No. 25-

IN THE

Supreme Court of the United States

MUHAMED PATHE BAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts in every federal district apply Rule 56 to 2255 motions; the application, however, is uneven. In the Second Circuit, the summary-judgment rules do not apply "in their entirety" in habeas proceedings, but in the Fourth and Sixth Circuits the summary-judgment rules apply as in civil cases. Here, a district court in the Fifth Circuit inverted the summary-judgment standard and placed the summary-judgment burden on the nonmovant. Petitioner asks this Court to use this case to define the relationship between Rule 56 and a motion brought under 28 U.S.C. § 2255.

What duties, if any, does an attorney owe his client when counsel is aware the client is acutely mentally ill and that client instructs counsel not to investigate mitigation evidence?

PARTIES TO THE PROCEEDINGS

Petitioner is Muhamed Pathe Bah.

Respondent is the United States of America.

There are no entities required to be identified under Rule 29.6.

RELATED PROCEEDINGS

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

United States v. Muhamed Pathe Bah, No. 24-40672, appeal of denial of certificate of appealability, not reported in Westlaw.

United States v. Bah, No. 21-40712, 2023 WL 2239021, at *1 (5th Cir. Feb. 24, 2023) (direct appeal from conviction).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION:

Bah v. United States, No. 1:23-CV-00166, 2024 WL 4453815, at *1 (S.D. Tex. Oct. 9, 2024) (order denying relief under 28 U.S.C. § 2255).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Muhamed Pathe Bah respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion from the United States Court of Appeals is unpublished. (1a-3a). The district court's opinion is likewise unpublished but available at 2024 WL 4453815. (4a-8a). The magistrate's recommendations that the district court adopted are likewise unpublished. (9a-62a).

JURISDICTION

The court of appeals affirmed the denial of the certificate of appealability on April 16, 2025. (1a-3a). Petitioner filed for reconsideration on April 30, 2025. The panel denied the motion for reconsideration on May 14, 2025. This Court granted Petitioner until September 11, 2025 to file this petition.

STATUTORY PROVISIONS INVOLVED

1. **Rule 81(a)(4) of the Federal Rules of Civil Procedure**: (a) Applicability to Particular Proceedings. . . . (4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings: (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and (B) has

previously conformed to the practice in civil actions.

2. **Rule 56 of the Federal Rules of Civil Procedure**: (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. . . . (c) Procedures. (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. (2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact

cannot be presented in a form that would be admissible in evidence. (3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record. (4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

3. **28 U.S.C. § 2255**: (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed

> was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial.

STATEMENT OF THE CASE

I. Factual Background

This case is an unintended consequence of North Carolina's COVID-19 "stay at home" orders. Exec. Order No. 121, 34 N.C. Reg. 1903 (Mar. 27, 2020); *see N. Carolina Bar & Tavern Ass'n v. Stein*, __ S.E.2d __, No. 126PA24, 2025 WL 2427604, at *2 (N.C. Aug. 22, 2025) (discussing orders). These orders indirectly forced the closure of the clinic that treated Mr. Bah for schizophrenia. When Mr. Bah stopped receiving treatment, he left his family in North Carolina for Harlingen, Texas. Within forty-five days of being in Texas Mr. Bah robbed a bank and tried to escape on a gold-Huffy bicycle. The police arrested Mr. Bah immediately and he admitted to the offense; the only question was the sentence. The district court imposed a life sentence followed by a sentence of three-hundred months.

Mr. Bah's story, however, begins as an ordinary child in North Carolina. But, between his seventeenth and eighteenth birthdays, he began to suffer from schizophrenia. As a result of the schizophrenia, between

2012 and 2019 North Carolina courts involuntarily committed Mr. Bah to mental health treatment at least six times.

In March 2019, a North Carolina court ordered Mr. Bah to enter an in-patient treatment program at Behavior Health in Charlotte. The clinic provided Mr. Bah schizophrenia medication. The medications, in particular an extended-release injection, alleviated the severe symptoms of Mr. Bah's schizophrenia. After Mr. Bah's release, he continued to receive the monthly injections until Behavioral Health shut down due to the COVID-19 "stay at home orders." Two months after his last injection, Mr. Bah's symptoms returned and he moved to Harlingen, Texas. At the time of his move—about a month before the offense—Mr. Bah had almost no money and knew no one in Harlingen, yet he moved fifteen hundred miles from his family (who provided his financial support) for a "lower cost of living."

One week after Mr. Bah moved to Harlingen, and two-to-three weeks before the offense, Mr. Bah's family, who had not heard from him and who were concerned about the deterioration of Mr. Bah's mental health, contacted the Harlingen Police Department, and requested a welfare check on Mr. Bah. The welfare check took place on June 22, 2020 (only four days before the offense). Lamentably, the police could not contact Mr. Bah.

On June 26, 2020, Mr. Bah—equipped to escape with a gold-Huffy bicycle—robbed Texas Regional Bank in Harlingen and in the process he shot a teller (the teller lived and did not require overnight care in the hospital). Almost immediately after Mr. Bah left the bank on the

bicycle, the police arrested him.

Mr. Bah admitted to the offense and the only question was the nature and duration of the sentence.

The PSR tangentially mentioned Bah's mental health problems. The PSR informed the district court:

- The "Mental and Emotional Health" section of the PSR simply states Mr. Bah's diagnosis "with minor schizophrenia" and "recommended that he participate in mental health assessment and treatment while incarcerated."

- The PSR briefly mentioned Mr. Bah's "in-patient treatment for 18 months at the Behavior Health Center in 2020, because he was having psychosis episodes."

- The PSR mentioned Dr. Thomas Gonzalez, a psychiatrist, on February 22, 2021, saw Mr. Bah through Telehealth while he was in Cameron County Detention Center in Brownsville, Texas, but "did not give any recommendations regarding diagnosis or medication."

When the district court asked counsel about Applicant's mental health disorders, counsel theorized: "I think a root to Mr. Bah's conduct is that it–it strongly appears that Mr. Bah suffers from some type of psychological disorder," and reported that the "conduct [wa]s consistent of somebody that—that had—there's a disorder," and feebly concluded "there's something wrong, to be quite honest."

The district court sentenced Bah to three-hundred months and to life and ordered the sentences to be served consecutively.

Bah appealed the reasonableness of the sentence but the Fifth Circuit affirmed. Bah then challenged the conviction under 28 U.S.C. § 2255. The magistrate held an in-person evidentiary hearing. The magistrate recommended denying relief; the district court affirmed and denied a certificate of appealability; and the Fifth Circuit affirmed the denial of the certificate of appealability and rejected Bah's request for rehearing.

REASONS TO GRANT THE PETITION

I. Circuits Apply Rule 56 and its Precedent Unevenly to motions under 28 U.S.C. § 2255. This case provides apt facts to clarify the relationship between Rule 56 and 28 U.S.C. § 2255.

> "Because of differences between habeas corpus proceedings and other civil proceedings, however, the Second Circuit has determined, persuasively, that Federal Rule of Civil Procedure 56 does not apply in its entirety in the habeas context."

Hervis v. United States, No. CIV. 09-CV-158-JD, 2010 WL 411233, at *2 (D.N.H. Jan. 28, 2010).

A. The district court's reasoning makes this an apt case to resolve the uneven application of Rule 56 to 2255 proceedings.

This Court is aware that the district courts, circuit courts, and even this Court face an annual avalanche of 2255 filings—many filed pro se. Rule 56 provides a convenient tool to resolve many of these cases, yet the application of Rule 56 to these thousands of annual filings is uneven. This is an apposite case to establish uniformity because here the district court placed the summary-judgment burden on Mr. Bah, the nonmovant.

Here the district court claimed to apply the traditional summary-judgment standard under Rule 56. Yet, the magistrate's opinion, adopted by the district court, concluded "Bah has failed to meet *his* burden to prove that Counsel's performance was deficient or that he was prejudiced. The undersigned recommends that the Court grant the Government summary judgment on Bah's claims for ineffective assistance of counsel's alleged failure to investigate or present mitigation evidence." (34a). (emphasis added).

The standard applied by the district court placed the burden on Bah—the nonmovant on summary judgment—to "prove" he was entitled to relief. (34a).

In a 2255 motion, the ultimate burden rests with the movant. *See*, *e.g.*, *In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016) (collecting cases). That fact does not distinguish 2255 motions from most civil cases. *See*, *e.g.*, *Sweeney v. Erving*, 228 U.S. 233, 237, 33 S. Ct. 416, 417, 57 L. Ed. 815 (1913) ("The trial judge refused this request, and, on the

contrary, instructed the jury: 'That the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray.'").

In a traditional civil case, the defendant can move for summary judgment, but the *defendant* has the burden to establish there is no genuine issue of material fact. *See*, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986) ("The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact.").

Under Rule 12 of the Rules Governing Section 2255 cases, the "Federal Rules of Civil Procedure . . . to the extent they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Rules Governing § 2254 and § 2255 Proceedings, Rule 12.

In this case the district court—in adopting the magistrate's recommendations—inverted the summary-judgment standard and required Bah to "prove" he was entitled to relief to survive summary judgment. (34a).

B. The circuits apply Rule 56 unevenly.

Most circuits, including the circuit in this case, claim to apply summary judgment to 2255 motions without amendment. *See*, *e.g.*, *United States v. White*, 366 F.3d 291, 300–01 (4th Cir. 2004) (" . . . a court may grant summary judgment only when 'there is no genuine issue as to any

material fact and . . . the moving party is entitled to judgment as a matter of law,' Fed. R. Civ. P. 56(c), with 'any permissible inferences . . . drawn from the underlying facts to be viewed in the light most favorable to the party opposing the motion.'"); *See United States v. Boyd*, No. 04-80391, 2011 WL 318098, at *1 (E.D. Mich. Jan. 31, 2011) (denying summary judgment in 2255 motion on standard grounds under Rule 56); *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995).

Other circuits find the straightforward application of Rule 56 to 2255 motions ungainly. *See Puglisi v. United States*, 586 F.3d 209, 214 (2d Cir. 2009).

In *Puglisi*, the Second Circuit explained:

- There is no discovery in summary judgment in a 2255 so "a petitioner may need only to identify available sources of relevant evidence rather than obtain it as in civil cases or seek a discovery order from the court under Rule 6 of the Rules Governing Section 2255 Proceedings."
- "[A] district court need not assume the credibility of factual assertions, as it would in civil cases, where the assertions are contradicted by the record in the underlying proceeding."
- The district court can make credibility determinations (and therefore abandon the normal summary-judgment standard)—especially if the judge that heard the case is presiding over the 2255 proceedings.

Id. at 213–14; *see also United States v. Aguiar*, 105 F. Supp. 3d 1, 3 (D.D.C. 2015) ("[t]he procedure for determining whether a hearing [on a § 2255 motion] is necessary is in

part analogous to, but in part different from, a summary judgment proceeding."); *Hervis v. United States*, No. CIV. 09-CV-158-JD, 2010 WL 411233, at *2 (D.N.H. Jan. 28, 2010) ("Because of differences between habeas corpus proceedings and other civil proceedings, however, the Second Circuit has determined, persuasively, that Federal Rule of Civil Procedure 56 does not apply in its entirety in the habeas context.").

This case asks this Court to clarify the relationship between Rule 56 and the thousands of 2255 motions filed annually. Defining the relationship between Rule 56 and 2255 motions will affect thousands of cases every year and set precedent for decades.

This is an apt case for this Court to clarify the application of the rules of summary judgment to motions brought under 28 U.S.C. § 2255 because here the district court placed the summary-judgment burden on the nonmovant to "prove" he was entitled to his requested relief. (34a). This is a recurrent problem faced by all district courts each week.

