United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 3, 2018
Decided October 11, 2018

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-1292

AUGUSTIN ZAMBRANO, *Petitioner-Appellant*, *v*. UNITED STATES OF AMERICA, *Respondent-Appellee*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 CV 332 Charles R. Norgle, *Judge*.

ORDER

Augustin Zambrano has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

AUGUSTIN ZAMBRANO. Petitioner,	)	
v.	)	No. 16 CV 332
UNITED STATES OF AMERICA,	)	Hon. Charles R. Norgle
Respondent.	)	

OPINION AND ORDER

Before the Court is Petitioner Augustin Zambrano's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. For the following reasons, the motion is denied.

I. BACKGROUND[1]

This § 2255 petition comes after an "extensive criminal prosecution aris[ing] out of the operations of the Latin Kings street gang in Chicago from 2000-2008." United States v. Garcia, 754 F.3d 460, 465 (7th Cir. 2014). Petitioner Augustin Zambrano ("Petitioner") was charged by superseding indictment with the following crimes: (1) participating in a

[1] The facts set forth in this section come from the record and the Seventh Circuit's decision in United States v. Garcia, 754 F.3d 460 (7th Cir. 2014), which affirmed Petitioner's conviction and sentence.

racketeering conspiracy ("RICO") in violation of 18 U.S.C. § 1962(d); (2) conspiring to commit extortion in violation of 18 U.S.C. § 1951; and (3) committing assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. § 1959(a)(3). Petitioner was one of fifteen gang members tried these for these and related offenses.

Petitioner was a member of the Almighty Latin Kings Nation, a notorious street gang in Chicago. As "Corona" of the gang from roughly 2000-2008. Petitioner was one of the highest-ranking members of the Latin Kings nationwide. During that time period, there were no other active Coronas in the gang nationwide. The Latin King's constitution stated that Coronas were tasked with ensuring that subordinates followed gang rules, administering gang rules, and providing final approval of gang rules.

On April 6, 2011, the jury returned a guilty verdict as to all counts. On June 8, 2011, Petitioner's trial counsel, who did not represent Petitioner on appeal, filed a motion for judgment of acquittal or new trial. On August 19, 2011, the Government filed its consolidated response to Petitioner and his codefendants' post-trial motions. On August 31, 2011, Petitioner submitted his reply to the Court through counsel. On September 25, 2011, this Court denied Petitioner's motion.

On November 10, 2011, the Probation Office provided its Presentence Investigation Report ("PSR"). The PSR listed Petitioner's total offense level as 43, Petitioner's criminal history category as Level VI

pursuant to the United States Sentencing Guidelines 4B1.1. and a Guidelines range of life in prison.

On January 5, 2012, Petitioner filed his sentencing memorandum and objections to the PSR. On January 9, 2012, the Government submitted its position paper regarding Petitioner's sentence, which sought a 60 year term of imprisonment. On January 10, 2012, Petitioner responded to the Government's position paper. On January 11, 2012, the Court sentenced Petitioner to 240 month terms of imprisonment on each of the three counts, with each term to run consecutively.

On January 11, 2012, Petitioner noticed his appeal, challenging both the conviction and sentence. Eight of Petitioner's codefendants filed similar appeals. All of these appeals were consolidated before the Seventh Circuit. On March 27, 2012, Petitioner's trial counsel withdrew from representation. Appellate counsel was appointed for Petitioner pursuant to the Criminal Justice Act. Appointed counsel filed Petitioner's opening appellate brief on January 10, 2013. On October 16, 2013, appointed counsel moved to substitute retained counsel. On October 29, 2013, the retained attorney took over Petitioner's representation. Retained counsel filed Petitioner's reply brief on Petitioner's behalf.

On June 13, 2014, the Seventh Circuit denied Petitioner's appeal, thereby affirming both his conviction and sentence. On August 1, 2014, Petitioner filed a petition for rearing and rehearing en banc. The Seventh Circuit denied that petition on August 20, 2014. On

November 14, 2014, Petitioner filed a petition for writ of certiorari before the Supreme Court, which the Supreme Court denied on January 12, 2015. On November 11, 2016, Petitioner filed this § 2255 petition.

II. DISCUSSION

A. Standard of Review

Section 2255 allows a federal prisoner to vacate, set aside, or correct his sentence when his judicial process contained "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Harris v. United States, 366 F.3d 593, 594 (7th Cir. 2004) (quoting Borre v. United States, 940 F.2d 215, 217 (7th Cir. 1991)); see also 28 U.S.C. § 2855. The Sixth Amendment guarantees criminal defendants "the right to effective assistance of counsel." Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). To prevail on an ineffective assistance of counsel claim a petitioner must show that: (1) "counsel's performance was deficient," and that (2) "the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. To establish deficient performance, "the petitioner must show 'that counsel's representation fell below an objective standard of reasonableness.'" Koons v. United States, 639 F.3d 348, 351 (7th Cir. 2011) (quoting Strickland, 466 U.S. at 688). Counsel has discretion to pursue a competent legal strategy; therefore, the Court's review of counsel's performance is "highly

deferential," and the Court applies "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Yu Tian Li v. United States, 648 F.3d 524, 527-528 (7th Cir. 2011) (citing Strickland, 466 U.S. at 689).

