case, ECF No. 74.

If the Court had granted Milner's objections to the inclusion of Group III, cross-references, and enhancements in calculating his sentence—and sentenced Milner under Sentencing Guideline § 2A3.1(a)(2) based on a total offense level of 30 and a criminal history category of V—Milner's guideline imprisonment range would still have been 151 to 188 months' imprisonment. His 180-month sentence was within this sentencing range.

Consequently, Milner cannot show that he would have received a lesser sentence had his counsel objected to the inclusion in the calculation of his sentence of Group III, pursuant to Sentencing Guideline §1B1.2(d), or the cross-references recommended for Group I and Group II, pursuant to Sentencing Guideline § 2A3.1. Thus, he cannot show his counsel's performance was deficient and the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689–94.

**(2) The probation officer properly calculated Milner's sentencing range under the Sentencing Guidelines**

Furthermore, Milner acknowledged in the plea agreement that he knowingly conspired to cause unspecified individuals to engage in commercial sex acts through force, threats of force, fraud, and coercion, or any combination thereof, in violation of 18 U.S.C. §§ 1591(a)(1) and

(b)(1). Plea Agreement 1–2, ECF No. 56. He also acknowledged he benefited financially by causing these unspecified individuals to engage in commercial sex, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1). *Id.* at 2. Notably, he did not identify the victims in the objects of the conspiracy in the plea agreement.

As a result, the probation officer recommended holding Milner accountable for all acts alleged in the superseding indictment. PSR ¶¶ 78–80, ECF No. 71. This resulted in three "groups" of offenses—one for each of Milner's three victims. *Id.* at ¶ 80.

"Group I" concerned the conspiracy to sex traffic victim J.V. by force. *Id.* at ¶¶ 81–86. The probation officer applied Sentencing Guideline § 2A3.1(a)(2), which established a base offense level at 30. *Id.* at ¶ 81. J.V. reported she witnessed Milner physically abuse another woman, C.P., who also worked for Milner as a prostitute. J.V. insisted she was frightened when she saw Milner hit C.P., and she remained afraid of him throughout the rest of their relationship. J.V. asserted when she wanted to leave, Milner threatened to post humiliating pictures and videos of her on the internet. J.V. recalled Milner had videos of her engaging in sexual activities with him. Consequently, the probation officer added four levels, pursuant to § 2A3.1(b)(1), because the offense against J.V. involved aggravated sexual abuse by force or threats. *Id.* at ¶ 81. This resulted in an adjusted offense level of 34. *Id.* at ¶ 86.

"Group II" concerned the conspiracy to sex traffic victim C.P. for private commercial gain, *Id.* at ¶¶ 87–93. C.P. claimed that after J.G. started working for Milner, he become physically violent with her. Hence, the probation officer applied the same guideline calculations as for Group I, but added an additional two-level enhancement, pursuant to Sentencing Guideline § 2A3.1(b)(4)(B), because C.P. sustained a serious bodily injury—a

broken wrist—at the hands of Milner. *Id.* at ¶ 89. This resulted in an adjusted offense level of 36. *Id.* at ¶ 93.

"Group III" concerned the conspiracy to sex traffic a minor victim, J.G., for private financial gain. *Id.* at ¶¶ 94–101. The probation officer applied Sentencing Guideline § 2G1.3(a)(1), which established a base offense level at 34. *Id.* at ¶ 94. J.G. claimed Milner advertised her services on an internet website, paid for the hotel room where she lived and met her customers, and provided her with food and clothing. J. G. also claimed Milner kept all the money from her prostitution. Consequently, the probation officer added a two-level enhancement, under § 2G1.3(b)(1), based on a finding J.G. was under Milner's custody and care; another two-level enhancement, under § 2G1.3(b)(3), based on a finding Milner used a computer to advertise J.G.'s services; and a final two-level enhancement, under §2G1.3(b)(4), based on a finding the offense involved the commission of sex acts, sexual contact, and commercial sex acts. *Id.* at ¶¶ 95–97. This resulted in an adjusted offense level of 40. *Id.* at ¶ 101.

Contrary to Milner's representations, the record supported the cross-references recommended for Group I and Group II. It supported consideration of Group III. Objections by Milner's counsel to the cross-references and consideration of Group III would have been unavailing. Thus, the record also supported the probation officer's calculation of Milner's sentencing range as 360 months to life imprisonment. *Id.* at ¶ 142. Had the Court not determined Milner's sentence based on the non-binding plea agreement, it likely would have overruled Milner's objections to the PSR and sentenced him to at least 360 months' imprisonment. Consequently, Milner cannot show that he would have received a lesser sentence had his counsel objected to the cross-references recommended for Group I and Group

the record itself). The record in this case is adequate to dispose fully and fairly of Milner's claims. The Court need inquire no further on collateral review and an evidentiary hearing is not necessary.

**CERTIFICATE OF APPEALABILITY**

A petitioner may not appeal a final order in a habeas corpus proceeding "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). In cases where a district court rejects a movant's constitutional claims on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (applying *Slack* to a certificate of appealability determination in the context of § 2255 proceedings). To warrant a certificate as to claims that a district court rejects solely on procedural grounds, the movant must show both that "jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Here, Milner's § 2255 motion fails because he has not identified a transgression of his constitutional rights or alleged an injury that he could not have raised on direct appeal that would, if condoned, result in a complete miscarriage of justice. Additionally, reasonable jurists could not debate the Court's reasoning for the denial of Milner's § 2255 claims on substantive or procedural grounds—or find that his issues deserve encouragement to proceed. *Miller-El v.*

*Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack*, 529 U.S. at 484).

Consequently, the Court will not issue a certificate of appealability.

**CONCLUSION AND ORDERS**

The Court concludes it plainly appears from the motion and the record of prior proceedings that Milner is not entitled to relief. Milner has failed to show either his trial or his appellate counsel provided constitutionally ineffective assistance. Therefore, he is not entitled to § 2255 relief. Additionally, the Court concludes Milner is not entitled to a certificate of appealability. Accordingly, the Court enters the following orders:

**IT IS ORDERED** that Movant David Maurice Milner's "Motion under 28 U.S.C § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody" (ECF No. 92) is **DENIED** and his civil cause is **DISMISSED WITH PREJUDICE**.

**IT IS FURTHER ORDERED** that Movant David Maurice Milner is **DENIED** a certificate of appealability.

**IT IS FURTHER ORDERED** that all pending motions are **DENIED** as **MOOT**.

**IT IS FINALLY ORDERED** that the District Clerk shall **CLOSE** this case.

**SIGNED** this 14 day of May 2019.

**FRANK MONTALVO**
**UNITED STATES DISTRICT JUDGE**