United States Court of Appeals for the Fifth Circuit

No. 21-40403

United States Court of Appeals
Fifth Circuit
FILED
February 28, 2022
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JAY JURDI,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:18-CV-61
USDC No. 4:12-CR-180-11

ORDER:

Jay Jurdi, federal prisoner # 20653-078, moves for a certificate of appealability (COA) from the denial of his 28 U.S.C. § 2255 motion. Jurdi is serving a life sentence after a jury convicted him of conspiracy to possess with intent to distribute methamphetamine. He contends that counsel was ineffective for failing to move for a mistrial after the jury appeared to have prematurely begun deliberations, that counsel was ineffective for failing to object to "false testimony," and that counsel failed to object to the use of a prior conviction to increase his sentence.

Appendix A1

Jurdi fails to demonstrate "that jurists of reason would find it debatable whether the petition 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 v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the motion for a COA is DENIED because Jurdi does not make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
United States Circuit Judge

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

JAY JURDI, #20653-078

VS.

UNITED STATES OF AMERICA

§
§
§
§
§

CIVIL ACTION NO. 4:18cv61
CRIMINAL ACTION NO. 4:12cr180(11)

ORDER OF DISMISSAL

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

It is therefore **ORDERED** that the motion to vacate, set aside, or correct sentence is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. It is further **ORDERED** that all motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 30th day of March, 2021.

Amos Mazzant

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

Appendix B

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

JAY JURDI, #20653-078	§	
	§	
VS.	§	CIVIL ACTION NO. 4:18cv61
	§	CRIMINAL ACTION NO. 4:12cr180(11)
UNITED STATES OF AMERICA	§	

FINAL JUDGMENT

Having considered the motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, and rendered its decision by an order of dismissal issued on this date, the court hereby

ORDERS that the case is **DISMISSED** with prejudice.

SIGNED this 30th day of March, 2021.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

JAY JURDI, #20653-078	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:18cv61**
	§	**CRIMINAL ACTION NO. 4:12cr180(11)**
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pro se Movant Jay Jurdi filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, challenging his Eastern District of Texas, Sherman Division conviction. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

I. BACKGROUND

On October 20, 2014, a jury found Movant guilty of conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine and/or 50 grams or more of methamphetamine (actual), in violation of 21 U.S.C. §§ 846 and 841(a)(1). The Presentence Report ("PSR") found that the statutory sentencing range for Movant was mandatory life imprisonment, and over objections, the District Court sentenced Movant to life imprisonment on September 17, 2015. After the District Court denied Movant's motion for new trial, the Fifth Circuit Court of Appeals affirmed Movant's conviction and sentence.

Appendix C

United States v. Jurdi, 683 F. App'x 286, 288 (5th Cir. 2017). In its decision, the Fifth Circuit held that the evidence was sufficient to support Movant's conviction. It noted:

> [T]he trial record is replete with direct evidence of his agreement to participate actively in a methamphetamine-distribution conspiracy, including his own post-arrest statements to officers admitting to have engaged in drug transactions, the testimony of Grasso and numerous other eyewitness co-conspirators establishing his activities, and the physical evidence, including the distributable quantity of 100% pure methamphetamine found in his jacket following his arrest.

8 ½ grams found in my jacket at the office 1 hr. after my arrest

Id. at 287-88. The Fifth Circuit further noted that each of Movant's co-conspirators "gave testimony that corroborated the statements of the others and that was further corroborated by testimony from investigating officers, by the documentary evidence, and by the physical evidence obtained at the time of [Movant]'s arrest." *Id.* at 288. On May 16, 2017, Movant filed another motion for new trial as to sentencing based on newly discovered evidence (Dkt. #609).

2 priors consolidated

On January 23, 2018, Movant filed the instant § 2255 motion, arguing he is entitled to relief based on a lack of jurisdiction and ineffective assistance of counsel. The Government filed a response, asserting Movant is entitled to no relief, to which Movant filed a reply. The District Court denied Movant's second motion for new trial as to sentencing (Dkt. #609) on February 20, 2018 (Dkt. #614).