B. Petitioner's Arguments in Support of His Section 2255 Petition

Petitioner raises the following five arguments in his memorandum of law: (1) trial and appellate counsel were ineffective for failing to object to the Government's broadening of the superseding indictment; (2) the conviction and sentence must be set aside because the jury did not convict Petitioner on the basis of two RICO predicate acts; (3) the Government failed to show that the illegal enterprise involved interstate commerce and that trial and appellate counsel were ineffective for failing to raise that issue; (4) the Hobbs Act violation was erroneous as a matter of law because the extortion scheme did not obtain property from "another"; and (5) trial and appellate counsel provided ineffective assistance because they failed to object to the introduction of inadmissible evidence presented by the Government.

Petitioner couches essentially all of his claims in terms of ineffective assistance of counsel, perhaps in an attempt to circumvent § 2255's restrictions on collateral relief and procedural default. See Williams v. United States, 805 F.2d 1301, 1303 (7th Cir. 1986) (failure to raise constitutional challenges on direct appeal

bars a petitioner from raising the same issues in a § 2255 proceeding absent a showing of good cause and actual prejudice resulting from the alleged constitutional violation). Because each claim is meritless with respect to the substantive argument, trial and appellate counsel as a matter of law could not have provided ineffective assistance. The Court turns to Petitioner's asserted bases for relief.

1. Claim One: Broadening of the Superseding Indictment

Petitioner first asserts that trial and appellate counsel provided ineffective assistance because both failed to object to the Government broadening the superseding indictment. The government may violate the Grand Jury Clause of the Fifth Amendment if the government constructively amends the indictment by introducing evidence that allows the jury to convict a defendant on bases not set forth in the indictment. United States v. Phillips, 745 F.3d 829, 831 (7th Cir. 2014). "A constructive amendment of an indictment occurs when the evidence at trial goes beyond the parameters of the indictment in that it establishes offenses different from or in addition to those charged by the grand jury." Id. at 832 (citation and quotation marks omitted). Such a violation "may occur during the government's presentation of evidence, through faulty jury instructions, or both." Id. (citation omitted). However, "the crime charged in the indictment must be materially different or substantially altered at trial, so that it is impossible to know whether the grand jury

would have indicted for the crime actually proved." Id. (citation, quotation marks, and brackets omitted).

For a RICO conspiracy violation under 18 U.S.C. 1962(d), "there must be proof that the individual, by his words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise, through the commission of two or more predicate acts." United States v. Neapolitan, 791 F.2d 489, 497 (7th Cir. 1986) (citation omitted). Further,"[t]here is no requirement of some overt act or specific act in the [RICO conspiracy] statute . . . unlike the general conspiracy provision applicable to federal crimes, which requires at least one of the conspirators have committed an act to effect the object of the conspiracy." Salinas v. United States, 522 U.S. 52, 63 (1997) (citation and quotation marks omitted); United States v. Tello, 687 F.3d 785, 793 (7th Cir. 2012) ("[T]he government need only prove that he agreed that some member(s) of the conspiracy would commit two or more predicate acts, not that the defendant himself committed or agreed to commit such acts."). It follows that there may be a conspiracy regardless of whether or not a conspirator "agree[s] to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other." Salinas, 522 U.S. at 63-64. Accordingly, to convict Petitioner, the jury merely had to find that Petitioner agreed that some member of the conspiracy would commit at least two of the predicate acts listed in Count I. The verdict was not

dependent on a finding that Petitioner committed assault with a dangerous weapon or that Petitioner agreed to another gang member's commission of an assault with a dangerous weapon. Alternatively, the jury convicted Petitioner of assault with a dangerous weapon in a separate count of the indictment, so it cannot be said that it is impossible to know whether the grand jury would have indicted for the crime actually proved.

a. Assault with a Dangerous Weapon

Petitioner claims that at trial, the Government added assault with a dangerous weapon as a predicate RICO element, despite the fact that this was not charged in Count I, the RICO count, of the superseding indictment. As such, he argues that his Fifth Amendment grand jury rights were violated because assault with a dangerous weapon was not charged as a predicate racketeering act. Petitioner also claims that, as a result, he suffered a violation of his Sixth Amendment rights because the jury therefore returned a verdict based on legally impermissible grounds. Finally, Petitioner believes that both trial and appellate counsel were constitutionally deficient by failing to "properly object to the broadening of the indictment" and "seek reversal under the plain error rule," respectively. Pet.'s Mem. at 15.

The Court rejects Petitioner's argument. As the Government discusses, and Petitioner concedes, the RICO allegations involved numerous indictable

predicate acts. Count I of the indictment charged Petitioner with engaging in a RICO conspiracy by agreeing to participate in an enterprise through a pattern of racketeering activity involving the following federal and state offenses: (1) drug trafficking; (2) extortion; (3) obstruction of justice; (4) witness tampering; (5) murder; (6) attempted murder; (7) solicitation to commit murder; and (8) intimidation/extortion.

Petitioner first points to the Government's closing argument. The Government argued, pursuant to the legal standard discussed above, that the gang members committed at least two acts of racketeering. Petitioner is correct that the Government did describe two assaults with dangerous weapons and indeed referred to those acts as acts of racketeering. Despite the fact that this characterization was correct—assault with a dangerous weapon can be a predicate act for a RICO charge—Petitioner is correct that the assaults with dangerous weapons were not included in the RICO charge in the indictment. Crucially, however, the Government did not state that the jury was required to find that particular crime to be one of the predicate acts necessary to convict Petitioner.

