

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

ISAAC J CULVER, III	:	
	:	
Movant,	:	Criminal No. 5:17-cr-26-MTT-CHW-1
	:	
v.	:	Civil No.: 5:22-cv-0001-MTT-CHW
	:	
UNITED STATES OF AMERICA,	:	Proceedings Under 28 U.S.C. § 2255
	:	
Respondent.	:	Before the U.S. Magistrate Judge

REPORT AND RECOMMENDATION

Before the Court is a motion to vacate, set aside or correct sentence filed by Isaac Culver under 28 U.S.C. § 2255. (Docs. 360, 363).¹ Movant contends that trial counsel was ineffective for several reasons stemming from the Court’s decision to sever Movant and his co-Defendant’s trial shortly before it commenced, leaving trial counsel without the benefit of three senior attorneys. He also argues that the verdict was tainted by bias demonstrated by the jury foreperson and his wife in favor of the government and by Juror 19 against Movant. Because Movant did not raise his arguments about juror bias on direct appeal, these claims are procedurally defaulted, and he has failed to overcome the default. Moreover, these claims, as well as his ineffective assistance of counsel claims, also fail on the merits. Accordingly, it is **RECOMMENDED** that Movant Culver’s Section 2255 motion (Docs. 360, 363) be **DENIED**.

PROCEDURAL BACKGROUND

Indictment and Pretrial Matters

On June 13, 2017, a federal grand jury returned, in this Court, a thirteen count indictment charging Movant with (1) one count of conspiracy to commit wire and mail fraud in violation of

¹ Movant amended his brief in support of his Section 2255 motion, and it was docketed as an amended motion. (Doc. 363).

18 U.S.C. §§ 1341, 1349, and 2; (2) ten counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2; (3) one count of mail fraud in violation of 18 U.S.C. § 1341 and 2; and (4) one count of money laundering in violation of 18 U.S.C. § 1956. (Doc. 1). Movant’s company, Progressive Consulting Technologies, Inc. (Progressive), and Dave Carty, co-owner of Progressive, were also charged. *See (id.)* Movant and Progressive were represented by attorneys Ed Garland and John Garland, who entered appearances in July 2017 for Movant and October 2017 for Progressive. (Docs. 29, 30, 36-37). Carty was represented by Frank Hogue and Laura Hogue. (Docs. 27, 28).

The case was declared complex in September 2017. (Doc. 35). The Court entered a scheduling order in November 2017, which set the case for trial on July 16, 2018. (Doc. 39). In advance of trial, the Court considered multiple pre-trial motions and matters. The motions and rulings most germane to Movant’s Section 2255 grounds are highlighted in this summary. First, following a hearing, Culver, Carty, and Progressive successfully objected to the admissibility of any Rule 404(b) evidence related to other contracts involving Defendants and the School District, which prevented the Government’s introducing extrinsic evidence of bribes paid by a third party to school superintendent Romain Dallemand in connection with a related, but separate, software transaction. *See* (Docs. 63, 66). John Garland and Ed Garland appeared at this hearing, and John Garland spoke on several issues at the hearing, including what defenses might be necessary at trial in light of the proposed Rule 404(b) evidence. (Doc. 73, p. 2, 31, 58-62). Second, the co-defendants were preparing for trial jointly until July 11, 2018, (*see* (Doc. 101)), when the Court severed Movant’s and Progressive’s trial from Carty’s trial. (Doc. 100). The severance was necessitated by the Court’s ruling that a deposition taken in a related civil case² from a deceased witness, Thomas Tourand, would be admitted against Movant and Progressive but not against Carty,

² *Bibb Cty. Sch. Dist. v. Dallemand, et al.*, No. 5:16-cv-549, (M.D. Ga. Aug. 16, 2019).

because Carty was not a party to the civil case when the deposition was taken. (Docs. 70; 100; 123, p. 34-48). The Court ruled that the trial of Movant and Progressive would move forward as scheduled on July 16, 2018. (Doc. 100). Five days before the trial date, Movant filed an emergency motion for continuance in which he contended that John Garland, the junior attorney on the case, would not be prepared to try the case in the absence of senior counsel Ed Garland, who would be unavailable due to a serious illness, and without the assistance of Frank Hogue and Laura Hogue following the severance of co-defendant Carty. (Doc. 101). The Court denied the motion and ordered that the trial would proceed as scheduled. (Doc. 102).

Trial, Post-trial Motions, and Sentencing

Movant and Progressive proceeded to trial with John Garland as lead trial counsel. (Docs. 147-152). Ed Garland was also present and participated in the direct examination of several defense witnesses. (*Id.*) Movant and Progressive were found guilty on all counts. (Doc. 117). Trial counsel moved for judgments of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure, which the Court denied. (Docs. 122; 149, p. 197-203; 151, 107-108). Prior to sentencing, Movant retained new counsel, who filed a motion for acquittal and a motion for new trial raising several grounds, including insufficiency of the evidence, the admission of Tourand's deposition, improper amendment of the indictment, and juror bias. (Docs. 164, 168). Following a hearing on the motions (Doc. 259), the Court denied these challenges to the verdict. (Doc. 202).

