APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. REYES VEGA, AKA Ray Vega, Defendant-Appellant.	No. 18-56248 D.C. Nos. 2:17-cv-09022-R 2:13-cr-00295-R-1 Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REYES VEGA, Petitioner/Defendant. v. UNITED STATES OF AMERICA, Respondent/Plaintiff,	CASE NO. CV-17-9022-R CR-13-295-R-1 ORDER DENYING DEFENDANT'S MOTION FOR RELIEF PURSUANT TO 28 U.S.C. § 2255

Before the Court is Petitioner/Defendant's Motion for Relief pursuant to 28 U.S.C. § 2255, filed on December 15, 2017. (Dkt. 1). Having been thoroughly briefed by both parties, this Court took the matter under submission on May 3, 2018.

In March 2014, Defendant Reyes Vega was convicted of conspiracy to commit bank robbery and bank robbery by use of a dangerous device. Vega was on trial with Aurora Barrera for a bank robbery that took place at the Bank of America in East Los Angeles where Barrera worked. Vega planned the bank robbery. Vega and Barrera were in a romantic relationship at the time of the robbery.

Before trial, Vega participated in informal plea negotiations with the Government. In this meeting, the Government offered Vega a five- to six-year sentence if he would reveal the location of the stolen money. Vega's attorney discussed the plea option with Vega several times, but Vega continuously maintained his innocence. After discussing the risks and benefits of going to trial or

accepting a plea, Vega decided not to enter into a plea bargain.

Before trial, Barrera filed a motion to sever her trial from Vega's. Vega's attorney informed Vega of his option to either join Barrera's motion or file an independent motion, but Vega felt it was in his interest to proceed with a joint trial. Barrera's motion was denied.

Trial began on March 11, 2014. During trial, Vega wore shackles around his ankles. Vega, a former United States Marine, had recently taken training courses in physical combat and had also been recorded disarming law-enforcement trainees. The jury could not see that Vega wore shackles. Vega was informed that, if he testified, he would be brought to the witness stand outside of the presence of the jury so they would not see the shackles.

At trial, cell phone records obtained pursuant to a court order issued under 18 U.S.C. § 2703(d) were admitted as evidence against Barrera and Vega. The evidence showed that Barrera and Vega were together the night before the robbery occurred. Vega did not object to the use of these cell phone records at trial.

At the end of trial, the judge instructed the jury as to the crime of bank robbery. Prior to trial, all parties agreed to the exact language of the instructions to be given to the jury. The language agreed to was as follows:

> The government has alleged in Count Two of the indictment that defendants assaulted a person **by** the use of a dangerous weapon or device as part of the alleged bank robbery. In order to establish this, the government must prove beyond a reasonable doubt that defendants intentionally made a display of force that reasonably caused an employee of Bank of America to fear bodily harm **by** using a dangerous weapon or device.

However, the judge instructed the jury at trial using different language:

> The Government has alleged that -- in count two of the indictment that the defendants assaulted person **by** the use of a dangerous weapon or device as part of the alleged bank robbery. In order to establish this, the Government must prove beyond a reasonable doubt that the defendants intentionally made a display of force that reasonably caused an employee of the Bank of America to fear bodily harm **or** using a dangerous weapon or device.

No party objected to the erroneous reading of the instruction at trial.

During discovery, the Government learned of a previous civil lawsuit against Vega. The lawsuit alleged that Vega received a large sum of money from a family to rescue their child who

they believed had been kidnapped. The lawsuit further alleged that Vega did not attempt to rescue the child and kept the entire sum of money. Vega never appeared in the action, and the court entered default against him. Before trial, the Government informed Vega's counsel that it planned to use this lawsuit to impeach Vega on cross-examination, if he testified. Although Vega had initially planned to testify, just prior to taking the stand, he decided to "rest on the state of the evidence" instead.

Both defendants appealed their convictions. The court upheld the convictions, holding, *inter alia*, Vega did not properly preserve the issue of severance and there was sufficient evidence to support convictions for assault with a dangerous weapon or device.

This motion is brought under 28 U.S.C. § 2255. Under § 2255(a), a federal prisoner in custody may move the sentencing court to vacate, set aside, or correct the sentence on the ground that the petitioner was sentenced in violation of the Constitution or laws of the United States. *Davis v. United States*, 417 U.S. 333, 344-45 (1974). Vega argues that he received ineffective assistance of counsel in violation of his Sixth Amendment rights. He claims that his counsel (1) failed to object to Vega wearing shackles during trial; (2) failed to object to the erroneous reading of the jury instruction for bank robbery; (3) failed to object to the admission of cell phone data at trial; (4) failed to move for severance from co-defendant Barrera; (5) improperly advised Vega regarding a plea agreement; and (6) failed to object to prosecutorial misconduct and misadvised Vega regarding his right to testify.

To prevail on an ineffective assistance of counsel claim, a defendant must satisfy the two-part *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 669 (1984). First, a defendant must show that "counsel's performance was deficient," meaning that the "representation fell below an objective standard of reasonableness." *Id.* "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Second, a defendant must show prejudice stemming from the conduct of the attorney. *Id.* The defendant must show that "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

In ground one of the motion, Vega claims that his counsel was ineffective for failing to

object to his wearing shackles during trial. To demonstrate that his shackling at trial amounted to a constitutional violation, a defendant must demonstrate that "(1) he was physically restrained in the presence of the jury, (2) that the shackling was seen by the jury, (3) that the physical restraint was not justified by state interests, and (4) that he suffered prejudice as a result." *Cox v. Ayers*, 613 F.3d 883, 890 (9th Cir. 2010). In this case, the shackling was never seen by the jury. Moreover, the physical restraint was justified by state interests because Vega, a former United States Marine, had recently taken training courses in physical combat and had also been recorded disarming law-enforcement trainees. It was reasonable to believe that Vega might attempt to disarm the United States Marshals present in the courtroom. Accordingly, the shackling was not a constitutional violation. Therefore, Vega's attorney was not ineffective for failing to object to it. This ground for relief fails.