II. STANDARD FOR FEDERAL HABEAS CORPUS PROCEEDINGS

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a § 2255 proceeding may not bring a broad-based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A "distinction must be

drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-1301 (5th Cir. 1992) (*citations omitted*). A (collateral) attack is limited to alleging errors of "constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). Conclusory allegations, which are unsupported and unsupportable by anything else contained in the record, do not raise a constitutional issue in a habeas proceeding. *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

corresponding

III. PROCEDURAL BAR

It is well-settled that, absent countervailing equitable considerations, a § 2255 movant cannot relitigate issues raised and decided on direct appeal. *United States v. Lopez*, 148 F.3d 427, 433 (5th Cir. 2001); *United States v. Rocha*, 109 F.3d 225, 299 (5th Cir. 1997); *Withrow v. Williams*, 507 U.S. 680 (1993). "[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are [generally] not considered in § 2255 motions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) (citing *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980)). It is also well settled that a collateral challenge may not take the place of a direct appeal. *Shaid*, 937 F.2d at 231. Accordingly, if Movant raised, or could have raised, constitutional or jurisdictional issues on direct appeal, he may not raise them on collateral review unless he shows either cause for his procedural default and actual prejudice resulting from the error, or demonstrates that the alleged constitutional violation probably resulted in the conviction of one who is actually innocent. *Id.* at 232.

claim #4

Movant claims that the Court lacked jurisdiction to impose the mandatory life sentence. There is no question the Court had jurisdiction to decide Movant's case. Movant is actually questioning the basis for the Court's life sentence. He asserts he did not have the requisite two prior

felony drug convictions necessary for the Court to find him a career offender under 21 U.S.C. § 851. Movant claims that his two prior Tarrant County felony drug convictions were not separate crimes, but part of the same episode; thus, they should count as only one conviction. Movant could have raised this issue on direct appeal, but did not. He fails to show cause for his procedural default and actual prejudice resulting from the error, or that he is actually innocent. *Shaid*, 937 F.2d at 232. Accordingly, this issue is procedurally barred. See attached 2255 Declaration (plain error review) also see e-mails to attorney (ineffective) & claim #

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Movant asserts he is entitled to relief based on several claims of ineffective assistance of counsel. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires the defendant to show the performance was deficient and the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. A movant who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance (greater importance) of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Strickland*, 466 U.S. at 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981).

A movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S.

at 694. Movant must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove the prejudice component, a court need not address the question of counsel's performance. *Id.* at 697.

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

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

Claim #1 & 5

In each of his issues, Movant claims that either trial or appellate counsel was ineffective for failing to object, challenge, file a motion, or raise an issue on appeal. A failure to challenge or

object does not constitute deficient representation unless a sound basis exists for objection. *See Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (a futile or meritless objection cannot be grounds for a finding of deficient performance). Even with such a basis, however, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy. *See Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (noting that a failure to object may be a matter of trial strategy as to which courts will not second-guess counsel). On habeas review, federal courts do not second-guess an attorney's decision through the distorting lens of hindsight, but rather, the courts presume that counsel's conduct falls within the wide range of reasonable professional assistance and, under the circumstances, that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. Failure to make frivolous objections does not cause counsel's performance to fall below an objective level of reasonableness. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). A defendant must allege specifically what actions counsel should have taken and how such actions would have affected the outcome.

A. Prior Conviction as Predicate Offense

Movant asserts counsel was ineffective for failing to object to the Government's intention to enhance his sentence. Specifically, he claims counsel failed to recognize that his prior Texas conviction for possession with intent to distribute a controlled substance that was used to increase his advisory guideline range was no longer valid as a predicate offense. He relies on a case that was decided after Movant was sentenced – *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017).

↳ see Mathis & Hinkle - claim 1, before Final Judgment (Reply P 7-8)

Prior to *Tanksley*, a conviction for possession with intent to deliver a controlled substance under Section 481.112(a) of the Texas Health and Safety Code qualified as a controlled substance offense for the career offender guidelines. *See United States v. Ford*, 509 F.3d 714 (5th Cir 2007). In

Tanksley, the Fifth Circuit determined that the Texas crime of possession with intent to deliver no longer qualifies as a controlled substance offense, abrogating *Ford*. *Tanksley*, 848 F.3d 347. The Fifth Circuit has repeatedly held, however, that "there is no general duty on the part of defense counsel to anticipate changes in the law." *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009). "Clairvoyance is not a required attribute of effective representation." *Id.* at 294-95.

Movant's prior Texas conviction for possession with intent to deliver was a "controlled substance offense" under the binding Fifth Circuit precedence of *Ford* when he was sentenced on September 17, 2015. Counsel cannot be ineffective for failing to anticipate the abrogation of *Ford* in 2017. This issue is without merit.

see Buford v. U.S. (claim 4 resp'g) p-13

B. Prosecution's Evidence

Movant asserts counsel should have objected when the prosecution knowingly used false evidence. Specifically, Movant claims that co-conspirator Anthony Grasso ("Grasso") testified falsely that the Government did not promise him they would file for a sentencing reduction in exchange for his testimony against Movant. Movant asserts that Grasso's plea agreement required the Government to either file a motion to reduce his sentence under 28 U.S.C. Section 35(b) or U.S.S.G. 5K1.1, or both.

