IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-51120

A True Copy
Certified order issued Oct 10, 2018
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PETER VICTOR AYIKA,

Defendant-Appellant

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

O R D E R:

In 2015, a jury convicted Peter Victor Ayika, federal prisoner # 33042-280, of health care fraud, in violation of 18 U.S.C. § 1347. He seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. Ayika's motion for leave to replace his original COA motion and supporting exhibits with a new COA motion and supporting exhibits is GRANTED.

To obtain a COA, Ayika must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As to the district court's procedural rulings, Ayika must show "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 that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*,

529 U.S. 473, 484 (2000). To the extent Ayika is challenging the denial of his claims on their merits, he must demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issues presented "deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citation omitted). Although Ayika's § 2255 motion included a due process challenge to the district court's imposition of a consecutive term of imprisonment, he has abandoned that claim by failing to raise it in his COA motion. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Ayika argues that his defense counsel was ineffective for failing to argue that his right to a speedy trial was violated under the Speedy Trial Act (STA) and the Sixth Amendment. On direct appeal, this court rejected his STA claim as well as his ineffective-assistance-of-counsel claim based on the alleged STA violation. *See United States v. Ayika*, 837 F.3d 460, 464-65 (5th Cir. 2016). Ayika's ineffective-assistance claim is therefore foreclosed to the extent he relies on the STA. *See United States v. Fields*, 761 F.3d 443, 463 n.12 (5th Cir. 2014). He has failed to make the requisite showing as to the Sixth Amendment basis for his ineffective-assistance claim.

Accordingly, Ayika's motion for a COA is DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

PETER VICTOR AYIKA,	§	
Reg. No. 33042-280,	§	
Petitioner,	§	**EP-17-CV-258-DB**
	§	**EP-11-CR-2126-DB-1**
v.	§	
	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Movant Peter Ayika's counseled motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (ECF No. 372)[1] and his pro se supplemental memorandum in support of his motion (ECF No. 375), the United States of America's (the Government) response (ECF No. 391), and Ayika's counseled reply (ECF No. 394) and his pro se reply (ECF No. 395). Also before the Court is Ayika's pro se motion for an evidentiary hearing. (ECF No. 396).

In his § 2255 motion, Ayika challenges the 87-month sentence imposed by the Court after a jury found him guilty of health care fraud. Ayika asserts his trial counsel provided constitutionally ineffective assistance and the Court denied him due process when it imposed a consecutive sentence. The Government responds "Movant has failed to demonstrate that his attorney's actions were ineffective or that ... he was denied any constitutional rights." (ECF No. 381 at 16).

[1] "ECF No." refers to the Electronic Case Filing ("ECF") number for documents docketed in EP-11-CR-2126-DB-1.

For the following reasons, the § 2255 motion is **DENIED**.

BACKGROUND AND PROCEDURAL HISTORY

A grand jury indictment returned on August 24, 2011, charged Ayika with one count of health care fraud, in violation of 18 U.S.C. § 1347 (Count One); one count of mail fraud, in violation of 18 U.S.C. § 1341 (Count Two); and one count of wire fraud, in violation of 18 U.S.C. § 1343 (Count Three). (ECF No. 1). The following recitation of Ayika's criminal proceedings comes from the Fifth Circuit's order vacating his guilty plea in this matter:

> In April 2011, a grand jury returned a two-count indictment charging Ayika, a licensed pharmacist, with unlawfully possessing and distributing hydrocodone (the drug case).[2] In August 2011, Ayika was separately indicted on charges of health care fraud, mail fraud, and wire fraud (the fraud case). This latter indictment alleged that Ayika billed various healthcare benefit programs for medications that he never dispensed or distributed.
>
> After a jury found him guilty on both counts in the drug case, Ayika indicated that he was interested in entering into a plea agreement in the fraud case. He informed the court, however, that he was unwilling to concede that the amount involved in the fraud exceeded $1 million and would not plead guilty if doing so required him to make such a concession. Subsequently, in February 2012, Ayika filed a Request for Change of Plea, stating that he wished to plead guilty and no longer contested the amount involved in the fraud. Shortly thereafter, the district court held a status conference. At the conference, counsel for Ayika informed the district court that the "instructions from my client have now changed," and that Ayika was unwilling to plead guilty if doing so meant agreeing to a forfeiture of the property identified in the indictment. Counsel further indicated that he was unsure whether, under the law of the Fifth Circuit, his client could plead guilty and still contest the forfeiture.
>
> In response to these statements, the district court stated that "in the Fifth Circuit, the forfeiture is solid as can be. . . . [T]here's no question in my mind that the forfeiture the government pled was well pled." The court further stated that "the best chance[] here, quite frankly, for him is the plea of guilty and the concurrent sentencing [of the drug and fraud cases]." At a number of other points during the conference, the district court stated that it would sentence Ayika to a

[2] The indictment in "the drug case," EP-09-CR-660-FM-1, was actually returned March 4, 2009. The indictment charged Movant with six counts of violating federal narcotics trafficking laws. *See United States v. Ayika*, EP-09-CR-660-FM-1, at ECF No. 1.