On November 15, 2018, Movant was sentenced to 87 months on each count to run concurrently with three years supervision upon his release. (Doc. 204). The judgments were amended twice to reflect forfeiture orders and updated restitution amounts. *See* (Docs. 251, 330).

Direct Appeal

Movant appealed his sentence to the Eleventh Circuit Court of Appeals, contesting the sufficiency of the evidence to sustain his convictions on the mail and wire fraud and money laundering counts and challenging the 2-level “sophisticated means” enhancement assessed against him at sentencing. *United States v. Culver*, 822 F. App’x 976 (11th Cir. 2020). On July 30, 2020, the Eleventh Circuit affirmed Movant’s conviction and sentence. *Id.*; (Doc. 342). Movant’s request for rehearing en banc was denied on October 2, 2020. *See* (Docs. 360, p. 12; 366, p. 4).

Motion to Vacate, Set Aside, or Correct Sentence

Movant, through appellate counsel, filed a timely Section 2255 motion, which raised ineffective assistance of trial counsel, juror bias based upon the foreperson’s wife’s bias in favor of the government, and a tainted jury due to Juror 19’s failure to disclose he knew Movant and was biased against him. (Doc. 360, p. 4-5, 7). In May 2022, Movant filed what was docketed as an amended Section 2255 motion but is in substance an amended brief in support of his original Section 2255 motion that raises no new grounds for relief. *Compare* (Doc. 360) and (Doc. 363). The Government responded to the motion and agreed that any additional details in Movant’s amended brief relate back to his original motion. (Doc. 366, p. 4-5, n. 1). Despite requesting and receiving two extensions to file a reply brief (Docs. 368-371), Movant did not file a reply.

FACTUAL BACKGROUND

As recounted by the Eleventh Circuit of Appeals in Movant’s and Progressive’s appeal, the evidence at trial showed:

In 2012, the Bibb County School District decided to upgrade the school system’s technology infrastructure. In June of that year, the School District published a Request for Qualifications (an “RFQ”) for an entity to fill the upgrade project’s Technical Project Manager role. The School District looked for a firm capable of providing “technical project management and network management support.” The School District wanted a firm to oversee the purchase and installation

of the technology upgrades, rather than a firm to complete the installation itself. The RFQ was the first step in the process for an applicant to become the project manager. Relevant here, another step required applicants to submit letters of recommendation from companies with whom they had recently worked.

In July 2012, Culver, on behalf of Progressive, completed an RFQ outlining Progressive's qualifications. As part of its submission package, Progressive included a letter from Allen Stephen, CEO of CompTech, Inc., a federal contracting firm located in Dayton, Ohio. However, Culver actually wrote the recommendation letter and at Culver's direction, Stephen put Culver's letter on CompTech [stationery]. At trial, evidence was introduced that Culver knew the assertions contained in the letter were "totally made up." Stephen also acknowledged that some assertions made in the letter were entirely false.³

Progressive was ultimately selected to serve as the project manager for the upgrade. The "Services Agreement" reflects the terms of the parties' agreement. It states that as project manager, Progressive would "[i]nstall, relocate, configure, modify and test routers, switches, and servers"; assist with "infrastructure deployments and technical hardware refresh, renovation, and transition initiatives"; and "[e]valuate and recommend new and evolving networking technologies."

Appellants recommended the School District use the NComputing L300 device as part of its technology upgrade and the School Board approved the purchase. Culver was involved with the purchase of these devices. However, the School District believed the devices were purchased from CompTech, because Culver was directing CompTech to invoice the School District. The School District paid CompTech \$3,768,000, but CompTech wired \$2,151,750 of that amount back to Progressive so that Progressive could pay for the NComputing devices. In a separate transaction, CompTech wired \$1,537,990 in profit to Progressive and kept the remaining \$78,260 for itself. Out of the over \$1.5 million wired to Progressive, Progressive wrote several checks payable to Culver. The School District did not know that CompTech was sending money back to Progressive as part of the purchase.

In March 2013, the School District contacted CompTech to ask when the NComputing devices would be installed. Stephen, however, never intended CompTech to perform the installation because he believed Progressive was doing it. When Stephen contacted Culver about this issue, Culver sent Stephen information about the equipment and deployment and directed Stephen to respond to the School District's inquiries.

³ In a footnote here, the appellate court's opinion notes, "For example, Progressive and CompTech never worked together on the project Culver described in the letter. And, despite the letter's claim that CompTech had an office in Atlanta, CompTech did not."

