

APPENDIX # 1

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UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAY 4 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-56811

Plaintiff-Appellee,

D.C. Nos. 3:16-cv-02049-WQH
3:10-cr-03044-WQH-5

v.

Southern District of California,
San Diego

CARLOS COSME,

ORDER

Defendant-Appellant.

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,
Plaintiff,

V.

CARLOS COSME.

Defendant.

CRIM CASE NO. 10cr3044WQH
CIVIL CASE NO. 16cv653WQH
CIVIL CASE NO. 16cv2049
ORDER

HAYES, Judge:

The matter before the Court is the motion to reopen and reenter judgment pursuant to Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6) (ECF No. 2360) filed by Defendant/Petitioner.

On January 11, 2017, this Court entered an order denying the motion pursuant to 28 U.S.C. § 2255 on the grounds of ineffective assistance of counsel filed by the Defendant/Petitioner. (ECF No. 2333). Defendant moves the Court to reopen his case and to reenter judgment on the grounds that his counsel did not send his a copy of the order denying relief and it recently came to his attention that the motion had been denied.

“Rule 60(b)(6) is a catch-all provision that allows a court to vacate a judgment for ‘any other reason justifying relief from the operation of the judgment.’ That rule has been used sparingly as an equitable remedy to prevent manifest injustice.” *Lehman v. U.S.*, 154 F.3d 1010, 1017 (9th Cir. 1998). Relief under Rule 60(b)(6) “is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.” *Harvest v. Castro*, 531 F.3d 737,

1 749 (9th Cir. 2008) (internal quotation marks omitted). The Court concludes that
2 Defendant/Petitioner has moved in a timely manner and set forth good cause to reopen
3 and reenter judgment.

4 IT IS HEREBY ORDERED that the motion to reopen and reenter judgment
5 pursuant to Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6) (ECF No. 2360)
6 filed by Defendant/Petitioner is granted.

7 IT IS FURTHER HEREBY ORDERED that motion pursuant to 28 U.S.C. §
8 2255 (ECF No. 2301) is denied on the grounds stated in the January 11, 2017 order
9 (ECF No. 2333). As stated in the January 11, 2017 order, a certificate of appealability
10 is denied. The Clerk of the Court shall send a copy of this order and a copy of ECF
11 No. 2333 to the Defendant at the address stated in ECF No. 2360.

12 DATED: November 6, 2017

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14 WILLIAM Q. HAYES
15 United States District Judge
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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 UNITED STATES OF AMERICA,
11 Plaintiff/Respondent,
12 v.
13 CARLOS COSME (5),
14 Defendant/Petitioner.

10cr3044WQH
16cv653WQH
16cv2049 WQH
ORDER

HAYES, Judge:

15 The matter before the court is the motion to vacate, set aside, or correct sentence
16 pursuant to 28 U.S.C. § 2255 filed by the Defendant Carlos Cosme. (ECF No. 2301).

17 **BACKGROUND FACTS**

18 On December 22, 2011, the grand jury issued a two-count second superseding
19 indictment. The second superseding indictment charged the Defendant Cosme and
20 others defendants in Count 1 with conspiring to conduct enterprise affairs through a
21 pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d) and in Count 2 with
22 conspiring to distribute cocaine, marijuana and methamphetamine in violation of 21
23 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), 841(b)(1)(A)(vii), 841(b)(1)(A)(viii) and 846.

24 On May 21, 2012, Defendant Cosme signed a Plea Agreement. In the Plea
25 Agreement, Defendant agreed to plead guilty to Counts 1 and 2 of the Second
26 Superseding Indictment. The parties agreed to jointly recommend a total offense level
27 of 37 and to recommend that the Court impose a sentence of 235 months. Defendant
28 initialed each page of the Plea Agreement and signed the Plea Agreement on the last

1 page along with his counsel and counsel for the Government.

2 The FACTUAL BASIS of the Plea Agreement stated:

3 Defendant has fully discussed the facts of this case with defense counsel.
4 Defendant has committed each of the elements of the crime, and admits
5 that there is a factual basis for this guilty plea. Defendant stipulates and
6 agrees that the facts set forth in the numbered paragraphs below occurred.
7 Defendant also stipulates and agrees that if this case were to proceed to
8 trial, the Government could prove the following facts beyond a
9 reasonable doubt by competent and admissible evidence:

10 1. Between the time period of November 2008 and July 22, 2010,
11 defendant Carlos Cosme entered into an agreement with other individuals
12 named in the above-noted charge to participate in the affairs of the
13 Fernando Sanchez Organization (the "FSO"), an "association-in-fact"
14 enterprise as defined in Title 18, United States Code, Section 1961(4).
15 Defendant Carlos Cosme agreed that a member of the FSO would commit
16 at least two racketeering acts.

