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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 10, 2022
Lyle W. Cayce
Clerk

No. 21-40073

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GARY LYNN MCDUFF,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:17-CV-391

Before HIGGINBOTHAM, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

Gary L. McDuff, federal prisoner # 59934-079, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion, in which he challenged his 2013 conviction and cumulative three-hundred-month sentence of imprisonment for conspiring to commit wire fraud and for money laundering in violation of 18 U.S.C. § 1349 and § 1956(a)(1)(B)(I), respectively.

In his petition, McDuff alleges that the Government failed to produce evidence in violation of *Brady v. Maryland*, 373 U.S. 82 (1963), and knowingly

used false testimony at trial in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). McDuff also asserts that the magistrate judge and district court violated *Haines v. Kerner*, 401 U.S. 519 (1972), by failing to consider supplemental exhibits he sought to submit on appeal. He alleges his appointed appellate counsel provided ineffective assistance by failing to raise certain arguments on direct appeal. Finally, he maintains that he is actually innocent.

To obtain a COA to appeal the denial of a § 2255 petition, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "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). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that issues presented are adequate the deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. If the district court denies relief on procedural grounds, a COA should issue if the movant demonstrates, at least, "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*, 529 U.S. at 484.

McDuff has failed to make the requisite showing. Accordingly, Appellant's motion for a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for a Rule 10(e)(1) hearing with a Fifth Circuit mediator to facilitate an agreement on the record on appeal is DENIED. IT IS FURTHER ORDERED that

Appellant's alternative motion to remand case to the trial court to conduct the hearing is DENIED.

APPENDIX D

United States Court of Appeals
for the Fifth Circuit
No. 21-40073

UNITED STATES OF AMERICA,
Plaintiff—Appellee,
versus

GARY LYNN MCDUFF,
Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:17-CV-391

UNPUBLISHED ORDER

Before Higginbotham, Duncan, and Wilson, *Circuit judges.*
Per Curiam:

IT IS ORDERED that Appellant's motion for leave to file his motion for reconsideration out of time is GRANTED.

This panel previously DENIED Appellant's motion for a certificate of appealability,a Rule 10(e)(1) hearing with a Fifth Circuit Mediator to facilitate an agreement on the record on appeal, and alternative motion to remand the case to the trial court to conduct a hearing.

The panel has considered Appellant's instant motion for reconsideration as to the denial of a certificate of appealability only. That motion is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for protection is DENIED.

APPENDIX I

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

GARY LYNN MCDUFF,
#59934-079 CIVIL NO. 4:17cv391
CRIMINAL NO. 4:09cr90(2)

VS.

UNITED STATES OF AMERICA

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson who issued a Report and Recommendation concluding that the motion to vacate, set aside, or correct sentence should be denied and dismissed with prejudice. Movant has filed objections.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a de novo review of the objections raised by Movant to the Report, 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 accordingly ORDERED that the motion to vacate, set aside, or correct sentence is DENIED and Movant's case is DISMISSED with prejudice. A certificate of appealability is DENIED. Finally, it is ORDERED that all motions not previously ruled on are hereby DENIED.

SIGNED this the 22nd day of November, 2020.

_____//s//_____
RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX J

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

GARY LYNN MCDUFF,

VS.

UNITED STATES OF AMERICA

#59934-079
CIVIL NO. 4: 17cv391
CRIMINAL NO. 4:09cr90(2)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pro se Movant Gary Lynn McDuff filed the above-styled and numbered motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The motion was referred to the 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. PROCEDURAL BACKGROUND

On March 27, 2013, a jury found Movant guilty of conspiracy to commit wire fraud (Count One) and money laundering (Count Two), in violation of 18 U.S.C. § 1349 and § 1956(a)(1)(B)(1), respectively. On April 16, 2014, the District Court sentenced Movant to two hundred forty months' imprisonment for both counts, but ordered that sixty months of Count Two shall run consecutive to the punishment for Count One, resulting in a total sentence of three hundred months. The Fifth Circuit affirmed Movant's conviction and sentence on February 3, 2016, finding the evidence was sufficient to support his guilt and that the issues raised were without merit. *United States v. McDuff* 639 F. App'x 978 (5th Cir. 2016). On June 2, 2017, Movant filed the instant motion, claiming he is entitled to relief based on numerous grounds for relief. The Government filed a response, asserting Movant is entitled to no relief, to which Movant filed a reply.

