

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 00-13879-CC; 00-13880-CC

CASTOR QUINTAIRES GONZALEZ,

Petitioner-Appellant,

versus

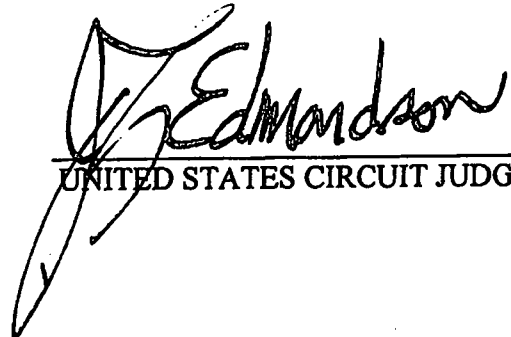
UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Appellant's motions to recall the mandates in Case Nos. 00-13879 and 00-13880 are
DENIED.


UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 00-13879, 00-13880

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 17, 2001
THOMAS K. KAHN
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D.C. Docket Nos. 98-06922-CV-JAL & 96-06021-CR-JAL
D.C. Docket Nos. 98-06923-CV-JAL & 96-06093-CR-DLG

CASTOR QUINTAIRES GONZALEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(August 17, 2001)

Before EDMONDSON, DUBINA and POLITZ*, Circuit Judges.

PER CURIAM:

*Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by
designation.

[ATTACHMENT A]

Castor Quintaires Gonzalez appeals the denial of his 28 U.S.C. § 2255 petitions in which he seeks to vacate, set aside, or otherwise correct the sentence he received after entry of a guilty plea. For the reasons assigned, we affirm.

BACKGROUND

Gonzalez was indicted for twenty-nine counts of drug related crimes, including engaging in a criminal enterprise, conspiracy, possession, importation, money laundering and obstruction charges. He was then charged by information with conspiracy to commit tax fraud. The two matters were consolidated.

Plea negotiations followed resulting in a written plea agreement prescribing a mandatory minimum sentence of twenty years and forfeitures exceeding \$3 million. It then became apparent to the parties that under 21 U.S.C. § 848(b) the offense carried a mandatory sentence of life imprisonment, not twenty years. On advice of his then counsel, Ruben Oliva, Gonzalez withdrew his guilty plea. The matter was set for trial and Oliva moved to withdraw as counsel based on a potential conflict of interest stemming from his representations of other individuals who had agreed to testify for the government at Gonzalez's trial. The government also moved to disqualify Oliva. Oliva's motion to withdraw was granted and attorney Richard Diaz enrolled as counsel for Gonzalez.

As trial commenced, just before the jury was sworn, on recommendation of

counsel Gonzalez entered into a new plea agreement which provided for a mandatory minimum sentence of life imprisonment and waiver of the right of appeal. Gonzalez received a life sentence, together with concurrent sentences of 240 months and 60 months.

Gonzalez invoked 28 U.S.C. § 2255 challenging the conviction and sentence. He also sought an evidentiary hearing. The trial court denied this relief and granted Gonzalez's petition for a certificate of appealability. This timely appeal followed.

ANALYSIS

To establish a violation of the sixth amendment based on an alleged conflict of interest, Gonzalez must show an actual conflict which had an adverse effect on counsel's representation.¹ We review the district court's findings of fact under a clearly erroneous standard. Its ruling concerning the constitutional ineffectiveness of counsel is a mixed question of law and fact which we review *de novo*.² The denial of the request for an evidentiary hearing is reviewed for an abuse of discretion.³

Sixth Amendment Violation

¹McConico v. State of Alabama, 919 F.2d 1543 (11th Cir. 1990).

²Id.

³Holmes v. United States, 876 F.2d 1545 (11th Cir. 1989).

Gonzalez contends that Oliva had an actual conflict of interest because he was also representing several of the co-conspirators who had agreed to testify against him. Assuming without deciding that such constitutes an actual conflict of interest in this factual setting, Gonzalez advances no allegations purporting to establish that this conflict had a meaningful adverse affect.

Gonzalez merely makes the conclusionary assertion that Oliva's conflict of interest adversely affected him when Oliva advised withdrawal of the guilty plea rather than attempt to enforce the first plea agreement. We are not persuaded. It is manifest that the twenty-year sentence contained in the original plea agreement was an illegal sentence and could not be enforced.⁴ The district court did not have

⁴21 U.S.C. § 848(b) provides that the minimum sentence for this offense is life imprisonment. Section 6B1.2 of the Sentencing Guidelines clearly states that the court may only accept the recommended or specific sentence in the plea agreement "if the court is satisfied either that: (1) the agreed sentence is within the applicable guideline range; or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons." Section 5G1.1(b) states that: "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." A court has only limited authority to depart from a mandatory minimum statutory sentence, as noted in 18 U.S.C. § 3553(e):

Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

There is no indication in the record or elsewhere that the government would have made such a motion, or that, if a motion had been made, the court would have granted a lesser sentence.

discretion to impose a sentence less than the statutory minimum life imprisonment.

Accordingly, it cannot be said that Gonzalez was adversely affected by counsel's failure to seek enforcement of this agreement, nor was he adversely affected by counsel's recommendation that Gonzalez withdraw his initial plea of guilty.

Nor are we persuaded that Gonzalez was adversely affected because he lost an opportunity to contend that the mandatory life sentence should not apply where the government obtained information satisfying § 848(b) from his post-arrest interviews. He had an opportunity to do so prior to and upon entry of his second guilty plea and in fact did so.⁵ Thereafter he voluntarily opted to enter his second guilty plea with full knowledge that he faced a minimum sentence of life imprisonment.⁶

Denial of Evidentiary Hearing

Section 2255 provides that in an action to vacate or correct the sentence the court shall grant a hearing to determine the issues and make findings of fact and

⁵Diaz, filed a motion seeking to suppress the use of this information at trial under Kastigar v. United States, 406 U.S. 441 (1972). The motion was fully litigated before a magistrate judge but was not ruled upon before entry of the second guilty plea.

⁶The second plea agreement specifically stated that the mandatory minimum sentence would be life imprisonment. Additionally, at the plea hearing, the court pointedly advised Gonzalez that if it accepted the plea agreement, it was bound to impose the mandatory minimum sentence of life. Gonzalez does not claim that he did not clearly understand this consequence of his plea.

conclusions of law "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." This rule does not require a district court to hold an evidentiary hearing every time a section 2255 petitioner asserts a claim of ineffective assistance of counsel. A hearing is not required where the petitioner's allegations are affirmatively contradicted by the record.⁷ As noted herein, the record in this case clearly contradicts the allegations set forth by Gonzalez in his § 2255 petition. Accordingly, the district court did not abuse its discretion in denying Gonzalez an evidentiary hearing on the motion, not did it err in any of its rulings.

The judgment appealed is AFFIRMED.

⁷Holmes v. United States, 876 F.2d 1545 (11th Cir. 1989).