17 2. During the time period noted above, members of the FSO engaged in
18 a pattern of racketeering activity, to include the commission of the
19 following crimes: murder; conspiracy to commit murder; attempted
20 murder; kidnaping; conspiracy to kidnap; attempted kidnaping; robbery;
21 conspiracy to commit robbery; attempted robbery; importation of
22 controlled substances into the United States from Mexico; conspiracy to
23 import controlled substances into the United States from Mexico;
24 distribution of controlled substances; conspiracy to distribute controlled
25 substances; money laundering; and conspiracy to launder money. The
26 FSO's pattern of racketeering activity affected interstate and foreign
27 commerce. During the time period relevant to this guilty plea, the FSO
28 operated in the Southern District of California and elsewhere.

29 3. Pursuant to his agreement to participate in the affairs of the FSO,
30 defendant Carlos Cosme was aware that the FSO's racketeering activities
31 included the commission of the crimes specified above in the preceding
32 paragraph, including the crimes of: (a) conspiracy to import and distribute
33 over 50 grams (pure) of methamphetamine; and (b) conspiracy to commit
34 murder.

35 4. The FSO constitutes an ongoing organization whose members function
36 as a continuing unit for the common purpose of achieving the objectives
37 of the FSO, which include: (a) enriching the members of the FSO
38 through, among other things, the importation and distribution of illegal
39 narcotics in the United States, committing robberies, the kidnaping of
40 individuals in the United States and Mexico, and "taxing" individuals
41 involved in criminal activities within the geographical areas controlled by
42 the Enterprise, to include Tijuana, Mexico, and areas of San Diego,
43 California; (b) keeping rival traffickers, potential informants, witnesses
44 against the FSO, law enforcement, the media, and the public-at-large in
45 fear of the FSO, and in fear of its members and associates through threats
46 of violence and violence; (c) preserving, protecting and expanding the
47 power of the FSO through the use of intimidation, violence, threats of
48 violence, assaults and murders; (d) preserving the continuity of
49 membership in the FSO by threatening members, associates and
50 individuals with knowledge of the FSO's illegal activities wishing to

1 leave the FSO with violence, assault and murder; and (e) preserving the
2 ongoing viability of the FSO by assaulting law enforcement officers
3 attempting to arrest FSO members, bribing public officials to secure the
4 release of arrested FSO members and making payments to public officials
5 in order to gain access to confidential law enforcement information
6 adverse to the interests of the FSO.

7 5. In furtherance of his agreement to participate in the affairs of the FSO,
8 defendant Carlos Cosme committed numerous racketeering offenses,
9 including: (a) conspiracy to import and distribute more than 50 grams
10 (actual) of methamphetamine and (b) conspiracy to commit murder.

11 6. Given his personal participation in the affairs of the FSO, defendant
12 Carlos Cosme knew that members of the FSO would, during the time
13 frame of the above-noted conspiracy, import and distribute more than 50
14 grams of actual methamphetamine. Further, defendant Carlos Cosme
15 personally performed numerous overt acts in furtherance of a conspiracy
to commit murder, including the recruitment of codefendant Jose Ortega
Nuno to run a "hit squad" on behalf of defendant Cosme.

16 7. In furtherance of his agreement to participate in the affairs of the FSO,
17 during February 2010, defendant Cosme arranged to sell a confidential
18 informant ("CI") 2 pounds of methamphetamine in Tijuana, Mexico.
19 Defendant Cosme knew that the methamphetamine would thereafter be
20 imported into the United States from Mexico. Once 1 3/4 pounds (1/4
21 pound was seized at the border by U.S. law enforcement officials) of
22 methamphetamine (758 grams of actual methamphetamine) had been
23 successfully imported into the United States, the CI paid defendant
Cosme for the methamphetamine.

16 (ECF No. 1703 at 5-8). These factual admissions are contained on Pages 5, 6, 7 and 8
17 of the Plea Agreement. Defendant's initials appear at the bottom right of each page as
18 follows: ("Def. Initials CC"). The Plea Agreement stated that "... the Government will
19 not be obligated to recommend any adjustment of Acceptance of Responsibility if
20 defendant engages in conduct inconsistent with acceptance of responsibility including,
21 but not limited to, the following: ... Materially breaches this plea agreement in any
22 way." *Id.* at 14. The Plea Agreement provided:

23 Defendant acknowledges, understands and agrees that if defendant
24 violates or fails to perform any of defendant's obligations under this
agreement, such violation or failure to perform may constitute a material
breach of this agreement.