II. FACTUAL BACKGROUND

The Fifth Circuit provided a short factual statement: McDuff was indicted in 2009 for conspiracy to commit wire fraud and for money laundering. According to the superseding indictment, McDuff, his co-defendant, and an unindicted co-conspirator made a series of misrepresentations to investors while soliciting investments in the Lancorp Financial Fund Business Trust ("Lancorp Fund," "Lancorp." or the "Fund"). Among other things, McDuff and his co-conspirators—in both conversations with prospective investors and a prospectus provided to them—

falsely stated that the Lancorp Fund was duly registered, would maintain an insurance policy to protect against losses, and would only invest in highly rated debt securities. They also failed to disclose that McDuff was a convicted felon without the requisite securities licenses or that his co-defendant was barred by California authorities from soliciting investments due to his past involvement in fraudulent securities offerings. McDuff and his co-conspirators received payments totaling approximately $10 million from over one hundred investors and diverted the bulk of those investments to an illegal investment scheme called Megafund. Megafund returned at least $1 million in payments to Lancorp, an entity controlled by the co-conspirators, and approximately two-thirds of those payments were diverted for their personal use.

McDuff remained abroad for some time after learning of his indictment but was eventually apprehended in 2012. Throughout the proceedings that followed, he represented himself but largely refused to participate meaningfully in his defense, except to claim that his criminal prosecution was precluded by a prior "private administrative judgment." In the course of the two-day trial, McDuff declined to cross-examine the government's witnesses or present a defense. *Id.*, at 979-80. The record shows that Movant and Gary Lancaster created the Lancorp Financial Fund. Movant, having been convicted of money laundering previously, was not disclosed as an official of Lancorp. He hired a securities attorney to draft the offering documents. The materials included statements that the investment would be protected by an insurance policy, the investment

would carry a rating of A+ or A1 by credible rating agencies, the offering was registered, and Lancaster was experienced in such investments.

Movant solicited investors, providing details and assurances as to the safety and viability of the investment. Lancaster was listed as principal of the fund, but did not conduct independent due diligence efforts, going along with Movant's plan to transfer funds invested in Lancorp to other businesses including Megafund and MexBank. These two businesses maintained accounts under Movant's control.

The Government presented evidence at trial that statements in the offering documents for Lancorp were false, but were relied upon by investors. Money invested in Lancorp was diverted into accounts not disclosed in the offering documents, ultimately making its way into the hands of Movant and his co-conspirators. Movant and his co-conspirators solicited more than $10 million from approximately one hundred investors, resulting in a $6 million loss to investors.

On June 11, 2009, Movant and co-defendant Robert Reese (now deceased) were indicted for conspiracy to commit wire fraud. On August 13, 2009, a superseding indictment additionally charged Movant with money laundering. Movant refused to accept the indictments, referring to them as an "offer" to discuss the case, and presented to the Government a "Firm Offer to Settle." Movant remained at large until May 2012, when he was arrested. At his arraignment before the United States Magistrate Judge, Movant refused to comply with the Court's directive to answer properly, and was ultimately

gagged. The Court entered a "not guilty" plea on behalf of Movant. After conducting a detention hearing, Movant was detained based on risk of flight.

Movant refused appointed counsel, opting instead to represent himself. He filed numerous pro se motions and notices prior to trial. He filed motions to dismiss the indictment, claiming his case had already been settled by "private administrative judgment." Based on the filings, the District Court ordered a mental competency evaluation, and Movant was found to be mentally competent. Movant, persisting in his wish to proceed pro se, refused to take delivery of discovery and refused to discuss his case with appointed standby counsel.