> term of imprisonment below the guidelines range if he entered a guilty plea and did not contest the forfeiture sought by the Government. The court made clear, however, that Ayika had the right to proceed to trial and that the court did not "have any problem" with Ayika's choosing to exercise that right. Toward the conclusion of the conference, the court told Ayika that pleading guilty "is your chance to cut your losses short." Counsel for Ayika did not object to these or any other statements made by the court.
>
> The day after the conference Ayika executed a plea agreement with the Government. He agreed to plead guilty to health care fraud and admit the forfeiture allegations in the indictment. During the district court's colloquy with Ayika regarding his desire to plead guilty, Ayika stated that no one had forced, threatened, or coerced him to enter the plea. After accepting Ayika's guilty plea, the district court sentenced Ayika to 63 months in prison for the fraud charge, 60 months in prison for count one in the drug case, and 170 months for count two in that case, all to run concurrently. The district court also ordered restitution in the amount of $2,498,586.86, and forfeiture of property as indicated in the indictment and plea agreement. The property forfeited included a parcel of real property, over $1,000,000 in specified bank accounts, more than $500,000 seized from other specified bank accounts, currency seized at specific locations, and two automobiles.
>
> Ayika appealed the judgments in both cases. A panel of this court affirmed the judgment in the drug case.

United States v. Ayika, 554 F. App'x 302, 303-04 (5th Cir. 2014). Although the Fifth Circuit affirmed Ayika's conviction in "the drug case," it concluded the trial judge had improperly, although unintentionally, encouraged him to plead guilty in this case, "the fraud case." *Id.* at 309. Accordingly, the appellate court vacated his guilty plea in "the fraud case" on February 12, 2014, and remanded the matter to a different judge. *Id.*

Upon remand, the Court granted Ayika's request to proceed pro se in his criminal proceedings after conducting a hearing on May 12, 2014. (ECF No. 135). The Court also appointed standby counsel. *Id.* At the same time, the Court granted Ayika's request for a continuance and excluded the time from May 6, 2014, through July 9, 2014, within the meaning of the Speedy Trial Act. *Id.* On July 9, 2014, the Court granted Ayika's motion for continuance,

and the matter was set for a jury trial on October 6, 2014. (ECF No. 157). On September 30, 2014, Ayika filed a pro se motion for a continuance, and on October 1, 2014, Ayika filed a motion to withdraw his pro se representation and to have his standby counsel reinstated as counsel of record. (ECF No. 173; ECF No. 175). Both motions were granted on October 3, 2014. (ECF No. 182). Ayika's trial was set for November 10, 2014. *Id.*

After the Court admonished Ayika as to his rights, he testified at his trial. (ECF No. 340 at 2-3, 9-64). After deliberating for several hours, the jury returned a verdict of guilty as charged in the indictment. (ECF No. 341 at 32). After Ayika's trial, the Court granted his motion to reinstate his pro se status. (ECF No. 222).

The presentence investigation report ("PSR") calculated Ayika's offense level at 29, which included enhancements because (1) the intended loss to the insurance companies was $3,288,135.69; (2) Ayika derived more than $1 million in gross receipts from one or more financial institutions as a result of the offense; and (3) Ayika abused a position of trust. (ECF No. 245 at 13). The PSR calculated a criminal history category of II, resulting in a guideline sentencing range of 97 to 121 months' imprisonment. (ECF No. 245 at 21). Ayika filed objections to the PSR. (ECF No. 262-2). A revised presentence investigation report was prepared, reflecting the Court's direction to omit calculations based on Ayika's convictions on Count Two and Count Three. (ECF No. 269). The revised PSR determined the offense level was 28 and the criminal history category was II, resulting in a guideline sentencing range of 87 to 108 months' imprisonment. *Id.*