25 Defendant acknowledges, understands and agrees further that the
26 following non-exhaustive list of conduct by defendant unquestionably
constitutes a material breach of this plea agreement: ...

27 4. Attempting to withdraw the plea...
28 In the event of defendant's material breach of this plea agreement,
defendant will not be able to enforce any of its provisions, and the
Government will be relieved of all its obligations under this plea
agreement.

1 *Id.* at 17.

2 On May 25, 2012, Defendant appeared before this district court judge for a
3 change of plea to the second superseding indictment pursuant to the Plea Agreement.
4 At the change of plea hearing, Defendant, represented by counsel, acknowledged that
5 he had been sworn under penalty of perjury and that he could be prosecuted for perjury
6 if he failed to provide truthful answers in this proceedings. Defendant represented that
7 he initialed each page of the plea agreement and signed his name on the last page of the
8 agreement. Defendant represented to the Court that he had an opportunity to review the
9 plea agreement paragraph by paragraph and line by line with his counsel and that the
10 agreement was translated to him in the Spanish language. Defendant represented to the
11 Court that he was satisfied with the services of his counsel and that he had no questions
12 about the terms of the plea agreement.

13 The Court reviewed the elements of the charge in Count One and the elements
14 of the charge in Count Two. Defendant stated that he understood that by admitting –
15 or pleading guilty to these offenses he will be admitting to each element of the offenses.
16 The Court then reviewed each of the seven paragraphs of the factual basis for the plea
17 contained in the Plea Agreement starting on page 5 and continuing through page 8. The
18 plea colloquy provided in part as follows:

19 THE COURT: Do you agree that pursuant to your agreement to
20 participate in the affairs of the FSO you were aware of the FSO's
21 racketeering activities, including the commission of the crimes specified
22 above that I just referred to, including the crimes of conspiracy to import
23 and distribute over 50 grams pure of methamphetamine and conspiracy to
24 commit murder?

25 THE DEFENDANT: Yes, Your Honor.

26 THE COURT: Do you agree that the FSO constitutes an on-going
27 organization whose members function as a continuing unit for the common
28 purpose of achieving the objectives of the FSO which include enriching
the members of the FSO through among other things the importation and
distribution of illegal narcotics into the United States, committing
robberies, the kidnaping of individuals in the United States and Mexico,
taxing individuals involved in criminal activities within the geographical
areas controlled by the enterprise to include Tijuana, Mexico, and areas of
San Diego, California?

THE DEFENDANT: Yes, Your Honor.

THE COURT: It is also includes keeping rival drug traffickers, potential
informants, witnesses against the FSO, law enforcement, the media and
the public at large in fear of the FSO, in fear of its members and associates

1 through threats of violence and harm?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: That includes preserving, protecting, and expanding the
power of the FSO through the use of intimidation, violence, threats of
violence, assaults and murders?

4 THE DEFENDANT: Yes, Your Honor. I understand.

5 THE COURT: Preserving the continuity of membership in the FSO by
threatening members, associates, and individuals with knowledge of the
6 FSO's illegal activities wishing to leave the FSO with violence, assault and
murder, and preserving the on-going viability of the FSO, by assaulting
7 law enforcement officers attempting to arrest FSO members, bribing
public officials to secure the release of arrested FSO members, and making
payments to public officials in order to gain access to confidential law
enforcement information adverse to the interests of the FSO?

8 THE DEFENDANT: Yes, Your Honor. I understand.

9
10 THE COURT: Further, do you agree that you personally performed --
performed numerous overt acts in furtherance of a conspiracy to commit
murder, including the recruitment of co-defendant Jose Ortega Nuno to
run a hit squad on behalf of you? And I am reading from paragraph -- page
11 8 paragraph 6. Do you understand the question, sir? Do you want me to
ask it again?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: This is on page 8 of your plea agreement, paragraph 6,
14 lines 3 through 11. Given your personal participation in the affairs of the
FSO, defendant Carlos Cosme knew that members of the FSO would
15 during the time frame of the above-noted conspiracy import and distribute
more than 50 grams of actual methamphetamine. Further defendant Carlos
16 Cosme personally performed numerous overt acts in furtherance of a
conspiracy to commit murder, including the recruitment of co-defendant
17 Jose Ortega Nuno to run a hit squad on behalf of defendant Cosme. Do
you agree that statement is true? Do you accept that as part of your factual
basis, sir, that statement?

