UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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56 Forsyth Street, N.W.
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April 17, 2018

Arthur Louis Wallace III
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Appeal Number: 18-10445-F
Case Style: Luis Salas v. USA
District Court Docket No: 1:15-cv-24590-KMW
Secondary Case Number: 1:14-cr-20017-KMW-13

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Dionne S. Young, F
Phone #: (404) 335-6224

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10445-F

LUIS SALAS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Luis Salas is a federal prisoner serving a 120-month sentence after pleading guilty to conspiracy to possess with intent to distribute 280 grams or more of cocaine base. He seeks a certificate of appealability ("COA") in his appeal from the district court's denial of his motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. He contends that reasonable jurists would debate whether (1) his counsel rendered ineffective assistance by misadvising him about the consequences of a direct appeal, causing him to abandon his desire to appeal; and (2) his claim in his amended § 2255 motion—that his counsel rendered ineffective assistance by failing to advise him that he could have to a jury trial on the issue of drug quantity—was timely. To merit a COA, Salas must show that reasonable jurists would find debatable both the merits of an underlying claim and the procedural issue that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

I. Appeal

Salas's counsel testified during an evidentiary hearing that he and Salas discussed appealing after the sentencing hearing. They discussed the fact that the plea agreement contained an appeal waiver and the fact that Salas had received the mandatory-minimum sentence for the crime to which he pled guilty. Counsel explained to Salas that there did not appear to be any issues to appeal. Counsel also explained that the Third Circuit had determined that a defendant who appealed after agreeing to an appeal waiver could be subject to resentencing and a harsher sentence. *See United States v. Erwin*, 765 F.3d 219, 228-32 (3d Cir. 2014). Counsel told Salas that the prosecutor assigned to his case was aggressive and could ask this Circuit to adopt the Third Circuit's approach.

The district court found that counsel's testimony was credible, and this case gives us no reason to disturb that credibility determination. *See Rivers v. United States*, 777 F.3d 1306, 1316-17 (11th Cir. 2015) (stating that we give substantial deference of a factfinder's credibility determination in a § 2255 proceeding and generally "refuse to disturb a credibility determination unless it is so inconsistent or improbable on its face that no reasonable factfinder could accept it" (quotation marks omitted)). Salas points out that *Erwin* is not binding in this Circuit. However, counsel did not perform deficiently by making Salas aware that a potential consequence of appealing was that the prosecutor would ask this Circuit to adopt the Third Circuit's approach.

Counsel's testimony shows that he adequately consulted with Salas about appealing. *See Thompson v. United States*, 504 F.3d 1203, 1206 (11th Cir. 2007) ("[A]dequate consultation requires informing a client about his right to appeal, advising the client about the advantages and disadvantages of taking an appeal, and making a reasonable effort to determine whether the client wishes to pursue an appeal, regardless of the merits of such an appeal." (emphasis

omitted)). Counsel and Salas both testified that, following this consultation, Salas did not want to appeal. Because counsel followed Salas's instruction not to appeal, Salas cannot show that counsel rendered ineffective assistance. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (stating that, if there is adequate consultation about appealing, counsel "performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal").

II. Trial on drug quantity

Counsel testified that he and Salas discussed potential trial strategies and the possibility of challenging the drug quantity at trial. Counsel explained that, "to receive a minimum mandatory after trial, the jury would have to decide whether [there] was a certain [drug] quantity or greater." The district court found that counsel's testimony was credible, and this case gives us no reason to disturb that credibility determination. *See Rivers*, 777 F.3d at 1316-17. Moreover, Salas testified that he knew when he pled guilty "that it was legally possible for [him] to go to trial and make the government prove all its allegations," including the allegation about drug quantity.

Salas cannot show that counsel rendered ineffective assistance by failing to advise him that he could have a jury trial on the issue of drug quantity. Even if reasonable jurists could debate whether this claim was timely, reasonable jurists would not debate the claim's merits. *See Slack*, 529 U.S. at 484.

Because Salas has not made a substantial showing of the denial of a constitutional right, his motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2).

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE