APPENDIX

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States of America,
Plaintiff—Appellee,

vs.

Matthew Sepulveda,
Defendant-appellant

Application for Certificate of Appealability the United States District Court for the Southern District of Texas USDC No. 7:24-CV-244 USDC No. 7:19-CR-2120-1

[Filed September 10, 2025]

25-40116

UNPUBLISHED ORDER

Before Jones, Richman, and Ramirez, *Circuit Judges*.

Per Curiam:

Matthew Lee Sepulveda, federal prisoner # 02706-579, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion, which challenged his convictions on two counts of depriving a person of rights under the color of law.

As an initial matter, Sepulveda raises the following claims that were not presented in his § 2255 motion:

(1) his post-trial counsel rendered ineffective assistance by failing to refile his motion for a new trial in the district court; and (2) the Government failed to turn over evidence of a victim's arrest in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Because Sepulveda failed to raise these claims in the district court, we do not consider them. *See Black v. Davis*, 902 F.3d 541, 545-46 (5th Cir. 2018).

Otherwise, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where, as here, the district court denies relief on the merits, the movant must show that jurists of reason could debate the district court's resolution of his constitutional claims or that the issues were adequate to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Sepulveda has not made the required showing. Accordingly, his motion for a COA is denied.

Because Sepulveda fails to make the required showing for a COA on his constitutional claims, we do not reach whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

COA DENIED.

APPENDIX B

UNITED STATES OF AMERICA,	)
Plaintiff - Appellee,	)
	)
v.	)
MATTHEW LEE SEPULVEDA,	)
Defendant - Appellant.	)
	)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CIV. NO. 7:24-cv-00244
CRIM. NO. 7:19-cr-02120-1

[FILED JAN. 29, 2025]

ORDER ACCEPTING FINDINGS CONCLUSIONS AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending before the Court is the January 2, 2025, Memorandum and Recommendation ("M&R") prepared by Magistrate Judge Juan F. Alanis. (Dkt. No. 6). Judge Alanis made findings and conclusions and recommended that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 due to ineffective assistance of counsel, (Dkt. No. 1), be denied and dismissed with prejudice and the case closed, (Dkt. No. 6 at 1, 21). Judge Alanis also recommended that this Court decline to issue a

certificate of appealability in this matter. (*Id.* at 2, 21–23).

The Parties were provided proper notice and the opportunity to object to the M&R. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). On January 16, 2025, Petitioner filed six objections. (Dkt. No. 7). First, Petitioner objects to the M&R's conclusion that he was not prejudiced by his counsel's failure to investigate six individuals, including the two victims and several police officers. (*Id.* at 1–5) (citing Dkt. No. 6 at 7–8, 13). Second, Petitioner alleges that the M&R erred in finding that trial counsel was not ineffective for failing to discuss discovery and trial strategy with him. (*Id.* at 5–6) (citing Dkt. No. 6 at 15–16). Third, Petitioner argues that Judge Alanis incorrectly determined that trial counsel was not ineffective for failing to properly cross-examine witnesses. (*Id.* at 6-7) (citing Dkt. No. 6 at 16–18). Fourth, Petitioner asserts that the M&R erred in concluding that trial counsel was not ineffective for failing to inform Petitioner of his right to testify. (*Id.* at 7–8) (citing Dkt. No. 6 at 18–19). Fifth, Petitioner challenges the M&R's dismissal of his argument that trial counsel infringed on his right to assert his innocence. (*Id.* At 8–9) (citing Dkt. No. 6 at 19–21). Sixth, Petitioner alleges that Judge Alanis improperly concluded that no evidentiary hearing was necessary after erroneously finding that Petitioner's "claims are devoid of factual and legal merit or are refuted by the court record." (*Id.* at 9) (citing Dkt. No. 6 at 21).

In accordance with 28 U.S.C. § 636(b)(1)(C), the Court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection [has been] made." After conducting this de novo review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by then magistrate judge." *Id.*; *see also* Fed. R. Civ. P. 72(b)(3).

The Court has carefully considered de novo those portions of the M&R to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendations for plain error. Finding no error, the Court accepts the M&R and adopts it as the opinion of the Court. It is therefore ordered that:

(1) Magistrate Judge Alanis's M&R, (Dkt. No. 6), is ACCEPTED and ADOPTED in its entirety as the holding of the Court; and
(2) Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, (Dkt. No. 1), is DENIED and DISMISSED with prejudice; and
(3) the Court DENIES a Certificate of Appealability in this matter.
It is SO ORDERED.

/s/ Drew Tipton /s/
Drew Tipton
United States District Judge

APPENDIX C

UNITED STATES OF AMERICA,	)
Plaintiff - Appellee,	)
	)
v.	)
MATTHEW LEE SEPULVEDA,	)
Defendant - Appellant.	)
	)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CIV. NO. 7:24-cv-00244
CRIM. NO. 7:19-cr-02120-1

[FILED JAN. 2, 2025]
REPORT & RECOMMENDATION

Movant, Matthew Lee Sepulveda, a federal prisoner proceeding with counsel, initiated this action by filing a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, alleging ineffective assistance of trial counsel. (Dkt. No. 1)[1]. Thereafter, the undersigned directed Respondent to file an answer or other response on or before September 19, 2024, and provided Movant the option to reply on or before October 21, 2024. R. Gov. Sec. 2255

[1] All docket citations will be to the civil docket unless otherwise indicated.

Proceedings 5. Respondent timely filed a memorandum in opposition requesting Movant's motion be denied without an evidentiary hearing. (Dkt. No. 4). Movant timely filed a response elaborating upon his ineffective assistance of counsel claims. (Dkt. No. 5).

