APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-41176

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FLAVIO TAMEZ,

Defendant-Appellant

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

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(Filed Dec. 13, 2018)

ORDER:

Flavio Tamez, federal prisoner # 14812-379, moves this court for a certificate of appealability (COA). He wishes to appeal the district court's denial of his 28 U.S.C. § 2255 motion and his post judgment motion that challenged his convictions of conspiracy to possess with intent to distribute more than 1,000 kilograms of marijuana and aiding and abetting money laundering.

According to Tamez, the district court erred in concluding, without holding an evidentiary hearing, that his § 2255 motion is barred by the appeal waiver

provision of his plea agreement and that the law of the case doctrine precluded review of the waiver's validity. Additionally, Tamez reurges his claims that his trial attorneys rendered ineffective assistance by misadvising him regarding his potential sentencing exposure and his appellate rights and by failing to ensure that he retained the right to appeal as discussed at his sentencing hearing and further that his appellate attorney was ineffective in failing to overcome the Government's motion to dismiss his direct appeal. Finally, Tamez contends that the district court abused its discretion in denying his postjudgment motion filed pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court has denied the claims on their merits, the movant must show "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 has dismissed on procedural grounds, a 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." *Id.*

Tamez has not made the required showing. Accordingly, his motion for a COA is DENIED. His

motions for leave to proceed in forma pauperis and for the appointment of counsel also are DENIED.

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

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff/Respondent,	§	
	§	**CRIMINAL NO.**
v.	§	**2:12-4184**
	§	
FLAVIO TAMEZ,	§	
	§	
Defendant/Movant.	§	

MEMORANDUM OPINION & ORDER

(Filed Jan. 18, 2018)

Pending before the Court is Defendant/Movant Flavio Tamez's Motion for Amended Findings and Conclusions and Incorporated Motion to Alter/Amend Judgment (D.E. 943), whereby he moves the Court to amend its September 26, 2017 Memorandum Opinion & Order granting the Government's motion for summary judgment and denying Movant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (D.E. 939).

I. BACKGROUND

Movant pled guilty to conspiracy with intent to distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)

(Count One) and money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 1956(a)(2) (Count Six). Pursuant to a written Plea Agreement, Movant waived his right to appeal his sentence or file a motion under 28 U.S.C. § 2255. The Court accepted Movant's guilty plea after being satisfied that he was competent to enter a plea, there was a factual basis for the plea, he understood the consequences of entering a plea, and he was voluntarily and knowingly pleading guilty.

Movant was sentenced to 324 months' imprisonment on Count One and 240 months on Count Six, to be served concurrently and followed by 5 years' supervised release. At sentencing, the Court also attempted to modify the Plea Agreement by rescinding the appellate waiver and allowing Movant to retain his right to appeal. Movant appealed, but the Fifth Circuit dismissed his appeal on the Government's motion for specific performance of the appellate waiver provision of the Plea Agreement. The Supreme Court thereafter denied Movant's petition for a writ of certiorari.

Movant filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 on March 2, 2017, asserting the following grounds for relief:

1) His guilty plea was involuntary because his waiver of his right to appeal and to post-conviction relief is the result of flawed advice from trial counsel regarding his potential sentencing exposure, and he was not correctly advised with respect to his rights to post-conviction relief;

2) The Court "failed to hew to Rule 11 of the Federal Rules of Criminal Procedure . . . during and in relation to sentencing and re-arraignment hearings," and trial counsel did not adequately represent Movant prior to and at rearraignment;

3) Appellate counsel was ineffective by failing to thwart the Government's effort to secure dismissal of the appeal under the waiver provision of the Plea Agreement; and

4) The doctrine of cumulative error arising as a result of ineffective assistance of counsel resulted in the imposition of an unreasonable sentence.

D.E. 899. By written Memorandum Opinion & Order and Final Judgment entered September 26, 2017, the Court granted the Government's motion for summary judgment and denied Movant's § 2255 motion on the grounds that the waiver contained in his written Plea Agreement barred his claims. D.E. 939, 940. Movant's present motion to amend that Order was mailed on October 24, 2017, according to his Certificate of Service. It is timely. *See* FED. R. CIV. P. 52(b), 59(e).