18 THE DEFENDANT: It wasn't like that -- yes, Your Honor. Yes, Your
Honor.

19 THE COURT: Let me read it again and make sure that I have an answer
20 that is clear. Here is the statement again, sir, I'll read it to you. Given his
personal participation in the affairs of the FSO, defendant Carlos Cosme
21 knew that members of the FSO would during the time frame of the
above-noted conspiracy import and distribute more than 50 grams of
actual methamphetamine. Further defendant Carlos Cosme personally
22 performed numerous overt acts in furtherance of a conspiracy to commit
murder, including the recruitment of co-defendant Jose Ortega Nuno to
run a hit squad on behalf of defendant Cosme. Do you agree that statement
23 is true? That statement is in your plea agreement. Do you agree that
statement is true?

24 THE DEFENDANT: Yes, Your Honor.

25 (ECF No. 1913-1 at 32-37).
26

27 The Court reviewed the sentencing provisions of the plea agreement including
the joint sentencing recommendation. Defendant stated that he understood that the
28 maximum penalty for the charge in Count 1 included life in prison and that the plea

1 agreement provides that the joint recommendation of the parties would be 235 months
2 in custody. At the conclusion of the plea, the Court stated on the record in open court:
3 “The pleas to Count 1 and 2 are accepted. I find the defendant has freely, voluntarily,
4 and competently entered the pleas; that he understands the plea agreement, including
5 the forfeiture provision; the charges against him and the consequences of the plea; that
6 there is a factual basis for the plea and that the defendant has knowingly intelligently
7 waived his rights.” (ECF No. 1913-1 at 45).

8 On October 5, 2012, Defendant filed a motion to withdraw his plea of guilty and
9 a request for new counsel. (ECF No. 1868). The Court granted Defendant’s request for
10 new counsel and provided new counsel with the opportunity to meet with the Defendant
11 and to decide whether or not to pursue the motion to withdraw his plea.

12 On January 25, 2013, Defendant filed a second motion to withdraw his plea of
13 guilty. (ECF No. 1906). The Court subsequently held an evidentiary hearing at which
14 prior counsel and the Defendant testified. Defendant testified under oath at the
15 evidentiary hearing that the factual allegation of a conspiracy to commit murder
16 including the recruitment of co-defendant Jose Ortega Nuno to run a hit squad “took
17 [him] by surprise.” (ECF No. 1935 at 13). Defendant testified that when he answered
18 “It wasn’t like that” to the judge’s questions he felt a “blow from behind” delivered by
19 his counsel and that “I felt in truth I had to say guilty.” *Id.* Defendant testified that it
20 was his understanding from his counsel that he was pleading guilty to “the sale of the
21 methamphetamine and the RICO.” *Id.* at 16. Defendant testified as follows:

22 Defense counsel: Okay. Did you agree at any time to plead guilty to
23 forming a hit squad as alleged in the plea agreement with co-defendant
Antonio Nuno?

24 Defendant: No, I wasn’t in agreement.

25 *Id.*

26 On April 19, 2013, the Court entered an order denying the Defendant’s motion
27 to withdraw his guilty plea. (ECF No. 1940). The Court stated:
28

The Court examined each of the factual admissions in the plea agreement
independently and thoroughly. The Court informed the Defendant that he
had no obligation to admit any facts in the Plea Agreement, and that he

1 could go forward on the trial date. (ECF No. 1913-1 at 35) ("He has no
 2 obligation to admit to it. He has no obligation to admit to that. We can
 3 take it off calendar and have a trial date set and we can pursue that.") In
 4 order to avoid any confusion, the Court stated: "Let me read it again and
 5 make sure that I have an answer that is clear." After reading Paragraph 6
 6 of the Plea Agreement in its entirety, the Court stated: "Do you agree that
 7 statement is true? That statement is in your plea agreement. Do you agree
 8 that statement is true?" Defendant stated: "Yes Your Honor." *Id.* at 37.
 9

10 At the time of the plea, the Court found that the Defendant
 11 knowingly admitted the factual basis for the plea of guilty. The Court
 12 concludes that there is no credible evidence to the contrary in this record.
 13 Defendant's claim that he did not know that the Plea Agreement contained
 14 an admission to conspiring to commit murder or that he did not knowingly
 15 make those admissions at the plea hearing is directly contradicted by the
 16 Plea Agreement, the Defendant's statements at the plea colloquy, and the
 17 credible testimony at the evidentiary hearing.