At some point during the spring of 2013, the School District began to question how the technical upgrade was being managed. On April 17, 2013, Culver sent Stephen a letter advising him that the School was putting together a timeline and record of payments to vendors for 2012. Culver again directed Stephen how to respond on behalf of CompTech. Culver told Stephen to say that in order to get the School District a discount on the NComputing devices, Progressive asked CompTech to purchase the devices and take a small profit “as a pass through for using CompTech’s GSA schedule.” Then on April 22, 2013, Culver sent Stephen a “heads up” email, letting Stephen know that he should tell the School District that CompTech was doing the install of the NComputing devices, and that CompTech had two “employees.” None of this information was true.

Eventually, the School District shut down the technology upgrade project. Only 300 of the 15,000 NComputing devices purchased were installed. The School District deemed the rest of the devices “unusable” because key components, like monitors and keyboards, were not purchased. In June 2017, the government indicted Progressive and Culver based on their roles in this scheme. A jury found them guilty of conspiracy to commit mail and wire fraud, mail and wire fraud, and money laundering. Culver was sentenced to a term of 87-months imprisonment and Progressive was sentenced to 5-years probation and a \$500,000 fine. This appeal followed.

Culver, 822 F. App’x at 978–979.

ANALYSIS

Movant raises several grounds in his Section 2255 motion, but for the reasons discussed below, these grounds fail to warrant relief. Accordingly, it is recommended that the Court deny Movant’s motion to vacate, set aside or correct sentence.

Ineffective Assistance of Counsel Legal Standard

Movant’s claims of ineffective assistance of counsel are adjudged under the standard set by *Strickland v. Washington*, 466 U.S. 668 (1984). To show ineffectiveness, a Section 2255 movant must ordinarily demonstrate both deficient performance, meaning that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed … by the Sixth Amendment,” and prejudice, meaning that “counsel’s errors were so serious as to deprive the defendant of a fair trial.” *Strickland*, 466 U.S. at 687. “[To] show that counsel’s conduct was unreasonable, [Movant] must establish that no competent counsel would have taken the action that

his counsel did take. This is a ‘difficult burden.’” *Perkins v. United States*, 73 F.4th 866, 879 (11th Cir. 2023) (internal citations omitted). To establish that he was prejudiced, Movant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland* 466 U.S. at 694.

A. Movant’s ineffective assistance of counsel claims fail.

Movant’s claims that John Garland (Garland)⁴ rendered ineffective assistance of counsel when he had to proceed to trial as lead counsel due to Ed Garland’s illness and the loss of the Hogues following the severance of Carty’s trial. In his amended brief in support of his Section 2255 motion,⁵ Movant argues that Garland’s assistance was ineffective because:

- (1) (a) Garland failed to counter the allegation that Movant misrepresented that Progressive would act as vendor because Garland never established to the jury that Dallemand and Tourand knew Progressive would be the vendor and that CompTech was a passthrough to meet Dallemand’s desired timeframe, and (b) Garland did not call a school contract expert despite Movant’s request (Doc. 363, p. 3-4);
- (2) Garland was completely unprepared to cross-examine Superintendent Dallemand and Allen Stephen of CompTech because prior to severance the Hogues would have cross-examined these witnesses. As a result, Garland did not question Stephen about the reason for the multiple wire transfers or ask Dallemand whether he knew Progressive was acting as the vendor for the equipment (*Id.*, p. 4-7);

⁴ John Garland will be denoted as “Garland” in this recommendation. Ed Garland will be referenced with his first and last name.

⁵ On his Section 2255 motion form, Movant suggests that trial counsel was ineffective because he did not adequately investigate the facts of Movant’s case and did not adequately prepare Movant to testify. (Doc. 360, p. 4). Because Movant failed to mention or develop these arguments in his brief (Doc. 366), these arguments are deemed abandoned. *See Holland v. Gee*, 677 F.3d 1047, 1066 (11th Cir. 2012) (“[T]he law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.”) (citations omitted).

- (3) Garland “was deficient in failing to designate two defense experts, [Don Wood and Marcus Wilson], in a timely manner, which led the district court to exclude their testimony” (*Id.*, p. 7-8); and
- (4) Garland failed to challenge the admission of the Tourand deposition on constitutional grounds. (*Id.*, p. 8).

Movant argues that Garland’s deficient performance cannot be excused as strategic and that Movant was prejudiced at trial. (*Id.*, p. 3-8) The record either specifically contradicts or fails to support these arguments. The record shows that trial counsel’s performance fell “within the wide range of reasonable professional assistance” that *Strickland* acknowledges. Movant, likewise, cannot show that he was prejudiced.