II. MOVANT'S CLAIMS

Movant's current motion for amended findings/conclusions or to alter/amend the judgment raises the following issues:

A. Whether the waiver provision at ¶ 7 of the written Plea Agreement can bar [Movant's] motion under 28 U.S.C. § 2255[;]

***

B. Whether the plea, plea agreement, and waiver were knowingly, voluntarily, and intelligently entered and enforceable[;]

***

C. Whether the law-of-the-case doctrine can apply to the instant situation[;]

***

D. Whether the claims of ineffective assistance of counsel nonetheless fail to pierce the waiver's veil[.]

D.E. 943, pp. 8, 15, 28, 45.

III. ANALYSIS

A. FED. R. CIV. P. 52(b)[1]

Citing Federal Rule of Civil Procedure 52(b), Movant first asks the Court to issue "supplemental findings and conclusions" in order to "provide a more complete explanation of the legal foundation for the

[1] The Federal Rules of Civil Procedure apply to federal habeas petitions to the extent that they are not inconsistent with applicable federal statutes and rules. Rule 12, RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS.

Order so as to render a record adequate to permit meaningful review." D.E. 943, pp. 7–8.

Rule 52 governs bench trials and provides that, "[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." FED. R. CIV. P. 52(a)(1). The Rule further provides that the Court "is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56. . . ." FED. R. CIV. P. 52(a)(3), Because the Court's September 26, 2017 Memorandum Opinion & Order ruled on the Government's motion for summary judgment under Rule 56, and it did not involve a bench trial, the Court need not state any findings or conclusions other than those previously set forth. Movant's "Motion for Amended Findings and Conclusions" pursuant to Rule 52(b) is therefore **DENIED**.

B. FED. R. CIV. P. 59(e)

Movant further moves the Court to alter or amend the judgment pursuant to Rule 59(e) and grant him relief under § 2255.

To prevail on a Rule 59(e) motion, the movant must show at least one of the following: (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) the need to correct a clear or manifest error of law or fact or to prevent manifest injustice. *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002). "A motion to alter or amend the judgment under Rule 59(e) 'must clearly establish

either a manifest error of law or fact or must present newly discovered evidence' and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued.'" *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863–64 (5th Cir. 2003) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). In some instances, a defendant bringing a Rule 59(e) motion may run afoul of the prohibition on second or successive motions. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (post-judgment motion pursuant to Rule 60(b) may be construed as second or successive § 2254); *Williams v. Thaler*, 602 F.3d 291, 303 & n.10 (5th Cir. 2010) (finding 59(e) claim to be second or successive). It is only when a Rule 59(e) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," that it does not raise a second or successive claim. *Gonzalez*, 524 U.S. at 532; *United States v. Hernandes*, 708 F.3d 680, 681 (5th Cir. 2013) ("Where a . . . motion advances one or more substantive claims, as opposed to a merely procedural claim, the motion should be construed as a successive § 2255 motion.").

Here, Movant's Rule 59(e) motion merely repeats his prior claims that his § 2255 waiver is not enforceable; his plea was not knowing and voluntary; his counsel was ineffective at sentencing; and the law-of-the-case doctrine does not apply.[2] These claims are

[2] Movant also offers for the first time the affidavit of attorney Jose Luis Ramos, who was retained to assist defense counsel at sentencing. D.E. 943-2. There is no indication this evidence is

substantive and are therefore second or successive claims. Where a claim is second or successive, the movant is required to seek, and acquire, the approval of the Fifth Circuit before filing a second § 2255 motion before this Court.[3] *See Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000); 28 U.S.C. § 2244 (b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Movant's motion does not indicate that he has sought or obtained such permission. Until he does so, this Court does not have jurisdiction over his claims.

Accordingly, Movant's "Incorporated Motion to Alter/Amend Judgment" under Rule 59(e) is **DENIED**.

"newly discovered" or was "not previously available" when Movant filed his initial motion under § 2255.