Based on review of the filings, the record, and relevant case law, this matter is ripe for consideration without the need for a hearing. For the reasons discussed in this Report and Recommendation, the undersigned concludes that Movant's § 2255 motion is without merit.

Therefore, the undersigned recommends that Movant's § 2255 motion (Dkt. No. 1) be DENIED. It is further recommended that Movant's motion (Dkt. No. 1) be DISMISSED with prejudice, and said case be closed.

It is also recommended the District Court DECLINE to issue a certificate of appealability in this matter.

I. BACKGROUND

On March 10, 2021, a jury found Sepulveda guilty of (1) 18 U.S.C. § 242-Deprivation of rights under color of law and (2) 18 U.S.C. § 242 - Deprivation of rights under color of law resulting in bodily injury, and included aggravated sexual abuse, attempted aggravated sexual abuse, and kidnapping. (Crim. Dkt. No. 78 (Judgment)).

As outlined by the Fifth Circuit Court of Appeals:

> "Sepulveda served as a police officer with the Progreso Police Department. The government alleged that in June 2019, Sepulveda sexually assaulted two young men inside the police station. At trial, the victims testified about the assaults, and the government introduced evidence corroborating their accounts.
>
> After a two-day trial, the jury found Sepulveda guilty on both counts. As to the second count, the jury specifically found that Sepulveda' s conduct resulted in bodily injury and included aggravated sexual abuse, attempted aggravated sexual abuse, and kidnapping. The district court sentenced Sepulveda to 12 months' imprisonment on the first count and 360 months' imprisonment on the second count, to run concurrently. In addition, the district court ordered Sepulveda to pay $10,000 in restitution to [victim 1 ("Vl")].[2]"

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[2] There are two victims in this case. To respect their privacy, they will be referenced as follows throughout this report and recommendation: V1 for the adult victim and MV2 for the minor victim.

United States v. Sepulveda, 64 F.4th 700, 703, 705-706 (5th Cir. 2023) (setting out the facts and circumstances of the allegations and evidence presented at trial).[3]

Sepulveda timely filed a notice of appeal to the Fifth Circuit. *Id.* at 706. In his appeal, Sepulveda argued the Government failed to disclose impeachment evidence, the district court erred by drawing an adverse inference from his silence during sentencing and challenged the amount of restitution. *Id.* at 706, 708, 712. The Fifth Circuit rejected these arguments and affirmed Sepulveda's conviction, sentence, and amount of restitution. *Id.* at 715.

Subsequently, Sepulveda filed a motion pursuant to 28 U.S.C. § 2255 alleging he received ineffective assistance of counsel during his trial. (Dkt. No. 1).

I. SUMMARY OF THE PLEADINGS

In his complaint, Sepulveda alleges his trial counsel was ineffective in various ways. Before trial, Sepulveda alleges counsel did not go over discovery, did not discuss trial strategy, minimized the charges

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[3] Sepulveda was initially charged by criminal complaint on October 17, 2019. (Crim. Dkt. No. 1). After multiple continuances had been granted to allow trial counsel to prepare for trial and due to Covid-19 pandemic, jury trial began on March 9, 2021; verdict was returned on March 10, 2021. (Crim. Dkt. Nos. 55, 56). Sepulveda was formally sentenced by the district judge on July 20, 2021. (Crim. Dkt. No. 78).

faced, and did not discuss the possibility of Sepulveda testifying in his own defense. (Dkt. No. 1 at 4). During trial, Sepulveda argues counsel ignored his advice when questioning witnesses. *Id* Particularly, Sepulveda complains counsel did not ask the questions Movant wrote on a legal pad during trial. *Id* Sepulveda also believes counsel was ineffective in impeaching witnesses. *Id* Sepulveda faults counsel for not questioning the law enforcement witnesses on whether said witnesses had Texas Commission on Law Enforcement ("TCOLE") certifications. *Id* Sepulveda alleges counsel did not question some government witness about sexual advances towards him. *Id.* Sepulveda further faults counsel for not using the fact Sepulveda allowed minor victim 2 ("MV2") to charge his phone to call his mother during questioning. *Id.* Sepulveda alleges he also had "witnesses who could attest" that VI was "bragging about getting his papers" in connection to the prosecution. *Id.* Sepulveda states the justification counsel provided for, any of the questioning and testifying decisions was to avoid "opening a can of worms." *Id.* Finally, Sepulveda argues counsel reassured Movant that if the case was lost at trial, it would be won on appeal. *Id.*

The Government contends Sepulveda's ineffective assistance of counsel claim lacks merit and should be denied without an evidentiary hearing. (Dkt. No. 4 at 14). First, Sepulveda supports his claim with mere vague and conclusory allegations. The Government contends Sepulveda was present during various pretrial hearings in which discovery was

discussed and Sepulveda's counsel requested additional time to review discovery. *Id.* at 17-18. Thus, the allegation counsel did not review discovery is contradicted by the record. *Id.* at 17. Further, Sepulveda cannot explain how additional consultation or explanation would have changed the outcome of his case. *Id.* at 18. Sepulveda complains of counsel's questioning but does not specify what the questions were, to whom they were directed, nor how they resulted in prejudice. *Id.* at 22. As to the right to testify, the Government argues Sepulveda's allegation is unsupported, as Sepulveda does not even state he wished to testify. *Id.* at 23. Finally, the Government asserts Sepulveda does not meet his burden in establishing that trial counsel was ineffective by failing to call some unnamed witnesses. *Id.* At 26. Thus, the Government submits that the habeas petition should be denied.