In ground two of the motion, Vega seeks relief for his counsel's failure to object to an erroneously read jury instruction. "Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing they constitute an abuse of the trial court's discretion." *United States v. Bordallo*, 857 F.2d 519, 529 (9th Cir. 1988). The court must examine "whether or not the instructions taken as a whole were misleading or represented a statement inadequate to guide the jury's deliberations." *United States v. Kessi*, 868 F.2d 1097, 1101 (9th Cir. 1989). In this case, although the trial judge failed to read the agreed upon jury instruction verbatim, the instructions taken as a whole were correct. The trial judge stated that the "Government has alleged that...the defendants assaulted person **by** the use of a dangerous weapon or device as part of the alleged bank robbery...the Government must prove beyond a reasonable doubt that the defendants intentionally made a display of force that reasonably caused an employee of the Bank of America to fear bodily harm **or** using a dangerous weapon or device." Therefore, in the sentence preceding the one that Vega now challenges, the Court clearly stated the Government's burden. It would not be reasonable for the jury to hear these two statements back to back and conclude that it could find guilt based on finding fear of bodily harm *or* the use of a dangerous weapon or device. Moreover, the part of the instruction that the Court misread is not grammatical and could not be reasonably understood to change the Government's burden. Therefore, Vega was

not prejudiced by his attorney's failure to object to the misreading of the jury instructions. This ground for relief fails.

In ground three of the motion, Vega asserts that his counsel unreasonably failed to object to the presentation of cell phone records obtained without a warrant. The records were obtained pursuant to an order issued under the Stored Communications Act, 18 U.S.C. § 2703(d). At the time of trial, neither the Supreme Court nor the Ninth Circuit had ruled on the issue of whether a warrant was required to obtain historical cell-site data.[1] However, all circuit courts that addressed this question prior to Vega's trial had determined that a warrant was not required to obtain historical cell-site data under 18 U.S.C. § 2703(d). *See, e.g., In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 313 (3d Cir. 2010). Under *Strickland*, failing to object to a matter of law not yet decided upon by the applicable binding circuit is only unreasonable if it violates clearly established federal law. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006); *Moses v. Payne*, 543 F.3d 1090, 1098 (9th Cir. 2008). At the time of trial, there was no clearly established federal law stating that a warrant was required to obtain historical cell-site records. An attorney is not expected to anticipate unexpected developments in the law. *United States v. Moss*, 2017 WL 5879847, at *23 (E.D. Cal. Nov. 29, 2017). Therefore, Vega's attorney did not act unreasonably by failing to object to the admissibility of the evidence.

In ground four of the motion, Vega alleges that his counsel improperly failed to sever his trial from Barrera's. In order to prevail on a motion to sever, the defendant must show that the magnitude of prejudice against him from a joint trial denied him a fair trial. "Antagonism between defenses is not enough, even if the defendants seek to blame one another. Rather, it must be shown...that the defenses are antagonistic to the point of being mutually exclusive." *United States v. Ramirez*, 710 F.2d 535, 546 (9th Cir. 1983). "Strategic choices made after thorough

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[1] The Court is aware of the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), holding that the government's acquisition of cell-site records is a search under the Fourth Amendment and therefore requires a warrant. However, at the time of Vega's trial, the Supreme Court had not yet weighed in on the issue.

investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Here, Vega's attorney made a strategic decision not to join the motion to sever. Additionally, it would have been futile to join the motion because Vega and Barrera's defenses were not "mutually exclusive," and the motion was denied. Therefore, Vega's attorney's decision not to join the motion to sever or separately move to sever did not fall below an objective standard of reasonableness.

In ground five of the motion, Vega asserts that his counsel improperly advised him not to accept a plea offer. To prevail, Vega must show that but for the alleged ineffective assistance of counsel, a plea deal would have been presented to and accepted by the court. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Here, the Government merely proposed the possibility of Vega receiving a lighter sentence if he were to identify the location of the stolen money. At no point was a formal plea deal ever presented to Vega. Under *Lafler*, Vega's counsel could not have possibly acted below the objective standard of reasonableness if no plea deal existed that could have been presented to the court. This ground for relief fails.

Finally, in ground six of the motion, Vega asserts that his counsel failed to object to prosecutorial misconduct that allegedly prevented him from testifying. Vega asserts that his counsel should have objected to the Government's plan to use Vega's past civil suit, in which he defrauded a family out of a significant amount of money, to impeach him on cross-examination. Under the Federal Rules of Evidence, an attorney can impeach a witness' credibility on cross-examination using a specific instance of conduct so long as such evidence is probative of the witness' truthfulness. Fed. R. Evid. 608(b); *see also United States v. Olsen,* 704 F.3d 1172, 1184 n.4 (9th Cir. 2013). Since this evidence was admissible character evidence, there was nothing for Vega's attorney to object to. There was no prosecutorial misconduct by the Government. Further, it is irrelevant that the evidence might have deterred Vega from testifying. If he desired to testify, that was still his right, as he was advised by his lawyer. This ground for relief fails.

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IT IS HEREBY ORDERED that Petitioner/Defendant's Motion for Relief is DENIED. (Dkt. No. 1)

Dated: July 17, 2018

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

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