[3] In pertinent part, 28 U.S.C. § 2255(h) provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

IV. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Movant has not yet filed a notice of appeal, the § 2255 Rules instruct this Court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11, § 2255 RULES.

A certificate of appealability (COA) "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). As to claims that the district court rejects solely on procedural grounds, the movant must show both 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*, 529 U.S. at 484.

The Court finds that Movant cannot establish at least one of the *Slack* criteria. Accordingly, he is not entitled to a COA as to his claims.

V. CONCLUSION

For the foregoing reasons, Movant's Motion for Amended Findings and Conclusions and Incorporated Motion to Alter/Amend Judgment (D.E. 943) is **DENIED**. He is also **DENIED** a Certificate of Appealability.

ORDERED 1/18/18.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

STARR COUNTY, TX, ET AL (&QUOTTAXING AUTHORITIES&QUOT [sic]), *et al*,	§ § § §	
Petitioners,	§	CRIMINAL ACTION
VS.	§ §	NO. 2:12-CR-418-1 CIVIL 2:17-321
FLAVIO TAMEZ,	§ §	
Defendant.	§	

MEMORANDUM OPINION & ORDER

(Filed Sep. 26, 2017)

Defendant/Movant Flavin Tamez filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 and memorandum of law in support. D.E. 900, 901.[1] Pending before the Court is the United States of America's (the "Government") motion for judgment on the pleadings and for summary judgment seeking to enforce Movant's waiver of his right to file the present motion (D.E. 909), to which Movant responded (D.E. 922). For the reasons stated herein, the Government's motion is **GRANTED**, and Movant's § 2255 motion is **DENIED**.

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[1] Docket entries refer to the criminal case.

I. BACKGROUND

On October 4, 2012, Movant pled guilty to conspiracy with intent to distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) (Count One) and money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 1956(a)(2) (Count Six). Pursuant to a written Plea Agreement (D.E. 387), Movant agreed to forfeit two pieces of real property noticed in the Superseding Indictment under the authority of 21 U.S.C. § 853. He also waived his right to appeal his sentence or file a motion under 28 U.S.C. § 2255.[2] In exchange for Movant's guilty plea, the Government agreed to recommend that Movant receive maximum credit for acceptance of responsibility and a sentence within the applicable guideline range. The Government also

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[2] The waiver provision read:

> Defendant waives his/her right to appeal both the conviction and the sentence imposed. Defendant is aware that Title 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. The defendant waives the right to appeal the sentence imposed or the manner in which it was determined. The defendant may appeal only (a) a sentence imposed above the statutory maximum; or (b) an upward departure from the Sentencing Guidelines which has not been requested by the United States, as set forth in 18 U.S.C. § 3742(b). *Additionally, the defendant is aware that Title 28 U.S.C. § 2255, affords the right to contest or "collaterally attack" a conviction or sentence after the conviction or sentence has become final. The defendant waives the right to contest his/her conviction or sentence by means of any post-conviction proceeding.*

Plea Agreement ¶ 7 (emphasis added).

agreed to forgo the $500,000 money judgment noticed in the Superseding Indictment.

Movant was represented by attorney Omar Escobar, Jr., at rearraignment. Movant affirmed under oath that he had a copy of the indictment and that he understood the nature of the charge, the elements of the offense, the penalty range for the offense, his right to plead not guilty and proceed to trial, and the terms of his written Plea Agreement, including the waiver of his right to appeal or collaterally attack his conviction or sentence contained in the Plea Agreement. 10/4/2012 Hrg. Tr., D.E. 753 at 13:1 1-24, 14:12–16:5, 17:4–21:5, 24:17–28:8. He testified that he had discussed the case with counsel, including the Plea Agreement and waiver, and that he understood the Plea Agreement's terms. *Id.* at 27:12-16, 29:3-9. He further testified that he was pleading guilty voluntarily and was not threatened or promised leniency in exchange for his guilty plea. *Id.* at 23:19–24:12. The Court explained its sentencing procedures, and Movant testified that he had discussed with counsel how the Sentencing Guidelines may apply to him. *Id.* at 21:25–23:11. He further testified that he understood he could not withdraw his guilty plea even if the Court imposed the statutory maximum sentence. *Id.* at 29:23–30:3. The Court accepted Movant's guilty plea after being satisfied that he was competent to enter a plea, there was a factual basis for the plea, he understood the consequences of entering a plea, and he was voluntarily and knowingly pleading guilty. *Id.* at 45:4-12.