Prior to addressing Movant’s individual arguments, the record demonstrates several overarching factors that undermine Movant’s general arguments regarding Garland’s readiness and preparedness for trial. While Movant contends that Garland’s “prediction that he would render ineffective assistance of counsel at trial proved true” (Doc. 363, p. 2-3), the record demonstrates that Garland was hardly the unfamiliar, unprepared junior attorney that Movant suggests. *See* (Docs. 360-2; 363). First, both Garlands entered their appearances within one month of Movant’s arraignment. Next, as noted in the procedural history outlined above, Garland appeared and argued several pre-trial matters, demonstrating an understanding of the intricacies of Movant’s case, including the admissibility of the Tourand deposition. Third, the trial had been scheduled for July 16, 2018, for at least six months prior to the decision to sever the trials. Fourth, Garland was not made to try the case alone, as Ed Garland did appear and participate in the trial. (Docs. 147-152). Lastly, the trial transcript demonstrates that Garland had a strategy throughout the trial to show that Movant and Progressive had no intent to defraud, that they committed no fraud, and that the

School District parties knowingly made a bargain and received what they bargained for. *See, e.g.*, (Doc. 147, p. 41-56; 151, p. 129-159). Garland was conversant with the record and exhibits in a way that belies Movant's suggestion that he was left with ineffectual counsel following the severance. (Docs. 147-152). Movant's four specific ineffective assistance of counsel arguments must be considered against this background.

Ineffective Assistance of Counsel – Ground One

Movant's argument that Garland failed to present an alternative theory to the jury or show that the parties knew Progressive would act as vendor is specifically contradicted by the record. As the Government noted in its brief, the evidence presented at trial showed that the School District parties thought CompTech was the vendor of the computing devices. (Doc. 366, p. 10-11). Movant cites to no portion of the record showing that Garland could have produced evidence to the contrary. Instead, Movant speculates "that Dallemand and Tourand fully knew Progressive was the vendor...to facilitate the technology upgrade by the end of 2012 as Dallemand demanded." (Doc. 363, p. 4).

The record also shows that Garland had a coherent strategy to challenge the Government's case and show that Dallemand dictated a deadline. As highlighted by opening and closing statements, the defense theory was that there was no intent to defraud and no fraud because Movant was simply trying to meet Dallemand's timing demands, which included Progressive acting as vendor. Movant testified at trial, and on direct examination Garland specifically asked Movant about his intentions regarding the sale and the use of CompTech as a pass through. *See, e.g.*, (Doc. 151, p. 25). Through this testimony, Garland presented the very concepts that Movant says Garland

failed to show at trial. Even if Garland’s specific strategy varied from what Movant wanted, Movant cannot show that Garland’s strategy and presentation to the jury were unreasonable.⁶

In this same vein, Movant argues that it was unreasonable for Garland not to present an expert witness to explain the intricacies of school contracting. Movant alleges that an expert would have shown “why the Government’s argument that Progressive’s role as project manager necessarily prohibited them from serving as a vendor for the devices was not accurate without an express limitation in the Services Agreement.” (Doc. 363, p. 4). Movant does not proffer any expert testimony or show what evidence such an expert could have added to this case. The trial court made clear that this was not a contract case and instructed the jury – at Garland’s request – that the contract had no provision that “prohibited the defendants from acting as a vendor or installer for the School District.” *See, e.g.*, (Doc. 151, p. 93-94, 204; Doc. 259, p. 10-14). The record, therefore, shows that the jury had the very information that Movant argues a contract expert witness would have provided.

Even if Movant could show that the failure to present an expert witness on government contracting was outside the wide range of reasonable assistance of counsel, Movant cannot show prejudice. On appeal, Movant argued that the agreement did not prohibit Progressive from acting as vendor and therefore the use of CompTech as a pass-through was not a material misrepresentation of fact for purposes of committing fraud. *Culver*, 822 F. App’x at 981-982. The Court of Appeals found Movant’s argument unpersuasive because “a misrepresentation need not be a term included in the parties’ agreement to be material.” *Id.* at 982. Given this finding, there is no suggestion that the outcome of Movant’s case would have been any different had a contracting

⁶ At its core, Movant’s brief demonstrates that current counsel simply would have tried the case differently and attempts to mold this belief into a basis to find Garland’s performance unreasonable and deficient. *Strickland* is clear that such “hindsight” strategizing is not a proper standard for measuring counsel’s performance.

expert explained that the agreement did not prohibit Progressive from being the vendor. Movant was therefore not prejudiced by counsel's decision not to present such an expert.