II. Does an Attorney Owe a Mentally Ill Client a Duty to Investigate Even if the Mentally Ill Client Instructs the Attorney Not to Investigate? Does *Landrigan* apply?

Statistics vary but generally agree that between a quarter and a half of all federal inmates have a history of mental illness. This case presents the question of whether an attorney has a duty to investigate mitigation evidence even if a competent but mentally ill client instructs counsel not to do so.

A doctor found Mr. Bah competent but there was no question he suffered from mental impairment during the period of representation. While suffering from mental impairment Mr. Bah told his attorney not to investigate mitigation evidence. The attorney followed this instruction and did not do a meaningful investigation into mitigation evidence.

This case asks whether an attorney has a duty to investigate potential mitigation evidence if his client is mentally ill and instructs counsel not to investigate any mitigation evidence.

This Court has recognized a generalized duty to investigate mitigation evidence in capital and noncapital cases. *See Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003) ("counsel has 'a duty to make reasonable investigations" of potential mitigating evidence or "to make a reasonable decision that makes particular investigations unnecessary.'").

A sub-set of cases, sometimes called affirmative-instruction cases, like this one, present a muddle. When an attorney represents a mentally ill defendant, does the attorney, even in the face of an affirmative instruction to the contrary, have a duty to investigate mitigation evidence?

This question begins with this Court's opinion in *Schriro*, which holds that when a defendant refused to allow the presentation of any mitigating evidence that the defendant "could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." *Schriro v. Landrigan*, 550 U.S. 465, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

Since *Schriro*, courts have cabined it to instances when the defendant "threaten[ed] to obstruct the presentation of any mitigating evidence." *See Hamilton v. Ayers*, 583 F.3d 1100, 1119 (9th Cir. 2009); *Stankewitz v. Wong*, 698 F.3d 1163, 1170 n.2 (9th Cir. 2012) (concluding that *Schriro* did not apply because the defendant "did not interrupt or try to sabotage trial counsel's presentation").

Schriro provides direction but does not answer the question of whether an attorney who represents a mentally ill client has an obligation to that client—even in the face of an affirmative instruction to the contrary—to investigate mitigation evidence.

In the absence of direction from this Court, circuits have opined on counsel's duty to a mentally impaired or challenged (although competent) client.

In the Eleventh Circuit, counsel cannot "blindly follow" a client's instructions not to investigate or present mitigation evidence, especially when the client may have a mental impairment that prevents proper judgment. *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1358 (11th Cir. 2009).

In the Ninth Circuit, a client may direct his attorney not to conduct a mitigation investigation, but that instruction does not relieve counsel of the obligation to investigate. "[A] lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes." *Silva v. Woodford*, 279 F.3d 825, 840 (9th Cir. 2002); *Summerlin v. Schriro*, 427 F.3d 623, 638 (9th Cir. 2005); *see also Andrews v. Davis*, 944 F.3d 1092, 1111 (9th Cir. 2019) ("A client may be 'fatalistic or uncooperative, but that

does not obviate the need for defense counsel to conduct some sort of mitigation investigation.'" (quoting *Porter v. McCollum*, 558 U.S. 30, 40, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009)). While this rule does not address mentally ill clients specifically, there is no reason that mentally ill or mentally impaired clients would be exempt from this broad mandate.

In the Fifth Circuit, however, a defendant can interfere with his attorney's duty to investigate and render the attorney immune from attack for a failure to investigate. (31a). *See Shore v. Davis*, 845 F.3d 627, 633 (5th Cir. 2017) (per curiam) ("A defendant cannot raise a *Strickland* claim based on counsel's compliance with his instructions."). This case relied on *Shore* to find that trial counsel was constitutionally effective. (31a).

Shore relied on Fifth Circuit precedent that predated *Schriro* to hold that an instruction not to investigate forever insulates an attorney from a claim of ineffective assistance of counsel for failing to investigate. *Shore* cited:

- *United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990) ("[A defendant cannot] avoid conviction on the ground that his lawyer did exactly what he asked him to do.").

- *Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984) ("By no measure can [a defendant] block his lawyer's efforts and later claim the resulting performance was constitutionally deficient."). And,

- *Sonnier v. Quarterman*, 476 F.3d 349, 362 (5th Cir. 2007).

This case is an apt case to decide whether counsel owes a mentally impaired or mentally ill client a duty to investigate even if that client instructs the attorney not to do the investigation.

As the magistrate explained, Mr. Bah' attorney argued during sentencing:

> (1) other than a misdemeanor offense five years prior, Bah had no criminal record beyond traffic violations;
>
> (2) while Bah fired his weapon, he only did so once, sparing the remaining individuals at the bank;
>
> (3) Bah did not resist arrest when he was ultimately apprehended;
>
> (4) "a root to Mr. Bah's conduct is that . . . it strongly appears that Mr. Bah suffers from some type of psychological disorder," indeed, "the PSR clearly reflects that . . . Mr. Bah was committed into a mental institution back in North Carolina";
>
> (5) Dr. Gonzalez "did not find any evidence of schizophrenia," but Bah's conduct during his legal proceedings was erratic and "consistent of somebody" with a disorder—hiring and firing his attorneys and waffling on whether to represent himself pro se multiple times; and

> (6) that Counsel spoke with Bah "quite a bit . . . and there's . . . something wrong."

(47a).

As the magistrate noted, "Bah instructed [Counsel] not to contact his family, precluding [Counsel] from developing additional mitigation evidence." (31a).

This case asks whether the Eleventh Circuit and the Ninth Circuit are correct, and that Mr. Bah's counsel had a duty to investigate the medical records from the seven involuntary commitments, to speak with Mr. Bah's family about Mr. Bah's illness, and to investigate the magnitude of Mr. Bah's mental health problems. Or whether the district court was correct and, while counsel recognized there was "something wrong" with Mr. Bah, counsel was free to blindly follow Mr. Bah's instructions not to investigate mitigation evidence?

The answer to this question will have immediate effects on the criminal practice in nearly every circuit.

Applicant asks this Court to grant this petition and to decide whether an attorney has a duty to investigate mitigation evidence even if his mentally ill client instructs him not to do so. This question need not reach all defendants and instead asks whether an attorney can decide not to investigate mitigation evidence based on the instruction of a client known to be mentally ill.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 10, 2025

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APPENDIX C — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION, FILED AUGUST 26, 2024 . . . . . 9a

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40672

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MUHAMED PATHE BAH,

Defendant-Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 1:23-CV-166
USDC No. 1:20-CR-433-1

ORDER:

Muhamed Pathe Bah, federal prisoner # 17991-579, moves for a certificate of appealability (COA) to challenge the dismissal of his 28 U.S.C. § 2255 motion. Bah filed the § 2255 motion to challenge his consecutive sentences of 300 months of imprisonment and life imprisonment, which were imposed following his guilty plea convictions of bank robbery with a dangerous weapon and use of a firearm during a crime of violence.

Appendix A

As an initial matter, Bah, who is represented by counsel, does not reprise his claims of ineffective assistance of trial counsel based on failure to present all formal plea offers and failure to raise objections to the presentence report. By failing to brief these claims, Bah has abandoned them. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Bah renews his claim that his trial counsel was ineffective for failing to investigate his mental health problems and present mitigating evidence related to the mental health issues at sentencing. Bah contends that reasonable jurists could debate both the district court's determination that his trial counsel did not perform deficiently and the determination that, even if counsel's performance was deficient, he had not established prejudice.

To obtain a COA, Bah must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When, as here, a district court has denied a claim on the merits, a movant must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (internal quotation marks and citation omitted); *see Slack*, 529 U.S. at 484.

Because Bah fails to make the requisite showing, his request for a COA is DENIED.

Appendix A

/s/James E. Graves, Jr.
JAMES E. GRAVES
United States Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION, FILED OCTOBER 9, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:23-cv-00166

MUHAMED PATHE BAH,
"Petitioner,"

v.

UNITED STATES OF AMERICA,
"The Government."

ORDER

Before the Court is the "Magistrate Judge's Report and Recommendation" ("R&R") (Dkt. No. 48) and Petitioner's "Objections to Magistrate Judge's R&R" ("Objections") (Dkt. No. 49). The Magistrate recommended that this Court: "(1) **GRANT** the Government's Motion for Summary Judgment on Bah's first and second claims; (2) **DISMISS** all three of Bah's claims; (3) **DECLINE** to issue a certificate of appealability; and (4) **DIRECT** the Clerk of Court to close this case" Dkt. No. 48. Upon a de novo review, the Court **ADOPTS** the R&R (Dkt. No. 48).

Appendix B

I. BACKGROUND

On June 26, 2020, Petitioner robbed a bank in Harlingen, Texas, during which he shot a bank teller in the head. Dkt. No. 4 at 8-9. Later, a grand jury indicted Petitioner on one count of robbery in violation of 18 U.S.C. § 2113(a) and (d) ("Count One") and one count of use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) ("Count Two"). Dkt. No. 3 at 97. Ultimately, this Court sentenced Petitioner to twenty-five years' incarceration on Count One and life imprisonment on Count Two. CR Dkt. No. 80 at 24-25.[1]

Now seeking habeas relief, Petitioner claims he received ineffective assistance of counsel during his sentencing. Dkt. No. 3 at 2-3. He argues that his counsel failed: (1) "to present mitigating evidence to explain Bah's history of mental illness"; (2) "to object to make fundamental objections to . . . Bah's case"; and (3) "to present all formal plea offers." *Id.*

II. STANDARD OF REVIEW

If a party objects to a magistrate's ruling, the district court will review that determination de novo. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

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1. The Court references the docket in this § 2255 action using the "Dkt." designation. The Court references the docket in Petitioner's underlying criminal cause, No. 1:20-cr-00433-1, using the "CR Dkt." designation.

III. DISCUSSION

Petitioner first objects to the Magistrate's finding that "Bah's family members reached out to Counsel to be involved in and *to request notice of Bah's sentencing date*." Dkt. No. 48 at 10 (emphasis added). Upon review of the record, this Court finds that Petitioner's family tried to contact counsel to get involved with Petitioner's case but agrees that it is unclear whether they also requested notice of his sentencing date.[2] Thus, Objection One is **SUSTAINED**.

Petitioner next objects to the Magistrate's finding that "the Court possessed the PSR, which included, among other things, information gleaned from *interviews with Bah's mother* and sister summarizing Bah's mental health history." Dkt. No. 48 at 19 (emphasis added). Petitioner claims there is error as Probation never received mental health information from Petitioner's mother. Yet the PSR states that his "personal and family history was corroborated by... his mother, Satoumata Binta Miller, on August 5, 2021, via a telephonic interview." Dkt. No. 4, at 19 ¶ 67. Thus, the Court finds no error. Objection Two is **OVERRULED**.

Petitioner's third Objection is that the Magistrate erroneously applied a summary judgment standard to a § 2255 habeas action. Dkt. No. 49 at 2. As Petitioner notes, however, the Fifth Circuit approves the use of summary judgment for these types of cases. *Randle v. Scott*, 43 F.3d 221, 226 (5th Cir. 1995). Thus, the Court finds no error. Objection Three is **OVERRULED**.

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2. The Court notes this for the sake of an accurate record. This finding does not change the Court's final judgment.

Petitioner's fourth Objection relies on a finding that the Magistrate erred with Objection Three. The Court found no error. Objection Four is **OVERRULED**.

Petitioner's next objection is that the Magistrate erred when granting summary judgment on his first ineffective assistance claim because "there is a genuine issue of material fact about whether trial counsel was *deficient* for failing to investigate... mitigation evidence." Dkt. No 49 at 4 (emphasis added). Petitioner misstates the standard though because whether counsel performance is deficient is a legal determination, not an issue of fact. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Moreover, the underlying material facts that the Magistrate considered in making this determination were undisputed. Finding no error with the Magistrate's analysis, Objection Five is **OVERRULED**.