The Court thereafter ordered the Probation Office to prepare a Presentence Investigation Report (PSR). The PSR held Movant responsible for 30,000 kilograms of marijuana and assigned a base offense level of 38. Two levels were added because a dangerous weapon was possessed, two levels were added because Movant maintained a premises for the purpose of distributing a controlled substance, two levels were added because Movant was convicted under 18 U.S.C. § 1956, and four levels were added because Movant was deemed an organizer/leader of criminal activity that involved five or more participants or was otherwise extensive. After credit for acceptance of responsibility, Movant's total offense level was 45. With a Criminal History Category I, his guideline range was life imprisonment. Movant filed written objections to being held responsible for 30,000 kilograms of marijuana and to the enhancements for maintaining a premises for the purpose of distributing a controlled substance, being an organizer/leader, and possessing a dangerous weapon.

Sentencing was held on March 28, 2013. At the hearing's outset, Movant's new attorney, G. Allen Ramirez, contested the Government's position that Movant could "be held responsible for 30,000 kilograms in the very vague way that it's figured out in the PSR" and urged the Court to allow Movant to retain his right to appeal and "exercise his very important right to challenge that methodology in the Court of Appeals." 3/28/2013 Hrg. Tr., D.E. 754 at 8:22–9:1. Defense counsel made it clear that he was "not asking that [Movant] be allowed to withdraw his plea." *Id.* at

14:3-4. Indeed, counsel conceded, "I'm not saying that he didn't enter [the Plea Agreement] knowingly and voluntarily. He did. I'm asking . . . for the Court not to bind him to the waiver of appeal before we start this hearing and allow him to appeal whatever ruling the Court makes in this case." *Id.* at 16:2-6. The Court granted Movant's request and modified the Plea Agreement by rescinding the appellate waiver and allowing Movant to "retain his right to appeal." *Id.* at 17:23-24.

After considering the lengthy testimony of codefendant Jose Carbajal, Jr., the Court granted Movant's objections to the enhancements for possessing a dangerous weapon and maintaining a premises for the purposes of distributing a controlled substance and overruled Movant's objections to his role in the offense and to the amount of marijuana involved. *Id.* at 68:15–69:6. This reduced Movant's total offense level to 41 and yielded a new guideline sentencing range of 324 to 405 months. Consistent with the terms of the Plea Agreement, the Government recommended a sentence at the lowest end of the Guidelines. *Id.* at 69:18-25. The Court agreed and sentenced Movant to 324 months on Count One and 240 months on Count Six, to be served concurrently and followed by 5 years' supervised release. *Id.* at 72:9-20. The Court then reiterated that it would allow Movant to appeal his sentence and admonished him that he had 14 days from the time the Judgment was entered to file a notice of appeal. *Id.* at 74:5-10. Judgment was entered April 1, 2013.

Movant appealed the Court's Judgment; however, because appellate counsel failed to comply with Fifth

Circuit procedures, the appeal was dismissed. On April 1, 2015, Movant filed a motion seeking relief under 28 U.S.C. § 2255 based on ineffective assistance of appellate counsel for failure to perfect an appeal. The Court denied relief under § 2255 without prejudice and granted Movant an out-of-time appeal. The Fifth Circuit ultimately dismissed Movant's appeal on January 26, 2016, on the Government's motion for specific performance of the appellate waiver provision of the Plea Agreement. On June 1, 2016, the Supreme Court denied Movant's petition for a writ of certiorari. Movant filed the present motion under § 2255 on March 2, 2017. It is timely.