Ineffective Assistance of Counsel – Ground Two

Movant next argues that Garland was unprepared to cross-examine two key government witnesses, Dallemand and Stephen. (Doc. 366, p. 4-7). Movant suggests that Garland failed to establish that Stephen, the principal of CompTech, transferred the money to Progressive in multiple installments because of the bank's daily transfer limit. (*Id.*, p. 4). This information, Movant suggests, would have undermined the money laundering counts and the "sophisticated means" sentencing enhancement. (*Id.*, p. 4-5). Movant has cited to nothing in the record⁷ to suggest that there were any such limits or even what the limits were, and he has not explained how this information would have changed the verdict. As to the effect on Movant's sentencing guidelines calculation, the Court of Appeals affirmed the "sophisticated means" sentencing enhancement for reasons unrelated to the number of wire transfers. On appeal, the appellate court acknowledged that parts of the scheme may not have been sophisticated, but the totality of the circumstances and activities supported the enhancement. *Culver*, 822 F. App'x at 984.

"These activities included: providing a fabricated reference letter to obtain a government contract; using false invoices to hide Progressive's role as a profiting vendor; sending a deceptive email, copying the School District, that gave the appearance of a fake arm's length negotiation; and feeding CompTech responses to the School District's inquiries. In short, Culver's offenses involved repetitive, coordinated conduct designed to allow him to execute his fraud and evade detection."

Id. (internal citations omitted).

⁷ Although Movant extensively quotes from the record, his briefs fail to provide specific citations to the record, requiring considerable extra effort from the Court to locate and review these quotes in context.

There is no suggestion that Garland's failure to ask Stephen about why or how he transferred the money to Progressive was unreasonable, but even if it were, the record demonstrates that this information was not integral to the verdict or to Movant's sentence.

As to Garland's alleged failure to impeach Dallemand's credibility or to question him about Progressive's role as vendor on cross-examination, the result is the same. The record shows that the jury knew that Dallemand had pleaded guilty to tax evasion and was cooperating with the Government as part of that agreement. (Doc. 149, p. 39-44). Therefore, the question of his credibility was before the jury. Movant does not explain how attacking Dallemand's credibility on cross, in and of itself, would have shown that he knew Progressive was the vendor. Instead, Movant points, without citation, to a related bribery case⁸ in which the defendant was acquitted, to show that counsel's strategy not to attack Dallemand's credibility was unreasonable and that Movant was thereby prejudiced. In this case, however, the trial court excluded any evidence of bribery over the Government's desire to introduce such evidence. *See* (Docs. 63, 66). The exclusion of this evidence was part of a strategy to keep out damning evidence against Movant. *See* (Doc. 259, p. 20-21). The record shows that Garland focused on what supported the defense theory of the case: that Dallemand was a demanding leader who wanted the technology upgrade to happen quickly and that Movant was trying to make that happen. (Doc. 149, p. 58-63). While this may have not been the strategy Movant's current counsel would have pursued, Movant cannot show it was objectively unreasonable.

Ineffective Assistance of Counsel – Ground Three

Movant argues that Garland was untimely in designating two defense expert witnesses, Don Wood, who would have testified about the fair pricing of the equipment, and Marcus Wilson,

⁸ Presumably, Movant is referring to *United States v. Whitby*, 5:17-cr-43 (MTT).

who would have testified about the efficacy of the plan to upgrade the school's technology, to counter the Government's suggestion that Movant and Progressive received a windfall from the transaction. (Doc. 366, p. 7-8). Movant further argues that a failure to meet a deadline cannot be excused as strategic. (*Id.*) These arguments are not supported by the record.

The record shows that Garland's notice of intent to introduce Wood as an expert was timely, but that the summary of Wood's expected testimony was inadequate to provide the required notice to the Government. (Docs. 65; 75; 77; 123, p. 50-51). Despite the notice issue, Garland clarified that Wood would be needed to explain issues with the GSA schedule, depending on what the Government introduced in its case-in-chief. (Doc. 123, p. 50-51). The Government had no objection, and the Court left open the possibility that Wood could be called for that purpose. (*Id.*) Therefore, Garland missed no deadline as alleged, and no action or inaction prevented Wood from testifying if the defense needed him.

Regarding the identification of Marcus Wilson, the record shows that, before the trials were severed but after the deadline, counsel for co-defendant Carty (the Hogues) noticed Wilson as an expert. (Doc. 97). The notice was late because Wilson had only recently become known to the Hogues, which as the Government argues, shows that Garland would not likely have known about Wilson any earlier. (Doc. 366, p. 15-16) (citing (Doc. 123, p. 52)). Even if the failure to notice an unknown expert was unreasonable, Movant cannot show he was prejudiced by the failure. The Hogues did not call Wilson at Carty's trial even with the benefit of knowing the outcome of Movant's trial. (Doc. 366, p. 16). Movant has not explained how Wilson's testimony about the pricing and efficacy of the upgrade plan would have affected the overall evidence of fraud such that there would have been a different verdict. Additionally, even if Wilson had countered the Government's "windfall" theory as Movant suggests, the outcome would likely have been the

same. As the Court of Appeals noted in Carty's appeal, there was no error in the Government's describing the deal as providing a windfall. *United States v. Carty*, 822 F. App'x 868, 875 (11th Cir. 2020). Movant has not demonstrated any prejudice.