On February 5, 2015, the Court denied in part and granted in part Ayika's pro se motion to arrest the verdict and dismiss counts of indictment,[3] and sentenced Ayika to a term of 87 months' imprisonment followed by three years' supervised release, based on his conviction on Count One. (ECF No. 275; ECF No. 276). The Court ordered Ayika to serve the sentence consecutively to the sentence imposed in the drug case, EP-09-CR-660-FM-1. (ECF No. 277 at 2). At that time, the Court dismissed Count Two and Count Three of the indictment. (ECF No. 275). The Court also ordered Ayika to pay $2,482,901.93 in restitution. *Id.*

Ayika filed a timely notice of appeal, (ECF No. 281), and was given leave to proceed pro se on appeal. (ECF No. 293). In his appeal, Ayika asserted (1) his rights to a speedy trial were violated and his counsel was ineffective for failing to assert his speedy trial rights;[4] (2) evidence of

---

[3] The Court's order on this motion states:

> Defendant's Motion challenges his conviction on several grounds. First, Defendant argues that his rights under the speedy trial provisions of 18 U.S.C. § 3161 were violated because he was not brought to trial within 70 days of the Fifth Circuit overturning his conviction. Second, Defendant argues that Counts Two and Three were improperly reinstated by the Court when, instead, they should have been submitted by the Government to a grand jury for re-indictment. Third, Defendant argues that he should not be subject to sentencing as to Count One since he has already served nearly 63 months in prison the same length of imprisonment originally imposed by Judge Montalvo for Count One on May 2, 2012. Fourth, Defendant argues that the Court erred in allowing certain character evidence during his trial that led to his conviction.
>
> ***
>
> In the instant cause, only three of the four conditions under Section 3296 were met for the reinstatement of Counts Two and Three.... The final condition, however, was not met: the Government did not file its motion to reinstate Counts Two and Three until November 6, 2014, approximately 245 days after the Fifth Circuit issued its mandate vacating Defendant's guilty plea, well beyond the 60-day time limit imposed by Section 3296. Thus, the Court finds that the Government's motion to reinstate Counts Two and Three was granted in error and that Counts Two and Three should be dismissed.

(ECF No. 276 at 3, 6).

[4] The Fifth Circuit characterized this claim as follows:

> Ayika argues that his indictment should have been dismissed based on violations of the

his prior drug conviction was improperly admitted at trial; (3) there was insufficient evidence to support his conviction; (4) the Court improperly calculated the total actual loss amount; and (4) the Government failed to prove funds remaining in Ayika's pharmacy's bank account were traceable to his healthcare fraud, as required to support forfeiture of funds. *United States v. Ayika*, 837 F.3d 460 (5th Cir. 2016). The Fifth Circuit granted relief on Ayika's claim regarding forfeiture but denied relief on Ayika's other claims. *Id.*

In his § 2255 motion, Ayika alleges his trial counsel provided constitutionally ineffective assistance when he failed to introduce evidence demonstrating a violation of the Speedy Trial Act and his Sixth Amendment right to a speedy trial. Ayika also claims the Court violated his right to due process when it imposed a sentence consecutive to the sentence imposed by the Court in "the drug case." Ayika asserts the imposition of a consecutive sentence was punishment for his exercise of his right to appeal the conviction in "the fraud case." (ECF No. 372 at 6). In response, the Government contends the claims are waived, procedurally barred, and without merit. (ECF No. 391). Additionally, the Government asks the Court to strike Ayika's pro se section 2255 pleadings because Ayika is represented by counsel in this matter. (ECF No. 391 at 4). Because the arguments presented in the pro se pleadings merely enlarge Ayika's arguments and do

---

Speedy Trial Act ("STA"). Specifically, Ayika contends that his healthcare fraud indictment should have been dismissed because: 1) his indictment on the healthcare fraud charges was "returned . . . approximately twenty nine (29) months" after his arrest (and was thus untimely under 18 U.S.C. § 3161 (b)); and 2) "two hundred and seventy one (271) days elapsed" between the reversal of his conviction and the start date of his trial (and was thus untimely under 18 U.S.C. § 3161 (e)). Ayika also contends that his counsel was ineffective for failing to raise these STA claims before the district court.

United States v. Ayika, 837 F.3d 460, 464 (5th Cir. 2016).

not alter the Court's conclusions regarding the merits of Ayika's claims, the Court will deny request to strike the pleadings.