18 Finally, Defendant contends that "there is no evidence or factual
 19 basis to believe the overt act of organizing a 'hit squad' alleged in the plea
 20 agreement, actually transpired." (ECF No. 1906-1 at 5). Defendant
 21 asserts that the phone conversations intercepted by the Government have
 22 been improperly interpreted. Defendant asserts that any reference to a
 23 "hit" that was to occur "was *not* a murder, but an arrest of the competing
 24 street vendors. When Mr. Cosme referred to a 'knife on them' the
 25 conversational figure of speech was intended to explain placing a knife on
 26 the individual's person, not in them, a method of taking a person into
 27 custody (i.e. pretext arrest)." (ECF No. 1906-1 at 10).

28 Defendant admitted at the evidentiary hearing that he used code
 1 words (12,1 and cashing a check) to refer to homicide on the taped
 2 conversations, that he advised a person known as Cabo that he had
 3 individuals in Mexico who could commit homicides at his request, and
 4 that he sold an album of police officer photographs to the confidential
 5 informant in this case. Defendant admitted at the evidentiary hearing that
 6 he knew that the confidential informant wanted to purchase the
 7 photographs so that he could target Mexican police officers for physical
 8 attack and murder. Defendant's plea of guilty to conspiracy to commit
 9 murder is supported by the factual admissions at the time of the guilty plea
 10 and the record in this case.

11 Defendant signed a Plea Agreement, swore in open court that he
 12 committed the facts as stated in the Plea Agreement, and actually
 13 committed the crime charged. The Court found a factual basis for the plea
 14 and explicitly accepted the plea of guilty. The Court concludes that
 15 Defendant has not shown any fair and just reason for requesting
 16 withdrawal of his plea of guilty.

17 (ECF No. 1940 at 18-19).

18 Plaintiff United States of America, subsequently, filed a motion for an order
 19 finding Defendant's material breach of the plea agreement. On June 21, 2013, this Court
 20 granted the motion for an order finding Defendant's material breach of the plea
 21 agreement. The Court concluded "that the Defendant materially breached the Plea
 22 Agreement by testifying under oath at the evidentiary hearing on the motion to
 23

1 withdraw his plea of guilty to facts directly contrary to the facts admitted in the 'factual
2 basis' portion of the Plea Agreement and admitted by the Defendant under oath at the
3 plea hearing." (ECF No. 1989 at 11).

4 On June 28, 2013, the Court sentenced the Defendant to a term of imprisonment
5 of 262 months in custody as to each count concurrently. (ECF No. 1995 at 2).

6 Defendant filed a timely notice of appeal to the Court of Appeals for the Ninth
7 Circuit on the grounds that the decision of the district court to deny his motion to
8 withdraw his guilty plea was an abuse of discretion.

9 On December 15, 2014, the Court of Appeals dismissed the appeal. The Court
10 of Appeals concluded that the district court did not abuse its discretion in denying
11 Defendant's motion to withdraw his plea and that Defendant knowingly and voluntarily
12 waived his right to appeal the district court's order. (ECF No. 2183).

13 On June 24, 2015, Defendant Carlos Cosme filed a request for the Court to
14 appoint counsel to assist him in the preparation of a writ of habeas corpus. (ECF No.
15 2144). Defendant informed the Court that he did not speak or write the English
16 language and was unable to represent himself.

17 On September 1, 2015, this Court entered an order appointing counsel to
18 represent the Defendant in the preparation of a writ of habeas corpus. (ECF No. 2235).

19 On March 14, 2016, Defendant Carlos Cosme, representing himself, filed a
20 motions pursuant to 28 U.S.C. § 2255. (ECF No. 2283).

21 On April 27, 2016, the Court ordered that Defendant Cosme and appointed
22 counsel for Defendant Cosme shall notify the Court in writing within 45 days of this
23 order whether Defendant will proceed representing himself or proceed through
24 appointed counsel. (ECF No. 2286).

25 On May 25, 2016, Defendant Cosme notified the Court in writing that he would
26 proceed through appointed counsel. (ECF No. 2290).

27 On August 09, 2016, Defendant Cosme, represented by counsel, filed a motion
28

1 pursuant to 28 U.S.C. § 2255. (ECF No. 2301).¹

2 On November 07, 2016, Plaintiff United States filed a response.

3 **APPLICABLE LAW**

4 28 U.S.C. §2255 provides that “A prisoner under sentence of a court established
5 by Act of Congress claiming the right to be released upon the ground that the sentence
6 was imposed in violation of the Constitution or laws of the United States, or that the
7 court was without jurisdiction to impose such sentence, or that the sentence was in
8 excess of the maximum authorized by law, or is otherwise subject to collateral attack,
9 may move the court which imposed the sentence to vacate, set aside or correct the
10 sentence.”

