

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

APR 26 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEJANDRO MARTINEZ,

Defendant-Appellant.

No. 18-55735

D.C. No. 2:17-cv-04723-PA
Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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No. 18-55735

D.C. No. 2:17-cv-04723-PA
Central District of California,
Los Angeles

ORDER

Before: IKUTA and N.R. SMITH, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 8) is denied. *See*
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-4585 PA CV 17-4723 PA CR 04-415 PA	Date	May 8, 2018
Title	Fernando Cazares v. United States of America Alejandro Martinez v. United States of America		

Present: The Honorable PERCY ANDERSON, U.S. DISTRICT JUDGE

Kamilla Sali-Suleyman

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: IN CHAMBERS - ORDER DENYING PETITIONERS' MOTIONS TO VACATE AND DENYING CERTIFICATE OF APPEALABILITY

Before the Court are Motions to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 ("2255 Motion") filed by petitioner Fernando Cazares ("Cazares") (Case No. CV 17-4585 PA & Docket No. 780 in Case No. CR 04-415 PA) and Alejandro Martinez ("Martinez") (Case No. 17-4723 PA & Docket No. 785 in Case No. CR 04-415 PA).^{1/}

I. Factual and Procedural Background

As summarized by the Ninth Circuit, Cazares, Martinez, and their codefendants Gilbert Saldana and Porfirio Avila,^{2/} were convicted by a jury of "violating 18 U.S.C. § 241 by conspiring to intimidate African-American citizens in the Highland Park neighborhood of Los Angeles and to deprive them of their constitutional right to 'purchase, lease and hold real and personal property, and the right to occupy a dwelling, free from intimidation based on race.'" United States v. Cazares, 788 F.3d 956, 962 (9th Cir. 2015). The jury also found "defendants

^{1/} "Cazares CV" refers to the Clerk's Record in Case No. CV 17-4585 PA and is followed by the applicable docket number. "Martinez CV" refers to the Clerk's Record in Case No. CV 17-4723 PA and is followed by the applicable docket number. "CR" refers to the Clerk's Record in Case No. CR 04-415 PA and is followed by the applicable docket number.

^{2/} A fifth defendant, Merced Cambero, fled to Mexico before trial. Mr. Cambero was arrested in Mexico and returned to the United States in 2017. He has entered a guilty plea in this action and is awaiting sentencing.

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Cazares, Saldana, and Martinez guilty of violating 18 U.S.C. §§ 245(b)(2)(B), and 2(a) by shooting Kenneth Kurry Wilson, an African-American man, because of his race and color and because he was enjoying facilities provided and administered by a subdivision of the State, namely the public streets of Los Angeles. The jury also found defendants Cazares, Saldana, and Martinez guilty of violating 18 U.S.C. §§ 924(c)(1)(A)(iii), (j)(1) and 2(a) by using firearms to kill Kenneth Kurry Wilson while carrying out the charged conspiracy.” Id.

At trial, the jury heard evidence that the defendants “are members of the Avenues 43, a Latino street gang in the Highland Park area, an area inhabited predominantly by Latinos.” Id. “One of the tenets of the Avenues 43 was to harass and use violence to drive African-Americans out of the Highland Park area. The conspiracy charged in the Second Superseding Indictment alleges overt acts continuing from 1995 through 2001 and involving racial slurs, threats, assaults, harassment, and murder directed at African-American residents of the Highland Park area, with the intent of causing the African-American residents to leave the Highland Park area.” Id. “Several black residents and former residents of the Highland Park area testified as to the harassment and violence the black residents of the Highland Park area suffered at the hands of the Avenues 43 gang members. The government also relied heavily on the testimony of former Avenues gang members, Jesse Diaz and Jose De La Cruz, who were incarcerated on state convictions, for evidence specific to the defendants.” Id.

This Court sentenced Cazares and Martinez to two consecutive sentences of life imprisonment. In affirming the convictions, the Ninth Circuit stated that the “evidence of guilt in this case was overwhelming.” Id. at 966 n.1. The Supreme Court denied a petition for writ of certiorari on June 20, 2016. See Cazares v. United States, 136 S. Ct. 2484 (2016). The 2255 Motions filed by both Cazares and Martinez were received by the Clerk’s Office on June 19, 2017, and are therefore timely under 28 U.S.C. § 2255(f)(1).^{3/}

The initial 2255 Motions filed by Cazares and Martinez, who are appearing pro se, raise substantially the same grounds for relief. Cazares’ 2255 Motion asserts the following grounds for relief:

^{3/} The Government additionally concedes that the 2255 Motions are also timely under the prison mailbox rule.