APPLICABLE LAW

A. 28 U.S.C. § 2255

"Relief under 28 U.S.C. 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that . . . would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992), *citing United States v. Capua*, 665 F.2d 1033, 1037 (5th Cir. 1981). A federal defendant may prevail on a § 2255 motion if he shows: (1) the imposition of the sentence was in violation of the Constitution or the laws of the United States; (2) the District Court that imposed the sentence lacked jurisdiction; (3) the sentence imposed was in excess of the maximum authorized by law; or (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). Accordingly, a movant may not raise an issue for the first time on collateral review without showing both cause for his procedural default of the claim and actual prejudice resulting from the error. *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). A movant may also achieve consideration of the claim if failure to consider the claim would result in a complete miscarriage of justice. *Id.* at 232 n.7 (citing *Capua*, 656 F.2d at 1037). A complete miscarriage of justice occurs when a constitutional violation has resulted in the conviction of a defendant who is actually innocent. *Id.* at 232. If a movant does not meet this burden of showing cause and prejudice, or a fundamental

miscarriage of justice, he is procedurally barred from attacking his conviction or sentence on the basis of the defaulted claim. *United States v. Drobny*, 955 F.2d 990, 994-95 (5th Cir. 1992).

B. Ineffective assistance of counsel

To successfully state a claim of ineffective assistance of counsel, a § 2255 movant must demonstrate counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Hayes*, 532 F.3d 349, 353 (5th Cir. 2008). Unless a movant establishes both deficient performance and prejudice, his ineffective assistance of counsel claim fails. *United States v. Bass*, 310 F.3d 321, 325 (5th Cir. 2002).

"To show that his attorney's performance was deficient, [a movant] must show that the attorney's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *United States v. Kayode*, 777 F.3d 719, 723 (5th Cir. 2014) (internal quotations omitted). Counsel's failure to raise an obviously meritless objection is not deficient performance and is per se not prejudicial. *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999). Furthermore, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691.

Section 2255 movants must "affirmatively prove prejudice." *Id.* at 693. Conclusory allegations of prejudice are insufficient to obtain relief under this section. *United States v. Woods*, 870 F.2d 285, 288 n.3 (5th Cir. 1989). Reviewing courts must consider the totality of the evidence before the finder of fact in assessing whether the result would likely have been different absent the alleged errors of counsel. *Strickland*, 466 U.S. at 695-96. The burden is on the

movant to show a reasonable probability that, but for counsel's errors, the result of his criminal proceedings would have been different. *Id.* at 694.

ANALYSIS

A. Speedy trial

Ayika contends counsel's performance was deficient because he failed to assert, prior to trial, that Ayika's speedy trial rights were violated. Ayika asserts his counsel should have introduced to the trial court "evidence of a criminal complaint and arrest warrant which demonstrated that [he] had been charged and arrested for the instant fraud offense in March of 2009," but was not indicted until August 24, 2011. (ECF No. 372 at 5). In support of this claim, Ayika submits a 116-page affidavit prepared by Federal Bureau of Investigation Special Agent Shanna Beaulieu, which he concedes "was filed in support of the search warrant executed on March 11, 2009. Not in support of a criminal complaint . . ." (ECF No. 397 at 2).

In his appeal before the Fifth Circuit, Ayika asserted "that his indictment should have been dismissed based on violations of the Speedy Trial Act." *United States v. Ayika*, 837 F.3d 460, 464 (5th Cir. 2016). He reasoned the grand jury returned his indictment in "the fraud case" approximately 29 months after his 2009 arrest, and his trial began 271 days after the Fifth Circuit reversed his guilty-plea conviction. *Id.* at 464-65. Ayika further asserted his counsel provided ineffective assistance by failing to timely assert these claims. *Id.* The Fifth Circuit considered the merits of these claims and denied Ayika relief. *Id.*

As a general rule, issues disposed of on a previous direct appeal are not reviewable in a subsequent collateral proceeding. *United States v. Fields*, 761 F.3d 443, 466 (5th Cir. 2014); *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986). Ayika's claims regarding his rights under the Speedy Trial Act and the ineffective assistance of counsel were raised and rejected on

appeal. Accordingly, these claims should not be reviewable in this § 2255 action.

Ayika asserts, however, the claims raised in his § 2255 motion differ from the claims raised on appeal because he now presents the affidavit of Special Agent Beaulieu, which he contends supports his allegation that authorities arrested him on a complaint alleging fraud in 2009. Ayika argues his counsel's performance was, therefore, deficient because he did not present this affidavit to the trial court and assert his rights under the Speedy Trial Act prior to his jury trial.