11 **CONTENTIONS OF PARTIES**

12 Defendant contends that he received ineffective assistance of counsel during the
13 plea agreement negotiations, execution of the written plea agreement with the
14 Government, and at the change of plea hearing held on May 25, 2012. Due to the
15 ineffective assistance of counsel, Defendant asserts that his plea agreement was not
16 knowing or voluntary. Defendant asserts that “his counsel did not inform him that, he
17 was admitting to recruiting for and forming a ‘hit squad’ . . . an allegation which he
18 vehemently denies.” (ECF No. 2301 at 7). Defendant contends that his counsel
19 informed him that he was admitting only to the distribution of methamphetamine and
20 the RICO count in general without any factual allegations related to murder.

21 Plaintiff United States contends that all of the assertions that support the claim
22 for ineffective assistance of counsel were fully litigated and resolved at the time
23 Defendant moved to withdraw his plea. Plaintiff United States asserts that the same
24 factual claims relating to the conduct of prior counsel were adversely decided against
25 Defendant and that Defendant is not entitled to relitigate these factual issues in this
26 collateral attack.

27
28 ¹ Motion (ECF No. 2283) filed on March 14, 2016, by Defendant Carlos Cosme,
representing himself, was deemed moot.

1 RULING OF COURT

2 The Sixth Amendment right to effective assistance of counsel “applies to all
3 critical stages of criminal proceedings,” including “the entry of a guilty plea.” *Missouri*
4 *v. Frye*, 132 S. Ct. 1399, 1405 (2012). A defendant is entitled to challenge the
5 intelligent, knowing, and voluntary aspects of his plea by demonstrating that the advice
6 he received from counsel did not constitute effective representation. *See Lambert v.*
7 *Blodgett*, 393 F.3d 943, 979-80 (9th Cir. 2004).

8 In order to prevail on a claim of ineffective assistance of counsel, Petitioner must
9 show that representation of counsel fell below an objective standard of reasonableness,
10 and that any deficiencies in counsel’s performance were prejudicial. *See Strickland v.*
11 *Washington*, 466 U.S. 688, 690 (1984). Both deficient performance and prejudice are
12 required before it can be said that a conviction or sentence resulted from a breakdown
13 in the adversary process that rendered the result of the proceeding unreliable and thus
14 in violation of the Sixth Amendment. *See United States v. Thomas*, 417 F.3d 1053, 1056
15 (9th Cir. 2005). To prevail on the prejudice prong of a claim of ineffective assistance
16 of counsel, the defendant must show that there is “a reasonable probability that, but for
17 counsel’s unprofessional errors, the results of the proceedings would have been
18 different. A reasonable probability is a probability sufficient to undermine confidence
19 in the outcome.” *Strickland*, 466 U.S. at 69.

20 Defendant sets forth the following three specific factual assertions in support of
21 his claim of ineffective assistance of counsel: 1) his counsel did not inform him that, he
22 was admitting to recruiting for and forming a ‘hit squad’ with co-defendant Jose
23 Antonio Ortega Nuno; 2) his counsel informed him that he was admitting only to the
24 distribution of methamphetamine and the RICO count in general without any factual
25 allegations related to murder; and 3) his counsel intimated him during the plea colloquy
26 to admit the “hit squad” allegation. The identical factual issues were litigated as a basis
27 for Defendant’s motion to withdraw his plea. During the litigation of this motion, the
28 parties submitted extensive briefing, and the Court held a two day evidentiary hearing,

1 which included the testimony of prior defense counsel and the Defendant. At the
 2 conclusion of the hearing the Court issued an order finding no credible evidence to
 3 support the factual assertions of the Defendant. The Court made the following ruling:

4 After the Defendant entered his plea, he began to advance a contention that
 5 he was physically coerced by his defense counsel in the courtroom at the
 6 time of the plea. The allegations by the Defendant began with a "pinch"
 7 (ECF No. 1868 at 8), moved to "lightly hit or patted me in the back" (ECF
 8 No. 1868 at 15), and became a "punch ... in the side" (ECF No. 1868 at
 9 6). At the evidentiary hearing, Defendant testified that his counsel
 10 delivered a "blow from behind." (ECF No. 1935 at 13). The Court finds
 11 the testimony of the Defendant at the evidentiary hearing that he felt a
 "blow from behind" delivered by his counsel in open court during the plea
 colloquy entirely without credibility. The Court further finds the
 testimony of the Defendant that "I felt in truth I had to say guilty" was not
 truthful and that this testimony is contradicted by all of the other evidence
 in the record. The Court finds that the Defendant did not testify truthfully
 in specific aspects of his testimony and concludes that the testimony of the
 Defendant generally lacked credibility.