II. MOVANT'S ALLEGATIONS

Movant's motion under 28 U.S.C. § 2255 asserts the following grounds for relief:

1) His guilty plea was involuntary because his waiver of his right to appeal and to post-conviction relief is the result of flawed advice from trial counsel regarding his potential sentencing exposure, and he was not correctly advised with respect to his rights to post-conviction relief;

2) The Court "failed to hew to Rule 11 of the Federal Rules of Criminal Procedure . . . during and in relation to sentencing and re-arraignment hearings," and trial counsel did not adequately represent Movant prior to and at rearraignment;

3) Appellate counsel was ineffective by failing to thwart the Government's effort to secure dismissal of the appeal under the waiver provision of the Plea Agreement; and

4) The doctrine of cumulative error arising as a result of ineffective assistance of counsel resulted in the imposition of an unreasonable sentence.

III. 18 U.S.C. § 2255

There are four cognizable grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) constitutional issues, (2) challenges to the district court's jurisdiction to impose the sentence, (3) challenges to the length of a sentence in excess of the statutory maximum, and (4) claims that 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). "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992).

IV. ANALYSIS

Movant waived his right to file a § 2255 motion by the Plea Agreement. "As a general matter . . . an informed and voluntary waiver of post-conviction relief

is effective to bar such relief." *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994); *see also United States v. White*, 307 F.3d 336, 341 (5th Cir. 2002). A waiver is enforced against an ineffective assistance of counsel claim unless the claimed ineffective assistance directly affected the validity of the waiver or the plea itself. *Wilkes*, 20 F.3d. at 343. If the plea and waiver were knowing and voluntary, and the waiver clearly covers § 2255 motions, the waiver can be enforced. *Id.* at 343–44.

As set forth *supra*, the Court questioned Movant about the Plea Agreement at rearraignment, including the waiver of his right to file a § 2255 motion. Movant testified that he read and discussed the Plea Agreement with counsel before he signed it and that he understood it. He further testified that he was aware of the waiver, had discussed the waiver with counsel, and understood it.

Movant nonetheless argues that the Court should not enforce the § 2255 waiver because "[t]he misadvice of Attorney Escobar as to sentencing exposure under applicable law rendered the plea not knowing, voluntary, and intelligent with respect to the negotiated plea agreement." D.E. 900, p. 5. The burden to demonstrate that his plea and waiver should not be enforced is on Movant. His sworn statements in open court that he understood his potential sentence, the Plea Agreement, and the waiver are entitled to a strong presumption of truthfulness. *United States v. Lampaziane*, 251 F.3d 519, 524 (5th Cir. 2001) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Indeed, the Fifth Circuit

affords "great weight to the defendant's statements at the plea colloquy." *United States v. Cothran*, 302 F.3d 279, 283–84 (5th Cir. 2002). Furthermore, a signed, unambiguous plea agreement is accorded great evidentiary weight when deciding if the plea is entered voluntarily. *See Bonvillan v. Blackburn*, 780 F.2d 1248, 1252 (5th Cir. 1986). The evidence before the Court supports a finding that Movant's guilty plea, including the waiver, was knowing and voluntary.

The law-of-the-case doctrine also requires a finding that Movant's guilty plea and waiver were knowing and voluntary. This doctrine " 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case.' " *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (quoting *United States v. Castillo*, 179 F.3d 321, 326 (5th Cir. 1999), and *Arizona v. California*, 460 U.S. 605, 618 (1983)). "The proscription covers issues [the appellate court has] decided expressly and by necessary implication, reflecting the 'sound policy that when an issue is once litigated and decided, that should be the end of the matter.' " *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004) (quoting *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950) (internal citations omitted)).