Sepulveda's reply argues trial counsel failed to investigate six individuals. First, Sepulveda alleges trial counsel failed to adequately investigate both victims. (Dkt. No. 5 at 3). Then, Sepulveda argues trial counsel failed to investigate Officer Rodriguez, who did not testify at trial, but an investigation would have revealed a spotty work history that warranted calling him to testify. *Id.* at 11. Sepulveda argues counsel failed to investigate Chief of Police Cesar H. Solis, who also did not testify at trial. But again, Sepulveda claims his background would have warrant further investigation. *Id.* Sepulveda also contends counsel failed to fully investigate Officer Jacob Rivera, who testified about the incident with

MV2 and about Sepulveda's behavior while at the police academy. *Id.* at 12-14. Finally, Sepulveda argues trial counsel failed to investigate Hidalgo County Sheriff Investigator Rigoberto Cantu, who did testify at trial on behalf of the government. An investigation would have revealed Investigator Cantu's longstanding career in law enforcement, which could have been used to impeach the testimony of the other law enforcement witnesses or cast doubt as to the collection of DNA evidence by Investigator Cantu. *Id* at 14-15.

Sepulveda also reiterates his counsel's failure to ask cross examination questions he wrote during trial. (Dkt. No. 5 at 16). Sepulveda argues trial counsel was ineffective for failing to call character witnesses during the trial and failing to object to extrinsic evidence. *Id* at 21, 22. Sepulveda alleges trial counsel failed to adequately explain Sepulveda's right to testify or to prepare him to testify. *Id* at 23. Finally, in his reply, Sepulveda raises a new claim, arguing his counsel interfered with his right to assert his innocence and committed structural error. *Id* at 24.

II. LEGAL STANDARD

Section 2255 of title 28 of the United States Code gives an individual in federal custody an opportunity to collaterally challenge his conviction. Thus, such a remedy is "reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct

appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Vaughn, 855 F.2d 367, 368 (5th Cir. 1992) (per curiam) (citations omitted). There are four specific grounds upon which to bring a § 2255 motion: (1) the sentence violates the Constitution or laws of the United States, (2) the court was without jurisdiction to impose a sentence, (3) the sentence exceeds the statutory maximum permitted, and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *United States v. Seyfert,* 67 F.3d 544, 546 (5th Cir. 1995). Additionally, ineffective assistance of counsel claims are properly raised in a§ 2255 motion. *United States v. Green,* 47 F.4th 279, 296 (5th Cir. 2022) (citations omitted). Finally, a § 2255 motion may be dismissed without an evidentiary hearing if "the motion, files, and record of the case conclusively show that no relief is appropriate." *United States v. Santora*, 711 F.2d 41, 42 (5th Cir. 1983) (citations omitted)*; United States v. Green,* 882 F.2d 999, 100 (5th Cir. 1989).

To demonstrate ineffective assistance of counsel, the Movant is charged with satisfying a two-prong test: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) he suffered prejudice because of the deficient performance. *Strickland v. Washington,* 466 U.S. 668,687 (1984). There is a "strong presumption that counsel's conduct falls within the wide range ofreasonable professional assistance" and "judicial scrutiny of counsel's performance must be highly deferential." Id at 689. In making this assessment, the Court must make every effort "to eliminate the

distorting effects of hindsight." Id Prejudice is shown when "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 at 694. What will amount to sufficient prejudice will vary case by case since the prejudice prong "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Russell v. Denmark*, 68 F.4th 252, 269 (5th Cir. 2023); *Williams v Taylor*, 529 U.S. 362, 393 n.17 (2000) (citing *Strickland*, 466 U.S. at 687; *Kimmelman v. Morrison*, 477 U.S. 365, 393 (1986) (Powell, J., concurring)).

If the Movant' s claim fails either prong, it should be disposed of on that ground without the need to discuss the other prong. *Strickland*, 466 U.S. at 696 ("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.").

II. ANALYSIS

Sepulveda raises one ground for relief, that his trial counsel provided ineffective assistance of counsel. (Dkt. No. 1 at 4). To support this, Sepulveda generally alleges four ways in which trial counsel provided ineffective assistance: (1) failed to properly investigate and call witnesses, (2) failed to discuss discovery and trial strategy, (3) failed to cross

examine witnesses and, (4) failed to explain and prepare Sepulveda to testify. Sepulveda also alleges trial counsel interfered with Sepulveda's right to assert his innocence. (Dkt. No. 5 at 24).
Each will be addressed in tum.

A. Failure to Investigate and Call Witnesses

When a movant claims his counsel failed to investigate, the movant must allege with *specificity* what the investigation would have revealed and how it would have changed the outcome of the trial. *United States v. Green,* 882 F.2d at 1003; *Johnson v. United States,* No. 6:20-cv-485, 2022 WL 806609, at *9 (E.D. Tex. Feb. 9, 2022). Further, "there is no presumption of prejudice based on the failure to investigate." *Gonzalez v. United States,* No. 5:19-CV-145, 2020 WL 1893552, at *3 (S.D. Tex. Jan. 24, 2020) (citing *Woodard v. Collins,* 898 F.2d 1027, 1029 (5th Cir. 1990)).