Ineffective Assistance of Counsel – Ground Four

Movant's final ineffective assistance of counsel ground involves an issue that was thoroughly considered by the trial court: the admissibility of the Tourand deposition. Movant now contends that trial counsel failed to object to the admissibility on proper constitutional grounds.⁹ (Doc. 363, p. 8). Movant argues, without citing to any portion of the record, that trial counsel admits he had no strategy in not objecting to the deposition on constitutional grounds. (*Id.*) Contrary to Movant's contention, Garland and previous co-counsel did object to Tourand's deposition both on constitutional grounds and pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). (Docs. 98; 123, p. 35-48). The record from the hearing on Movant's motion for new trial shows that even if further objections on constitutional grounds had been raised, Tourand's deposition would have still been admitted. (Docs. 168; 202, p. 13) ("Tourand's testimony was properly admitted under both Rule 804 and the Sixth Amendment....Even if the Defendants had made before or at trial the arguments they make now, Tourand's testimony would have still been admitted."). Therefore, Movant cannot show that the outcome would have been different.

⁹ The Government argues that this claim is procedurally defaulted because Movant challenged the admissibility of Tourand's deposition on Sixth Amendment grounds in his motion for new trial, and, therefore, could have raised it on direct appeal. (Doc. 366, p. 16-19). As discussed below, one common way a movant will attempt to overcome procedural default is by couching the argument as an ineffective assistance of counsel claim. Even if the claim was procedurally defaulted, the merits of the ineffective assistance claim must still be considered as to how Movant raised this claim of error. Therefore, the merits of Movant's arguments are considered here despite any possible procedural default.

B. Claims of Juror Bias Are Procedurally Defaulted

Movant claims that two instances of juror bias deprived him of a trial by an impartial jury. In ground two, Movant argues that the juror foreperson was biased in favor of the Government, and in ground three, that Juror 19 failed to disclose that he had dated Movant's cousin and that he harbored bias against Movant. (Docs. 360, p. 5-7; 363, p. 14-18). Movant raised ground two in his motion for new trial (Doc. 168), but he did not raise either ground on appeal. Therefore, these claims are procedurally defaulted. As explained below, Movant cannot overcome this procedural bar.

Section 2255 is not a substitute for appeal (*Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004)), and claims not raised on appeal generally are procedurally defaulted, meaning they "may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003). In addition to showing cause and prejudice, there are three other ways that movants can overcome a procedural default. First, a movant "can raise a claim for the first time on collateral review without demonstrating cause and prejudice, if the alleged error is jurisdictional." *United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020). Second, a Movant may overcome a procedural default by showing that "a constitutional violation has resulted in the conviction of one who is actually innocent." *Lynn*, 365 F.3d at 1234. A "gateway" showing of actual innocence requires a showing of "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). A third route for overcoming procedural default, and the most common approach in Section 2255 actions, is to raise the claims in the context of ineffective assistance of counsel either at the trial level or at the appellate level.

Because Movant has not raised any of these latter grounds in the context of his juror bias claims, he must show cause and prejudice to excuse his failure to raise these errors on appeal.

“Allegations [supporting cause and prejudice] must be factual and specific, not conclusory.” *Tharpe v. Warden*, 898 F.3d 1342, 1346 (11th Cir. 2018). Movant does not specifically address the cause and prejudice prongs by name (*see* (Doc. 366, p. 14-18)), but instead explains that he did not raise these grounds on appeal because “direct appeal does not provide an avenue for a hearing to create the record necessary to adequately resolve this issue.” (Doc. 360, p. 6). He asks for a hearing to develop these issues more fully, but the record before the Court is adequate to decide these claims and demonstrates that Movant cannot overcome the procedural default of these claims.

1 Movant has not shown cause and prejudice to excuse his default.

a. Cause

Generally, to show cause for a procedural default, a movant must show that “some objective factor external to the defense” prevented the movant from raising the claims on direct appeal and that “this factor cannot be fairly attributable to [the movant’s] own conduct.” *Lynn*, 365 F.3d at 1235. In such cases, “the question is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal the claim was available at all.” *Lynn*, 365 F.3d at 1235. Despite Movant’s insistence that a hearing is necessary to develop these claims and direct appeal did not afford him that opportunity, the record shows that these claims were available to him before his direct appeal and no objective factor prevented him from raising them.