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- (1) This Court lacked jurisdiction over the Second Superseding Indictment (the “Indictment”) because it was not signed by the foreperson and was amended at the beginning of trial without notice to the defense;
- (2) The conviction on Count Three (use of a firearm in connection with a crime of violence) cannot stand because his conspiracy conviction (Count One) does not qualify as a crime of violence;
- (3) The jury instructions on Count Two constructively amended the elements of the crime charged;
- (4) Ineffective assistance of counsel, in which Cazares asserts 13 different bases, including: (a) Counsel’s failure to challenge the Indictment or this Court’s jurisdiction (Grounds A-1, A-2, A-3, B-3, B-4); (b) Counsel’s evidentiary-related decisions (Grounds B-1, B-2, B-6); (c) Counsel’s instruction-related decisions (Grounds B-5, B-7, B-8); and (d) Appellate counsel’s conduct (Grounds C-1, C-3);^{4/} and
- (5) The convictions should be vacated because of cumulative error.

The Government filed its Opposition to Cazares’ 2255 Motion on September 19, 2017. In its Opposition, the Government asserts that Cazares’ claims of error committed by this Court were procedurally defaulted because they were not asserted on direct appeal, and otherwise lack merit. As to the ineffective assistance of counsel claims, the Government contends that those claims fail because Cazares has failed to show that his counsel’s performance at trial or on appeal was objectively unreasonable or that counsel’s performance resulted in prejudice to the defense.

On November 1, 2017, Cazares filed a Motion to Supplement, in which he sought to add six more grounds to support his ineffective assistance of counsel claims. Specifically, those six additional grounds allege that Cazares’ counsel was constitutionally ineffective by failing to:

- (1) claim that the trial was permeated with hearsay racial slurs;
- (2) move for severance;
- (3) challenge the indictment on the basis that it “was not specific in the charges and [that] the

^{4/} As the Government points out in its Opposition, Cazares misnumbered his arguments alleging ineffective assistance of appellate counsel. There is no “C-2” argument.

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necessary allegations of racial animus were left to inference and speculation;” (4) object to the lack of specific dates for some overt acts in the 18 U.S.C. § 241 conspiracy charge; (5) request a lesser included offense instruction; and (6) move for dismissal of the indictment based on conflicting theories. The Government filed an Opposition to the Motion to Supplement in which it argues that these additional grounds are untimely and substantively meritless.

Martinez’ 2255 Motion asserts the following grounds for relief:

- (1) This Court lacked jurisdiction over the Indictment because it was not signed by the foreperson and was amended at the beginning of trial without notice to the defense;
- (2) The conviction on Count Three (use of a firearm in connection with a crime of violence) cannot stand because his conspiracy conviction (Count One) does not qualify as a crime of violence;
- (3) The jury instructions on Count Two constructively amended the elements of the crime charged;
- (4) The sentence exceeded the statutory maximum of 18 U.S.C. § 241;
- (5) Ineffective assistance of counsel, in which Martinez asserts 15 different bases, including: (a) Counsel’s failure to challenge the Indictment or this Court’s jurisdiction (Grounds A-1, A-2, A-3, B-3, B-4); (b) Counsel’s evidentiary-related decisions (Grounds A-4, B-1, B-2, B-6); (c) Counsel’s instruction-related decisions (Grounds B-5, B-7, B-8); and (d) Appellate counsel’s conduct (Grounds C-1, C-2, C-3); and
- (6) The convictions should be vacated because of cumulative error.

The Government filed its Opposition to Martinez’ 2255 Motion on September 25, 2017. In its Opposition, the Government asserts that Martinez’ claims of error committed by this Court were procedurally defaulted because they were not asserted on direct appeal, and otherwise lack merit. As to the ineffective assistance of counsel claims, the Government contends that those claims

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fail because Martinez has failed to show that his counsel's performance at trial or on appeal was objectively unreasonable or that counsel's performance resulted in prejudice to the defense.

