

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAVIER ROSAS CISNEROS - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS

APPENDIX

JAVIER ROSAS CISNEROS

JUAN GABRIEL CISNEROS

BR 40178079

901 COUNTY ROAD 201

FALFURRIAS, TEXAS 78355

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40316



A True Copy
Certified order issued Sep 17, 2018

Jyle W. Cayer
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAVIER ROJAS-CISNEROS,

Defendant-Appellant

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

USDC No. 1:16-CV-289
USDC No. 4:95-CR-196-8

Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

Javier Rojas-Cisneros, former federal prisoner # 65822-079,¹ pleaded guilty to conspiring to aid and assist in the escape of persons in the custody of the Attorney General. He seeks a certificate of appealability (COA) to appeal the district court's denial of relief on his 28 U.S.C. § 2255 motion, which he filed to challenge the escape conspiracy conviction and the 12-month sentence of imprisonment imposed by the district court. Rojas-Cisneros's motion to supplement his COA application is GRANTED.

¹ Rojas-Cisneros is no longer in custody or under court supervision, but he was when he filed this motion in the district court and release does not moot a challenge to the conviction.

No. 17-40316

To obtain a COA, Rojas-Cisneros must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For claims rejected on procedural grounds, to obtain a COA the movant must show “that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484; *see Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004).

The district court may have erred in treating Rojas-Cisneros’s section 2255 motion as a Rule 60 motion. The 2016 motion also should not be treated as a successive motion for postconviction relief because the district court did not notify him that it was treating his 1996 filing as a section 2255 motion. *See Castro v. United States*, 540 U.S. 375 (2003). Nonetheless, there is no arguable basis for allowing Rojas-Cisneros to proceed with his recent motion. It was filed twenty years after his conviction (the one-year sentence for the escape conviction was tacked on to a lengthy drug and money laundering sentence, which is why this still mattered). So the new motion was timely only if it relied on new evidence or a right recently recognized by the Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. 2255(f)(3), (4). Rojas-Cisneros did not attempt to meet either of these avenues for seeking postconviction relief more than a year after his judgment became final.

The request for a COA is DENIED.

APPENDIX B

ENTERED

April 18, 2018

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

JAVIER ROJAS CISNEROS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

§
§
§
§
§
§
§
§

**Civil Action No. 1:16-289
Criminal No. H:95-196-8**

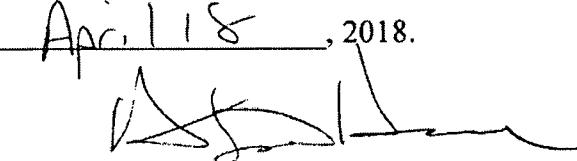
ORDER

On November 7, 2016, Petitioner Javier Rojas Cisneros filed what the Court construed to be a “Motion for Relief from Final Judgment” pursuant to FED. R. CIV. P. 60(b)(4). Dkt. No. 1. Due to an internal reference to Rule 60, the Court ruled on that basis; however, after further review, the Court now finds that it should have been considered a § 2255 petition. If the Court had jurisdiction, it would correct this error. Cisneros objected to the prior construction of his petition as well as to the Court’s decision not to hold an evidentiary hearing on his claim of ineffective assistance of counsel. Dkt. No. 9.

Cisneros has appealed this Court’s denial of his motion. Dkt. No. 14. The appeal divests this Court of the jurisdiction to correct its error. United States v. Pena, 713 F. App’x 271, 272 (5th Cir. 2017).

The Court issues this order as a sua sponte indicative ruling, pursuant to FED. R. CIV. P. 62.1. See United States v. Cardoza, 790 F.3d 247, 248 (1st Cir. 2015) (District court’s sua sponte order indicating that it would grant a sentence reduction considered an indicative ruling under FED. R. CIV. P. 62.1 and FED. R. APP. 12.1); Smitherman v. Bayview Loan Servicing, L.L.C., 683 F. App’x 325, 326 (5th Cir. 2017).

DONE at Brownsville, Texas, on Apr. 11 18, 2018.



Andrew S. Hanen
United States District Judge