Counsel's decision to present witness testimony is part of trial strategy and ultimately a strategic decision. *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985); *Murray v. Maggio, Jr.,* 736 F.2d 279,282 (5th Cir. 1984). Thus, "complaints of uncalled witnesses are not favored" since "allegations of what a witness would have testified are largely speculative." *Buckelew v. United States,* 575 F.2d 515,521 (5th Cir. 1978); *Lockhart v. McCotter,* 782 F.2d 1275, 1282 (5th Cir. *l986);Adams v. Quarterman,* 324 F. App'x 340,350 (5th Cir. 2009). When the only evidence of missing witness testimony comes from a

defendant, the ineffective assistance claim should be viewed "with great caution." *United States v. Cockrell,* 720 F.2d 1423, 1427 (5th Cir. 1983); *Lockhart,* 782 F.2d at 1282. And, conclusory claims alone are not enough to warrant habeas relief. *Green v. Johnson,* 160 F.3d 1029, 1042 (5th Cir. 1998)(citations omitted). To prove an ineffective assistance of counsel claim based on an uncalled witness, a movant must name the witness, show the witness would have testified, set out the content of the witness's proposed testimony, and show the testimony would have been favorable. *Gregory v. Thaler,* 601 F.3d 347, 352 (5th Cir. 2010); *Alexander,* 775 F.2d at 602. The movant must overcome a strong presumption that his counsel's decision to not call a witness was a strategic decision. *Murray,* 736 F.2d at 282 (citing *Strickland,* 466 U.S. at 689-90).

Sepulveda claims his trial counsel failed to investigate six people. (Dkt. No. 5 at 5-15). However, Sepulveda does not demonstrate how any of the information he presents would have changed the outcome of the trial. First, Sepulveda argues his counsel should have investigated the background of minor victim 2 ("MV2") because it would have revealed MV2 had been indicted by the county, after Sepulveda's crime but before MV2's testimony at trial.[4] (Dkt. No. 5 at 5). Sepulveda argues if counsel

[4] MV2 was indicted for sexual assault of a child in Hidalgo County, Texas. Ultimately, the district attorney presented the case to a grand jury which returned a "no bill" for the case and no further charges were brought against MV2. (Dkt. No. 5 at 5).

would have known about this, by investigating, he could have impeached the witness and demonstrated his true motives, since his county indictment was "No Billed" by the state grand jury thereafter. *Id.* at 5-6.

Although Sepulveda seems to imply the federal prosecutors played some hand in the county proceedings, he fails to show any prejudice. Assuming Sepulveda's trial counsel found this information, he still could have chosen not to question on this point. Further, there is also a chance this line of questioning would not have been permitted because there was no conviction on the matter. As the district court concluded, "the evidence of 'a mere allegation against [MV2] would not have been admissible to impeach'" MV2. See Sepulveda, 64 F.4th at 707. Ultimately though, Sepulveda cannot show questioning the minor victim on this point would have changed the jury's mind. Sepulveda cannot show the jury would have discredited MV2's testimony so much so that they would not convict him. The record demonstrates MV2's testimony was supported by evidence, such as Sepulveda's browser history, surveillance video, and the similarities between both victim statements. Furthermore, Sepulveda's trial counsel did question MV2 on other topics that dealt with credibility and other relevant issues in the case. (Crim. Dkt. No. 68 at 51-54) (trial counsel questioned MV2 on topics like marijuana being present in the vehicle at the time of law enforcement encounter, whether Sepulveda locked any doors or handcuffed MV2 while in Sepulveda's custody, and whether Sepulveda wore

gloves)[5]. Thus, Sepulveda fails to establish that he was prejudiced by any failure to investigate MV2's criminal record[6].

Second, Sepulveda faults his trial counsel for failing to investigate victim 1 ("VI"). (Dkt. No. 5 at 9). Particularly, Sepulveda argues there was information VI 's motives for testifying in the case were to secure his immigration status. Id Sepulveda claims he told his trial counsel about an individual ("J.M.") who had information on this point, and that his trial counsel never interviewed "J.M" or others acquainted with VI. Id This claim fails because Sepulveda does not provide what this investigation would have revealed or how it would have changed the outcome of the case. One, Sepulveda's trial counsel did question VI on this exact motive. Two, Sepulveda cannot state what further investigation would have revealed, as trial counsel was already aware of these allegations. Three, to the extent Sepulveda attempts to posit "J.M" would have testified on his behalf, Sepulveda does not explain who "J.M" is, what exactly "J.M." would have testified about, that said witness was willing to testify, and that the testimony would have favorably changed

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[5] Crim. Dkt. Nos. 67 and 68 are, respectively, transcripts from two-day jury trial from March 9-10, 2021.

[6] In Sepulveda's direct appeal, the Fifth Circuit concluded evidence of MV2's arrest and subsequent disposition of the case was not material under Brady, and that Sepulveda's "attenuated chain of inferences" did "not give rise to a reasonable probability that Sepulveda's case would have turned out differently." United States v. Sepulveda, 64 F.4th 700, 708 (5th Cir. 2023).

the result. *Gregory*, 602 F.3d at 352; *Alexander*, 775 F.2d at 602.

Sepulveda's claim also fails because his trial counsel did question Vl about his potential motives and trial counsel does not need to present cumulative or repetitive evidence. *United States v. Harris,* 408 F.3d 186, 191 (5th Cir. 2005) (citing *Murray,* 736 F.2d at 282). And the omission of cumulative testimony cannot amount to ineffective assistance. *Id.* As noted, Sepulveda's counsel questioned Vl during cross examination about the point Sepulveda wanted to present. Sepulveda's counsel specifically asked, "now as a result of this case, you've been granted a visa, is that correct?" (Crim. Dkt. No. 67 at 85). Sepulveda's counsel also asked Vl if the U.S. Attorney's office helped him apply for the temporary permit to remain in the country. *Id* at 87. It is evident trial counsel attempted to cast doubt into Vl's testimony based on this line of questioning. Not only does this establish that Sepulveda' s counsel cross-examined the witness on potential motives but bolsters the presumption that trial counsel's decision not to call more witnesses was trial strategy.