Objection Six is **OVERRULED**; it merely reiterates the same argument related to Petitioner's second and third ineffective assistance claims.

After reviewing the evidence, the Magistrate found that Petitioner failed to make a "substantial showing of denial" of his right to effective assistance of counsel, which is required to issue such a certificate. *See generally* Dkt. No. 48; *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Objection Seven is **OVERRULED** because "reasonable jurists" would agree that the Magistrate carefully analyzed that Petitioner's counsel's performance was reasonable. *See Miller-El*, 537 U.S. at 336 (citing standard for certificate of appealability).

Petitioner's eighth Objection is that the Magistrate misapplied the standard governing the reasonableness of Petitioner's counsel's performance. Dkt. No. 49 at 7. Specifically, Petitioner argues that the Magistrate did not properly hold Petitioner's previous counsel to their duty of investigating mitigating evidence. *Id.* Upon a de novo review, the Court finds no error with either counsel or the Magistrate's application of law. Objection Eight is **OVERRULED**.

IV. CONCLUSION

For these reasons, Petitioner's Objections (Dkt. No. 49) are **OVERRULED (except for Objection 1, which does not affect this order)**. The R&R (Dkt. No. 48) is **ADOPTED**. The Court **GRANTS** the Government's "Motion for Summary Judgment and Response" (Dkt. No. 16) as to Petitioner's first and second claims and **DISMISSES with prejudice** all three of his claims. A certificate of appealability is **DENIED**, and the Clerk of the Court is **ORDERED** to close this case.

Signed on this 9th day of October, 2024.

/s/ Rolando Olvera
Rolando Olvera
United States District Judge

APPENDIX C — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION, FILED AUGUST 26, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. 1:23-cv-166

MUHAMED PATHE BAH,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Muhamed Pathe Bah moves under 28 U.S.C. § 2255 to vacate, set aside, or correct his federal sentence, arguing in three claims that he received ineffective assistance of counsel at trial. Dkt. Nos. 1, 3 (collectively, Bah's "Motion"). The United States of America ("the Government") responded and moved for summary judgment, asserting that Bah has failed to meet his burden to prove ineffective assistance of counsel. Dkt. No. 16.[1] For

1. The Court references the docket in this § 2255 action using the "Dkt." designation. The Court references the docket in Bah's underlying criminal cause, No. 1:20-cr-00433-1, using the "CR Dkt." designation.

the reasons provided below, the undersigned recommends that the Court: (1) **GRANT** the Government's Motion for Summary Judgment on Bah's first and second claims; (2) **DISMISS** all three of Bah's claims; (3) **DECLINE** to issue a certificate of appealability; and (4) **DIRECT** the Clerk of Court to close this case.

I. Jurisdiction

The Court has federal question subject matter jurisdiction. *See* 28 U.S.C. §§ 1331, 2255.

II. Background & Procedural History

On June 26, 2020, Bah robbed the Texas Regional Bank in Harlingen, Texas. Dkt. No. 4 at 8. During the robbery, Bah fired one shot, which hit a bank teller in the head—the teller fell to the ground bleeding, felt a burning sensation, and temporarily lost his hearing.[2] *Id.* at 8-9, 12. Bah then aimed his gun at a second teller and demanded money; the second teller obliged, filling Bah's backpack with greenbacks.[3] *Id.* at 9-10. Bah fled on his bicycle only to be apprehended by police soon after. *Id.* at 9. Police found on Bah a ten-shot, .22 caliber revolver and

2. The teller was taken to the hospital for various tests and treatments, ultimately receiving over a dozen staples in his scalp. CR Dkt. No. 63 at 2.

3. As a result of the robbery, the second teller spent a day in the hospital, noting that she could not breathe, she felt her heart beating very fast, and she thought she would pass out or suffer a heart attack. *Id.* at 14.

a backpack containing stacks of currency totaling $16,500. *Id.* at 9, 11. They retrieved surveillance footage from the bank showing the robbery. *Id.* at 9.

Police transported Bah to the police station where they tested his hands for gunshot residue, got a positive result, and discovered nine rounds and one spent bullet casing loaded in Bah's revolver. *Id.* at 10-11. The police read Bah his *Miranda* rights, and Bah admitted that he entered the bank with the gun but did not remember firing it. *Id.* at 11.

On July 21, 2020, a grand jury indicted Bah on one count of robbery in violation of 18 U.S.C. § 2113(a) and (d) ("Count One") and one count of use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) ("Count Two"). Dkt. No. 3 at 97. In October 2020, at Bah's initial appearance, the Court appointed the Federal Public Defender to represent Bah. CR Dkt. (October 5, 2020 Minute Entry). At his arraignment in November 2020, Bah informed the Court that he desired to proceed pro se. CR Dkt. (November 2, 2020 Minute Entry). The Court warned Bah that proceeding pro se is inadvisable and then discharged the Federal Public Defender from the case. *Id.* At a final pretrial conference on December 2, 2020, Bah confirmed his desire to proceed pro se and announced ready for trial. CR Dkt. No. 77 at 5. The Government expressed concern over Bah's proceeding pro se given, among other things, his prior schizophrenia diagnosis. *Id.* at 5-7. It urged that "given the seriousness and potential punishment range for this case," and because "Bah indicated that he had been diagnosed with

schizophrenia at one point," which "may be something that could feed into [his] election [to proceed pro se] . . . it would behoove us all" to have an attorney interview Bah to ensure his desire to proceed pro se. *Id.* at 7, 14. The Court warned Bah a second time about proceeding pro se and appointed a Criminal Justice Act Panel attorney ("Counsel") as standby trial counsel to assist Bah.[4] *Id.* at 7-8, 15-16.

On December 4, 2020, though ostensibly still on standby status, Counsel moved to evaluate Bah's competency, informing the Court in part that:

> During the attorney-client interview, [Bah] appeared to have a psychological illness and it appears to [C]ounsel that [Bah] may presently be suffering from a mental disease or defect to the extent that he is unable to understand the nature and the consequences of the proceedings against him or properly assist in his defense . . . [and] is unable to understand the nature and the consequences of his conduct with respect to the charges filed against him.

CR Dkt. No. 25 at 1. The Court granted the motion (CR Dkt. No. 29), and psychiatrist Dr. Tomas A. Gonzalez

4. As described in more detail below, throughout this case, Counsel shifted on Bah's request from standby status to counsel of record then back to standby status and then to counsel of record once more. The undersigned refers to Bah's trial counsel as "Counsel" throughout this Report and Recommendation irrespective of Counsel's status at any one point.

examined Bah and submitted a report containing his findings (CR Dkt. No. 33).

Among other things, Dr. Gonzalez's report describes the "current status" of Bah's mental health, Bah's "past medical history," and Bah's "legal history." CR Dkt. No. 33 at 2-3. The report lists that: (1) Bah's family committed him to certain psychiatric hospitals eight times from 2012 through 2019; (2) Bah received medication for his mental health; (3) Police arrested Bah in 2016 for assaulting a government official; and (4) Bah claims he is schizophrenic, but he was not presenting signs or symptoms of schizophrenia during the exam. *Id.* at 3-4. Based on his examination, Dr. Gonzalez concluded that Bah was competent to stand trial and assist in his defense. *Id.*

At a status conference in March 2021, Bah indicated that he no longer desired to proceed pro se, and the Court designated Counsel as Bah's counsel of record. CR Dkt. (March 24, 2021 Minute Entry). In April 2021, Bah once again desired to proceed pro se. CR Dkt. (April 21, 2021 Minute Entry); Dkt. No. 16-1 at 3. The Court again designated Counsel as standby counsel and set the trial date for June 28, 2021. CR Dkt. (April 21, 2021 Minute Entry); Dkt. No. 16-1 at 3. On June 25, 2021, Bah changed his mind once more and requested that Counsel be reappointed counsel of record, and the Court granted that request. Dkt. Nos. 3 at 79-80, 16-1 at 3-4.

On June 28, 2021, Bah entered an open plea of guilty on both counts alleged in the indictment, which the

Court accepted. Dkt. No. 3 at 89. The Court ordered a presentence investigation report ("PSR") and scheduled sentencing for September 22, 2021. *Id.* at 92-93. The United States Probation Office filed the PSR on September 21, 2021. Dkt. No. 4 at 6. The PSR summarized the facts of the case, including that Bah had been diagnosed as schizophrenic and committed for treatment; described the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines") offense level computation; and concluded that the guidelines range for Count One was fifty-one to sixty-three months' imprisonment, and the mandatory minimum term on Count Two was a consecutive, ten-year term of imprisonment. Dkt. No. 4 at 20-21. Further, the PSR stated that the statutory maximum punishment on Count One was twenty-five years' imprisonment, and life imprisonment on Count Two. *Id.*

On September 22, 2021, the Court held Bah's sentencing hearing. CR Dkt. No. 80. Neither party objected to the PSR. *Id.* at 2-3. The Government sought consecutive punishment in the form of twenty-five years' (300 months') incarceration on both counts, constituting an upward departure or variance from the Guidelines range of a combined 171-183 months. *Id.* at 6-9. Ultimately, the Court sentenced Bah to twenty-five years' incarceration on Count One and life imprisonment on Count Two—both the statutory maximums. *Id.* at 24-25. Bah appealed his sentence, challenging the Court's upward variances on both counts; the Fifth Circuit affirmed Bah's sentence as to both counts. *United States v. Bah*, No. 21-40712, 2023 U.S. App. LEXIS 4682, 2023 WL 2239021, at *4 (5th Cir. Feb. 24, 2023) (per curiam).

On November 13, 2023, Bah filed his instant Motion arguing that he received ineffective assistance of counsel during sentencing when Counsel failed: (1) "to present mitigating evidence to explain Bah's history of mental illness and schizophrenia diagnosis"; (2) "to object to make fundamental objections to . . . Bah's case"; and (3) "to present all formal plea offers by the United States to . . . Bah" when "there [was] a reasonable probability [Bah] would have accepted an earlier plea offer had he been afforded effective assistance of counsel." Dkt. No. 3 at 2-3. Bah advances multiple arguments within each of the three listed grounds for ineffective assistance of counsel. For clarity, the Court will list additional facts pertinent to its analysis when addressing each issue below.

On January 25, 2024, the Government responded to Bah's Motion and moved for summary judgment. Dkt. No. 16. Bah replied on February 13, 2024. Dkt. No. 22. The Government filed its surreply on February 29, 2024. Dkt. No. 24. And Bah filed his sur-surreply on March 6, 2024. Dkt. No. 28. On August 2, 2024, the Court held an evidentiary hearing limited to Bah's third issue concerning plea offers. Dkt. (August 2, 2024 Minute Entry). Bah's Motion is now ripe for consideration.

III. Legal Standard

A. 28 U.S.C. § 2255

Postconviction relief under 28 U.S.C. § 2255 is limited to errors of constitutional dimension that could not have been raised on direct appeal and that, if left unaddressed,

would result in a complete miscarriage of justice. *See United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *see also United States v. Rodriguez-Castro*, 814 F. App'x 835, 837-38 (5th Cir. 2020) (per curiam). Given these limitations, a federal defendant may move to vacate, set aside, or correct his sentence under § 2255 only if: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court lacked jurisdiction to impose the sentence; (3) the sentence imposed exceeds the statutory maximum; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

B. Summary Judgment Standard

The standard applied when ruling on a motion for summary judgment is set forth in Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56(a). In pertinent part, Rule 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (same). When considering a motion for summary judgment, the court must view the evidence and "construe all facts and inferences in the light most favorable to the nonmoving party." *Valderas v. City of Lubbock*, 937 F.3d 384, 388, 774 Fed. Appx. 173 (5th Cir. 2019) (per curiam). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine [dispute] of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007). "A fact is material if its resolution could affect the outcome

of the action." *Dyer v. Houston*, 964 F.3d 374, 379 (5th Cir. 2020) (cleaned up). "A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018) (per curiam) (cleaned up). In the context of habeas petitions, the Federal Rules of Civil Procedure apply to the extent that they do not conflict with the Rules Governing § 2255 Proceedings. Rule 12, Rules Governing § 2255 Proceedings; *see also* Fed. R. Civ. P. 81(a)(4).