Moreover, the Seventh Circuit found on appeal that "the record contain[ed] overwhelming evidence that [Petitioner] agreed to the commission of far more than two such acts. He was involved with cocaine distribution; he issued standing orders for retaliatory shootings; and he supervised some violations for member misconduct." Garcia, 754 F.3d at 471. This alone forecloses Petitioner's argument.

Digging deeper into the trial proceedings, the Government presented an abundance of evidence at trial from which the jury reasonably inferred Petitioner's guilt. For example, the Government established that for eight years, Petitioner served as the Latin Kings' Corona—the highest ranking gang member in the nation. The evidence at trial showed that the gang had detailed rules—even a written constitution—through which Petitioner, as the leader, guaranteed compliance therewith and held ultimate authority to approve the gang's internal regulations. The Government presented substantial evidence, such as volumes of audio and video recordings implicating Petitioner, and offered damning testimony against Petitioner from cooperating gang member witnesses. See Gov't Resp. at 10 n. 9 (citing the Court's denial of Petitioner's post-trial motion, which cited over seventy audio and video recordings). The evidence presented entitled the jury to find that by virtue of his position as Corona, Petitioner blessed the commission of myriad racketeering activity at issue in the case, including murder, attempted murder, solicitation of murder, intimidation, witness tampering, obstruction of the administration of justice, and extortion. In short, the Government correctly asserts that the jury could reasonably infer that due to his stature in the gang's hierarchy, Petitioner agreed to the aforementioned predicate acts, even if he did not execute the activity himself.

Further examination of the record undermines Petitioner's selective citations of instances in the transcript where the Government referred to assault with

a dangerous weapon as a predicate act. For example, in its closing argument, the Government stated to the jury:

> You must find that each of the defendants agreed that some member of the conspiracy would commit at least two acts of racketeering as described in Count I.
>
> What are the racketeering acts? And you will have this back there in the indictment. But any of the following is considered a racketeering act: murder, attempted murder, solicitation to commit murder, intimidation, drug trafficking, extortion, witness tampering, or obstructing the due administration of justice.
>
> All that you must find is that the defendant agreed that some member of the Latin King street gang would commit one of those two acts. Or commit two of one of those acts . . .
>
> Let me clarify that a little bit more.
>
> Say a neighbor is going to join the Latin King street gang. And that neighbor knows that some member of the Latin King street gang is going to engage in drug dealing and he knows that some member is going to engage in a shooting.
>
> This is enough to establish the second element [the pattern prong].

Trial Transcript ("Trans.") at 2789:7-2780:1. The prosecutor also directly stated to the jury that it would have the indictment at its disposal when deliberating

and clearly communicated to the jury numerous crimes for which the jury could find Petitioner guilty of predicate acts contained in Count I of the indictment.

In full context, it was not improper to raise the issue of assault with a dangerous weapon. The Court is persuaded by the Government's position that the discussion of assault with a dangerous weapon could fairly be used as a means of providing further context of the gang activity for the jury's benefit. In particular, the Government reasonably posits that it sought to use the evidence to show the jury the Latin King members strictly followed the gang's rules—including rules that required the aforementioned racketeering activities—of which Petitioner had final approval.

Ultimately, the transcript is rife with references to the gang's participation in all kinds of racketeering activity and Petitioner's involvement in agreement to such activity. Additional examples include the Government's discussion of Petitioner's knowledge of and agreement to the Latin Kings' shootings, including murder and attempted murder; extortion; and narcotics trafficking, as well as his provision of insurance for gang members' drug dealing. See, generally, Trans. 2836:11-2843:17 (discussing Petitioner's authority as Corona and involvement with the gang's drug enterprise, extortion scheme, and shootings); see also id. at 2840:12-18 ("[Agustin Zambrano and other gang members] personally participated in the commission of these acts . . . We know that they did shootings. There was cocaine distribution. The extortion of the

Miqueros[2] [a group of individuals of Mexican descent selling fraudulent identifications, who were required to pay "street taxes" to the Latin Kings and were violently beaten by the gang when they failed to do so]. There were murders and attempt[ed] murder[s] and solicitation to commit murder."); id. at 2863 (discussing testimony stating that Petitioner collected or received the money collected from the Miqueros); id. at 2865 (discussing testimony that Petitioner ensures that the chain of command is followed).

Further, to the extent Petitioner challenges that the shootings constitute assaults with a dangerous weapon, the Court rejects that position in favor of the Government's argument that the jury certainly could have viewed shootings as evidence of attempted murder—one of the predicate acts listed in Count I of the indictment.

The Court's proper issuance of jury instructions also allays the concerns Petitioner has expressed. For example, the Courts jury instructions for Count I, stated that the jury "must find beyond a reasonable doubt that a particular defendant knowingly agreed that one or more members of the conspiracy would commit at least two separate acts of racketeering." Zambrano Jury Instructions ("Jury Instructions") at 42. The instructions explained that the Government was not required to prove these racketeering acts were

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[2] The term "Miqueros" refers to people who sell "micas" or "green cards." RAFAELA G. CASTRO, A GUIDE TO THE FOLKTALES, TRADITIONS, RITUALS AND RELIGIOUS PRACTICES OF MEXICAN-AMERICANS, 157 (Oxford University Press, 2000).