A review of the record reflects that Grasso testified he was not promised a sentence reduction for testifying and understood that the Government was not required to file for a reduction in his sentence. Criminal Action No. 4:12cr180(11) (Dkt. #457, p. 505). A review of Grasso's plea agreement shows this provision concerning substantial assistance:

> If, in its sole discretion, the government determines that the defendant has provided substantial assistance in the investigation or prosecution of others, the government will file a motion for downward departure pursuant to U.S.S.G. § 5K1.1 or a motion

> for reduction of sentence pursuant to Fed. R. Crim. P. 35(b). The defendant's cooperation does not automatically require the government to request a downward departure or a reduction in sentence, and the time for filing such motion will be determined by the government. It is entirely within the Court's discretion as to what, if any, reduction in sentence the defendant will receive.

Criminal Action No. 4:12cr180(1) (Dkt. #167, p.4). Movant is simply mistaken in his assertion. As shown in Grasso's plea agreement, the Government was not required to file for a downward departure based on his cooperation. Accordingly, Grasso did not testify falsely. Any argument trial counsel would have advanced in this vein would have been frivolous. Counsel cannot be held to be ineffective for failing to argue frivolous claims. *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990).

see attachment's dismissal of supervised release wel before my trial 11/13 Grasso & government lied durin trail. Napue v. Illi Brady vi Maryl

C. Failure to Move for Mistrial

Movant asserts that his right to a fair trial was violated because the jury begin deliberating prematurely; thus, his counsel's failure to move for a mistrial constitutes deficient performance. Specifically, when the jury submitted questions to the Court, Movant argues the jurors must have been deliberating prematurely. Consequently, he alleges his counsel did not shift the burden to the Government to show that any misconduct by the jury was harmless.

Every criminal defendant has the right to trial by an impartial jury, and deliberations prior to the close of evidence may threaten that impartiality. *United States v. York*, 600 F.3d 347, 356 (5th Cir. 2010). The trial judge has broad discretion, especially "when the allegation involves internal misconduct such as premature deliberations, instead of external misconduct such as exposure to media publicity." *Id.*

The record shows that Movant's counsel raised the issue of premature deliberations after the Court received questions from the jury. The Court observed:

I think I need to tell them that they will just have to listen to the evidence that is

> presented and make a decision based on that evidence. And I will tell them that some of these questions they've posed may be answered between now and the conclusion of the trial.

Criminal Action No. 4:12cr180(11) (Dkt. #563, p. 4). United States District Judge Richard A. Schell commented that he did not think the jurors were doing anything more than trying to "aid themselves in understanding" the evidence. *Id.* Counsel for the defense and for the Government agreed that instructions to the jury would resolve the problem. Based on defense counsel's concern that further questions might aid the Government by giving them insight into the jury's thinking, the Court gave a full statement admonishing the jury to refrain from discussing the case and that many of their questions may be answered during the course of the trial. *Id.* at p. 5. Both the Government and counsel agreed to the Court's suggested answer to the jury's questions. *Id.* The Court addressed the jury with the following curative instruction:

> The Court recognizes that questions from jurors and answers from the court may assist you in resolving this case and reaching a verdict. But when you send questions to the court during trial, you may also be inadvertently assisting one side or the other by giving the parties a glimpse into your current thinking about this case before you've heard all the evidence. Moreover, we don't know whether your notes and questions are joined in by all jurors or fewer than all. None of your notes have been signed. Your role in this trial is to listen to the testimony and view the evidence presented and base your verdict on all that evidence.
>
> Some of these questions may be answered during the rest of the trial, I don't know. But I think it's better if you keep your questions and thoughts about the case to yourself until you've heard all of the evidence and you've heard the final arguments. Then you can go and deliberate on the case.

Id. at pp. 20-21.

The Court first notes that Movant presents no evidence to show that the jury actually deliberated or continued to deliberate after the Court's curative instruction. He also fails to show prejudice from any alleged premature deliberations.

The decision whether to grant a mistrial is reserved to the broad discretion of the trial judge, but "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious cases." *Renico v. Lett*, 559 U.S. 766, 774 (2010). The curative instruction and Judge Schell's statements that the jury was simply trying to aid themselves in understanding the evidence, show that a mistrial would not have been warranted or granted. Counsel cannot be held to be ineffective for failing to argue frivolous claims. *Koch,* 907 F.2d at 527. Movant fails to show that, but for counsel's alleged deficient performance in failing to move for a mistrial, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. This issue is without merit.

D. Sentence Enhancement

At the time Movant was sentenced, Section 841 provided that a defendant who "commits a violation . . . after two or more prior convictions for a felony drug offense have become final, such [defendant] shall be sentenced to a mandatory term of life imprisonment without release. . . ." 21 U.S.C. § 841(b)(1)(A). Movant asserts that counsel was ineffective for failing to object to the use of his two prior Texas Convictions of possession with intent to deliver.