On March 26, 2013, jury selection began, but Movant refused to participate in his trial in any meaningful way. After the jury found Movant guilty on both counts, a Presentence Report ("PSR") was prepared, determining Movant's guideline punishment range to be 262-327 months. Movant did not file objections to the PSR, but instead, filed a 202-page "PSI Report," describing the facts of his life and circumstances surrounding the offenses for which he was convicted. Movant claimed actual innocence. The Government responded to Movant's claims and objected to the offense level and the failure to include an adjustment for abuse of position of trust. On April 16, 2014, the District Court sustained the Government's objections, made revisions to the PSR, and overruled Movant's "PSI Report." The District Court sentenced Movant to three hundred months' imprisonment - two hundred forty months for Counts One and Two to be served concurrently, with sixty months of Count Two to be served consecutively to the punishment assessed in Count One. The Court

also ordered that Movant was not allowed to file anything further without first obtaining leave of the Court.

On July 21, 2014, Movant filed a notice of appeal. On August 14, 2015, he filed a motion for interlocutory appeal concerning the Court's denial of his "Motion to Reserve Right of Colorable Showing of Factual Innocence." On appeal, the Fifth Circuit consolidated his two appeals. Counsel was appointed in Movant's case, and Counsel's brief was filed on June 3, 2015. On February 3, 2016, the Fifth Circuit affirmed Movant's conviction and sentence, denying Movant's repeated motions to stay and/or recall the Court's mandate. Movant did not file a petition for writ of certiorari.

Overlapping with his criminal conviction and appeal, the U.S. Securities and Exchange Commission (SEC) issued an order instituting proceedings against Movant. seeking his permanent disbarment from the securities industry. The SEC had to prove by a preponderance of the evidence that Movant acted as a broker during his misconduct. After further developing the record and holding a hearing, the Administrative Law Judge ("ALJ") found that Movant's "testimony and many of his exhibits were not believable." (Diet. #7-5). "Indeed, the record is replete with masons for doubting McDuff's testimony and questioning the truth and authenticity of his allegedly exculpatory exhibits." *Id.* In detailing the reasons for his conclusions, the ALJ noted that Movant filed numerous fraudulent documents and forged signatures. Nonetheless, on December 16, 2016, the ALI found that the SEC failed to meet its burden in proving that Movant acted as a broker at the time of his misconduct.

In his criminal case, on March 10, 2017, Movant filed a postjudgment motion to withdraw certain documents previously filed, claiming he was "duped" concerning the legal defense and strategy advice he received in jail. The Court denied the motion, and Movant filed the instant § 2255 motion. In response to the Government's request, standby trial and appointed appellate counsel for Movant, Daniel Kyle Kemp (Counsel), provided an affidavit. In his affidavit, Counsel stated that Movant refused to speak with him in the criminal case-that Movant said he would not accept any public benefit. He refused to discuss the indictment, the Court's directives to answer, and essentially refused to "acknowledge the legitimacy of the proceedings." (Dkt #7-6).

After numerous attempts to visit Movant at the Fannin County Jail, Counsel was able to have only one "superficial" conversation in which Movant again refused legal assistance. Advising Movant that the prosecutor advised the discovery was voluminous, Movant still refused to answer Counsel's inquiry about any certain documents that he should be looking for within the discovery. Counsel noted that at all of the pre-trial hearings and during trial, Movant failed to participate in any meaningful way.

Counsel affirmed he reviewed discovery in several visits to the offices of the FBI-Dallas and the SEC Receiver's office. Counsel noted that much of the discovery was duplicative of each other, most of which were bank records from the various relevant entities. Only after Movant was convicted did he have a substantive conversation with Counsel. At that time, Movant told Counsel that certain people had been helping him through the trial process and that he had hired a "think tank of appellate lawyers" on

the west coast. Movant asked Counsel to sign the appellate brief that he had prepared himself which was three times the allowable length. While Counsel informed Movant that he was not comfortable doing that, Counsel filed motions to exceed the page limit, but the Fifth Circuit denied them. After reviewing Movant's brief Counsel removed what he considered to be frivolous arguments. The Fifth Circuit denied the oversized brief when Counsel attempted to comply with Movant's wishes. After Counsel filed the revised brief on June 3, 2015, Movant filed his own brief on January 2, 2016. Counsel noted that during his representation of Movant and while he served as standby counsel, Movant made numerous meritless filings discussing UCC governing disputes and amounts in controversy that were inapplicable to the criminal proceedings. At the Government's request to review Movant's § 2255 motion and related attachments, Counsel stated that he recalls reviewing most of the documents Movant claims were not disclosed. (Dkt #7-6).

