APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 25 2019

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AURORA BARRERA, Defendant-Appellant.	No. 18-56290 D.C. Nos. 2:18-cv-00058-R 2:13-cr-00295-R-4 Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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

AURORA BARRERA, Petitioner/Defendant. v. UNITED STATES OF AMERICA, Respondent/Plaintiff,	CASE NO. CV 18-58-R CR-13-295-R-4 * 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 January 3, 2018. (Dkt. 1). Having been thoroughly briefed by both parties, this Court took the matter under submission on May 14, 2018.

In March 2014, Defendant Aurora Barrera was convicted of conspiracy to commit bank robbery and bank robbery by use of a dangerous device. The robbery occurred at a Bank of America in East Los Angeles, where Barrera was an assistant manager. Reyes Vega, Barrera's then-boyfriend, devised the scheme to rob the bank. Barrera and Vega were tried together for the bank robbery.

Before trial, Barrera participated in a proffer meeting with the Government. During this meeting, the Government laid out the evidence they had against Barrera, hoping she would decide to testify against Vega. Barrera's attorney discussed with Barrera the option of pursuing a plea deal rather than going to trial. He advised Barrera that the evidence against her was

"overwhelming and in all likelihood she would be found guilty if she chose to proceed at trial." He also advised her that she would likely face lesser penalties if she accepted a plea deal than if she proceeded to trial. Nonetheless, Barrera remained "steadfast and unwavering in her innocence." Although Barrera claims the Government offered her "less time," there is no evidence to support this because no plea offer was ever drafted or transmitted to Barrera.

Before trial, Barrera also filed a motion to sever her trial from Vega's on the ground that she planned to "demonize" Vega as the "mastermind" behind the robbery. The motion was denied. Barrera did not renew the motion to sever at trial.

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. Neither Barrera nor Vega objected 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 Ninth Circuit upheld the convictions, holding, *inter alia*, that Barrera 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). Barrera argues that she received ineffective assistance of counsel in violation of her Sixth Amendment rights. Specifically, she claims that her counsel (1) improperly advised her regarding a plea agreement; (2) failed to object to the admission of cell phone data at trial; (3) failed to object to the erroneous reading of the jury instruction for bank robbery; (4) failed to renew Barrera's motion to sever from co-defendant Vega; and (5) failed to object to prosecutorial misconduct.

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, the 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 attorney's conduct. *Id.* The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

In ground one of the motion, Barrera asserts that her counsel improperly advised her not to accept a plea offer. To prevail, Barrera 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 only proposed the possibility of Barrera receiving a lighter sentence if she were to testify against Vega; no formal plea deal was ever presented to Barrera or her attorney. Under *Lafler*, Barrera'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.

In ground two of the motion, Barrera asserts that her 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 Barrera'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 relevant 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 anticipate unexpected developments in the law. *United States v. Moss*, 2017 WL 5879847, at *23 (E.D. Cal. Nov. 29, 2017). Therefore, Barrera's attorney did not act unreasonably by failing to object to the admissibility of the evidence.

In ground three of the motion, Barrera seeks relief for her 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

---

[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 Barrera's trial, the Supreme Court had not yet weighed in on the issue.

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

In ground four of the motion, Barrera claims that her counsel improperly failed to renew the motion to sever. After presenting all evidence in a case, an attorney may renew a motion to sever in order to preserve the issue for appeal. *See United States v. Chong*, 720 F. App'x 329, 333 (9th Cir. 2017). To succeed on appeal, the appellant must show that the joint trial subjected them to such prejudice that they were denied a fair trial. *Id.* "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 investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

In this case, Barrera's attorney decided, as a point of strategy, not to renew the motion. Moreover, Barrera cannot demonstrate that her joint trial with Vega prejudiced her so that she was denied a fair trial. *See Ramirez*, 710 F.2d at 546. In fact, there is no evidence that Barrera was prejudiced at all by the joint trial or that there was antagonism between the defenses. A renewed

motion to sever would have been futile. Therefore, the attorney's conduct did not fall below an objective standard of reasonableness. This ground for relief fails.

Finally, in ground five of the motion, Barrera asserts that her counsel failed to object to prosecutorial misconduct. Barrera asserts that her counsel should have objected to the Government's plan to use Vega's past civil suit to impeach him on cross-examination. The lawsuit alleged that Vega defrauded a family out of a significant amount of money. 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 Barrera's attorney to object to. There was no prosecutorial misconduct by the Government. This ground for relief fails.

IT IS HEREBY ORDERED that Petitioner/Defendant's Motion for Relief is DENIED. (Dkt. 1)

Dated: July 17, 2018

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AURORA BARRERA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 18-56290

D.C. Nos. 2:18-cv-00058-R
2:13-cr-00295-R-4
Central District of California,
Los Angeles

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise under 28 U.S.C. § 2255. Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. Under *Asrar*, if the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the Clerk of the district court shall forward

to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

The Clerk shall send a copy of this order to the district court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AURORA BARRERA, PETITIONER v. UNITED STATES OF AMERICA, RESPONDENT.	CASE NUMBER CV-18-58-R / CR-13-295-R-4 **ORDER RE: CERTIFICATE OF APPEALABILITY**

On 9/24/18, Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is **GRANTED**. The specific issue(s) satisfy §2253(c)(2) as follows:

☒ The Certificate of Appealability is **DENIED** for the following reason(s):
- ☒ There has been no substantial showing of the denial of a constitutional right.
- ☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.
- ☐ The appeal seeks to test the validity of the detention pending removal proceedings.

10/30/18
Date

United States District Judge

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