

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARIO GONZALEZ,

Petitioner,

- VS -

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

APPENDIX (TO)

PETITION FOR WRIT OF CERTIORARI

Mario Gonzalez
Reg. #61423-018
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720-6020

APPENDIX LIST

Appendix 1 - Judgment in a Criminal Case;
United States v Mario Gonzalez;
USDC AU:14-CR-292(4)ss;
United States District Court,
Western District of Texas, Austin
Division.

Appendix 2 - United States Court of Appeals for the Fifth Circuit; Affirmed District Court's Conviction and Sentence.

Appendix 3 - District Court Order Amending Judgment; Amended Judgment In A Criminal Case.

Appendix 4 - District Court Order Denying 28 U.S.C. § 2255 Motion.

Appendix 5 - Fifth Circuit Order Denying Certificate of Appealability.

Appendix 6 - Transcript excerpt, "Rearraignment/Plea

Appendix 7 - District Court Order; Ordering Limited Disclosure of Electronic Surveillance Materials

Appendix 8 - Attorney Montalvo Letter regarding stating Judge Sparks has the electronic surveillance materials, under a "non-disclosure order; Letter from counsel on appeal refusing wire intercept issue. Petitioner's attempt to obtain copies of the affidavit/ applications for wire intercepts and Orders.

Appendix 9 -

Appendix 10 - Plea Agreement

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50100
USDC No. 1:16-CV-1164
USDC No. 1:14-CR-292-4



A True Copy
Certified order issued Nov 30, 2017

UNITED STATES OF AMERICA,

Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit
Plaintiff-Appellee

v.

MARIO GONZALEZ,

Defendant-Appellant

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

O R D E R:

Mario Gonzalez, federal prisoner # 61423-018, seeks a certificate of appealability (COA) from the denial of his 28 U.S.C. § 2255 motion challenging his conviction and sentence for trafficking in cocaine. Despite contrary language in his plea agreement, he contends that the agreement was breached where his sentence was based on relevant conduct including trafficked methamphetamine. He also asserts that counsel was ineffective for failing to challenge the sentence on this ground. In addition, he contends in a speculative and conclusory manner that counsel was ineffective for failing to investigate and seek the suppression of evidence derived from intercepted electronic communications and a GPS tracking device.

APPENDIX 5

Gonzalez fails to show “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His motion for a COA is therefore DENIED. *See* 28 U.S.C. § 2253(c)(2).

/s/Jennifer Walker Elrod

JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

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CLERK'S OFFICE - WESTERN DISTRICT OF TEXAS

BY AD

MARIO GONZALEZ,

Movant,

-vs-

CAUSE NO. Case No. A-16-CA-1164-SS
[No. A-14-CR-292(4)-SS]

UNITED STATES OF AMERICA,
Respondent.

ORDER

BE IT REMEMBERED on this day, the Court reviewed the file in the above-styled cause, and specifically Movant Mario Gonzalez's (Gonzalez) Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 [#786], the Government's Response [#789] in opposition, and Gonzalez's Reply and Objection to the Government's Response [#791]. Having considered the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

On April 15, 2015, Gonzalez plead guilty to conspiracy to possess with intent to distribute five kilograms or more of a mixture and a substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 846. Five days later, this Court accepted Gonzalez's plea. On August 27, 2015, this Court sentenced Gonzalez to a term in the penitentiary of 235 months, followed by a five-year term of supervised release, and ordered Gonzalez to pay \$100 as a mandatory assessment fee.

Gonzalez pursued a direct appeal. However, Gonzalez's appellate counsel filed an *Anders* brief. The Fifth Circuit agreed the appeal "present[ed] no nonfrivolous issue," authorized Gonzalez's

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appellate counsel to withdraw from the case, and dismissed the appeal. *United States v. Gonzalez*, No. 15-50810, 2016 U.S. App. LEXIS 12101, at *1 (5th Cir. June 21, 2016).

On October 25, 2016, Gonzalez filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mot. [#786]. In his motion, Gonzalez asks the Court to vacate his conviction and sentence, impose a new sentence, or, alternatively, hold an evidentiary hearing. As a basis for relief, Gonzalez claims (1) his Fifth and Sixth Amendment rights were violated when this Court imposed a sentence, which took into account a base level offense considering both cocaine and methamphetamine, when Gonzalez pled guilty under the belief his sentence would be determined with consideration of cocaine only; (2) he was denied effective assistance of counsel at trial; and (3) he was denied effective assistance of counsel on appeal.