III. FEDERAL HABEAS CORPUS PROCEEDINGS STANDARD

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, 1300-01 (5th Cir. 1992). 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). Mere conclusory allegations, which are unsupported and unsupportable by anything else contained in the record are insufficient for habeas relief. *Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996).

IV. PROCEDURAL BAR

Movant brings numerous issues that were either brought on direct appeal or could have been brought on direct appeal but were not. It is well-settled that, absent countervailing equitable considerations, a § 2255 movant cannot relitigate issues raised and decided on direct appeal. *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 could have raised constitutional or jurisdictional issues on direct appeal, he may not raise them on collateral review unless he first 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.

Here, Movant claims that Government witnesses and attorneys lied at trial[1], the jury charge constructively amended the indictment, the judge was biased, the Government improperly charged him in the indictment, the Government withheld B*rady/-Giglio/Jencks* material, his Ninth Amendment rights[2] were violated, and the statutory language charged is unconstitutionally vague. The record shows that Movant raised the *Brady* issue on appeal and argued that the conspiracy and money laundering charges merged, but the Fifth Circuit found no error. *McDuff*, 639 F. App'x 978. Movant may not Mitigate issues raised on appeal. *Shaid*, 937 F.2d at 231. Movant could have raised the remaining issues on direct appeal as the record was fully developed for appellate review. Movant did not raise the remaining issues on appeal and he fails to show cause or prejudice for the default, other than making a bald assertion that his counsel was ineffective for failing to do so. *Id*; *United States v. Lopez*, 248 F.3d 427, 433 (5th Cir. 2001) (defendant is barred from

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[1] Movant claims" newly discovered evidence" shows the lies he alleges. Movant fails, however, to demonstrate that this evidence was not available previously or how it supports his position. The record clearly shows that the Government made such evidence available prior to trial. Movant refused to look at it or discuss the discovery with his standby counsel. Furthermore, the District Court denied Movant's motion for new trial based on the same argument of "newly discovered evidence" in his motion for new trial. See Cause No. 4:09cr90(2) (Dkt. #168).

[2] The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth amendment does not confer substantive rights. See *Johnson v. Texas Bd. Of Crim. Justice*, 281 F. App'x 319, 320 (5th Cir. 2008).

raising claims in his § 2255 motion that he failed to raise on direct appeal unless he shows cause for the omission and prejudice resulting therefrom); See *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983); *Joseph v. Butler*, 838 F.2d 786, 788 (5th Cir. 1988) (conclusory allegations and bald assertions are insufficient to support the motion). Accordingly, Movant's issues that were brought on appeal or could have been brought on appeal are procedurally barred.

V. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

Movant claims his appointed appellate counsel was ineffective for failing to raise certain issues on direct appeal. 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 v. Washington*, 466 U.S. 668, 687 (1984). In a counseled appeal alter conviction, the key is whether the failure to raise an issue worked to the prejudice of the defendant. *Sharp*, 930 F.2d at 453. This standard has been affirmed by the Supreme Court. See *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that the petitioner must first show that his appellate attorney was objectively unreasonable in failing to find arguable issues to appeal, and also a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief raising these issues, he would have prevailed on his appeal). See also *Williams v. Taylor*, 529 U.S. 362 (2000); *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001).

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

Movant's overriding conclusory complaint is that Counsel was ineffective because he failed to raise issues that brought success on appeal. Federal courts do not "consider a habeas petitioner's bald assertions on a critical issue in his pro se petition ... mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Smallwood v. Johnson*, 73 F.3d 1343, 1351 (5th Cir. 1996) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983)). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d 285, 288 (5th Cir. 1989); *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982).

Movant also complains that the Fifth Circuit declined to address issues not properly briefed by Counsel. Movant fails, however, to show such issues had arguable merit or how those issues would have changed the outcome of his case. Movant fails to show that Counsel's failure to raise a certain issue worked to his prejudice. *Sharp*, 930 F.2d at 453. He complains that the issues Counsel raised were

meritless, although Movant raised some of the same issues in his pro se appellate brief.[3] In sum, Counsel is not required to consult with Movant on issues raised on appeal, and Movant fails to show trial errors with arguable merit that should have been raised on appeal. *Hooks,* 480 F.2d at 1198. Moreover, Movant fails to show that he would have prevailed on appeal had Counsel filed a different brief. *Robbins*, 528 U.S. at 285. This issue is conclusory and meritless.