In its motion to dismiss Movant's appeal before the Fifth Circuit, the Government requested specific performance of the appellate waiver provision contained in Paragraph 7 of the Plea Agreement. *Tamez v. United States*, No. 16-40928 (5th Cir. 2015), Gov't Br. pp. 12, 18 (citing *United States v. Serrano-Lara*, 698

F.3d 841, 844–45 (5th Cir. 2012) (dismissing appeal and holding that, once a district court chooses to accept a plea agreement, it "does not then have the option to perform a judicial line item veto, striking a valid appeal waiver or modifying any other terms"); *United States v. Hammeren*, 518 F. App'x 296, 297 (5th Cir. 2013) (district court's comment at sentencing that defendant retained the right to appeal, contrary to the plea agreement, did not grant a right to appeal)). In granting the Government's motion to dismiss based on Movant's appellate waiver, the Fifth Circuit implicitly found that Movant's guilty plea and waiver were knowing and voluntary. The Fifth Circuit also implicitly found that this Court did not reject the entire Plea Agreement, as Movant now claims. The Fifth Circuit's dismissal of Movant's appeal and denial of rehearing, and the Supreme Court's subsequent denial of certiorari, implicate the law of the case doctrine and mandate dismissal of Movant's § 2255 motion as waived under the Plea Agreement. *See United States v. Goudeau*, 512 F. App'x 390, 393 (5th Cir. 2013) (affirming denial of § 2255 motion under law of the case doctrine after panel dismissed defendant's direct appeal as barred by waiver, notwithstanding defendant's ineffective assistance of counsel claims).

Movant argues that his § 2255 waiver is nonetheless unenforceable because sentencing counsel was ineffective in failing to have the plea withdrawn under Federal Rule of Criminal Procedure 11(d) on the basis that the appellate waiver was invalid. Under Rule 11, a defendant can withdraw from a guilty plea "after the

court accepts the plea, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5); or (B) the defendant can show a fair and just reason for requesting withdrawal." FED. R. CRIM. P. 11(d)(2). Here, Movant asked the Court to allow him to "retain his right of appeal" and "exercise his very important right to challenge [the PSR's] methodology in the Court of Appeals." 3/28/2013 Tr. at 8:4, 8:24–9:1. In response, the Court attempted to "allow [Movant] to retain his right to appeal." *Id.* at 17:23-24. Based on the Court's response, sentencing counsel believed, albeit incorrectly, that Movant's right to appeal had been restored. The Court did not reject the Plea Agreement, and there was no reason for requesting withdrawal before the Court imposed sentence. Counsel's failure to move to withdraw Movant's plea under Rule 11 was therefore not deficient. Moreover, Movant does not explain how counsel's alleged ineffectiveness related to the appellate waiver rendered the § 2255 waiver invalid.

For the reasons stated herein, Movant's § 2255 waiver is enforceable and bars his claims.

V. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Movant has not yet filed a notice of appeal, the § 2255 Rules instruct this Court to "issue or deny a certificate

of appealability when it enters a final order adverse to the applicant." RULE 11, § 2255 RULES.

A certificate of appealability (COA) "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To warrant a grant of the certificate as to claims denied on their merits, "[t]he 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). This standard requires a § 2255 movant to demonstrate that reasonable jurists could debate whether the motion should have been resolved differently, or that the issues presented deserved encouragement to proceed further. *United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (relying upon *Slack*, 529 U.S. at 483–84). As to claims that the district court rejects solely on procedural grounds, the movant must show both 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*, 529 U.S. at 484 (emphasis added).

Based on the above standards, the Court concludes that Movant is not entitled to a COA on any of his claims. That is, reasonable jurists could not debate

the Court's resolution of his claims, nor do these issues deserve encouragement to proceed. *See Jones*, 287 F.3d at 329.

VI. CONCLUSION

For the foregoing reasons, the Government's motion for judgment on the pleadings and for summary judgment (D.E. 909) is **GRANTED**, and Movant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (D.E. 900) is **DENIED**. Movant is further **DENIED** a Certificate of Appealability.

ORDERED this 26th day of September, 2017.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-40928

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FLAVIO TAMEZ,

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

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(Filed Jan. 26, 2016)

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that appellee's unopposed alternative motion for an extension of 30 days from the date of this ruling to file its brief is DENIED AS MOOT.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-41176

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FLAVIO TAMEZ,

Defendant - Appellant

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

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

(Filed Feb. 19, 2019)

Before JONES, ELROD and ENGELHARDT, Circuit Judges.

PER CURIAM:

(X) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
UNITED STATES CIRCUIT JUDGE