

FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
IN THE UNITED STATES DISTRICT COURT

MARIO AVILA,	:	
	:	
Petitioner,	:	
	:	
vs.	:	CIVIL ACTION 11-0123-CB-M
	:	
GARY HETZEL,	:	
	:	
Respondent.	:	

ORDER

This matter is before the Court on Petitioner’s objections to the Report and Recommendation of the Magistrate Judge recommending that the underlying habeas petition be denied without an evidentiary hearing. After due and proper consideration of all pleadings in this file, and a *de novo* determination of those portions of the Recommendation to which objection is made, the Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is adopted as the opinion of this Court.

Petitioner Mario Avila has raised two objections, neither of which has merit. First, he argues that the Magistrate Judge misinterpreted his first ineffective assistance claim as a failure to object to the admissibility of prior bad act evidence when, in fact, his claim was failure to make a *proper* objection. This is a distinction without a difference. Even if Petitioner could prove that counsel’s performance was unreasonable based on

his failure to object, or even his failure to object *properly*, he could not succeed on the prejudice prong of an ineffective assistance claim. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(to succeed on ineffective assistance of counsel claim petitioner must prove unreasonable performance and prejudice). As the Magistrate Judge's report makes clear, the evidence was relevant and properly admitted. Petitioner's second objection is less clear. He takes issue with the admissibility of the toxicology report but fails to explain why the Magistrate Judge's ruling on the related ineffective assistance claim is in error. Consequently, this claim does not provide a basis for habeas relief.

It is ORDERED that this habeas petition be DENIED and that this action be DISMISSED. The Court further finds that Petitioner is not entitled to a certificate of appealability and, therefore, not entitled to appeal *in forma pauperis*.

DONE this 31st day of October, 2011.

s/Charles R. Butler, Jr.
Senior United States District Judge