The record shows that Movant, through prior counsel, was aware of some of these issues during trial, but at the very least was aware by July 26, 2018, when the Court held a phone conference to discuss issues concerning the foreperson’s wife and Juror 19. (Doc. 134). On that call, the Assistant U.S. Attorney (AUSA) disclosed that the wife of the jury foreperson handed her

a note and an inscribed prayer book flagged to the verdict date following the verdict in this case. (Doc. 134). Copies of the writings were provided to the defense. (Doc. 141-1, Ex. 2). At the conference, prior counsel cited other misconduct concerns because the wife and foreperson had also spoken to other players in the case, including Movant's "arch nemesis." (Doc. 134, p. 4). The AUSA also referenced the first day of the trial, when the wife approached her. The Court noted that "[the wife] apparently didn't miss anybody. I didn't talk to her, but apparently -- it sounds like everybody else in the courthouse did." (*Id.*, p. 5-6). Counsel and the Court also noted that the wife had commented that "her husband (the foreperson) wouldn't tell her anything...." (*Id.*, p. 7).

During the conference, prior counsel likewise noted that Movant had learned that Juror 19 had once dated his cousin, a relationship that ended poorly, and that Juror 19 texted the cousin during the trial:

MR. GARLAND: And before I had a chance to contact the government and Your Honor about another issue -- when I got this notice for a call -- my client found out from his cousin on Tuesday, after the verdict, that juror number 19 had texted his cousin during the trial.

And the text was something to the effect of -- she had come into the courtroom and apparently juror number 19 saw her. They used to date and had an acrimonious breakup over allegations of infidelity. And he texted her saying, you know, I can't believe I am in this mess. You know, something to the effect of what are you doing [here]? Are you here to observe or do you know someone? And she indicated that -- I don't recall the specifics, but basically that she was the defendant's cousin. And he said, "Oh." And I think that there was a text about how are you and then that was it.

THE COURT: So it's apparent that at the time the contact was made the juror didn't know what any connection was, if any, with the case other than the fact that she was in the courtroom?

MR. GARLAND: I certainly think that's a reasonable implication from those texts. Obviously, I haven't spoken with the juror to confirm that. But I certainly agree with Your Honor's impression of that exchange.

(*Id.*, p. 4-5).

Movant, through new counsel, requested an investigation into juror bias or any influence other parties may have had on a juror. (Doc. 141). Movant stated that in light of the “clear evidence that [the foreperson’s wife] was biased in favor of the Government during trial,” he needed to investigate whether his right to an impartial jury was violated by the gift of the prayer book and whether the foreperson’s wife exerted any influence on her husband. (*Id.*) The motion for an investigation did not present any allegations regarding Juror 19. (*Id.*) The Government responded by arguing that Movant’s speculative allegations did not provide a basis for an investigation (Doc. 145), and the Court denied the motion. (Doc. 138). The Court recounted that it had repeatedly instructed jurors not to talk about or research the case outside of court and recalled the jurors’ responses that no one had problems following the Court’s instructions, including on the day when the Court’s question was tailored to the issue of the foreperson’s wife. (*Id.*, p. 3-4). The Court ultimately decided that the allegations against the foreperson’s wife and the information sought via the investigation were based on matters that are not admissible to impeach the verdict. (*Id.*, p. 183). Moreover, the Court reasoned that even if the evidence were proper, an investigation would be unwarranted because Movant’s allegations were speculative and fell short of the standard to hold post-trial hearings. (*Id.*, p. 8-12). Movant raised these issues again in his motion for new trial. (Doc. 168). The Court rejected those arguments for the same reasons. (Docs. 202, p. 7; 259, p. 42).

Neither Movant’s motion for investigation (Doc. 141) nor his motion for new trial (Doc. 168) raised concerns about Juror 19’s bias. Movant cannot plausibly say he was unable to raise this issue on appeal because he is the one who discovered a potential issue and brought it to the Court’s attention. (Doc. 134). It is likewise implausible that not having a hearing or investigation about Juror 19 prevented raising this issue on appeal, because Movant would not have needed the

Court's permission to question his cousin and obtain further information about the exchange with Juror 19.

Based on the record, as summarized above, any claims about juror bias were known and available to Movant at the time of his direct appeal, and the Court's decision to deny an investigation did not prevent him from raising it. At the very least, Movant had the opportunity to challenge the Court's decision to deny his motion for investigation. Movant failed to raise either challenge in his direct appeal, and he cannot now demonstrate the requisite cause to overcome the procedural default of these claims.

b. Prejudice and Merits of the Juror Bias Claims

For the reasons summarized above and explained in the Court's previous rulings, Movant likewise cannot meet the prejudice¹⁰ prong of the procedural default analysis for his juror bias claim about the foreperson's wife. Movant's claim would fail on the merits for the same reasons.