In his direct appeal, Ayika also claimed his counsel was ineffective for failing to raise the Speedy Trial Act claims before the district court. *Ayika*, 837 F.3d at 464. And Ayika provided an extract from Special Agent Beaulieu's affidavit with his appellate brief. Appendices (Record Excerpts), Appellant's Br., *United States v. Ayika*, No. 15-50122 (5th Cir.), Doc. 00513131324 at 3-9, filed July 24, 2015. To the extent Ayika asserts that the Fifth Circuit did not have information concerning affidavit before it, he is incorrect.

In response to Ayika's claim that his speedy trial rights were violated and that his counsel was ineffective for failing to assert this claim, the Government argued in its appellate brief:

> Ayika has not shown error regarding the timing of the indictment. Section 3161(b) of the Speedy Trial Act states that an indictment or information must be filed within thirty days "from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). Ayika asserts that the indictment in the instant case violated the Speedy Trial Act because it was not returned within thirty days of his arrest. (Ayika Br. 18).
>
> Ayika mistakenly asserts that he was arrested for charges in the instant case on March 11, 2009. (Ayika Br. 18). For this proposition, he states that a complaint alleging health care fraud was filed on March 4, 2009. (Ayika Br. 17). The first entry into the record in the instant case, however, is the return of the indictment on August 24, 2011. (ROA.29). Ayika asserts that an affidavit he attached to his brief as "Exhibit A" is proof of the existence of the 2009 complaint. (*Id.*). The plain language of the affidavit, however, shows that it was made in support of a "search and seizure warrant." (*Id.* at 69).

> Moreover, the record in the drug case shows that Ayika was indicted on March 4, 2009, with an arrest warrant issuing the same date. *See* 3:09-CR-660, Docket Entries 1, 8. Indeed, the detention order he references in his brief was filed in the drug case. (Ayika Br. 18; ROA.969). Given that Ayika was not arrested for health care fraud charges prior to his indictment in 2011, he cannot show a violation of the Speedy Trial Act stemming from the date of that indictment.

Appellee's Br., *United States v. Ayika*, No. 15-50122 (5th Cir.), Doc. 00513198292 at 17-18, filed Sept. 17, 2015.

Further, to characterize Special Agent Beaulieu's affidavit as supporting a criminal complaint is incorrect; there is no criminal complaint in the docket of Ayika's proceedings in either "the drug case" or "the fraud case." In both cases, Ayika was charged by indictment.

Additionally, the plain language of the affidavit shows that it was made in support of a "search and seizure warrant," not an arrest warrant. It clearly concludes, "[b]ased upon facts and circumstances of this Affidavit, it is believed that probable cause exists for the issuance of the search and seizure warrants for the locations listed in Attachment A & B and the items listed in Attachment C & D. (ECF No. 399-1 at 54). And Special Agent Beaulieu testified at Ayika's trial that she prepared the affidavit to obtain a search warrant for Continental Pharmacy (Ayika's business) and Ayika's residence, and that the search warrant was executed on March 11, 2009. (ECF No. 337 at 92). Special Agent Beaulieu also testified that Ayika's arrest on March 11, 2009, was for "the drug case," not for healthcare fraud, wire fraud, or mail fraud. (ECF No. 337 at 164).

Finally, Ayika's claim that he was arrested in "the fraud case" in 2009 is simply incorrect. The warrant for arrest in "the drug case," EP-09-CR-660-FM, signed March 4, 2009, ordered Ayika's arrest pursuant to an indictment charging him with violations of 21 U.S.C. §§ 846 and 841. Notwithstanding the fact that the search warrant affidavit indicates authorities were

investigating Ayika for health care fraud, he was not arrested on "the fraud case" prior to his indictment in 2011. Accordingly, as a matter of law, Ayika cannot show a violation of the Speedy Trial Act based on the date of "the fraud case" indictment.

Ayika also asserts his trial counsel provided constitutionally ineffective assistance when he failed to introduce evidence demonstrating violations of Ayika's Sixth Amendment right to a speedy trial. The Sixth Amendment guarantees every person accused of a crime the right to a speedy trial. U.S. Const. amend. VI. An inquiry into a speedy trial claim requires courts to consider: (1) length of the delay; (2) reason for the delay; (3) petitioner's assertion of his right to speedy trial; and (4) prejudice to the petitioner. *Barker v. Wingo*, 407 U.S. 514, 530, 533 (1972).