Furthermore, regarding Vl, Sepulveda urges his trial counsel failed to request his body camera footage that would have revealed V1 resisted arrest. Even if the Court credits this unsupported assertion, Sepulveda cannot show prejudice. Sepulveda does not establish how having or obtaining the body camera footage would have changed the outcome of his case. Vl may have well resisted arrest, but that would not

impact his testimony that Sepulveda sexually assaulted him, which occurred after the supposed resisted arrest and was further corroborated by DNA evidence presented at trial. Third, Sepulveda faults his trial counsel for failing to investigate Officer Alberto A. Rodriguez, another Progreso Police Department officer who was present at the traffic stop location where Sepulveda encountered MV2. (Dkt. No. 5 at 9-11). Particularly, Sepulveda argues trial counsel should have conducted a record search in the Texas Commission on Law Enforcement ("TCOLE") database, which provides records of law enforcement officers and their training, certifications, and disciplinary history. *Id.* at 9-10. Such search would have revealed that Officer Rodriguez had some spotty work history and that he received a public reprimand thirty-five days after Sepulveda's arrest. *Id.* at 10-11. Sepulveda argues his trial counsel should have called Officer Rodriguez to ask him about these things.

This claim fails because Sepulveda cannot show prejudice. Of note, this apparent investigation into Officer Rodriguez does not reveal any material information for Sepulveda's case. Sepulveda does not show how this information changes the outcome of his case. Officer Rodriguez was not called as a witness by the prosecution, so there was no need to impeach or discredit him as a witness. Sepulveda does not reveal any information that would have affected his case in a manner that warranted calling Officer Rodriguez to the stand. Indeed, trial counsel could have very well made a strategic decision in not calling Officer Rodriguez, as such testimony could present further

evidence of guilt and be cumulative as to what Officer Rivera testified to as to the allegations. Again, counsel's decision to call a witness is a strategic decision, and a defendant's conclusory claims alone do not support habeas relief. *Green,* 160 F.3d at 1042.

For example, in *United States v. Harris,* the Fifth Circuit reversed a district court for finding failure to call witnesses amounted to ineffective assistance of counsel. 408 F.3d 186, 191 (5th Cir. 2005). The Fifth Circuit reasoned trial counsel's decision to rest his case on the only witness who could refute the government's evidence on the merits, and declining to call witnesses with cumulative or *irrelevant* testimony was proper and did not amount to ineffective assistance of counsel. The same is true here. Sepulveda does not present a single fact worth discussing before a jury. If Officer Rodriguez did not last at jobs very long, for whatever reason, it does not speak to Sepulveda's guilt or innocence. Sepulveda does not provide what the public reprimand was about, or why it matters to his case. Sepulveda presents conclusory allegations that solely speak on peripheral, wholly irrelevant matters. Such claim does not warrant habeas relief.

Fourth, Sepulveda argues his trial counsel was ineffective because he failed to investigate the Chief of Police for Progresso Police Department at time of the incident - Cesar H. Solis. (Dkt. No. 5 at 11). Chief Solis was not present at the scene of any relevant events and did not testify in Sepulveda's trial. Sepulveda again argues a search of TCOLE records

would have revealed Chief Solis worked for six different agencies since 1998, was noncompliant from 2013-2017, and was reprimanded in May of 2018. *Id* This claim fails for substantially the same reasons as above. Sepulveda does not provide what testimony could have been elicited and cannot show how any of this information changes the outcome of his case. The information this proposed investigation would have revealed is irrelevant. Chief Solis' history is all before Sepulveda was charged with his crime nor is Chief Solis a fact witness to either crime. Thus, there is no basis by which this information changes the outcome of Sepulveda's trial. Accordingly, this claim fails.

Fifth, Sepulveda argues his trial counsel was ineffective because he failed to investigate Officer Jacob Rivera, who attended the police academy with Sepulveda, worked with Sepulveda and initiated the traffic stop relevant to MV2, and testified at trial. (Dkt. No. 5 at 12-14). Sepulveda argues a search of TCOLE records would have revealed there are many profiles associated with the name "Jacob Rivera." *Id* at 12. Further, Officer Rivera was not employed in law enforcement at the time of his testimony. *Id* Finally, Sepulveda faults his counsel for failing to object to Officer Rivera's testimony about Sepulveda's behavior at the police academy. *Id.* At 13. Again, Sepulveda fails to establish how any of this information would have changed the outcome of his case. One, the fact many profiles are associated with "Jacob Rivera" provides nothing of evidentiary value. Two, Officer Rivera no longer being employed at the Progreso Police Department does not speak to

Sepulveda's claim. After all, it was an unpaid volunteer position. (Crim. Dkt. No. 67 at 211). This is a peripheral matter, and Sepulveda does not provide any reason why a different motive for Officer Rivera leaving his position is relevant to the outcome of Sepulveda's case. *Cf* Fed. R. Evid. 401 (noting that evidence is relevant when "it has any tendency to make a fact more or less probable than it would be without said evidence"). Three, although it may have been worthwhile to object to portions of Rivera's testimony, Sepulveda cannot show the outcome of his case would have changed if such objections took place. Ignoring Rivera's testimony about Sepulveda's behavior at the academy, there was sufficient evidence for the jury to reach the conclusion it did. Thus, this claim fails to establish any prejudice.

Lastly, Sepulveda argues his trial counsel failed to investigate Investigator Rigoberto Cantu. (Dkt. No. 5 at 14). Investigator Cantu was employed by the Hidalgo County Sheriffs Office, and he testified at trial about his role in executing a search warrant for Sepulveda's DNA. (Crim. Dkt. No. 67 at 109-16). Sepulveda argues a search of TCOLE records would have revealed Investigator Cantu was a law enforcement officer for thirty years and was certified as an "Advanced Officer." (Dkt. No. 5 at 14-15). Sepulveda contends this information would have been useful because his trial counsel could have cross-examined Investigator Cantu in a manner that could "undermine the collection of the DNA evidence or the acts of the other officers in this case." *Id.* at 15. This claim is also meritless. Sepulveda cannot

demonstrate how this information changes the outcome of the case. Instead, these contentions are solely based on speculation. Such speculative endeavors are not a proper basis to grant habeas relief. *Green,* 160 F.3d at 1042.