The record is less developed as to Movant's Juror 19 claims, but the context the record does provide is sufficient to show that Movant was not prejudiced and that this claim would not be meritorious. Movant argues that Juror 19 knew Movant, that Juror 19 was dishonest when he did not disclose knowing Movant in voir dire, and that his dishonesty would have provided a challenge for cause due to bias harbored from an acrimonious relationship with Movant's cousin. (Doc. 363, p. 16-18). "Voir dire protects the Sixth Amendment right to an impartial jury 'by exposing possible biases, both known and unknown, on the party of the potential jurors.'"

McWhorter v. Comm'r, Al. Dept. of Corr., 824 F. App'x 773, 781 (11th Cir. 2020) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984)). The test for granting a

¹⁰ To establish prejudice in the procedural default context, Movant must show that an error "of constitutional dimensions" worked to his "actual and substantial disadvantage." *Bane*, 948 F.3d at 1297 (quoting *Fordham v. United States*, 706 F.3d 1345, 1350 (11th Cir. 2013)). Movant has not presented any evidence to make such a showing, and there is no plausible evidence that he could present.

new trial when a juror gives a mistaken answer requires a showing that a juror did not honestly answer a material question and that a correct response would have created a valid basis to challenge that juror for cause. *Id.* Whether a wrong answer provides “a valid basis for a challenge for cause requires us to determine whether [a juror’s] nondisclosure resulted from actual bias that would disqualify her.” *Id.* at 781-782 (citing *United States v. Perkins*, 748 F.2d 1519, 1532 (11th 1984)). Bias is demonstrated “by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed,” and “[o]ften, the juror’s dishonesty in and of itself is ‘a strong indication’ that she was not impartial.” *Id.* at 782 (citing *Perkins*, 748 F.2d at 1532).

The record demonstrates that Movant’s bias claims are speculative at best and fail to demonstrate that his right to an impartial jury was violated. Movant’s argument assumes that Juror 19 was dishonest when he did not disclose knowing Movant even though he had dated Movant’s cousin five years prior to trial, attended sporting events with Movant’s family, and visited Movant’s home. (Doc. 366, p. 17). Movant relies on Juror 19’s mid-trial text to Movant’s cousin to ask why she was in the courtroom as proof he was dishonest during voir dire, but this text message instead suggests that he was truthful when he answered that he did not know or remember Movant. Otherwise, Juror 19 would not have needed to ask the cousin why she was present at trial.

Movant also states he would have asked to strike Juror 19 for cause because Juror 19 harbored bias towards Movant due to the end of his relationship with the cousin five years earlier. Movant argues that he “would have suspected that Juror 19 bore ill will and bias against him, and could have used [Movant] as an opportunity to retaliate against Movant’s cousin and her family.” (Doc. 363, p. 18) (emphasis added). There are any number of reasons that Juror 19 may have not remembered Movant, but the mere fact that a relationship with Movant’s cousin ended badly does

not necessarily establish that Juror 19 held any sort of animus, bias, or ill will toward Movant. These allegations of bias are speculative, and Movant has not shown that Juror 19's *potential* bias would have provided a valid basis for a challenge for cause.

Movant's argument also overlooks a key factor: Movant himself did not recognize or remember Juror 19 during voir dire. If Juror 19 had been so familiar with and biased against Movant that he could not render a fair verdict, Movant should have been able to recognize Juror 19 during voir dire, told trial counsel in real time, and moved to strike him. None of those things happened, indicating that Movant did not recognize or remember Juror 19, or if he did, that he either stayed silent to invite error or wanted Juror 19 to become a juror. No matter Movant's motivation, his failure to raise concerns about Juror 19 at trial or on appeal does not now give rise to a meritorious claim on collateral review or show that Movant was prejudiced.

EVIDENTIARY HEARING

No evidentiary hearing is needed to resolve Movant's Section 2255 motion. Movant makes no allegations that, if proved true, would entitle him to relief. Rather, for reasons discussed above, "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §2255(b). *See also Rosin v. United States*, 786 F.3d 873, 877–78 (11th Cir. 2015) ("an evidentiary hearing is unnecessary when the petitioner's allegations are 'affirmatively contradicted by the record'").

CONCLUSION

Based on the foregoing, it is **RECOMMENDED** that the Court **DENY** Movant's Section 2255 motion. (Docs. 360, 363). Additionally, because Movant has not made a substantial showing of the denial of a constitutional right, it is further **RECOMMENDED** that the Court deny a

certificate of appealability. *See* 28 U.S.C. § 2253(c)(2); *see also* *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, **WITHIN FOURTEEN (14) DAYS** after being served with a copy thereof. Any objection is limited in length to **TWENTY (20) PAGES**. *See* M.D. Ga. L.R. 7.4. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, “[a] party failing to object to a magistrate judge’s findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court’s order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

SO RECOMMENDED, this 31st day of October, 2023.

s/ Charles H. Weigle
 Charles H. Weigle
 United States Magistrate Judge