VI. ACCESS TO EVIDENCE

Movant claims that the Bureau of Prisons impeded his access to evidence for his use during his appeal. The Court first notes that Movant had appointed appellate counsel; thus, he had no need to access legal materials. There is no constitutional right to hybrid representation. See *Mckaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *Myers v. Johnson*, 76 F.3d 1330, 1335 (5th Cir. 1996). Second, Movant's appellate counsel submitted an affidavit (Dkt. #7-6) in which he outlined the level of Movant's involvement in the prosecution of his case. Essentially, Movant participated none at all prior to his conviction. After conviction, Movant and Counsel engaged in numerous phone calls and emails. Counsel visited Movant twice at the prison in Beaumont. During those visits, Counsel saw that Movant had a "microwave-sized box" of documents from the discovery and pretrial process. Movant told Counsel

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[3] Movant's pro se brief was docketed as a "Restricted Document, doc. Number 00513335358" in Movant's appeal in Cause No. 14-40905

he had hired a "think tank of appellate lawyers" on the west coast to assist him with the appellate brief that he, himself was writing. While the details concerning the appeal have been discussed above, the Court notes that Counsel reviewed Movant's list of allegedly withheld evidence. Although he could not recall every item listed, Counsel stated that most of the items on Movant's list were part of the discovery and had been made available to Movant. Counsel said that any claim that these documents were not previously disclosed and/or made available to Movant is untrue.

Finally, Movant raised this same claim during the SEC's administrative hearing process. In response to this claim, SEC senior trial attorney Janie Frank submitted a thorough and extensive thirty-two-page declaration outlining the lengths to which Movant's prison facility went to accommodate Movant in preparation for his SEC hearing. (Dkt. #7-12). In short, the prison allowed Movant to have a dozen or more boxes of records be sent to him, provided a separate room for Movant to work in and store the boxes of records, allowed extra hours of phone calls, and allowed several fellow inmates to assist Movant in his research and preparation The prison accommodated Movant to the extent it possibly could. With few exceptions, the only denials the prison gave to Movant's requests were due to Movant's failure to comply with a set prison policy. In sum, Movant was represented by Counsel on appeal, and he fails to show the Bureau of Prisons obstructed his access to documents; thus, the issue is without merit.

VII. CONCLUSION

Many of Movant's § 2255 claims are procedurally barred because he did not object at trial or bring the issue on appeal. Likewise, issues that were raised on direct appeal may not be re-litigated in the § 2255 motion as they are also procedurally barred. In his ineffective assistance of counsel claims, Movant fails to show there is a reasonable probability that, but for Counsel's alleged unprofessional errors, the result of the proceeding would have been different. He fails to show the Bureau of Prisons obstructed his appeal. In sum, Movant fails to show a violation of a federal constitutional right. *Shaid*, 937 F.2d at 232. Accordingly, Movant's motion should be denied.

VIII. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(C)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. See *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sea 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. McDonnell*, 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 or a constitutional right and that jurists of reason would find it debatable whether the district com was correct in its procedural ruling *Id.*

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

IX. RECOMMENDATION

It is recommended that Movant's motion for relief under 28 U.S.C. § 2255 be **DENIED** and the case be **DISMISSED** with prejudice. It is further

recommended that 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), superseded 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 8th day of September, 2020.

//s//
KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX K

Constitutional & Statutory
Provisions Involved verbatim

See pages App.45-56

UNITED STATES CONSTITUTION
Article I, Section 9, Clause 2
Fifth Amendment Sixth Amendment
Fourteenth Amendment

STATUTES
18 USC § 3632(d)(2) 28 USC § 753
28 USC § 1734 28 USC § 2241 28 USC § 2255
34 USC § 60541(9)

RULES
Rule 36.1, S. Ct.
Rule 5 F. R. Civ. P.
Rule 10 F. R. App. P.
Rule 21 F. R. App. P.
Rule 23(a) F. R. App. P.
Rule 25(4) F. R. App. P.
Rule 41.2 F. R. App. P.
Rule 72(a) F. R. Civ. P.