Under the first factor, the right to speedy trial begins at the time of arrest or indictment, whichever is first. *Amos v. Thorton*, 646 F.3d 199, 206 (5th Cir. 2011) (citing *Dillingham v. United States*, 423 U.S. 64, 65 (1975) (per curiam)). A delay between the arrest or indictment and trial becomes "presumptively prejudicial" around the one-year mark. *Goodrum v. Quarterman*, 547 F.3d 249, 260 (5th Cir. 2008).

The grand jury indicted Ayika in "the fraud case" on August 24, 2011, law enforcement officers arrested him on August 28, 2011, and he entered a guilty plea less than a year later on May 2, 2012. His trial began 271 days after the Fifth Circuit reversed his guilty-plea conviction. Accordingly, Ayika has not made a threshold showing of prejudicial delay, sufficient to trigger a full *Barker* analysis. *Amos*, 646 F.3d at 206.

Because any assertion of a violation of the Speedy Trial Act or the Sixth Amendment right to a speedy trial lacks merit, Ayika's counsel was not deficient for failing to raise these claims prior to his trial. Moreover, counsel was not ineffective for failing to offer Special Agent Beaulieu's affidavit in support of these claims because the affidavit does not support these claims.

In sum, Ayika's speedy trial claims lack merit. His counsel's failure to raise obviously meritless objections does not support a conclusion that counsel's performance was either deficient or prejudicial. *Kimler*, 167 F.3d at 893. Ayika is not entitled to relief on this claim.

B. Vindictive sentencing

Ayika also asserts the imposition of a consecutive sentence upon remand and after a trial constitutes judicial vindictiveness. (ECF No. 372 at 19-23). He argues "[t]he decision to run consecutive punishments was in contravention of U.S.S.G. § 5G1.3 and 18 U.S.C. § 3553(a)(2)," and that "it was apparent that [he] was being punished based on his decision to exercise his right to appeal and to trial by jury, in violation of due process." (ECF No. 372 at 6). Ayika further argues "actual vindictiveness" is established by the "huge increase without explanation" of his aggregate sentence. (ECF No. 372-1 at 22). The Government contends this claim is procedurally defaulted by Ayika's failure to raise this issue in his appeal. (ECF No. 391 at 11).

As the Court noted above, "[r]elief under 28 U.S.C. 2255 is reserved for . . . injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *Vaughn*, 955 F.2d at 368. Accordingly, a movant may not raise an issue for the first time on collateral review without showing both cause for his procedural default of the claim and actual prejudice resulting from the error. *Shaid*, 937 F.2d at 232.

Ayika could have raised this claim in his direct appeal, but did not. He does not offer any argument regarding cause or prejudice in either his counseled reply to the response, (ECF No. 394), or in his pro se reply (ECF No. 395). Ayika also does not assert his actual innocence. Accordingly, his claim is procedurally defaulted and he is not entitled to relief.

Further, Ayika claim lacks merit.

In his direct appeal, the Fifth Circuit rejected Ayika's argument that the consecutive

sentence violated the Fifth Amendment's Double Jeopardy Clause:

> Ayika contends that because he was resentenced to serve a term consecutive to his criminal drug sentence—whereas originally the two sentences were to run concurrently—the consecutive sentence violates the Double Jeopardy Clause of the Fifth Amendment. As we have previously held, however, "[d]ouble jeopardy does not preclude a sentencing authority from, upon a defendant's reconviction following a successful appeal, imposing 'whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction,'" as it is a "'well-established part of our constitutional jurisprudence ... that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean.'" Thus, this claim is meritless.

United States v. Ayika, 837 F.3d 460, 477 n.28 (5th Cir. 2016) (quoting *United States v. Colunga*, 812 F.2d 196, 198 (5th Cir. 1987).

The Fifth Circuit has also explained it will not presume a motive for vindictiveness exists when a different judge than the judge whose decision was vacated on appeal imposes a lengthier sentence on remand. *United States v. Rodriguez,* 602 F.3d 346, 359-60 (5th Cir. 2010) ("[W]e join our seven sister circuits that . . . do not apply the presumption when different judges preside over the first and second sentencing."). The Supreme Court has indicated, and several Circuit Courts of Appeal have held, that the presumption of vindictiveness does not arise in the "second sentencer" context. *Alabama v. Smith*, 490 U.S. 794, 799 (1989); *Texas v. McCullough*, 475 U.S. 134, 140 (1986) ("The presumption is also inapplicable because different sentencers assessed the varying sentences that [the defendant] received."); *Rodriguez*, 602 F.3d at 359-60 (collecting cases). When a different judge imposes a lengthier sentence, there is no "reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority" and thus no reason to apply the presumption of vindictiveness. *Smith*, 490 U.S. at 799 (internal citation omitted). Accordingly, a movant must show "actual vindictiveness" to prevail

on a claim. *United States v. Reinhart*, 442 F.3d 857, 860 (5th Cir. 2006); *United States v. Mathurin*, 868 F.3d 921, 936-37 (11th Cir. 2017).