In addition to the failure to investigate claims, Sepulveda argues his trial counsel failed to present character witnesses at the guilt-innocence phase of his trial. (Dkt. No. 5 at 21). Again, to show ineffective assistance of counsel based on uncalled witnesses, a movant must name the witness, show the witness would have testified, set out the content of the witness's proposed testimony, and show the testimony would have been favorable. *Gregory,* 602 F.3d at 352. There is also strong presumption counsel's decision not to call certain witnesses is trial strategy. *Murray,* 736 F.2d at 282. To support his claim, Sepulveda posits there were "coworkers, classmates, family and friends who could have been called as character witnesses." (Dkt. No. 5 at 21). Presumably, they would have testified about the "stellar background and record" Sepulveda had before his arrest. *Id* This claim fails as well.

By way of example, in *Clark,* an individual challenged his conviction through a § 2255 motion, alleging he received ineffective assistance of counsel because his trial attorney did not call specific witnesses. *Clark* v. *United States,* No. 4:09-cv-387, 2012 WL 3580687 at *5 (E.D. Tex. Aug. 17, 2012). Movant provided the court with a list of names that could have testified on his behalf. *Id* The court denied

movant's motion because he did not provide sufficient evidence that counsel's decisions were not trial strategy and did not provide any details as to what the testimony would have been or whether the witnesses were willing and able to testify on his behalf. *Id*

In the present case, Sepulveda does not even provide the names of these proposed character witnesses. (Dkt. No. 5 at 21-22). He does not show any of the witnesses were available or willing to testify. *Id* He does not specify the content of such testimony, nor does he establish how this testimony would have been favorable to him. *Id.* There is no reason to doubt the fairness and soundness of his conviction simply because some witnesses could have testified Sepulveda was a "good person." *Clark,* 2012 WL 3580687, at* 5; *see also Harris,* 408 F.3d at 191 (noting that prejudice was not established by petitioner because character witnesses, who were "of peripheral relevance" to claim would not have changed the outcome of the trial).

A. Failure to Discuss Discovery and Trial Strategy

Sepulveda argues trial counsel did not review discovery or discuss trial strategy with him. (Dkt. No. 1). Such claim cannot simply rely on conclusory allegations that are unsupported by the record and speculative at best. *United States v. Turner,* No. H-16-1994, 2019 WL 1506656 at *4 (S.D. Tex. Apr. 4, 2019); *see also Green,* 160 F.3d at 1042. In fact,

allegations that counsel believed the case would be won at trial can support both that counsel reviewed discovery and discussed trial strategy with a defendant. *Id* In this case, Sepulveda alleges counsel continuously reaffirmed him the case would be won. (Dkt. No. 1 at 4). Further, counsel requested the Court grant eight of eleven total continuances to effectively prepare and go over discovery and retain a DNA expert. (Crim. Dkt. Nos. 19, 21, 23, 29, 33, 35, 39, 45). Counsel specifically told the court, "It's a very serious case by way of punishment.. .I need to complete my review and then talk to my client." (Crim. Dkt. No. 84 at 4 (Transcript of Pretrial Conference, October 30, 2020)). Notably, Sepulveda was present with counsel at these hearings. *Id* at 7. Particularly, in Sepulveda's presence, counsel stated the defense plan was "to raise doubt" connected to the DNA evidence. (Crim. Dkt. No. 85 at 6 (Transcript of Pretrial Conference, December 4, 2020)).[7] Thus, Movant's assertion his counsel did not review discovery or discuss trial strategy is contradicted by the record. Further, Sepulveda does not explain how this alleged defect prejudiced his defense. *See Duriso* v. *United States,* No. l:19-cv-636, 2022 WL 18283185 at *3 (E.D. Tex. Nov. 17, 2022).

Sepulveda contends his trial counsel had "no theory of the case and no manner to get his theme (if any) across to the □Jury." (Dkt. No. 5 at 16). Yet, Sepulveda also faults counsel for centering his defense on undermining the validity of the DNA evidence. (Dkt. No. 5 at 20-21). Despite these contradicted contentions, Sepulveda does not propose any

alternative or more persuasive defense. Sepulveda makes no allegations to support additional review or discussion with counsel "would have enabled his attorney to develop additional evidence or defenses." *United States* v. *Elliot,* No. 95-30901, 1996 WL 556816, at *1 (5th Cir. Sept. 9, 1996). Trial counsel's decision to focus on "an argument that the prosecution had not proved its case" is proper because "it 'sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.'" *United States* v. *Bernard,* 762 F.3d 467, 478 (5th Cir. 2014) (quoting *Harrington* v. *Richter,* 562 U.S. 86, 109 (2011)).

Since Sepulveda cannot demonstrate prejudice, his claim for ineffective assistance of counsel in the context of discussing trial strategy and discovery fails.

B. ***Failure to Cross Examine Witnesses***

Counsel's decisions on how to approach cross examination are considered strategic and will usually "not support an ineffective assistance claim." *Kroma* v. *United States,* No. 4:18-CV-823, 2021 WL 2229733, at *12 (E.D. Tex. Mar. 2, 2021) (quoting *Dunham* v. *Travis,* 313 F.3d 724, 732 (2d Cir. 2022)). Thus, to maintain an ineffective assistance of counsel claim based on cross examination, movant must show that further impeachment would have changed the jury's verdict. *Russell* v. *Collins,* 944 F.2d 202, 206 (5th Cir. 1991). In other words, movant must establish what testimony would have been elicited and how it

would have changed the outcome of the case. *Day v. Quarterman,* 566 F.3d 527, 539-40 (5th Cir. 2009).