actually committed or that Petitioner agreed to personally commit the racketeering acts. Id. The Court then instructed the jury as to the precise definition of racketeering activity, explaining that the law defines such activity "[a]ny act or threat which is chargeable as a felony under any of the [Illinois State law statutes for murder, attempted murder, solicitation to commit murder, intimidation, or extortion]," "[a]ny act which is indictable under [18 U.S.C. § 1503, namely, obstructing the due administration of justice]," "[a]ny act which is indictable under [18 U.S.C. § 1512, namely, witness tampering," "[a]ny act which is indictable under [18 U.S.C. § 1951, namely, extortion]," and [a]ny drug trafficking act which is indictable under [21 U.S.C. §§ 841(a)(1) and 846]." Jury Instructions at 44-45. The Court continued by summarizing for the jury the exact acts of racketeering that the jury could properly consider for the purposes of Count I. Id. at 46. Finally, the Court explained in great detail the particular elements required to prove each individual offense chargeable under Illinois State law and indictable under federal law. Id. at 46-52. The record demonstrates that the jury had clear and precise instructions as to the exact charges that could constitute racketeering activity for purposes of Count I of the indictment.

Finally, the jury returned a guilty verdict as to the assault with a dangerous weapon count, indicating that the grand jury would have indicted Petitioner for the RICO count had the Government sought to include the assault with a dangerous weapon as a predicate act. Therefore, even if Petitioner was correct that the

jury considered assault with a dangerous weapon to be a predicate act, he still cannot show impossibility in the determination as to whether the jury would have indicted for a RICO charge predicated, in part, upon assault with a dangerous weapon.

In sum, in light of the proper jury instructions and abundance of evidence presented in support of a great many racketeering acts, Petitioner's personal involvement in the commission of the racketeering acts, and Petitioner's approval of and agreement to the acts of racketeering through his position as Corona, there is no basis for finding a constructive amendment. Even on Petitioner's view of the conviction, the crime charged in the indictment was not materially different or substantially altered at trial. There is no doubt the grand jury would have—and, in a separate count, actually did—indict for assault with a dangerous weapon.

b. Shifting the Burden of Proof and Alleged Failure to Cure Jury Instructions

Petitioner also asserts that "the [G]overnment's closing argument was [] prejudicial error because it egregiously presented misstatements of the law and shifted the burden of proof." Pet.'s Mem. at 19, and therefore violated his Fifth Amendment grand jury rights. Other than stating the broad proposition that prejudicial error may result when a jury is misinformed by a prosecutor's statement as to a critical issue in the case, Petitioner does absolutely nothing to

expound on the arguments addressed in the preceding section. His argument merely restates his complaint that the Government convinced the jury that assault with a dangerous weapon and smashing someone's hands constituted predicate racketeering acts upon which the jury could convict Petitioner, and in fact did convict Petitioner. As set forth above in painstaking detail, there is no reason to believe that the jury was misled into rendering a constitutionally defective verdict. The Government presented an abundance of evidence showing that Petitioner committed or agreed to a number of other predicate acts housed in Count I of the indictment.

Petitioner next contends that the Government conceded that it constructively broadened the superseding indictment and that the jury instructions were constitutionally deficient. Petitioner cites to a sidebar in which the Government brought to the Court's attention that assault with a dangerous weapon should not be read to the jury as an act of racketeering for purposes of Count I. That citation, however, shows that Petitioner's argument mischaracterizes the proceedings. He actually states that "the [G]overnment[ ] conce[ded] that assault with a deadly weapon was not a predicate act element of the racketeering conspiracy charged in Count I." Pet.'s Mem. at 21. But conceding a fact never in dispute is not an admission of a constitutional violation. There was nothing improper, as the Government raised this issue *before* any instruction was read to the jury, in order to ensure that there could be no question as the fairness of any ensuing verdict. See

Trans. at 3031:24-32:1 ("Assault with a dangerous weapon will be stricken out and not read to the jury. And a clean, pure, page 10 must be given."); Id. at 3046:7-3051:12 (discussing predicate acts and omitting assault with a dangerous weapon).

Aside from the clear instructions discussed above, it is worth noting that the Government correctly points out that one of the codefendant's counsel explicitly told the jury that assault with a dangerous weapon *could not* constitute an act of racketeering in this case. Counsel stated:

> Nowhere on that list [of predicate acts] is mandatory bust-outs. Nowhere on that list is demos. Nowhere on that list is following Little Village rules. *Nowhere on there is smashing someone's hand with a hammer. Nowhere on that list—and you'll get a copy of this list as part of your jury instructions—is assault with a dangerous weapon.*

Id. at 2981:9-14 (emphasis added). Petitioner's belief that the Government was forbidden from discussing at trial various assaults which demonstrated Petitioner's supreme authority over the gang's activities is mistaken, and his meritless concern is further ameliorated by the Court's explicit statement to the jury that the lawyers' statements are not evidence. Id. at 3029:25-30:1. There was more than ample evidence of racketeering acts stated in the indictment, and it is hard to imagine that the jury could have had a clearer understanding omits responsibilities in deliberation.

c. Statements Made at the Sentencing Hearing and on Appeal

Petitioner asserts that the Seventh Circuit erred as a matter of law by finding assault with a dangerous weapon—a hand smashing incident—served as one of the predicate acts upon which the jury found against Petitioner. In another disingenuous attempt to dupe the Court, Petitioner selectively snips portions of the Seventh Circuit's opinion to support his position, while ignoring the full context. The Seventh Circuit made this remark when considering Petitioner's challenge to the sufficiency of the evidence *for assault in aid of racketeering*. Garcia, 754 F.3d at 472. Count IX of the indictment—on which the jury also returned a guilty verdict—was for the knowing and intentional commission of assault with a dangerous weapon in violation of 18 U.S.C. § 1959(a)(3). Superseding Indictment at 21. The Seventh Circuit therefore was not even discussing the count Petitioner now challenges, as Count I was for violating 18 U.S.C. § 1692(d). Id. at 13. In discussing the RICO conspiracy, the court of appeals stated that:

> A RICO charge requires proof of two predicate acts, or an agreement to commit those acts, in furtherance of the conspiracy . . . the *record contains overwhelming evidence that [Petitioner] agreed to the commission of far more than two such acts. He was involved with cocaine distribution; he issued standing orders for retaliatory shootings; and he supervised some violations for member misconduct.* Those facts were well supported by testimony from five former gang members, audio recordings of

> conversations discussing retaliatory shootings, video evidence of violations, and documentary evidence of the gang's rules . . . [T]he extortion of the Miqueros and the hand-smashing [] are not even mentioned in Guzman's statement. *If there was error at all in the admission of the statement or the instructions that addressed it, any such error was harmless.*

Garcia, 754 F.3d at 471-72 (emphasis added). Thus, there is no concern that the Seventh Circuit erred in its analysis of Petitioner's appeal.

Petitioner also asserts if there were defective jury instructions—there were not—the instructions fooled the Court into finding assault with a dangerous weapon to be a RICO predicate act at sentencing. However, the Government is correct that the Court adopted the presentence investigation report ("PSR"). The PSR found that the RICO predicate acts were not to be grouped under § 3D1.2 of the Sentencing Guidelines. Moreover, the Court agrees with the Government that the assaults with a dangerous weapon were not awarded separate units pursuant to the PSR. Thus, even if there was an error in the description of the aggravated assault at sentencing—there was not—that error would be entirely harmless. There was no constitutional violation, and the sentence was within the legally authorized duration. The Court rejects Petitioner's contention.

For the reasons stated above, the Court need not address Petitioner's further argument that the jury's

verdict was unconstitutionally tainted, as the argument relies on the merit of the arguments the Court has rejected above. The Court also rejects Petitioner's request for vactur of his entire sentence because it is premised on the Court vacating his RICO conviction. In light of Petitioner's failure to demonstrate constitutional defect in his conviction, the sentence also stands.

d. Ineffective Assistance of Trial and Appellate Counsel

Petitioner's claims for ineffective assistance of counsel warrant little attention. He challenges that trial counsel failed to know the contents of the record and failed to understand the superseding indictment and thus incompetently failed to raise the issues Petitioner litigates in the present habeas petition. Because all of Petitioner's arguments are losers, trial counsel could not have provided deficient representation, nor could Petitioner have suffered the requisite prejudice for a finding of ineffective assistance.

Petitioner's ineffective assistance of appellate counsel claim is equally deficient. Appellate counsel raised more than ten issues before the Seventh Circuit. Garcia, 754 F3d at 469. Counsel is not required to throw every argument against the wall to see what sticks. Rather, on appeal, counsel attempted to target the arguments most likely to succeed. This was a prudent strategy. See Knox v. United States, 400 F.3d 519, 522 (7th Cir. 2005) ("A lawyer who concentrates attention on issues that have the best chance of success does

not display objectively deficient performance, and thus does not render ineffective assistance of counsel."). In any event, given that all of the arguments lodged in this petition have been rejected, Petitioner could not have suffered any prejudice. Neither trial counsel nor appellate counsel provided ineffective assistance.

2. Claim Two: Petitioner was not Convicted of Two Predicate RICO Acts

Petitioner challenges that because the jury did not convict him of two predicate acts, his RICO conviction cannot stand. Petitioner cites to United States v. Holzer, 840 F.2d 1343, 1351-52 (7th Cir. 1988) for the proposition that a finding of guilty on two RICO predicate offenses is a necessary condition for a RICO conviction. The argument fails to recognize the distinction between a substantive RICO conviction and a RICO conspiracy. In Holzer, a jury found the defendant guilty of mail fraud, extortion, and racketeering. Id. at 1345. But, the racketeering conviction was not for conspiring to violate the RICO Act. Here, by contrast, Petitioner was charged and convicted for violations of § 1962(d) which prohibits individuals from "conspir[ing] to violate any of the provisions of [the other subsections of § 1962]. In Petitioner's case, the jury properly convicted him of the RICO violation because under a conspiracy theory of racketeering, an individual must merely agree to participate in two predicate acts, directly or indirectly; there is no requirement to actually commit the acts himself. Neapolitan, 791 F.2d at 497; Salinas, 522 U.S. at 63. Accordingly, Petitioner's cited

proposition and authority are inapposite. His incorporation by reference of his previous ineffective assistance claims is therefore futile as well.

3. Claim Three: The Government's Proof of the Interstate Commerce Element of the Hobbs Act Conviction

Petitioner argues that "the record is devoid of evidence from which any trier of fact could find the defendant guilty of the essential elements of the [Hobbs Act] offense beyond a reasonable doubt." Pet.'s Mem. at 42. The argument is difficult to take seriously.