C. Ineffective Assistance of Counsel

The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings" instituted against him. *Missouri v. Frye*, 566 U.S. 134, 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (citing *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009)). Critical stages include trial and pretrial proceedings—including the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing is also constitutionally impermissible. *Id.* at 164-65.

Whether a criminal defendant has been denied effective assistance of counsel is governed by *Strickland v. Washington*'s two-part inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious

> that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate that an attorney's performance was constitutionally deficient, a defendant bears the burden to prove that his counsel's representation "fell below an objective standard of reasonableness." *Id.* at 687-88. In reviewing counsel's performance, the Court must be "highly deferential," making every effort "to eliminate the distorting effects of hindsight," and must "indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689. To establish prejudice, the convicted defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.*

IV. ANALYSIS

Bah contends that Counsel provided ineffective assistance of counsel during sentencing for three reasons. Dkt. No. 3 at 2-3. The Court addresses each contention in turn.

Appendix C

(1) Failure to Present Mitigation Evidence

The bulk of the parties' briefing addresses Bah's first claim, in which he asserts that his "[t]rial counsel was constitutionally ineffective for failing to present mitigating evidence to explain Bah's history of mental illness and schizophrenia diagnosis." Dkt. No. 3 at 12. Counsel "failed him," Bah continues, "by not presenting all arguments or evidence to help in reaching a fair and just sentence, not gathering and submitting as much mitigating information relevant to sentencing as reasonabl[y] possible, and by not independently investigating the facts relevant to sentencing and simply relying on the presentence investigation report ('PSR')." *Id.* at 13. Bah claims that the PSR merely "touched on [his] history of mental disorders," including a diagnosis for "minor schizophrenia" and inpatient treatment for psychosis episodes, when, in fact, there were considerable other mental health-related narratives that should have been raised. *Id.* at 13-14.

Bah provides affidavits in support of his Motion from his three siblings and his mother, who live in North Carolina, cataloguing his mental health history. *Id.* at 154-57, 313-24. Each relative testified that Bah's behavior changed at around age seventeen from a happy, active, and hygienic kid who was a good student and enjoyed school, to a kid who dropped out of school, stopped brushing his teeth, shaved his head, stayed in his room with the lights off, and laughed and talked to himself. *See generally id.* at 154-57, 313-24. His family members aver that they moved on multiple occasions to involuntarily commit Bah to a behavioral health facility, and that a judge signed orders of involuntary commitment. *See generally id.* at 154-57, 313-

24. They state that Bah was diagnosed with schizophrenia and began receiving medication in the form of a pill and a monthly injection. *Id.* at 318. His family contends that with medication, Bah began acting like himself again. *Id.* He eventually switched from inpatient to outpatient care. *Id.* at 156. In 2020, the facility at which Bah received treatment closed due to COVID-19, purportedly leaving Bah without the ability to refill his prescription or receive his monthly shots. *Id.* Consequently, Bah's mental health deteriorated. *Id.*

At some point in early 2020, Bah learned that Harlingen has a "low cost of living." *Id.* Within two days of that discovery, he drove to Harlingen from his home in North Carolina. *Id.* About two days after that, Bah "became unreachable." *Id.* On June 22, 2020, Bah's sister called the Harlingen police department to request a welfare check of her brother. *Id.* at 318-19. When authorities arrived at his rental house, Bah was nowhere to be found. *Id.* Four days later, Bah walked into the Texas Regional Bank, shot a teller, and made off with $16,500. *Id.* at 319.

Bah's family members assert that they reached out to Counsel to be involved in Bah's case and to request notice of Bah's sentencing date. Dkt. No. 3 at 319. However, according to the family, when they called Counsel, he "was uninterested in speaking with" them and "told [them] to never call him again." *Id.* at 323. Each family member affirmed that they were available and would have testified for Bah at his sentencing hearing on June 28, 2021. *Id.* at 157, 315, 319, 323.

Appendix C

Bah also provides the Court with "seven years' worth of involuntary commitment and mental health records," from September 2012 through July 2019, from "the North Carolina Court system." Dkt. No. 3 at 27-35, 159-252. Among other facts, the records show that:

> In September 2012, Bah's family brought him to the hospital because he was talking about messages from the TV, he exhibited aggressive behavior toward his siblings, and he withdrew "from all friends/activities." *Id.* at 172. Bah also scratched his mother on the way to the emergency room. *Id.* A doctor deemed Bah mentally ill and a danger to himself or others. *Id.* The Doctor also noted that Bah was hallucinating and acted aggressively toward his family. *Id.* Bah was committed for thirty days. *Id.*

> In January 2013, a doctor at the behavioral health center determined that Bah appeared paranoid and recommended inpatient commitment for fourteen days to prevent harm to Bah and others. *Id.* at 184-88. Doctors believed that Bah was exhibiting signs of schizophrenia. *Id.* at 184-85. A North Carolina court determined that Bah should be committed to a mental health hospital. *Id.* at 190.

> In May 2016, Bah was again involuntarily committed after the North Carolina state

court found him to be "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." *Id.* at 198. The commitment stemmed from a few incidents during which Bah became aggressive toward his family members, threatened his family members, ransacked his bedroom, punched a hole in the wall, did not talk to anybody for days, and shaved his head until it started bleeding. *Id.* at 200.

> In March 2019, Bah was again committed to a mental health facility after his family found him aimlessly wandering the streets, covered in gasoline, and carrying a gasoline canister. *Id.* at 240. The commitment order states that he held a schizophrenia diagnosis. *Id.* Bah's family provides a video clip of the incident. *Id.* at 273.

Bah contends that Counsel's failure to present the mitigating evidence resulted in a sentence that "unreasonably fails to reflect the statutory sentencing factors in 18 U.S.C. § 3553(a)." *Id.* at 36; *see* 28 U.S.C. § 3553(a) ("Factors to be considered in imposing a sentence.").

The Government responds, arguing that Bah's ineffective assistance for failure to provide mitigating evidence claim is meritless because: (1) "Bah instructed [Counsel] not to contact his family, precluding [Counsel]

from developing additional mitigation evidence"; and (2) the district court "was aware of Bah's mental health issues and history" when it sentenced Bah. Dkt. No. 16 at 60. As to its first assertion, the Government provides an affidavit from Counsel stating in relevant part:

> I met with Mr. Bah on August 17, 2021, . . . [and] I asked Mr. Bah to allow me to speak to his mom or sister, so that I could get letters in support of him at sentencing and to give me support statements or documents as to any mental issues that he had in the past. He refused to give me permission to contact them. In fact, under oath, I asked Mr. Bah on numerous occasions to give me permission to speak to his family to help me develop mitigations and to ask them to appear as character witnesses in person or at least send me letters of support, and he refused to give me permission each and every time.

Dkt. No. 16-1 at 4. The Government also notes that Bah "limited the degree to which [Counsel] could address his mental health issues, and refused to either apologize to the victims or allow [Counsel] to apologize on his behalf." Dkt. No. 16 at 28, 61-62. As to its second assertion, the Government contends that even if Counsel provided deficient performance, Bah cannot prove that he was prejudiced because the Court was sufficiently informed of Bah's mental health history through Bah's mental health evaluation, the PSR, Counsel's arguments at sentencing, and the Court's own observations. *Id.* at 62-63.

In his reply to the Government's response, Bah clarifies that his first argument centers not solely on Counsel's failure to *present* mitigation evidence, but also his failure to reasonably *investigate* for any such evidence. Dkt. No. 22. Bah contends that Fifth Circuit precedent holds that an attorney has a duty to investigate for mitigation evidence even if the defendant refuses to consent to the investigation. *Id.* at 7 (citing *Sonnier v. Quarterman*, 476 F.3d 349, 358 (5th Cir. 2007)).

The Government argues in its surreply first that Bah improperly relies on "capital murder death sentences cases to support his claim that counsel was ineffective" for allegedly failing to investigate for and present mitigation evidence and, in any event, even under the capital murder standard, Bah's claim fails. Dkt. No. 24 at 2, 9-10. The Government claims there is no constitutional duty to present mitigation evidence in non-capital cases. *Id.* at 8-9. The Government then contends that under Supreme Court and Fifth Circuit precedent, a defendant's instruction not to present mitigation evidence forecloses an ineffective assistance claim for failing to investigate for mitigation evidence. *Id.* at 13-15 (first citing *Schriro v. Landrigan*, 550 U.S. 465, 478, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007); and then citing *Balentine v. Lumpkin*, No. 18-70035, 2021 U.S. App. LEXIS 22909, 2021 WL 3376528, at *7 (5th Cir. Aug. 3, 2021) (per curiam)). And the Government asserts that Bah's argument "comes down to a matter of degrees." *Id.* at 17. That is, Bah's habeas evidence merely "provide additional details on Bah's childhood and mental health episodes," and "[n]one of the evidence establishes any additional substantive issues that th[e] Court was not

already aware of at sentencing—namely that Bah had a mental health history with a diagnosis of schizophrenia." *Id.*

Finally, Bah responds in his sur-surreply, arguing among other things that "[w]hile there may not be a constitutional requirement that mitigating evidence be *presented* in a non-capital case, there is a constitutional right to effective assistance of counsel, and for counsel to deliver effective assistance, counsel has a duty to *investigate*." Dkt. No. 28 at 5. Bah also takes issue with the Government's "matter of degrees" argument because, per Bah, Counsel conducted no investigation at all. *Id.* at 9-10.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The Supreme Court "has explicitly rejected a 'constitutional duty to investigate' applicable to all cases, instead emphasizing that the 'constitutionally protected independence of counsel' precludes the establishment of a 'particular set of detailed rules' or even 'specific guidelines' beyond reasonableness." *Clark v. Thaler*, 673 F.3d 410, 419 (5th Cir. 2012) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 194-95, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)). Accordingly, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Courts must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time

of counsel's conduct." *Id.* The Supreme Court "long ha[s] recognized that '[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable[.]'" *United States v. Juarez*, 672 F.3d 381, 388 (5th Cir. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 366-67, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)). However, the American Bar Association ("ABA") standards are "only guides, and not inexorable commands." *Padilla*, 559 U.S. at 367 (cleaned up). While the "standards may be valuable measures of the prevailing professional norms of effective representation," *id.*, the ultimate test remains one of reasonableness under the circumstances, *Strickland*, 466 U.S. at 689-90; *see Clark*, 673 F.3d at 419.