Ayika makes no showing of "actual vindictiveness," but instead merely asserts the fact that the Court imposed a consecutive sentence alone establishes vindictiveness. (ECF No. 372 at 22). With this conclusory assertion, he fails to overcome the presumption that vindictiveness does not arise in this "second sentencer" context.

Ayika further contends the imposition of a consecutive sentence is in contravention of federal statutes and the Sentencing Guidelines. (ECF No. 372 at 21-22). However, both 18 U.S.C. § 3584(a) and Sentencing Guideline §5G1.3 authorize the Court to impose a sentence consecutively to an undischarged sentence. Further, § 3584(a) creates a presumption that sentences imposed at different times run consecutively unless otherwise ordered. *United States v. Candia*, 454 F.3d 468, 477 (5th Cir. 2006). Sentencing Guideline § 5G1.3 sets forth the method of implementing the total sentence of imprisonment when a defendant is subject to an undischarged term of imprisonment in another case. Specifically, § 5G1.3(d) (Policy Statement) provides, in pertinent part, "[i]n any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(d) (U.S. SENTENCING COMM'N 2008).

Ayika's claim that "[t]he decision to run consecutive punishments was in contravention of U.S.S.G. § 5G1.3 and 18 U.S.C. § 3553(a)(2)," (ECF NO. 372 at 2), is an incorrect statement of the law.

Further, a consecutive, within-guidelines sentence enjoys a rebuttable presumption of reasonableness. *Candia*, 454 F.3d 468 at 471. Ayika has not rebutted the presumption of reasonableness affixed to his within-guidelines sentence. Ayika has not shown, for example, some relationship between the two District Judges involved in this case which would induce the Court to impose a consecutive sentence motivated purely by vindictiveness. Ayika has not shown the Court has some sort of bias against him, such as a bias based on his exercise of his right to appeal his first conviction after his guilty plea. Ayika has not even alleged the Court sought to discourage appeals. Indeed, Ayika's assertion that vindictiveness, which relies on the assertion that the Court overruled his objections to the PSR without explanation, is identical to the claim rejected in *Rodriguez*. 602 F.3d at 361-62. *See also United States v. Moore*, 997 F.2d 30, 38 (5th Cir. 1993) ("neither the judge's remarks at resentencing nor anything else in the record demonstrates that the district court's resentencing was vindictive. Moore's claims in this respect are rejected.").

Ayika has not successfully rebutted the presumption of the reasonableness of his consecutive, within-guidelines sentence.

Finally, the Court did not overrule his objections to the PSR without explanation. In sentencing Ayika, the Court adopted the PSR (ECF No. 278 at 1), which included the following information and recommendation:

> Multiple terms of imprisonment imposed at different times run consecutively unless the Court orders that the terms are to run concurrently 18 U.S.C. § 3584(a). The term of imprisonment imposed in this case is to run consecutive to the sentence in Dkt. No. EP-09-CR-660FM(1), unless the Court orders them to run concurrently.

(ECF No. 270-1 at 20). The PSR further states:

> In 2007, agents began investigating Ayika into the matter of Ayika selling large quantities of hydrocodone to individuals without a prescription. The individuals

> to whom Ayika sold hydrocodone were individuals who were chemically dependent on the pain medication and during the course of the investigation three individuals died as a result of their dependence on hydrocodone. As Ayika was being investigated for selling medication illegally, it was also discovered Ayika had been submitting fraudulent prescription claims for several years to various insurance companies for which Ayika was paid in excess of $2,000,000. One cannot ignore the extent of Ayika's level of criminal activity which not only included health care fraud but selling prescribed medication to chemically dependent individuals. It appears what drove Ayika was his greed and a callous disregard for any of the victims who were involved in these cases. As such, a sentence of 87 months custody is recommended followed by a term of 3 years supervised *to run consecutive* to the sentence imposed in Dkt. No. EP-09-CR-660FM(1).

(ECF No. 270-2 at 1-2) (emphasis added).

Because the Court adopted the PSR at sentencing, the Court's imposition of the sentence was not unexplained. *United States v. Izaguirre-Losoya*, 219 F. 3d (5th Cir. 2000) (noting that, although the court did not make a statement on the record from which its consideration of the section 3553 factors could be inferred, the court was advised of those factors by the presentence report).