First, although, as the Government notes, Petitioner did not specifically attack the interstate commerce element on direct appeal, the Seventh Circuit rejected Petitioner's challenge to the sufficiency of the evidence regarding the extortion conviction. The court of appeals stated that "[t]he jury heard ample evidence from which it could conclude that the Miqueros paid the Latin Kings under an implied threat of violence for the period alleged in the indictment. After seeing the consequences of noncompliance, the Miqueros made sizable monthly payments for a decade without interruption. That is enough to support the jury's verdict . . . " Garcia, 754 F.3d at 470. Thus, Petitioner cannot effectively seek a second appeal on the same issue. White v. United States, 371 F.3d 900, 902 (7th Cir. 2004) (prisoners are forbidden from relitigating in a collateral proceeding an issue that was decided on direct appeal).

Second, the Court has already dealt with certain of Petitioner's codefendants' challenges, which contested the same issue of whether the Latin Kings' activity affected interstate commerce. In another order, the Court explained:

> "At [] trial . . . the Government [presented] witnesses who provided testimony evidencing the Miqueros' (who the Latin Kings extorted] interstate dealings; specifically, the evidence supported a finding of drugs brought to Illinois from outside the state, the selling of fraudulent identification documents from other states, the interstate travel of the individuals engaged in the activity at issue, and the use of internationally produced software.

Fernando King v. United States ("King Order"), Case No. 15-cv-10156, Order of March 9, 2017 at 3; see also Vicente Garcia, Case No. 16 cv-16-859. Order of March 22, 2017 at 11-12 (discussing trial evidence of extortion of the Miqueros, whose fraudulent identification scheme involved interstate and foreign dealings including, the crossing of international and state borders; the distribution of drugs across state lines; the use of software from Mexico; and the use and sale of firearms, which traveled in interstate commerce).

Additionally, at trial, the Government provided numerous examples of the gang's operations' effect on interstate commerce. For example, an FBI special agent testified that the Miqueros operated in the Little Village neighborhood, a cooperating witness testified to the beatings of the Miqueros in the Little Village

area, and the fraudulent identifications included drivers licenses from numerous stales such as Wisconsin, Indiana, Ohio, Michigan, California, and Texas. The evidence also showed that agents seized money from a car owned by a Miquero located in Texas.

Accordingly, the Government presented an abundance of evidence in support of the Hobbs Act conviction. As was the case with his other arguments. Petitioner's incorporation of his ineffective assistance claims do not require additional discussion; the claims are futile.

4. Claim Four: Property of "Another" Pursuant to the Hobbs Act

a. Organization as "Another"

Petitioner next claims that the Hobbs Act's use of the term "another" in 18 U.S.C. § 1951(b)(2) precludes a conviction where a defendant extorts an organization. On Petitioner's reading of the term, the statute would only extend to the extortion of an individual. As a threshold matter, Petitioner has not cited any case that adopts this understanding of the statute. For this reason alone the argument fails. See Mahaffey v. Ramos, 588 F.3d 1142, 1146 (7th Cir. 2009) ("Perfunctory, undeveloped arguments without discussion or citation to pertinent legal authority are waived.").

Delving deeper, the Court dealt with this very argument in one of Petitioner's codefendant's § 2255 petition. The Court explained that:

Such a reading would reward defendants for ripping off a group of individuals, rather than a single person. In turn, Petitioner's interpretation fails, as it would result in absurd consequences. See Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J. concurring) (explaining that courts should not construe statutes in a manner resulting in absurd consequences). As the Supreme Court has explained, "'Another' is a relational word. It describes how one entity is connected to a different entity. In particular, it describes an entity 'different from the one first considered.'" Ocasio v. United States, 136 S. Ct. 1423, 1441 (2016) (quoting Merriam—Webster's Collegiate Dictionary 51 (11th ed. 2003)); see also United States v. Boulahanis, 677 F.2d 586, 590 (7th Cir. 1982) (Commerce is affected when an *enterprise*, which . . . customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victims potential as a purchaser of such goods.") (discussing the application of the depletion-of-assets theory and stating that extortion generally has a greater effect on interstate commerce when directed at *business* than at individuals) (internal quotation marks and citation omitted) (emphasis added). The Miqueros are an entity different or distinct from the conspiratorial group. Accordingly, the Court declines to adopt Petitioner's statutory interpretation.

King Order at 3-4. The same reasoning obtains here, and Petitioner's argument thus fails.

The Government's cited authority also supports the rejection of Petitioner's statutory interpretation. Juries have routinely convicted defendants for the extortion of entities rather than individuals. For example, in United States v. Orlando, a defendant appealed his conviction for a "scheme to extort money owed to . . . an *Illinois printing company.*" 819 F.3d 1016, 1019 (7th Cir. 2016) (emphasis added). The Government also points to United States v. Giles, where the defendant appealed his conviction, including the extortion of money *from a company* operating an illegal dump in his aldermanic ward. 246 F.3d 966, 968 (7th Cir. 2001) (emphasis added). Thus, Petitioner errs in his understanding of the Hobbs Act.[3]

b. Naming Individuals in the Indictment

Petitioner believes that the Hobbs Act count in the indictment was defective because the indictment failed to name any individuals specifically. He asserts that the indictment did not sufficiently apprise him such that he could prepare an adequate defense because the charge failed to inform him of any victim of the

[3] The Court also notes that the Government correctly points out that the trial record is replete with evidence that the Latin Kings extorted individual Miqueros. Gov't Mem. at 43-44 (discussing witness testimony regarding beating and collecting money from individual Miqueros and investigations, arrests, and seizures of individual Miqueros).