Sepulveda contends his trial counsel "failed to question or effectively cross-examine any witnesses. Rather, his questions only solidified or shored up any testimony presented by counsel for the government." (Dkt. No. 5 at 16). To support this, Sepulveda points to the page count difference in the trial transcript between trial counsel's questioning and the Government. *Id.* at 7, 15. Simply complaining that trial counsel should have asked more questions, without providing what the questions should have been or how they were necessary, does not show ineffective assistance[7].

In his motion, Sepulveda argues he informed counsel of "sexual advances" a government witness made towards him, but such allegation was not used during cross. (Dkt. No. 1 at 4). Sepulveda does not elaborate on this assertion in his reply. The

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[7] Numerical quantity of questions does not necessarily equate with quality. In other words, the number of questions asked does not determine the effectiveness of the questioning. "Cross-examination is a sharp two-edged sword and more criminal cases are won by not cross-examining adverse witnesses, or *by a very selective and limited cross-examination of such witnesses,* than are ever won by demolishing a witness on cross-examination." *Molina v. Madden,* No. CV 16-05454 FMO (AFM), 2017 WL 1224556, at *11 (C.D. Cal. Feb. 6, 2017) (quoting *United States v. Clayborne,* 509 F.2d 473, 479 (D.C. Cir. 1974) (emphasis added)). "The decision whether to cross-examine a witness [and how] is peculiarly one for defense counsel and his judgment should be entitled to great respect by the court." *Clayborne,* 509 F.2d at 479.

Government correctly points out this claim lacks specificity. (Dkt. No. 4 at 24). Sepulveda fails to name the witness or provide details about what the information elicited would have been. Finally, Sepulveda does not state how this information would have led to a not guilty verdict.

Sepulveda also notes he wrote questions for his counsel to ask as cross examination of witnesses took place. (Dkt. No. 5 at 16). This allegation is faulty on the same grounds. Sepulveda does not tell the Court what these questions were or how these questions would have changed the outcome of the case. Thus, the only support Sepulveda provides for his claim are his own conclusory allegations. *Day,* 566 F.3d at 539-40. Sepulveda needed to show what testimony would have been elicited and how it would have changed the outcome of the case. *Id.* He shows neither. This claim based on inadequate cross-examination fails for noted reasons.

A. Movant's Right to Testify

A criminal defendant has a constitutional right to testify or to abstain from testifying. *Rock v. Arkansas,* 483 U.S. 44, 49-53 (1987). Yet, trial counsel's decision as to whether a defendant should testify is considered trial strategy, and "should not easily be condemned with the benefit of hindsight." *United States v. Mullins,* 315 F.3d 449, 453 (5th Cir. 2002) (citation omitted). The key is that the ultimate decision on whether to testify lays with the defendant, and trial counsel cannot override this decision. *Id.*

So, if the defendant knew of his right to testify but acquiesced in his lawyer's advice to refrain from testifying, he must show the advice counsel provided was not sound. *Id.* at 454.

Sepulveda argues "trial defense counsel never explained to [a]pplicant any possible strategies for testifying or not testifying. Rather, he advised him not to testify for fear of 'opening up a can of worms.'" (Dkt. No. 1 at 4). Sepulveda supports this claim by summarizing the events at trial, noting Sepulveda was not called to the stand. (Dkt. No. 5 at 23). Sepulveda correctly points out there are instances in which the Fifth Circuit finds error when counsel prevents a client from testifying. *Id.* But Sepulveda fails to show how his case falls within those instances.

Sepulveda does not provide any supporting facts that show counsel prevented him from testifying. In fact, his own words demonstrate Sepulveda' s trial counsel did have conversations about Sepulveda taking the stand, and Sepulveda acquiesced in his counsel's advice. (Dkt. No. 1 at 4). Sepulveda does not argue he would have taken the stand. Sepulveda does not argue his trial counsel coerced him into not testifying either. After day one of the two-day trial, the Court noted some changes to the jury charge were necessary "now that the Defendant is not going to testify." (Crim. Dkt. No. 67 at 251). This further shows that discussions about testifying took place and Sepulveda ultimately acquiesced to his counsel's advice. *Mullins,* 3'i5 F.3d at 453-54.

In *Turner,* a defendant testified at trial and later argued her counsel never informed her the decision to testify was hers alone to make. 2019 WL 1506656 at *5. The court rejected this argument because she could not show she expressed desire not to testify, that counsel coerced or forced her testimony, or that if counsel would have told her the decision was hers alone, she would not have testified. *Id.* at *4. Similarly, but in the opposite position as the petitioner in *Turner,* Sepulveda does not provide any facts to support counsel prevented him from testifying. Sepulveda simply states a defendant has a right to testify and his counsel cannot override his will and stop him. This is true, but it is not what happened at Sepulveda's trial. Thus, Sepulveda's ineffective assistance of counsel claim for failure to call him to testify should be denied. *See also Ross v. Estelle,* 694 F.2d 1008, 1012 (5th Cir. 1983) (noting that "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." (citation omitted)).