On that note, Bah relies on *Sonnier v. Quarterman*, 476 F.3d 349 (5th Cir. 2007), for the proposition that "a defendant's refusal to consent to counsel undertaking more extensive and in-depth discussions with the defendant's family and acquaintances to determine the nature and extent of the mitigation evidence available is not a reasonable grounds for their failure to do so." Dkt. No. 22 at 7 (cleaned up). *Sonnier* stemmed from a death row inmate's 28 U.S.C. § 2254 petition. *Sonnier*, 476 F.3d at 354. In that case, at sentencing, "Sonnier's attorneys, pursuant to [Sonnier's] wishes and instructions, did not present any mitigation evidence. Sonnier, on the record, confirmed that he had consistently instructed his attorneys not to present any mitigation evidence." *Id.* at 355. The Texas state court sentenced Sonnier to death. *Id.* Sonnier later filed his federal habeas petition, which was denied along with his request for a certificate of appealability ("COA"). *Id.* Sonnier then requested a COA from the

Fifth Circuit contending, among other things, that his trial counsel was ineffective for failing to investigate and present mitigation evidence at the punishment phase of his trial. *Id.*

Addressing the deficient performance *Strickland* prong, the Fifth Circuit explained that in *Strickland*, the Supreme Court "rel[ied] upon the guideposts of the ABA's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, [when] not[ing] that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 357-58 (citing *Strickland*, 466 U.S. at 691). At the time, the version of ABA standards for death penalty cases in place provided that "investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." *Id.* at 358 n.3 (quoting ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* § 11.4.1c (1989)). So, the Fifth Circuit, "[*a*]*pplying that standard*," concluded "that the trial attorneys stopped short of making a reasonable investigation," and that "Sonnier's refusal to consent to their undertaking more extensive and in-depth discussions with his family and acquaintances to determine the nature and extent of the mitigation evidence available was not reasonable grounds for their failure to do so." *Id.* at 358 (emphasis added).[5]

5. The Fifth Circuit concluded, however, that Sonnier could not meet his burden to prove the prejudice prong of *Strickland*, so it denied his request for a certificate of appealability. *Sonnier v. Quarterman*, 476 F.3d 349, 358-59 (5th Cir. 2007).

That standard does not apply in the non-death penalty context within the "criminal justice standards for the defense function" cited by Bah here—indeed, they specify that "the death penalty differs from other criminal penalties" and informs counsel in capital cases to reference the applicable death penalty standards. *See* ABA, *Criminal Justice Standards for the Defense Function*, § 4-1.2(g) (4th ed. 2017) ("Because the death penalty differs from other criminal penalties, defense counsel in a capital case should make extraordinary efforts on behalf of the accused and, more specifically, review and comply with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases."). Instead, in non-capital offenses, counsel maintains a "duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges." *Id.* § 4-4.1(a). The standard also provides that "[t]he duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt." *Id.* § 4-4.1(b). Unlike in the death penalty context, the standard does not specify its applicability or necessity in the sentencing phase of trial and for mitigation purposes. *Id.* And as applicable here, that standard also does not provide that an attorney must disregard a defendant's instructions not to contact specific witnesses, like one's parents and siblings. *Id.*; *see also Neiheisel v. United States*, No. 3:17-CR-89-BJD-JBT, 2022 U.S. Dist. LEXIS 205005, 2022 WL 17534123, at *8 (M.D. Fla. Sept. 27, 2022) ("Nor do the ABA standards

provide, as Lamos suggested, that an attorney must disregard a client's directive not to contact a specific witness even when the client has not suggested that the witness would be helpful."), *adopted by*, No. 3:17-CR-089-BJD-JBT, 2022 U.S. Dist. LEXIS 204391, 2022 WL 16833629 (M.D. Fla. Nov. 9, 2022); *cf. Richmond v. United States*, No. 4:15CR00028-001, 2019 U.S. Dist. LEXIS 58676, 2019 WL 1499160, at *5 (E.D. Tex. Apr. 5, 2019) (suggesting that the reasonableness standard applied to counsel's failure to investigate and present mitigation evidence in the death penalty context differs from the standard "in the context of a non-capital case after a plea of guilty pursuant to a plea agreement"). For these reasons, to the extent it bears on the reasonableness of Counsel's performance, the ABA standards Bah cites and *Sonnier* provide little guidance here.[6]

The Government cites *Schriro v. Landrigan*, 550 U.S. 465, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007), *Balentine*, 2021 WL 3376528, at *7, *Shore v. Stephens*, No. CV H-13-1898, 2016 WL 687563, at *11 (S.D. Tex. Feb. 19, 2016), *Ramirez v. Davis*, 780 F. App'x 110, 119-20 (5th Cir. 2019), and *Villanueva v. Stephens*, 619 F. App'x 269, 273-74 (5th Cir 2015) (per curiam), for the proposition that "a defendant who refuse[s] to allow the presentation of any mitigation evidence could not establish *Strickland* prejudice based

6. Bah also cites *Soffar v. Dretke*, 368 F.3d 441, 477 (5th Cir. 2004), and *Escamilla v. Stephens*, 749 F.3d 380, 392 (5th Cir. 2014), for support. These cases, too, are distinguishable. *See Soffar*, 368 F.3d at 477 (death penalty case where counsel's inadequate investigation was not due to defendant's instructions not to investigate); *Escamilla*, 749 F.3d at 392 (death penalty case relying on *Sonnier*).

on his counsel's failure to *investigate* further possible mitigating evidence," because "a competent defendant's instructions are entitled to be followed by counsel" as the defendant is the "master of his own defense." Dkt. No. 24 at 13, 13-15. While an accurate recitation of the stated rule, here, according to the evidence in the record, Bah did not disallow the investigation or presentation of *any* mitigation evidence, but only Counsel's investigation and presentation of testimony from his family and Bah's medical records. *See* Dkt. Nos. 16 at 28, 61-62; 16-1 at 4. Nevertheless, family testimony and medical records are the two focuses of Bah's briefing, so the undersigned only addresses the same.

In his affidavit, Counsel states that he asked Bah for permission to speak to Bah's mother or sister to obtain "support statements or documents as to any mental issues that he had in the past" for use at sentencing, but Bah refused. Dkt. No. 16-1 at 4. After Bah's sentencing, Counsel asked Bah to answer some questions on the record:

> [Counsel] Now I . . . just want to ask you on the record, sir, prior to today, I . . . did go visit you at the jail on several occasions and I asked you to give me permission to reach out to your family so they could maybe write a letter of reference or something on your behalf; is that correct?
>
> [Bah] Yeah.

[Counsel] And you said, no. You did not allow me to do that correct?

[Bah] That's true.

Dkt. No. 3 at 82. Bah does not dispute that he informed Counsel not to contact his family for records or testimony. This evidence precludes a deficiency finding regarding Counsel's alleged failure to interview and collect medical records from Bah's family members. After being found competent to assist in his defense, Bah directed Counsel not to interview or collect records from his family members, and Counsel complied. Bah cannot now fault Counsel for following his directions. *See Shore v. Davis*, 845 F.3d 627, 633 (5th Cir. 2017) (per curiam) ("A defendant cannot raise a *Strickland* claim based on counsel's compliance with his instructions."); *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004) ("[W]hen a defendant blocks his attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel."); *cf. Mullis v. Lumpkin*, 70 F.4th 906, 914 (5th Cir. 2023) (stating that counsel's request for a mental health evaluation constituted a form of investigation).

Finding that Counsel did not provide deficient performance, the Court need not assess Bah's assertion that his sentence would have been different had his family's testimony and his medical records been before the Court at sentencing. *See Strickland*, 466 U.S. at 694;

Amos v. Scott, 61 F.3d 333, 348 (5th Cir. 1995) ("In deciding ineffective assistance claims, a court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test."); *see also Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994) ("[I]n deciding ineffectiveness claims, we need not address both prongs of the *Strickland* test."). Nevertheless, even assuming without finding that Counsel was deficient, the Court finds that Bah cannot prove that he was prejudiced. *See Strickland*, 466 U.S. at 694. To establish prejudice, Bah must prove that but for his family members' testimony and the health records, the Court would have imposed a shorter sentence. *See id.* at 687, 694.

As stated above, concerned with Bah's mental health, Counsel requested a psychiatric evaluation, which the Court ordered. CR Dkt. Nos. 25, 29. Dr. Gonzalez then interviewed Bah, chronicled his mental health history, and subjected him to certain forensic tests. CR Dkt. No. 33. Dr. Gonzalez learned that Bah's family had him involuntarily committed eight times from 2012 through 2019, and that Bah carried a schizophrenia diagnosis. *Id.* at 2. Dr. Gonzalez concluded that Bah showed no current signs or symptoms of schizophrenia, was competent to stand trial, and was capable of assisting in his defense. *Id.* at 3-4.

After being found competent to do so, Bah pleaded guilty to each count in his indictment. CR Dkt. (June 28, 2021 Minute Entry). The only issue that then remained was sentencing before the Court. Before sentencing, and

in addition to Dr. Gonzalez's report, Counsel and the Court possessed the PSR, which included, among other things, information gleaned from interviews with Bah's mother and sister summarizing Bah's mental health history. Dkt. No. 4 at 18-20. The affidavits and medical records Bah presents here, while heavier on specific details of certain mental health episodes, contain the same basic information listed in the PSR—that Bah: (1) was diagnosed with schizophrenia; (2) received medical treatment in North Carolina; (3) suffered from psychosis episodes and was involuntarily committed to a mental health facility multiple times from 2012 through 2019; (4) was medicated and began feeling better; (5) stopped taking his medication when released from his commitment and his mental health deteriorated; and (6) was in denial that he suffered from a mental condition. *Id.* The Court also possessed surveillance video of Bah's robbery showing Bah shooting the bank teller; victim impact statements detailing what the Fifth Circuit described as "the harrowing facts of the case"; and the Court observed Bah and listened to Bah's brief testimony throughout his various proceedings in which he asserted that he had been diagnosed with schizophrenia and refused to apologize to his victims. Dkt. No. 4; CR Dkt. Nos. 65, 80 at 11, 63-63-5; *Bah*, 2023 U.S. App. LEXIS 4682, 2023 WL 2239021, at *4. With all that information in hand, the specific details of Bah's psychosis episodes—most occurring years earlier—were of limited additional value to present in mitigation. Thus, the undersigned does not find that their presentation to the Court at sentencing would have changed Bah's sentence. *See Strickland*, 466 U.S. at 694.

Bah has failed to meet his burden to prove that Counsel's performance was deficient or that he was prejudiced. *Id.* The undersigned recommends that the Court grant the Government summary judgment on Bah's claim of ineffective assistance of counsel for Counsel's alleged failure to investigate or present mitigation evidence.

(2) Failure to Make Certain Objections to the PSR

By his second claim with five sub-claims, Bah argues that Counsel was ineffective for failing to make various objections to the PSR. Dkt. No. 3 at 40. Specifically, Bah argues that:

> There were at least five objections counsel could have made to the PSR, but which he did not make: (1) Counsel failed to object to a four-level increase for a victim sustaining "serious bodily injury," (2) Counsel failed to object to the PSR's failure to comply with Rule 32 of the Federal Rules of Criminal Procedure, (3) Counsel failed to object to the PSR's finding that factors were present to support an upward departure, (4) Counsel advocated against Mr. Bah by taking an adverse position and recommending an upward departure/variance of at least five years, and (5) Counsel failed to dispute the United States's mischaracterization of Mr. Bah's only prior misdemeanor conviction as a "conviction of violence conviction" [sic]. (Exs. 4, 9). Had counsel made these objections, this

> Court could have subtracted two points off the offense level, reducing the Guideline range from fifty-one to sixty-three months to forty-one to fifty-one months for Count One. *See* U.S.S.G. §5A.

Id. [7] For various reasons considered below, the Government asserts that each of these five claims is meritless. Dkt. No. 16 at 42. The Court addresses the claims in turn.

(i) Failure to object to enhancement for "serious bodily injury"

Bah asserts that Counsel was ineffective when he "failed to object to the absolute lack of evidentiary support necessary for the Court to make a finding that the offense caused 'serious bodily injury'" and "failed to object to the PSR's erroneous application of a four-level increase for serious bodily injury, which resulted in an improperly calculated offense level and Guideline range." Dkt. No. 3 at 41. According to Bah, the PSR exaggerated the teller's injury by repeated reference to his being "shot in the head" when there is no evidence that the bank teller's headwound was any more serious than a mere graze. *Id.* at 41-43.