extortion. The argument merits little attention, as Petitioner misunderstands the law. The law is clear that the test for an indictment's sufficiency is not whether it states the names of each individual victim in each count. See United States v. Roya, 574 F.2d 386, 391 (7th Cir. 1978) (rejecting the argument that the failure to state the names and addresses of individuals warrants dismissal of an indictment because "[t]he test is whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial."). Petitioner has therefore failed to set forth a basis upon which to show his inability to adequately prepare for trial.

c. The Miqueros as an Organization

Petitioner once again advances an argument that mirrors those the Court has rejected in Petitioner's codefendant's requests for relief under § 2255. He argues that "the Miqueros was in essence a fictitious name, a name that could not be a victim and not a person in fear from any demand for payments. Only persons and not things can perceive fear." Pet.'s Mem. at 59. The Court has previously stated in the analysis of Petitioner's codefendant's argument that:

> Petitioner argues that "Miqueros" is a fictitious name and thus cannot constitute a person or organization for purposes of § 1951. Thus, the argument goes, they could not feel fear as defined by the statute. Petitioner's brief, however, acknowledges that "Miqueros"

> was a slang name for Mexicans selling fake identifications. The constituents of the group are obviously people who could feel the threat of force or violence or fear injury, and, as explained *infra*, an entity may be the target of extortion for purposes of a § 1951 violation. The Court therefore rejects this contention.

King Order at 3. It would be absurd to find that an entity cannot act through individual members or be victimized on the basis of what happens to those individual members. See Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 389 n. 4 (7th Cir. 2008) (explaining that corporations must act through individuals); see also Pub. Citizen, 491 U.S. at 470 (Kennedy. J. concurring) (courts should not construe statutes in a manner resulting in absurd consequences). If Petitioner's understanding were correct, it would be difficult to see how an entity could violate the law or be the victim of a violation of the law.

Because all of Petitioner's arguments seeking to vacate the Hobbs Act conviction fail, so, too do his arguments in support of setting aside his sentence as well as for ineffective assistance.

5. Claim Five: Failure to Object to inadmissible Evidence

a. Shanna's Personal Knowledge as Inadmissible

Petitioner contends that trial counsel rendered ineffective assistance because counsel did not object to

certain testimony from a cooperating witness. Specifically, he contends that Milton Shanna's ("Shanna") testimony was improperly admitted into evidence pursuant to Federal Rules of Evidence 602 and 701. Petitioner argues that the errors were not harmless and that counsel performed deficiently as a result of counsel's failure to object to the testimony and renew the objection in Petitioner's post-trial motion. The challenged testimony supported the conviction on Count IX of the indictment, which charged Petitioner with assault with a dangerous weapon under 18 U.S.C. §1959(a), arising out of his involvement in the April 14, 2008 smashing of Rudolfo Salazar ("Salazar") and Enrique Enriquez's ("Enriquez") hands.

As an initial matter, Petitioner's failed attempt to attack the sufficiency of the evidence for the assault in aid of racketeering on direct appeal procedurally bars his present attempt to relitigate the issue in a collateral attack. Petitioner argued before the Seventh Circuit that the evidence did not show that he ordered the assaults and that even if he did, his motivation was not gang discipline—it was love and revenge." Garcia, 754 F.3d at 472. The court of appeals rejected Petitioner's position, finding that it was "hard to take the [] argument seriously. We are confident that a rational jury could find that the assaults were committed at [Petitioner's] command, that they were not for love or personal revenge, and that he was enforcing gang rules." Id. The Seventh Circuit specifically stated that "Shanna and [Ruben] Caquias [another witness] said exactly this in their testimony, *which the jury was*

entitled to credit." Id. (emphasis added). The court concluded that "[Petitioner's] order went through the Latin Kings' chain of command; it was implemented by subordinates; the victims were Latin Kings members who had defied express orders and broken gang rules; and the assaults followed the ritualistic pattern used for 'violations.' Tellingly, the victims acquiesced in their own brutal punishment. *This was more than sufficient to support the jury's verdict*." Id. (emphasis added). In sum, the Seventh Circuit already rejected Petitioner's attack on the sufficiency of the evidence in support of the assault with a dangerous weapon conviction. In doing so, the court specifically cited the validity of the jury's credibility determination as to the Shanna testimony Petitioner now challenges. Accordingly, Petitioner's argument in his § 2255 petition fails.[4]

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[4] The Court also notes that had there been an error in admitting the Shanna testimony—there was not—any error would be harmless. See Garcia, 754 F.3d at 472 (stating that there "was *more than sufficient* [evidence] *to support the jury's verdict*) (emphasis added). The Government accurately provides further support that any error would be harmless because other evidence introduced included: Ruben Caquias' testimony regarding Petitioner's hand smashing orders; recorded conversations where Petitioner alludes to his ordering of the assaults; evidence demonstrating Petitioner's position as the Corona and the authority held by a Corona; evidence showing that the gang had specific rules and its own constitution; and evidence of the Petitioner's motive, namely that Salazar had wronged Petitioner's girlfriend. The Court agrees that the jury was entitled to weigh this evidence and draw the inference that Petitioner ordered the assaults.