12 . . . The Court finds that all of the credible evidence in the record supports
 13 the conclusion that the Defendant fully discussed the factual basis for the
 14 plea with his counsel, understood the factual admissions in the plea
 agreement, and understood the factual admission at the plea colloquy.

15 The Court finds that the testimony of defense counsel Levine that he
 16 reviewed the plea agreement with the Defendant and an interpreter line by
 17 line and page by page is credible and supported by the evidence.
 18 Defendant's initials appear at the bottom of each page of the plea
 19 agreement and the Defendant signed the plea agreement on the last page.
 Counsel for Defendant testified credibly that his practice was to review the
 plea agreement thoroughly with an interpreter and Spanish speaking
 Defendant and that he recalled following these procedures with the
 Defendant in this case. There is no evidence to the contrary in the record
 of this case.

20 Defendant's plea agreement in Paragraph 6 stated that the Defendant
 21 stipulates and agrees that the following facts occurred: "[D]efendant
 22 Carlos Cosme personally performed numerous overt acts in furtherance of
 23 a conspiracy to commit murder, including the recruitment of co defendant
 24 Jose Ortega Nuno to run a 'hit squad' on behalf of defendant Cosme."
 25 (ECF No. 1703 at 8). Defendant's initials appear at the bottom of this
 26 page. Defense counsel Levine testified that he advised the Defendant
 27 while reviewing the plea agreement that the plea agreement required him
 28 to admit that he formed a hit squad with his co-defendant Ortega-Nuno.
 Levine testified: "I had Mr. Ortega Nuno's plea agreement as well, and we
 discussed the contents of that plea agreement which mirrors that part of
 Mr. Cosme's plea agreement." (ECF No. 1935 at 52). The factual
 admissions of the Plea Agreement for the Defendant Jose Antonio Ortega
 Nuno signed by Nuno on December 6, 2001 stated in part: "In furtherance
 of his agreement to participate in the affairs of the FSO, defendant Jose
 Antonio Ortega Nuno agreed to operate and supervise a 'hit squad' under
 the direction of Carlos Cosme. Defendant Jose Antonio Ortega Nuno
 knew that the 'hit squad' he agreed to operate and supervise would be

1 tasked with murdering individuals on behalf of the FSO." (ECF No. 1152
2 at 6). This provision mirrors the provision in Defendant Cosme's Plea
3 Agreement and supports the testimony of defense counsel Levine that he
4 advised that Defendant Cosme that the plea agreement required him to
5 admit that he formed a hit squad with his co-defendant Ortega-Nuno, as
6 well as Levine's testimony that there was no confusion voiced by the
7 Defendant Cosme that he was required to make this admission regarding
8 the conspiracy to commit murder.
9

10 At the time of the Rule 11 plea colloquy, the Court reviewed each of the
11 seven paragraphs of the factual basis of the plea with the Defendant in
12 open court. The Court stated: "Do you agree that pursuant to your
13 agreement to participate in the affairs of the FSO you were aware of the
14 FSO's racketeering activities, including the commission of the crimes
15 specified above that I just referred to, including the crimes of conspiracy
16 to import and distribute over 50 grams pure of methamphetamine and
17 conspiracy to commit murder?" Defendant answered: "Yes, Your
18 Honor." The Court asked the Defendant about his personal participation
19 as stated in Paragraph 6 of the Plea Agreement.

20 THE COURT: Let me read it again and make sure that I
21 have an answer that is clear. Here is the statement again, sir,
22 I'll read it to you. Given his personal participation in the
23 affairs of the FSO, defendant Carlos Cosme knew that
24 members of the FSO would during the time frame of the
25 above-noted conspiracy import and distribute more than 50
26 grams of actual methamphetamine. Further defendant Carlos
27 Cosme personally performed numerous overt acts in
28 furtherance of a conspiracy to commit murder, including the
recruitment of co-defendant Jose Ortega Nuno to run a hit
squad on behalf of defendant Cosme. Do you agree that
statement is true? That statement is in your plea agreement.
Do you agree that statement is true?

THE DEFENDANT: Yes, Your Honor.