The Government responds, arguing that Bah "minimizes the injury he inflicted by shooting the bank

7. In arguing the deficient performance prong of *Strickland* for the five sub-arguments of his second issue, Bah cites no case law to assist the Court in its analysis. *See* Dkt. No. 3 at 40-56.

teller in the head and ignores the text of the guidelines." Dkt. No. 16 at 43. It highlights that the teller was treated at a hospital, underwent testing, and received "over a dozen staples in [his] scalp." *Id.* at 44; *see also* CR Dkt. No. 63 at 1-4 (the teller's victim impact statement). The Government asserts that courts "have affirmed the [serious bodily injury] enhancement as applied to lesser injuries than presented here" and "Counsel cannot be deficient for failing to press a frivolous point." Dkt. No. 16 at 44-45. Attached to its response is an affidavit by Counsel stating that objecting to the serious bodily injury designation here would have been frivolous and potentially violative of the Rules of Professional Conduct. Dkt. No. 16-1 at 4. The Government also highlights that claims raising Guidelines errors are not cognizable in § 2255 motions. Dkt. No. 16 at 42-43 n.12; *see United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999) ("Misapplications of the Sentencing Guidelines . . . are not cognizable in § 2255 motions.")). The Government contends that Bah's PSR claims "are thinly veiled in . . . Bah's [Motion] and brief as ineffective assistance claims," purportedly as an attempt to skirt the former argument's restriction in this § 2255 action. Dkt. No. 16 at 42-43 n.12.

Section 2B3.1(b)(3)(B) of the Guidelines calls for a four-level sentence increase if the victim of a robbery sustained a "serious bodily injury." U.S.S.G. § 2B3.1(b)(3)(B). "Serious bodily injury" is defined in the Guidelines commentary as an "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." *Id.* § 1B1.1. cmt. n.(1)(M); *see also*

United States v. Nelson, No. 22-12511, 2023 U.S. App. LEXIS 22981, 2023 WL 5608430, at *3 (11th Cir. Aug. 30, 2023) (per curiam) (unpublished) ("[T]he Guidelines themselves do not define serious bodily injury."). Courts have found a wide spectrum of injuries to constitute serious bodily injuries. *See, e.g.*, *United States v. Lavert*, 830 F. App'x. 894, 895 (9th Cir. 2020) (concluding no error when district court held defendant caused serious bodily injury when he "struck the victim on the head with a gun, causing a laceration requiring nine staples"); *United States v. Urbina-Robles*, 817 F.3d 838, 847 (1st Cir. 2016) (concluding the same regarding a lesion on one victim's head, multiple bruises on both victims' faces and heads, and necessary continued psychiatric care for trauma); *United States v. Clay*, 90 F. App'x. 931, 933 (6th Cir. 2004) (concluding the same when defendant pistol whipped the victim causing him to lose consciousness, bleed, and require sutures); *United States v. Reed*, 26 F.3d 523, 531 (5th Cir. 1994) (holding that post-traumatic stress disorder can constitute a "serious bodily injury"); *United States v. Moore*, 997 F.2d 30, 37 (5th Cir. 1993) (concluding no error when district court held defendant caused serious bodily injury where victim had extremely painful gunshot flesh wound in leg requiring a two-hour emergency room visit but no surgery).

Per the record, one bank teller "was shot at the top right side of [his] head."[8] CR Dkt. No. 63 at 2. He fell to the

8. Notably, Bah agreed with the Government's factual summary of his offense stating, among other things, that he shot one teller "in the head" and "assaulted and put in jeopardy the life of a person by the use of a dangerous weapon, a firearm." Dkt. Nos. 3 at 91, 43-2; CR Dkt. No. 49.

ground, was bleeding profusely, and temporarily lost his hearing. Dkt. No. 4 at 12. He "was taken to Valley Baptist Medical Center and underwent a full body CT scan to ensure that there was not any bleeding in his head." CR Dkt. No. 63 at 2. He "was monitored for several hours and had [his] head wound cleaned and received over a dozen staples in [his] scalp." *Id.* The undersigned finds that these injuries would have supported a "serious bodily injury" designation and enhancement. *See, e.g.*, *Lavert*, 830 F. App'x. at 895; *Clay*, 90 F. App'x. at 933. Therefore, Counsel was not deficient for failing to object to the designation, and Bah was not prejudiced. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument . . . cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."); *Smith v. Puckett*, 907 F.2d 581, 585 n.6 (5th Cir. 1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."); *see also Strickland*, 466 U.S. at 687. The undersigned recommends that the Court grant the Government summary judgment on this claim.

(ii) Failure to object to the PSR's noncompliance with Rule 32 of the Federal Rules of Criminal Procedure

Federal Rule of Criminal Procedure 32(d) sets forth the requirements of a PSR. *See* Fed. R. Crim. P. 32. Among other things, the PSR must "identify any factor relevant to . . . the appropriate kind of sentence, or . . . the appropriate sentence within the applicable sentencing

range," *id.* R. 31(d)(1)(D), and "any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a)," *id.* R. 31(d)(2)(G); *see* 18 U.S.C. § 3553(a) ("Factors to be considered in imposing a sentence."). Bah asserts that "[i]nstead of presenting an objective review of all factors relevant to determining the sentence, the PSR injected its own subjective and unqualified medical opinions in alleging Mr. Bah caused 'serious bodily injury.'" Dkt. No. 3 at 44. He also alleges that the PSR lacks sufficient detail of his mental health history. *Id.* at 45. Given the Probation Officer's purported violation of Rule 32, Bah contends that Counsel was ineffective for failing to object to the PSR. *Id.*

The Government responds by noting, as it did above, that this claim too is "thinly veiled as an ineffective assistance claim, but is actually an attack on the PSR and the Probation Officer." Dkt. No. 16 at 46. It states that "Bah does not point to any particular section of Rule 32 that the PSR failed to comply with." *Id.* It directs the Court to Counsel's affidavit in which he states that Bah's argument that he "did not object [to the fact] that the PSR violated Rule 32" is "broad, nonspecific[,] and [he] was not aware of any improper issue with the PSR that would give rise to a violation of Rule 32." Dkt. No. 16-1 at 4.

Indeed, Bah does not specify which of and how the PSR requirements were not met and cites no authority beyond a general Rule 32 citation in advancing this sub-claim to help clarify his argument for the Court. *See* Dkt. No. 3 at 44-46. To the extent that Bah argues that Counsel's failure to object to the PSR prejudiced him

because the PSR recommended a four-level increase for a "serious bodily injury" to the victim, the undersigned has already found that a serious bodily injury existed to support the increase, making that claim meritless. *See Kimler*, 167 F.3d at 893. The only other contention Bah advances is that "[C]ounsel's failure to object to the PSR's failure to comply with Rule 32 and failure to adequately present Mr. Bah's mental health history was clearly detrimental to Mr. Bah." Dkt. No. 3 at 46. Critically, lacking further development, this argument does not suffice to prove that Counsel was deficient. *See Strickland*, 466 U.S. at 687; *United States v. Holmes*, 406 F.3d 337, 361 (5th Cir. 2005) ("Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue." (citation omitted)). The undersigned recommends that the Court grant the Government summary judgment on this claim.

(iii) Failure to object "to the PSR's finding that factors were present to support an upward departure/variance"

Bah argues that the PSR improperly calls for an upward departure from the Guidelines sentencing range. Dkt. No. 3 at 46; *see* Dkt. No. 4 at 23-24. Count One of Bah's indictment is for bank robbery; Count Two is for use of a firearm during a crime of violence. Dkt. No. 3 at 97-100. Under Guidelines § 2B3.1(b)(2), a seven-level increase is warranted when "a firearm was discharged" during an offense's commission. U.S.S.G. § 2B3.1(b)(2). But when, as here, the indictment lists a second count with a mandatory, consecutive minimum sentence, the

enhancement is not added "to avoid unwarranted double counting." *Id.* § 3D1.1 cmt. n.2.

Bah concedes that the PSR is correct when—in line with the Guidelines—it states as follows:

> **Specific Offense Characteristics**: Pursuant to USSG § 2B3.1(b)(2)(A), if a firearm was discharged, a seven-level increase is applicable. Although Bah entered the bank and shot the victim . . . in the head, this enhancement is not applicable pursuant to USSG § 3D1.1, comment. (n.2). This instructions' [sic] main emphasis is to avoid unwarranted double counting; therefore, the offense level for Count 1 under USSG § 2B3.1 is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline.

Dkt. No. 4 at 13-14. In other words, although Bah discharged a firearm during the commission of his robbery, the seven-level enhancement under § 2B3.1(b)(2)(A) was not included in the underlying sentence level calculation because a mandatory, consecutive sentence was already included for Count Two of Bah's indictment for use of a firearm during a crime of violence.

Bah disagrees with the PSR, though, in that it includes a section listing "factors that may warrant departure and/or variance." Dkt. No. 4 at 23-24; *see* Dkt. No. 3 at 47. In that section, the PSR states:

Appendix C

> Pursuant to USSG § 5K2.6, if a weapon or dangerous instrumentality was used or possessed in the commission of the offense the Court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.
>
> In committing the robbery in the instant offense, the defendant discharged his handgun and shot the victim in the head. The victim suffered serious bodily injury to his head and could have been killed. Additionally, after the victim was shot, the defendant pointed the handgun to another teller demanding the money be given to him. The teller also received medical treatment and may have suffered a minor heart attack or anxiety attack as a result.

Dkt. No. 4 at 23-24. "[F]or reasons unknown and unexplained in the PSR," Bah contends, "the United States Probation Office ignored the directives of [§ 3D1.1 of] the Guidelines by suggesting factors explicitly excluded from consideration in determining the offense level could somehow justify an upward departure from the offense level [under § 5K2.6]." Dkt. No. 3 at 47. Bah evidently treats the sentencing enhancement considerations under § 2B3.1 the same as a sentencing departure consideration

under § 5K2.6—if improper under § 2B3.1, then improper under § 5K2.6.

The Government responds by noting again that "[t]his is another issue in which Bah attacks the PSR and the Probation Officer, couching it as an ineffective assistance claim." Dkt. No. 16 at 50. It further highlights that "courts have affirmed upward departures under § 52K.6, even in cases where [use of a firearm during a crime of violence] convictions were involved, when defendants intentionally discharged firearms at other individuals." *Id.* at 51. And critically, it notes that the Court's sentence represented a variance, not a departure from the Guidelines range. *Id.* at 52; *see United States v. Watley*, 46 F.4th 707, 718 n.7 (8th Cir. 2022) ("A departure occurs within the context of the Guidelines themselves, which prescribe that the sentencing court should depart from the Guidelines range in certain situations . . . . A variance, however, results from a separate analysis of whether a non-Guidelines sentence would be more appropriate under the circumstances pursuant to 18 U.S.C. § 3553(a)." (cleaned up)); *United States v. Jacobs*, 635 F.3d 778, 781-82 (5th Cir. 2011) (per curiam) (describing the differences between departures and variances and noting that the two "are not one and the same").

The Court need only address the Government's latter point because it is dispositive. Bah's sub-claim fails in part because he cannot prove that he was prejudiced by the Court's application of the Guidelines' departure sections, as the Court did not depart from the Guidelines range to impose its sentence—rather, it varied from it. CR Dkt.