Even considering the, argument on its merits, it does nothing to support his request for relief. Under Rule 602, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." Rule 701(a) similarly provides that a layperson's opinion testimony must be "rationally based on the witness's perception."[5]

The Government presented an abundance of evidence demonstrating Shanna's personal knowledge of the fact that Petitioner ordered the assaults with a dangerous weapon. The jury heard recorded conversations capturing Petitioner instructing Shanna to "whoop' [Salazar's] ass." Garcia, 754 F.3d at 472. In reference to Salazar, the recordings also showed that Petitioner stated "you tell, dude, I don't care, hopefully a bird shits on her, and every time something happens to her I'm gonna come and see [Salazar]." Trans. at 1991:3-4. The recorded conversation further demonstrated that Petitioner said that he would have a "special squad to whoop [Salazar's] ass, see how he likes it." Trans. at 1992:9-10. Shanna testified regarding these precise conversations, which supported his personal knowledge, as required under Rules 602 and 701(a), of Petitioner's orders to carry out assault.

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[5] Notably, the advisory committee notes equate this limitation to "the familiar requirement of first-hand knowledge or observation." Fed. R. Evid. 701(a) advisory committee's note to 1972 proposed rules.

Shanna and Ruben Caquias ("Caquias") testified consistently on numerous occasions, stating, that they understood Petitioner to have ordered the smashing of Salazar's and Enriquez's hands. See Garcia, 754 F.3d at 468 ("On [Petitioner's] orders, gang member Caquias used a hammer and a landscaping brick to smash Salazar and Enriquez's hands as a violation . . . Shanna [] explained that Salazar 'was warned, and he still messed up and suffered the consequences.' "); see also Trans. at 2008:9-14 (Shanna testifying that he understood Petitioner to have given the orders to smash Salazar's hands); Trans. at 2552:8-15 (testimony that Petitioner ordered Salazar's hands to be broken).[6] Furthermore, Shanna testified as to Petitioner's motive for ordering the smashing of Salazar's hand. He explained that Petitioner sought to punish Salazar for stealing from Petitioner's girlfriend's house. Trans. at 2006:22-23. Shanna elaborated further, explaining that he had a phone call on April 14, 2008—the day of the hand smashing—in which Petitioner instructed him "to go to the house because they had caught Mr. Salazar there, and to take care of the situation." Id. at 2007:19-20. In addition to the phone call, Shanna also had an in person meeting with Petitioner, on which he based his testimony that Petitioner ordered Salazar's hands to be

[6] The testimony also shows that before settling on the order to smash the victim's hands, Petitioner wanted other gang members to inflict "an unlimited beating with—from the Latin Kings, which means no limited time, and there isn't no [sic] restrictions upon weapons that would be used. So bats, crowbars, all that would be put into exception, and it would be an unlimited amount of time." Trans. at 2552:23-2553:2.

smashed. Trans. at 2008:5-14. The record is clear that Shanna based his testimony on an abundance of personal knowledge of conversations with Petitioner and various other gang members—which, damningly, include recorded phone calls and meetings—that implicate Petitioner as the person who ordered the assaults. As the Seventh Circuit held, and this Court agrees, "the jury was entitled to credit [Shanna and Caquias' testimony]. Garcia, 754 F.3d at 472. The witness's testimony was properly admitted.

Finally, Petitioner's contention that Shanna's testimony was inadmissible under Rule 701(b) also fails. Rule 701(b) requires that a lay witness opinion be "helpful to clearly understanding the witness's testimony or to determine a fact in issue." The foregoing discussion demonstrates that the Government laid a substantial foundation for Shanna's uniquely personal knowledge of the assault orders. Shanna's opinion that Petitioner ordered the assaults was rooted in Shanna's personal involvement with the gang activity and personal interactions with Petitioner regarding the assaults at issue. Shanna's testimony therefore undoubtedly aided the jury in determining whether or not Petitioner ordered Salazar and Enriquez's hands to he smashed. Shanna's testimony added to the evidentiary palette, and the jury was free to determine the credibility and draw inferences as it saw fit. Accordingly, none of Petitioner's evidentiary challenges warrants relief.

b. Ineffective Assistance of Counsel

Petitioner's ineffective assistance claims again need not be addressed at length. First, because the evidence Petitioner challenges was admissible at trial, so any further objection by counsel would have been futile.

Second, trial counsel indeed objected to the foundation supplied for Shanna's testimony regarding the assault against Salazar. Trans. at 2007:4. The Court sustained the objection. Id. at 2007:5. The Government proceeded to successfully lay the requisite foundation in order to elicit Shanna's testimony within his personal knowledge. Again, there was nothing further to which counsel could have meritoriously objected. Counsel was not required to object to testimony detrimental to Petitioner's case in a frivolous, Hail Mary attempt to preclude that testimony. Counsel took a measured approach in seeking to prevent the admission of the testimony by objecting to the Government's foundation.

III. CONCLUSION

In sum, Petitioner fails to set forth any basis warranting relief under § 2255. Additionally, a Certificate of Appealability is denied pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings for the United States District Courts because Petitioner failed to make a substantial showing that he was denied a constitutional right.

IT IS SO ORDERED.

ENTER:

/s/ Charles Norgle
CHARLES RONALD
NORGLE, Judge
United States District Court

DATE: December 14, 2017

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 3, 2019

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-1292

AUGUSTIN ZAMBRANO, *Petitioner-Appellant*, *v*. UNITED STATES OF AMERICA, *Respondent-Appellee*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:16-cv-00332 Charles R. Norgle, *Judge*.

ORDER

On consideration of the petition for rehearing filed by petitioner-appellant on November 26, 2018, all members of the original panel have voted to deny the petition for panel rehearing.

Accordingly, the petition for rehearing is hereby DENIED.