Right to Assert Innocence

Sepulveda argues his trial counsel deprived him of his right "to the autonomy to decide the objective of the defense was to assert innocence." (Dkt. No. 5 at 24). In support, Sepulveda argues trial counsel "misled and confused" and "hindered and discouraged [Sepulveda] from asserting his innocence" and encouraged him to enter a guilty plea. *Id.* at 24-25. In essence, Sepulveda attempts to

say his trial counsel did not allow Sepulveda to assert his innocence. Because a criminal defendant has a right to decide the objective of his defense throughout the criminal proceedings, Sepulveda argues he suffered structural error, and his conviction should be vacated. *Id.* at 25-26. In *McCoy v. Louisiana,* the Supreme Court recognized a defendant has the right to decide on the objective of his defense and defense counsel cannot override this decision. 584 U.S. 414, 423 (2018). Thus, "when a client expressly asserts that the objective of *'his* defen[s]e' is to maintain innocence" counsel "must abide by that objective" and cannot concede his client's guilt. *Id.* McCoy was facing the death penalty for three murders. *Id.* at. 418. McCoy repeatedly told counsel he was innocent of the crime and attempted to assert his innocence in open court. *Id.* at 418-20. Yet, his trial counsel surmised it would be better to admit guilt in hopes of avoiding the death penalty. *Id.* at 422. Despite McCoy's insistence, trial counsel told the jury his client was guilty of the murders. *Id.* at 418-20. Thus, counsel violated the Sixth Amendment by conceding McCoy's guilt to the jury notwithstanding his objections.

Sepulveda's case could not be more different. Sepulveda supports his autonomy argument with allegations that clearly do not resemble *McCoy*. Sepulveda states "trial counsel failed to inform, prepare or discuss the case to be tried and presented to a O]ury." (Dkt. No. 5 at 24). This is not overriding a client's autonomy to assert innocence. This is an ineffective assistance of counsel claim for, failure to

discuss trial strategy (which fails as discussed above, *see supra* pp. 13-14). It does not rise to the level of structural error.

Next, Sepulveda attempts to bolster his claim with allegations that trial counsel misled, confused, hindered, and discouraged him from asserting his innocence. (Dkt. No. 5 at 24). For instance, Sepulveda argues, trial counsel "attempted to push for a plea of guilty." *Id.*

The Court is unpersuaded. Sepulveda's trial counsel honored his client's request to assert innocence and Sepulveda provides nothing to discredit this. Sepulveda did not take a plea deal. And any conversations in which trial counsel discussed with Sepulveda the option of a plea deal would unquestionably be proper. *Missouri v. Frye,* 566 U.S. 134, 145 (2012). Of course, the ultimate choice, whether to plead guilty or whether to assert innocence at trial, belongs to the defendant. *McCoy,* 584 U.S. at 422. Trial counsel did not concede his client's guilt. Instead, trial counsel attempted to raise doubt about the DNA evidence and attempted to discredit witnesses, all consistent with asserting innocence. There was a jury trial in this matter requiring the Government to prove the case based on proof beyond a reasonable doubt and Sepulveda' s autonomy to assert innocence argument is meritless on the facts of that trial and should be dismissed.

C. Evidentiary Hearing

"Section 2255 requires a hearing unless the motion, files and record of the case conclusively show that no relief is appropriate." *United States v. Santora,* 711 F.2d 41, 42 (5th Cir. 1983). There is no need for an evidentiary hearing in this case because Sepulveda's claims are devoid of factual or legal merit or plainly refuted by the record. *See Green,* 882 F.2d at 1008; *United States v. Bondurant,* 689 F.2d 1246, 1251 (5th Cir. 1982); *see also United States v. Bartholomew,* 974 F.2d 39, 41 (5th Cir. 1992).

III. CONCLUSION

A. Recommended Disposition

After careful review of Sepulveda's § 2255 motion, the record and relevant law, the undersigned concludes that Sepulveda's § 2255 motion does not establish ineffective assistance of counsel on any of the presented arguments. Therefore, the undersigned recommends that Sepulveda's § 2255 motion (Civ. Dkt. No. 1) be DENIED. It is further recommended that Sepulveda's motion (Civ. Dkt. No. 1) be DISMISSED with prejudice, and said case be CLOSED. It is also recommended that the District Court DECLINE to issue a certificate of appealability in this matter. Certificate of Appealability

It is recommended that the District Court deny a certificate of appealability. Because the undersigned recommends the dismissal of Movant's § 2255 action, it must be addressed whether Movant is entitled to a certificate of appealability ("COA"). The

Rules Governing Section 2255 Proceedings instruct that the District Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." R. Gov. Sec. 2255 Proceedings **11.** An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding under section 2255 "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C.§ 2253(c)(l)(B).

A movant is entitled to a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). For claims denied on their merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000); *see also United States v. Jones,* 287 F.3d 325, 329 (5th Cir. 2002) (applying the *Slack* standard to a COA determination in the context of a § 2255 proceeding). An applicant may also satisfy this standard by showing that 'jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El,* 537 U.S. at 327; *see also Jones,* 287 F.3d at 329. For claims that a district court rejects solely on procedural grounds, the prisoner must show both that "jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right

and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484. For the reasons explained in the report, Sepulveda would not be able to establish that reasonable jurists would find debatable or wrong the conclusion that Sepulveda's § 2255 motion fails to establish prejudice on any of the claims. Accordingly, it is recommended that the District Court deny a COA.

NOTICE TO THE PARTIES

The Clerk shall send copies of this Report and Recommendation to Petitioner, who has fourteen (14) days after receipt thereof to file written objections pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file written objections to the proposed findings and recommendations contained in this report within 14 days after service shall bar an aggrieved party from *de nova* review by the District Court of the proposed findings and recommendations and from appellate review of factual findings or legal conclusions accepted or adopted by the District Court, except on grounds of plain error. *See Douglas v. United Serv. Auto Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en bane), *superseded by statute on other grounds,* 28 U.S.C. § 636(b)(l).

The Clerk shall provide copies of this order to counsel for each party.

Done at McAllen, Texas on 2nd day of January 2025

/s/ Juan Alanis
United States Magistrate Judge