No. 73 at 2-3; *cf. Watley*, 46 F.4th at 718 n.7; *Jacobs*, 635 F.3d at 781-82. In other words, Bah was not prejudiced by the PSR's (proper or improper) inclusion of information relative to departures when the Court did not depart from Bah's sentence.[9]

In a final argument, Bah asserts that Counsel was ineffective by failing to object to the PSR's "improper use of subjective and emotionally charged language" used to "justify its position that factors were present to warrant an upward departure." Dkt. No. 3 at 48-49. Bah opposes the PSR's statement that the first bank teller was "shot in the head," that the teller suffered "serious bodily injury," and that the teller "could have been killed." *Id.* at 48-50. He also rejects the PSR's assertion that the second teller "may have suffered a minor heart attack or anxiety attack" when Bah pointed a gun at him." *Id.* However, again, the Court did not depart from Bah's Guidelines range, it varied from it. Further, even before the Probation Office prepared the PSR, Bah agreed with the Government's factual summary of his offense stating, among other things, that he shot one teller "in the head" and "assaulted and put in jeopardy the life of a person by the use of a dangerous weapon, a firearm." *See* Dkt. No. 3 at 91; CR Dkt. No. 49. Bah pleaded guilty to those offenses. Dkt. No. 3 at 89. Counsel, then, was

9. On direct appeal, Bah "challeng[ed] the sufficiency of the district court's reasoning in" varying upward and "imposing [a sentence of] 300 months and life in prison, respectively." *United States v. Bah*, No. 21-40712, 2023 U.S. App. LEXIS 4682, 2023 WL 2239021, at *1 (5th Cir. Feb. 24, 2023) (per curiam). As noted, the Fifth Circuit affirmed Bah's sentence. *Id.* at 1-4.

not ineffective for failing to object to the information in the PSR to which Bah previously admitted. *See Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."). Even assuming without finding deficient performance for failure to object to the PSR's inclusion of the opposed information, the information was provided to the Court elsewhere in the record.[10] Thus, the Court cannot find that but for Counsel's failure to object to the information in the PSR, Bah's sentence would be different. *See Strickland*, 466 U.S. at 694.

The undersigned recommends that the Court grant the Government summary judgment on this claim.

(iv) Counsel "should not have . . . advocated against Mr. Bah by recommending an upward departure/variance of at least five years"

Bah next claims that Counsel was ineffective "by recommending an upward departure/variance of at least five years." Dkt. No. 3 at 50. "While the Guidelines provided an advisory range of 171 months to 183 months imprisonment," Bah continues, "[C]ounsel inexplicably argued for a sentence of 243 months, thus adding five years to the high-end of the advisory Guideline range and

10. In affirming the Court's sentence variance in Bah's direct appeal, the Fifth Circuit cited as a reason for its conclusion the Court's "intimate[] familiar[ity] with the harrowing facts of the case[.]" *Bah*, 2023 U.S. App. LEXIS 4682, 2023 WL 2239021, at *4. Those facts include "Bah's admission of guilt," Bah's decision not to allocute, and details contained in victim impact statements. *Id.*

over six years to the low-end of the advisory Guideline range." *Id.* The Government contends that Counsel "was pursuing an advisable trial strategy given the egregious facts of Bah's offense, which were highly likely to lead to an upward departure or variance." Dkt. No. 16 at 53. That is, with a "variance or departure [being] highly likely," it was sound strategy to recommend a sentence of 283 months' imprisonment in the face of the Government's request for 600 months' imprisonment. *Id.* at 53-54.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (cleaned up).

At the September 22, 2021 sentencing hearing, the Government informed the Court that: (1) Bah's Guidelines range on Count One was fifty-one to sixty-three months' imprisonment; (2) a consecutive, minimum ten-year sentence was mandatory on Count Two, making the effective Guidelines range 171-183 months' imprisonment for both counts; (3) Count One has a statutory maximum sentence of twenty-five years' imprisonment, and Count Two a maximum sentence of life imprisonment; (4) the

Government sought an upward departure and variance, as per its notice and intent filed August 27, 2021, of twenty-five years' incarceration on both counts to run consecutively, because the Guidelines "punishment range at the high end . . . grossly underrepresents the facts of this crime and the dangerousness of Mr. Bah"—including the fact that Bah shot one bank teller within five seconds of approaching him; and (5) the victims of Bah's crime continue to suffer from emotional trauma. CR Dkt. No. 80 at 5-17. The Court also possessed the PSR detailing, among other things, Bah's robbery and mental health history; Bah's competency evaluation; and surveillance video of Bah's robbery—including his shooting the bank teller. Dkt. No. 4; CR Dkt. Nos. 65, 80 at 11.

With that information before the Court, Counsel replied, noting that: (1) other than a misdemeanor offense five years prior, Bah had no criminal record beyond traffic violations; (2) while Bah fired his weapon, he only did so once, sparing the remaining individuals at the bank; (3) Bah did not resist arrest when he was ultimately apprehended; (4) "a root to Mr. Bah's conduct is that . . . it strongly appears that Mr. Bah suffers from some type of psychological disorder," indeed, "the PSR clearly reflects that . . . Mr. Bah was committed into a mental institution back in North Carolina"; (5) Dr. Gonzalez "did not find any evidence of schizophrenia," but Bah's conduct during his legal proceedings was erratic and "consistent of somebody" with a disorder—hiring and firing his attorneys and waffling on whether to represent himself pro se multiple times; and (6) that Counsel spoke with Bah "quite a bit . . . and there's . . . something wrong." CR Dkt.

No. 80 at 17-21. Counsel then asked the Court to consider sixty-three months' imprisonment on Count One and 180 months' imprisonment on Count Two, for a total of 243 months' imprisonment, and stated that he believed that sentence "serves to punish Mr. Bah for what he's done but also takes into consideration the mitigating factors . . . that I'm hoping the court will . . . consider with respect to what happened that day and then the conditions that . . . Mr. Bah suffers from." *Id.* at 20-21. The Court then varied upward past Counsel's and the Government's recommendations and sentenced Bah to consecutive terms of twenty-five years' and life imprisonment. Dkt. No. 3 at 135-36.

The Court further finds Bah has not overcome the presumption that Counsel's conduct might have been sound strategy. *Strickland*, 466 U.S. at 689. For one thing, Bah does not address that possibility. *See* Dkt. No. 3 at 50-52. Rather, Bah contends that Counsel "inexplicably" recommended a sentence of 243 months' imprisonment in violation of the ABA's Standards for Criminal Justice: Prosecution and Defense Function, and that prejudice followed. *Id.* at 50, 56; *see* ABA, *Criminal Justice Standards for the Defense Function*, § 4-1.2(b), (d) (4th ed. 2017) (concerning counsel's duties to "render effective, high-quality legal representation with integrity" and to "act zealously within the bounds of the law and standards on behalf of their clients"). Neither does Bah supply the Court with relevant authority holding that recommending a sentence above the Guidelines range but well below the Government's recommended sentence represents per se deficient performance. Instead, Counsel very well might have been confident that the Court would vary significantly

from the Guidelines range, particularly if he requested a within-Guidelines sentence, given the grim details of the case. *See Bah*, 2023 U.S. App. LEXIS 4682, 2023 WL 2239021, at *4. Stated otherwise, as the Government does, Counsel could have been "keenly aware that a significant variance or departure was highly likely, and seemed to be attempting to account for that while undercutting the Government's recommendation by more than 25 years." Dkt. No. 16 at 54.

In the end, even assuming without finding that Counsel provided deficient performance, Bah cannot prove prejudice because the Court did not sentence Bah to a within-Guidelines range, 243 months' imprisonment as recommended by Counsel, or 600 months' imprisonment as per the Government's request, but instead life plus twenty-five years' imprisonment. Dkt. No. 3 at 135-36. There is no indication in the record that Bah's sentence would have been shorter had Counsel requested a sentence within the Guidelines range.

Bah has failed to show that Counsel provided ineffective assistance. Thus, the Government's summary judgment on this claim should be granted.

(v) Failure to dispute the Government's "mischaracterization of Mr. Bah's only prior conviction"

The PSR asserts that Bah was once convicted for a crime. Dkt. No. 3 at 52-53; *see* Dkt. No. 4 at 15. The misdemeanor in question is a 2016 arrest and conviction

in North Carolina for assault of a government employee, resulting in a sixty-day jail sentence, which, according to the PSR, the North Carolina state court suspended and then placed Bah on a term of twelve months' probation. Dkt. No. 4 at 15. By his final sub-claim, Bah argues that Counsel was ineffective for failing to object at the sentencing hearing to the Government's claim that the same conviction was for a crime "of violence," which Bah asserts contributed to the Court's "upward departure." Dkt. No. 3 at 54.

Among other things, the Government argues that Bah's "attempt[] to characterize the Government's brief comment as critical to the argument for an upward variance . . . is not supported by the record." Dkt. No. 16 at 58. "The focus of the Government's argument for an upward departure or variance was the egregious nature and circumstances of the offense, particularly injuries and impact on the victims." *Id.* The Government highlights that the alleged improper comment "was a single sentence in the ten pages of [its] argument for an upward departure or variance." *Id.*

The parties amply assess whether Bah's assault conviction was a crime of violence under North Carolina law. Dkt. Nos. 3 at 52-55, 16 at 56-59. But the Court need not analyze North Carolina law here because, even assuming without finding that Counsel's performance was deficient by failing to object to the PSR and at the sentencing hearing regarding the Government's mention of Bah's 2016 misdemeanor conviction as being one for a "crime of violence," Bah has not met his burden to prove

that his sentence would be different but for the deficient representation. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). When it sentenced Bah, the Court was "intimately familiar with the harrowing facts of the case." *Bah*, 2023 U.S. App. LEXIS 4682, 2023 WL 2239021, at *4. Those facts include "Bah's admission of guilt," Bah's decision not to allocute, details contained in victim impact statements, and surveillance video of the robbery. *Id.* The Government reiterated those details at the September 22, 2021 sentencing hearing. CR Dkt. No. 80 at 5-17. There is nothing in the record supporting the contention that the Government's brief "crime of violence" statement had any impact on the Court's sentence. So Bah has not established that counsel's alleged deficient performance prejudiced him, and his claim fails.

The undersigned recommends that the Court grant the Government summary judgment on this claim.[11]

(3) Failure to Present All Formal Plea Agreements

Bah's final ineffective assistance of counsel claim concerns Counsel's alleged failure to present all plea offers to him. "[T]he Sixth Amendment right to effective

11. Bah concludes this section of his argument by asserting that Counsel's deficiencies, considered in the aggregate, prejudiced Bah. Dkt. No. 3 at 56-59. But as noted, four of Counsel's alleged failures did not constitute deficient performance, and the one remaining of Counsel's actions, even assuming deficient performance, did not prejudice Bah.

assistance of counsel extends to plea negotiations." *Miller v. Thaler*, 714 F.3d 897, 902 (5th Cir. 2013) (citing *Frye*, 566 U.S. at 144). "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 566 U.S. at 145. The *Strickland* standard also applies to claims that counsel's deficient performance caused a plea offer to lapse or be rejected. *Id.*; *see also United States v. White*, 715 F. App'x. 436, 437 (5th Cir. 2018) (per curiam). When counsel's performance is deficient by failing to communicate formal plea offers to the defendant, to prove *Strickland*'s prejudice prong, the defendant must demonstrate a reasonable probability that:

> (1) he would have accepted the plea offer had he been afforded effective assistance of counsel; (2) the plea would have been entered without the prosecution canceling the offer or the trial court's refusing to accept it; and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

King v. Davis, 898 F.3d 600, 605 (5th Cir. 2018).

Bah's final claim stems from the following exchange at his June 28, 2021 re-arraignment hearing:

> THE COURT: And, [Counsel], have all formal plea offers by the government been conveyed to your client?