(ECF No. 1913-1 at 41). The Court asked the Defendant in open court to
acknowledge his personal participation in the conspiracy to distribute
methamphetamine and the conspiracy to commit murder. When defense
counsel answered on behalf of the Defendant, the Court asked that the
Defendant personally answer. Reading from the facts stipulated by the
Defendant in the Plea Agreement, the Court stated: "[D]efendant Carlos
Cosme personally performed numerous overt acts in furtherance of a
conspiracy to commit murder, including the recruitment of co-defendant
Jose Ortega Nuno to run a hit squad on behalf of defendant Cosme. Do
you agree that statement is true? Do you accept that as part of your factual
basis, sir, that statement?" Defendant answered: "It wasn't like that -- yes,
Your Honor. Yes, Your Honor." The Court stated:

Let me read it again and make sure that I have an answer
that is clear. Here is the statement again, sir, I'll read it to
you. Given his personal participation in the affairs of the
FSO, defendant Carlos Cosme knew that members of the
FSO would during the time frame of the above-noted
conspiracy import and distribute more than 50 grams of
actual methamphetamine. Further defendant Carlos Cosme
personally performed numerous overt acts in furtherance of

1 a conspiracy to commit murder, including the recruitment of
2 co-defendant Jose Ortega Nuno to run a hit squad on behalf
3 of defendant Cosme. Do you agree that statement is true?
That statement is in your plea agreement. Do you agree that
statement is true?

4 (ECF No. 1913-1 at 41). Defendant unequivocally answered: "Yes, Your
5 Honor." The Court examined each of the factual admissions in the plea
6 agreement independently and thoroughly. The Court informed the
Defendant that he had no obligation to admit any facts in the Plea
7 Agreement, and that he could go forward on the trial date. (ECF No.
8 1913-1 at 35) ("He has no obligation to admit to it. He has no obligation
to admit to that. We can take it off calendar and have a trial date set and
we can pursue that.") In order to avoid any confusion, the Court stated:
"Let me read it again and make sure that I have an answer that is clear."
After reading Paragraph 6 of the Plea Agreement in its entirety, the Court
9 stated: "Do you agree that statement is true? That statement is in your plea
agreement. Do you agree that statement is true?" Defendant stated: "Yes
10 Your Honor." *Id.* at 37.

11 At the time of the plea, the Court found that the Defendant knowingly
12 admitted the factual basis for the plea of guilty. The Court concludes that
13 there is no credible evidence to the contrary in this record. Defendant's
claim that he did not know that the Plea Agreement contained an
admission to conspiring to commit murder or that he did not knowingly
make those admissions at the plea hearing is directly contradicted by the
14 Plea Agreement, the Defendant's statements at the plea colloquy, and the
credible testimony at the evidentiary hearing.

15 (ECF No. 1940 at 17-19).

16 In this case, the Court has found the factual assertions that defense counsel did
17 not properly inform the Defendant of the facts admitted in the Plea Agreement and
intimidated the Defendant at the time of the plea lack any credibility and denied the
18 Defendant's motion to withdraw his plea. Defendant filed an appeal and the Court of
Appeals affirmed the decision. Having litigated these same factual issues regarding the
19 conduct of his counsel on direct appeal, Defendant may not relitigate the same issue
under 28 U.S.C. § 2255. *Foster v. Chapman*, 136 S.Ct. 1737, 1758 (2016), Alito
20 concurring ("As a general rule, federal prisoners may not use a motion under 28 U.S.C.
21 § 2255 to relitigate a claim that was previously rejected on direct appeal."), *Onley v.*
22 *United States*, 433 F.2d 161, 162 (9th Cir. 1965) ("Having raised this point
23 unsuccessfully on direct appeal, appellant cannot now seek to relitigate it as part of a
petition under § 2255."). The Court concludes that are no facts asserted in this motion
24 that would support the claim that representation of counsel fell below an objective
25

1 standard of reasonableness.

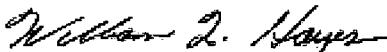
2 **CONCLUSION**

3 IT IS HEREBY ORDERED that motion pursuant to 28 U.S.C. § 2255 (ECF No.
4 2301) on the grounds of ineffective assistance of counsel filed by the Defendant is
5 denied. IT IS FURTHER ORDERED that Gerardo A. Gonzalez is relieved from further
6 representation of the Defendant on this matter.

7 A certificate of appealability must be obtained in order to pursue an appeal from
8 a final order in a Section 2255 habeas corpus proceeding. 28 U.S.C. § 2253(c)(1)(B).
9 A certificate of appealability may issue “if the applicant has made a substantial showing
10 of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A certificate should
11 issue where the prisoner shows that jurists of reason would find it debatable whether the
12 petition states a valid claim of the denial of a constitutional right, and whether the
13 district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473,
14 484 (2000). The Court finds that reasonable jurists could not find Defendant’s claim
15 that he was entitled to relief under 28 U.S.C. § 2255 to be debatable.

16 A certificate of appealability is denied.

17 DATED: January 11, 2017

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19 **WILLIAM Q. HAYES**
20 United States District Judge

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**Additional material
from this filing is
available in the
Clerk's Office.**