In particular, Gonzalez claims his trial counsel was ineffective because his trial attorney failed to object to the inclusion of methamphetamine in the calculation of sentence. Gonzalez further alleges the trial counsel was ineffective because he did not present evidence of Gonzalez's minor role in the conspiracy, did not challenge the Government's use of a GPS tracking device on Gonzalez's vehicle, did not file a motion to suppress the evidence obtained by the use of the tracking device, and waived Gonzalez's rights to challenge authorization of the wire intercepts and GPS tracking monitors.

In terms of his appeal, Gonzalez claims his appellate counsel was ineffective because she filed an *Anders* brief only addressing procedural aspects, failed to recognize Gonzalez's plea was for cocaine only, did not address Gonzalez allegedly incorrect sentencing, and failed to brief the issue of breach of plea agreement.

The Government responded on November 23, 2016. Resp. [#786]. Gonzalez filed a reply on December 19, 2016. Reply [#791]. The motion is now ripe for the Court's consideration.

Analysis

I. Section 2255-Legal Standard

Generally, there are four grounds upon which a defendant may move to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255: (1) the imposition of a sentence in violation of the Constitution or the laws of the United States; (2) a lack of jurisdiction of the district court that imposed the sentence; (3) the imposition of a sentence in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). Section 2255 is an extraordinary measure; it cannot be used for errors that are not constitutional or jurisdictional if those errors could have been raised on direct appeal. *United States v. Stumpf*, 900 F.2d 842, 845 (5th Cir. 1990). If the error is not of constitutional or jurisdictional magnitude, the movant must show the error could not have been raised on direct appeal and would, if condoned, "result in a complete miscarriage of justice." *United States v. Smith*, 32 F.3d 194, 196 (5th Cir. 1994). In addition, a defendant who raises a constitutional or jurisdictional issue for the first time on collateral review must show both "cause" for his procedural default, and "actual prejudice" resulting from the error. *Placente*, 81 F.3d at 558.

I. Application

The Court construes Gonzalez's § 2255 motion as raising two main grounds for relief: (1) the Court erroneously calculated his sentence, and (2) his trial and appellate counsel were ineffective.

A. Erroneous Sentence

As an initial matter, the Fifth Circuit has expressly held a defendant's "claim the trial judge erred in calculating her sentence is not grounds for section 2255 relief. Technical application of the Sentencing Guidelines does not give rise to constitutional issues." *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *see also United States v. Larry*, 312 F. App'x 660, 661 (5th Cir. 2009) ("[C]hallenge to the application of the Guidelines is not cognizable in a § 2255 motion.").

Even considering the merits of his claim, however, Gonzalez's first ground for relief is invalid.¹ During his plea, Gonzalez was notified and responded he understood he would be held responsible for both cocaine and methamphetamine. Resp. [#789] Ex 1. (Transcript of Arraignment/Plea) at 12–13. In fact, Gonzalez's plea agreement indicates, in bold, "[b]ased on the investigation, Mario [Gonzalez] and the government agree that he is responsible for the distribution of 25 kilograms of cocaine and five kilograms of methamphetamine." Resp. [#789] Ex. 3 at 9.

Based on the foregoing, the Court finds Gonzalez's sentence was not manifestly unjust. Gonzalez's motion is therefore DENIED as to this ground.

B. Ineffective Assistance of Counsel

Gonzalez's remaining allegations include a series of ways he claims his trial and appellate counsel failed to provide him effective assistance of counsel. The United States Supreme Court's decision in *Strickland v. Washington* provides the familiar two-pronged test for establishing a claim of ineffective assistance of counsel:

¹ The Government correctly notes there is a clerical error on the Court's judgment. Resp [#789] at 2 n.1. The judgment should read that Gonzalez was adjudicated guilty to the offense of "Conspiracy to Possess with Intent to Distribute 5 kilograms or more of cocaine" rather than methamphetamine. *See* J. of Aug. 31, 2015 [#680]. The remainder of the judgment, however, is correct. The Court will issue a Judgment Nunc Pro Tunc to correct the clerical error.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Essentially, to succeed on a claim of ineffective assistance of counsel, a movant must show (1) his counsel's actions fell below an objective standard of reasonableness and (2) the ineffective assistance of counsel prejudiced him. *United States v. Payne*, 99 F.3d 1273, 1282 (5th Cir. 1996) (citing *Strickland*, 466 U.S. 668). In the context of sentencing, the movant must demonstrate a reasonable probability that, but for counsel's errors with respect to sentencing matters, he would have received less time in prison. See *United States v. Grammas*, 376 F.3d 433, 438 (5th Cir. 2004).

i. Trial Counsel

Gonzalez alleges his trial counsel was ineffective, but Gonzalez does not carry his burden of showing his counsel's representation was unreasonable and that he was prejudiced.

First, Gonzalez's claim his trial counsel provided ineffective assistance by failing to object is meritless because the failure to object does not establish a claim for ineffective assistance of counsel. See *Payne*, 99 F.3d at 1282.

Second, Gonzalez alleges he would have received a lighter sentence if his trial counsel had presented evidence of Gonzalez's minor role in the conspiracy, allowing for a minor role adjustment and sentence reduction under U.S.S.G. § 3B1.2(b) Amendment 794 (Amendment 794). But, significantly, Amendment 794 only became effective November 1 2015, more than two months after

Gonzalez was sentenced. It was therefore reasonable for Gonzalez's trial counsel to decline to present evidence relevant for Amendment 794.

Finally, Gonzalez argues his trial counsel provided ineffective assistance in failing to challenge the Government's use of a GPS tracking device, in particular by not filing a motion to suppress evidence obtained by use of the tracking device and in failing to contest the authorizations for wire intercepts and the tracking monitors. According to Gonzalez, trial counsel's error waived Gonzalez's rights to challenge those authorizations. Yet, Gonzalez provides no facts even suggesting the wire intercepts and GPS tracking were unauthorized or problematic. Without evidence suggesting there was a basis to challenge the GPS tracking, the Court cannot conclude trial counsel's actions fell below an objective standard of reasonableness. *See Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982) ("Mere conclusory statements do not raise a constitutional issue in a habeas case.").

ii. Appellate Counsel

Gonzalez's allegations of ineffective assistance of appellate counsel all rely on Gonzalez's claim his sentence incorrectly incorporated methamphetamine when it should have only included cocaine. But, as discussed above, Gonzalez's sentence did not erroneously consider methamphetamine. Where the grounds underlying an alleged error by appellate counsel lack merit, the failure to pursue relief on those bases does not constitute ineffective assistance of counsel. *Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001).

Moreover, in his plea agreement, Gonzalez agreed to waive "his right to appeal his conviction on any ground, except in a case in which the sentence imposed by the Court is greater than the maximum sentence authorized by statute." Resp. [#789] Ex. 3 at 3. The maximum sentence a court may impose for the statute Gonzalez violated, 21 U.S.C. § 846, is life. As this Court sentenced

Gonzalez to a 235-month term of imprisonment, the sentence was less than the maximum and Gonzalez waived his right to appeal his conviction.

Consequently, it was not unreasonable for appellate counsel to have filed an *Anders* brief or to have declined to raise the issues Gonzalez claims she should have.

Because Gonzalez has not shown his trial counsel or appellate counsel's actions fell below an objective standard of reasonableness, Gonzalez's motion is therefore DENIED as to his claims of ineffective assistance of counsel.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing § 2255 Proceedings, effective December 1, 2009, a district court must issue or deny a certificate of appealability (COA) when it enters a final order adverse to the applicant.

A COA may issue only if the movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To meet that burden in cases where a district court rejected a movant's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the dismissal of Gonzalez's § 2255 motion on substantive or procedural grounds nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not issue.

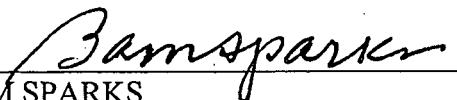
Conclusion

Accordingly,

IT IS ORDERED that Movant Mario Gonzalez's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [#786] is DENIED; and

IT IS FINALLY ORDERED that a certificate of appealability is DENIED.

SIGNED this the 6th day of January 2017.



SAM SPARKS
UNITED STATES DISTRICT JUDGE

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