[Counsel]:	They have, Your Honor.
THE COURT:	All right.
[Counsel]:	And we, for the record, we've rejected them.
THE COURT:	Thank you, sir.

Dkt. No. 3 at 82. Bah asserts that contrary to Counsel's statement, Counsel never informed Bah of any plea agreements. *Id.* at 60, 440-41 (Bah's "Unsworn Declaration Under Penalty of Perjury").

The Government responds that Bah's claim "is unsupported by the record and meritless." Dkt. No. 16 at 36. Attached to its motion for summary judgment is an affidavit by Counsel stating, among other things, that:

> On March 31, 2021, [Counsel] went to the jail to review plea papers and the initial plea deal offered by the Government which was to plea guilty to both counts and [Bah] would receive acceptance points and a recommendation of low end. At this point, Mr. Bah refused to enter a plea deal.
>
> On April 13, 2021, [Counsel] was able to arrange with the prosecutor, a "show and tell" for the purpose of trying to convince Mr. Bah to plea guilty pursuant to a plea deal. Mr. Bah was shown pictures of all the evidence . . . . Mr.

> Bah did not want to plea guilty and did not want to entertain a plea deal and refused to sign the plea papers.

Dkt. No. 16-1 at 3.

Given Bah's and Counsel's conflicting statements, the Court held an evidentiary hearing on August 2, 2024, to determine whether the Government extended any plea offers to Bah and, if so, whether Counsel informed Bah of the offers. Dkt. No. 46; *see United States v. Rivas-Lopez*, 678 F.3d 353, 358 (5th Cir. 2012) ("A district court must hold an evidentiary hearing 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" (quoting 28 U.S.C. § 2255(b) (brackets omitted))); *see also United States v. Lopez*, 825 F. App'x. 196, 199 (5th Cir. 2020) (holding that dispute between defendant and counsel as to whether counsel advised defendant that rejecting a plea offer could lead to a much longer sentence at trial "is precisely the sort of factual dispute that requires an evidentiary hearing"); *cf. United States v. Giacomel*, 153 F.3d 257, 258 (5th Cir. 1998) (stating that a Magistrate Judge may make credibility findings based on evidence presented at an evidentiary hearing in a 28 U.S.C. § 2255 case).

Testifying at the evidentiary hearing were Bah, Counsel, and David. A. Lindenmuth—the Assistant United States Attorney who prosecuted Bah's case. Dkt. No. 46 at 2. Before testimony opened, the Government offered, without objection, six exhibits. *Id.* at 5; Dkt. Nos. 43-43-6. Among the exhibits were two "plea packet

memo[s]." Dkt. Nos. 43-1 ("Government Exhibit 1"), 43-2 ("Government Exhibit 2"). The Court admitted all six exhibits. Dkt. No. 46 at 5.

Bah's habeas counsel called Bah to the stand. *Id.* at 7. Bah testified that the Court appointed Counsel to represent him in his criminal case, and Counsel met with him to discuss his case. *Id.* at 7-8. When asked whether Counsel presented any plea offers to him, Bah responded, "No." *Id.* at 8. When asked whether he would have accepted a plea offer for a recommendation of the low end of the Guidelines sentence range and acceptance of responsibility points, Bah responded, "Yes." *Id.*

On cross-examination by the Government, Bah agreed that Counsel visited him in jail "on many occasions." *Id.* at 9. He confirmed that he had a "show-and-tell" with Counsel and the Government where he saw the evidence against him, but he denied that Counsel or the Government "mentioned anything about a plea offer." *Id.* at 9-10. Later in Bah's testimony—after he and the Government discussed his waffling on whether to have Counsel represent him at trial—the Government asked Bah whether the first time he told Counsel that he was willing to plead guilty was just before his June 28, 2021 re-arraignment hearing. *Id.* at 12. Bah responded: "No, I told [Counsel] when he came to visit me at [the detention center] the first time to discuss the plea offer. That was before the first Arraignment Hearing." *Id.* at 12-13. According to Bah, at some unspecified date, he informed Counsel that he would plead guilty, and Counsel asked Bah "to sign a paper." *Id.* at 13. The paper's substance

represented the "same open plea . . . that [Bah] ended up signing later on." *Id.*

Next, the Government called Counsel to the stand. *Id.* at 14. Counsel testified that he met with Bah on March 31, 2021, to present Bah with a "set of plea papers" containing a recommendation "that [Bah] would get acceptance for responsibility and a recommendation of low end on both counts of the Indictment." *Id.* at 18. The Government asked Counsel whether he was familiar with Government Exhibit 1, the first plea agreement extended to Bah, and whether it was the offer Counsel presented to Bah on March 31, 2021. *Id.* at 18-19. To both questions, Counsel answered affirmatively. *Id.* at 18-20. Counsel testified that in response to the Government's plea offer, Bah "was very hesitant, declined to sign it, [and] said he did not want to enter a plea." *Id.* at 20. Thereafter, Counsel and the Government set up a show and tell at the United States Attorney's Office in Brownsville at which "Bah was shown the evidence that the Government had." *Id.* at 20-21. Counsel did not recall whether any plea offers were discussed at the show and tell; instead, he believed the purpose of the show and tell was for Bah to "understand that . . . he doesn't want to go to trial because this is the evidence the Government has." *Id.* at 21-22.

The Government then asked Counsel if "at any other point in time" he "discuss[ed] plea offers from the Government" with Bah. *Id.* at 22. Counsel responded affirmatively and began describing a series of events following the show and tell on April 13, 2021, to around June 25, 2021. *Id.* at 22. On April 20, 2021, Counsel met

with Bah, and Bah informed Counsel that "he wanted to fire [Counsel] at that point and go back to representing himself." *Id.* at 22-23. Counsel immediately moved for a hearing on the matter, and the hearing transpired the following day. *Id.* at 23. At the hearing, the Court "authorized" Bah to proceed pro se, appointed Counsel as standby counsel again, and set the trial date for June 28, 2021. *Id.* at 23. Counsel testified that shortly before June 28, he spoke with Bah via telephone, at which point "[Bah] said he did not want to go to trial, that he wanted to plead guilty, and he wanted [Counsel] to represent him to get him to the plea." *Id.* at 24-25. According to Counsel, that was the first time that Bah confirmed that he desired to plead guilty. *Id.* at 25. Counsel "notified Mr. Lindenmuth . . . of what transpired" and acquired "a second set of plea papers." *Id.* In exchange for Bah's guilty plea, waiver of certain appellate rights, and forfeiture of firearms, those plea papers recommended only a two-point sentence reduction for acceptance of responsibility. *Id.* Counsel advised Bah not to accept that offer because Bah was getting nothing in return for his waiver of appellate rights; Bah declined to sign the offer—but he did sign "the Factual Summary [Sheet]" describing the offer. *Id.* Counsel confirmed that Government Exhibit 2 is the relevant "Factual Summary [Sheet]" that he, Lindenmuth, and Bah each signed. *Id.* at 26. Counsel testified that he had asked Lindenmuth if Bah could plead to only one count, but Lindenmuth informed him that "the offense [wa]s too egregious" for him "to agree to dropping either of the counts." *Id.* at 27. The Government concluded its direct examination of Counsel by asking whether his statement at the June 28, 2021 sentencing hearing that

he and Bah had rejected all formal plea offers meshes with his testimony at the evidentiary hearing. *Id.* at 29. Counsel responded:

> Yes, sir. I had shown [Bah] the first set of plea papers that had an offer of acceptance and a low end, and he had rejected that. And then the second offer, which was of the June 28, was just two points and waive his appellate rights. And I advised him that he did not want to waive his appellate rights, so we rejected that offer, too.

Id.

Last to the witness stand was Lindenmuth. *Id.* at 35. He testified that he prosecuted Bah's case, and that he extended two plea agreements to Bah. *Id.* at 35-36. He stated that he likely sent the first agreement to Bah "close in time to [Bah's] arrest." *Id.* at 36. In response to the Government's questioning, Lindenmuth affirmed that there came a time after he made the first plea offer that he reconsidered it. *Id.* He testified that he rescinded the first plea offer after recognizing that the low end of the estimated Guidelines range for Bah's crimes "was grossly insufficient for the behavior that [he] had charged" Bah with. *Id.* at 37-38. Thereafter, Lindenmuth "superseded" the first offer with the Government's second plea offer and stated that he would not have then moved forward with the first plea offer even if Bah agreed to it. *Id.* at 38-39. Lindenmuth confirmed that Government Exhibits 1 and 2 represent the two plea offers he extended to Bah. *Id.* at 38-39. The Government asked Lindenmuth whether

he discussed a plea offer at the April 12, 2021 show and tell. *Id.* at 40-41. Lindenmuth responded, "Absolutely," and claimed that in "every single show-and-tell" that he has ever conducted, he addressed plea offers. *Id.* at 41. On cross-examination, Lindenmuth admitted that he did not recall when exactly he withdrew the first plea offer or which plea offer was discussed at the show and tell. *Id.* at 45-47.

This record demonstrates that Counsel did not render ineffective assistance. *See Frye*, 566 U.S. at 145; *King*, 898 F.3d at 605. Both Counsel and Lindenmuth testified in detail that the Government extended two plea offers to Bah, and that Counsel informed Bah of the offers. Dkt. No. 46 at 29, 35-36. The Court admitted without objection Government Exhibits 1 and 2, which both Counsel and Lindenmuth testified accurately represented the two offers presented to Bah. Further, Bah testified inconsistently. He originally asserted via affidavit and later testified during the evidentiary hearing that nobody ever presented him with a plea offer. During the hearing, he further testified that Counsel "came to visit [him] . . . to discuss the plea offer," and that Counsel asked him to "sign a paper" which had the "same open plea . . . that [Bah] ended up signing later on." Dkt. No. 46 at 12-13. In other words, by Bah's own admission (and, indeed, Bah's signature on the Factual Summary Sheet containing one of the two plea offers), Counsel presented at least one plea offer to him. Evidence elsewhere in the record supports a finding that Bah was informed of the two plea offers presented to Counsel—most notably the fact that Bah did not object to Counsel's statement at his June 28, 2021 re-

arraignment hearing that all plea offers were presented to and rejected by Bah. *See generally* Dkt. No. 3 at 82.

For these reasons, after considering all the evidence in this case, the undersigned finds that both plea offers were extended to and rejected by Bah. And because that ends the inquiry,[12] Bah's claim should be dismissed.

V. Certificate of Appealability

Rule 11 of the Rules Governing § 2255 Proceedings states that a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability shall not issue unless the movant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a "showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] 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, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (cleaned up). Where claims have been dismissed 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.* District courts may deny

12. Finding that Bah failed to prove the deficient performance *Strickland* prong on this claim, the Court need not assess the prejudice prong. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995).

certificates of appealability sua sponte, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (per curiam).

A certificate of appealability should not issue in this case because a reasonable jurist would not find the Court's assessment of Bah's constitutional claims debatable or wrong.

VI. Recommendation

For the foregoing reasons, it is recommended that the Court: (1) **GRANT** the Government's Motion for Summary Judgment on Bah's first and second claims; (2) **DISMISS** all three of Bah's claims; (3) **DECLINE** to issue a certificate of appealability; and (4) **DIRECT** the Clerk of Court to close this case.

VII. Notice to Parties

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996).

SIGNED on this **26th** day of **August, 2024**, at Brownsville, Texas.

/s/ Ignacio Torteya, III
Ignacio Torteya, III
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40672

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MUHAMED PATHE BAH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:23-CV-166

UNPUBLISHED ORDER

Before SMITH, GRAVES, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED Appellant's motion for a certificate of appealability. The panel has considered Appellant's opposed motion for reconsideration.

IT IS ORDERED that the motion is DENIED.