Movant's PSR shows that on October 11, 1996, a Tarrant County jury convicted Movant of possessing 28 grams of methamphetamine on July 3, 1994, in Case No. 0555206D. Criminal Action No. 4: 12cr180(11) (Dkt. #513). That same day, the same jury convicted Movant of possessing more than four grams, but less than two hundred grams of methamphetamine on December 5, 1995, in Case No 0603096D. *Id.* Specifically, Movant claims the two offenses were consolidated and should not have been used as two separate offenses to enhance his sentence. An identical claim was made in *United States v. Rodriguez*, 894 F.3d 228, 235 (5th Cir. 2018). There, the defendant claimed that because his two prior convictions were consolidated, they should not be counted as two separate

convictions for sentencing purposes. The Fifth Circuit held, however, that the defendant's two prior convictions for transporting drugs, occurring five months apart, were separate offenses for sentencing purposes. *Id.* Applying its prior holding in *Barr*, the Fifth Circuit held that, although the crimes were consolidated and sentencing occurred on the same day, the crimes did not constitute a "single act of criminality" because they were committed "sequentially." *Id.*; *see United States v. Barr*, 130 F.3d 711, 712 (5th Cir. 1997) ("Separate convictions constitute one offense when the violations occur simultaneously, as opposed to sequentially.").

In this case, Movant's two underlying state convictions were for two sequential acts five months apart, although the offenses were joined for trial purposes. The Texas appellate court found that, under the Texas joinder statute, Movant failed to show he was prejudiced by the denial of his motion to sever the cases and that the trial court did not err. *Jurdi v. State,* 980 S.W.2d 904, 908 (Tex. App.–Fort Worth 1998, pet. ref'd). The state decision, however, does not affect the Fifth Circuit's precedent that determines the convictions were two separate and distinct convictions for sentencing purposes. *Rodriguez,* 894 F3d at 235. Therefore, counsel cannot be considered ineffective for failing to raise this issue, as the Court did not err in concluding that Movant's Tarrant County convictions constitute two separate underlying convictions for sentencing purposes. Movant fails to show that, but for counsel's alleged deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. This issue is without merit.

E. Career Criminal Enhancement - on Appeal see claim #5 (Reply To government)

Movant claims his counsel on appeal was ineffective for failing to challenge the Court's finding that he was a career criminal, which resulted in a life sentence. As discussed above, the record shows that Movant had two separate felony drug convictions; thus, the enhancement was

appropriately applied. Counsel cannot be held to be ineffective for failing to argue frivolous claims. *Koch,* 907 F.2d at 527. Movant fails to show that, but for appellate counsel's failure to raise this issue on appeal, he would have prevailed. *Robbins*, 528 U.S. at 285.

F. Two Points Added for Importation of Methamphetamine from Mexico - on Appeal

Finally, Movant claims that appellate counsel was ineffective for failing to raise that the two-point addition to his offense level for the methamphetamine being imported from Mexico was not supported by the record. A review of the record, however, shows that Joe Henry Mata, an agent for the Drug Enforcement Administration, testified that the methamphetamine was being sourced "directly from Mexico." Criminal Action No. 4:12cr180 (11) (Dkt. #561, p.63). Further, it was concluded in the PSR that "[i]nformation contained during the investigation of the instant offense revealed the methamphetamine distributed during the conspiracy was imported from Mexico." *Id.* (Dkt. #513, p. 7). Counsel cannot be held to be ineffective for failing to argue frivolous claims. *Koch,* 907 F.2d at 527. Movant fails to show that, but for appellate counsel's failure to raise this issue on appeal, he would have prevailed. *Robbins*, 528 U.S. at 285.

V. CONCLUSION

On direct appeal, Movant could have argued that the trial court erred by considering his two prior Tarrant County felony drug convictions as separate convictions for sentencing purposes, but he did not. He fails to show cause for his failure to do so, as well as actual prejudice resulting from the error, or that he is actually innocent. Accordingly, the issue is procedurally barred. *Shaid*, 937 F.2d at 232. Movant also fails to show that, but for trial counsel's alleged deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Finally, Movant fails to show that, but for appellate counsel's failure to raise certain issues on appeal, he

would have prevailed. *Robbins*, 528 U.S. at 285. Having found no merit to Movant's claims, the § 2255 motion should be denied.

VI. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is recommended that this court, nonetheless, address whether Movant would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a [movant] relief is in the best position to determine whether the [movant] has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

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

district court was correct in its procedural ruling. *Id.*

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

VII. RECOMMENDATION

It is recommended that the motion to vacate, set aside, or correct sentence be **DENIED**, and the case is **DISMISSED** with prejudice. It is further recommended a certificate of appealability be **DENIED**.

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

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

(extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 24th day of February, 2021.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

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