In sum, Ayika's vindictiveness claim is procedurally barred or, in the alternative, lacks merit. Ayika is not entitled to relief on this claim.

EVIDENTIARY HEARING

Section 2255 permits a federal prisoner to bring a collateral challenge by moving the sentencing court to vacate, set aside, or correct his sentence. 28 U.S.C. § 2255(a). Once a defendant files a section 2255 motion, the district court is required by statute to hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also United States v. Reed*, 719 F.3d 369, 373 (5th Cir. 2013). The Court's decision to grant or deny a movant an evidentiary hearing is a matter within the Court's discretion. *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir.

2006). To establish abuse of discretion in the denial of an evidentiary hearing, a petitioner "must present independent indicia of the likely merit of his allegations." *United States v. Cavitt*, 550 F.3d 430, 442 (5th Cir. 2008) (quotation marks omitted). Conclusory assertions are insufficient to warrant an evidentiary hearing, and one is warranted only if a movant produces independent indicia of the likely merits of his allegations. *United States v. Cervantes*, 132 F.3d 1106, 110 (5th Cir. 1998).

A district court abuses its discretion by denying an evidentiary hearing if the motion sets forth specific, controverted issues of facts that are not conclusively negated by the record and that, if proved at the hearing, would entitle the petitioner to any relief. *United States v. Kayode*, 777 F.3d 719, 731 (5th Cir. 2014) (Dennis, Circuit Judge, dissenting from an opinion denying section 2255 relief on an ineffective assistance of counsel claim without an evidentiary hearing in a case wherein the movant had submitted a sworn affidavit contradicting counsel's claims); *United States v. Reed*, 719 F.3d 369, 374 (5th Cir. 2013). *Accord Branch v. Radar*, 596 F. App'x 273, 277 n.3 (5th Cir. 2015) ("Other cases that hold that the defendant provided sufficient evidence that he requested counsel file an appeal have contained outside evidence in the record supporting the defendant's claim or, at the least, no evidence inconsistent with the defendant's assertion."). As the Supreme Court has explained, even if the Government contends the movant's allegations are "improbable and unbelievable," if the movant makes specific and detailed assertions in his motion and *provides a sworn affidavit* that create contested issue of fact that, if true, entitle him to relief, an evidentiary hearing is warranted. *Machibroda v. United States*, 368 U.S. 487, 494 (1962).

Ayika seeks an evidentiary hearing for the purpose of introducing evidence supporting his speedy trial claim, presented herein as an ineffective assistance of counsel claim. Although

Ayika repeatedly contends, including via affidavit, that a criminal complaint on the charges of fraud exists and that he was arrested on that complaint in 2009, there is no evidence of this presumed fact in the record in this matter or in the record in Ayika's other criminal proceeding. It is clear from the record in this matter that the "delay" in indicting Ayika on the fraud charges after the execution of the search warrant was due to the volume and complexity of the evidence seized during the search, and the necessity of having a forensic accountant review tens of thousands of individual records to determine the extent of the fraud, resulting in the 2011 indictment. Ayika has not presented independent indicia of the likely merit of his allegations. Additionally, the motions, files, and records of the case show Ayika is not entitled to relief. Therefore, the Court will not conduct an evidentiary hearing in this matter.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under section 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 Section 2255 Proceedings, the District Court must issue or deny a certificate of appealability when it enters a final order adverse to the movant.

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where the Court rejects a movant's constitutional claims on the merits, "the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

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

CONCLUSION AND ORDERS

The Court concludes the record supports a conclusion that Ayika's claims lack merit or are procedurally defaulted and an evidentiary hearing is unnecessary. The Court further concludes Ayika is not entitled to a certificate of appealability. Accordingly, the Court enters the following orders:

IT IS ORDERED that Respondent United States of America's **MOTION TO STRIKE** (ECF No. 391) is **DENIED**.

IT IS FURTHER ORDERED that Movant Peter Ayika's motion for an evidentiary hearing (ECF No. 396) is **DENIED**.

IT IS ALSO ORDERED that Movant Peter Ayika's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 372) is **DENIED** and his civil cause is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Movant Peter Ayika is **DENIED** a certificate of appealability.

IT IS FINALLY ORDERED that the civil cause is **CLOSED**.

SIGNED on this 5th day of December, 2017.

DAVID BRIONES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-51120

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PETER VICTOR AYIKA,

Defendant - Appellant

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

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

APPENDIX C