On October 10, 2017, Martinez filed a Motion to Supplement, in which he sought to add six more grounds to support his ineffective assistance of counsel claims. Specifically, those six additional grounds allege that Martinez' counsel was constitutionally ineffective by: (1) by failing to claim that the trial was permeated with hearsay racial slurs that inappropriately provided the jurisdictional basis for the federal case; (2) by failing to move for severance; (3) by failing to challenge the indictment on the basis that it "was not specific in the charges and [that] the necessary allegations of racial animus were left to inference and speculation;" (4) by failing to object to the fact that some overt acts in the 18 U.S.C. § 241 conspiracy charge failed to specify the date or month in which the overt act occurred; (5) by failing to request a lesser included offense instruction; and (6) by failing to move for dismissal of the indictment based on conflicting theories. The Government filed an Opposition to the Motion to Supplement in which it argues that these additional grounds are untimely and substantively meritless. Martinez filed a "Second Supplement" on November 17, 2017, asserting three additional grounds to support his ineffective assistance of counsel claims. In his Second Supplement, Martinez contends that his appellate counsel was ineffective by failing to challenge the sufficiency of the evidence to support his conviction on each of the three counts.

Soon after filing his 2255 Motion, Martinez also filed various discovery motions, including requests for the verdict form, jury instructions, disclosure of grand jury proceedings, and for leave to propound interrogatories and requests for admissions directed to the Government's policies pertaining to criminal civil rights prosecutions and other topics. (Martinez CV 10, 11, 13, & 29, CR 795, 797.) Cazares did not file his Motion for Leave to Conduct Discovery and a Motion to Unseal Transcripts until November 1, 2017. (Cazares CV 15, CR 819, 823.) The Government's Opposition to Martinez' Discovery Motions does not oppose the requests for certain documents, including the verdict form, but contends that the documents are unnecessary to the resolution of the 2255 Motions. The Court has attached a copy of the Verdict Form to this Order. To protect the anonymity of the foreperson, the Court has redacted the foreperson's signature. The Verdict Form is in fact signed by the foreperson and discloses no basis to vacate the convictions and sentences of Martinez and Cazares.

As to the other information sought by both Martinez and Cazares, the Government asserts that they have not met the "good cause" standard of Rule 6(a) of the Rules Governing Section

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2255 Proceedings. See Calderon v. United States Dist. Ct. for the N. Dist. of Cal., 98 F.3d 1102, 1106 (9th Cir. 1996) (“[C]ourts should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation.”). Although Martinez also requested a copy of the jury instructions, he apparently had a copy of the trial transcript for the day that the Court instructed the jury both because some of his asserted grounds for relief include challenges to the jury instructions and his request for certain trial transcripts did not include the transcript for the date the jury was instructed. Like his other requests for discovery and other materials, Petitioners’ efforts to obtain documents and evidence appears to be nothing more than a fishing expedition. Moreover, these documents do not provide a basis for relief pursuant to § 2255 because any challenge Petitioners seek to pursue based on them would be procedurally defaulted, has already been specifically rejected by the Ninth Circuit on direct appeal, or is otherwise meritless. The Court therefore concludes that Petitioners have failed to establish good cause for the discovery and documents they have requested and denies the remaining discovery-related motions.^{5/}

II. Legal Standard

A. 28 U.S.C. § 2255

“In general, § 2255 provides the exclusive procedural mechanism by which a federal prisoner may test the legality of his detention.” Ivy v. Pontesso, 328 F.3d 1057, 1059 (9th Cir. 2003) (quoting Lorensen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000)). Under § 2255, “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum imposed by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” 28 U.S.C. § 2255(b).

^{5/} Cazares’ discovery motions fail for the additional reason that they were filed long after the expiration of the statute of limitation contained in 28 U.S.C. § 2255(f). As a result, those motions, and any grounds he hoped to uncover through that discovery, are untimely.

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“In determining whether a hearing and findings of fact and conclusions of law are required, ‘[t]he standard essentially is whether a movant has made specific factual allegations that, if true, state a claim on which relief could be granted.’ Under this standard, a district court may summarily dismiss a § 2255 motion only if the allegations in the motion, when viewed against the record, do not give rise to a claim for relief or are ‘palpably incredible or patently frivolous.’” United States v. Withers, 638 F.3d 1055, 1062-63 (9th Cir. 2011) (quoting United States v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984)) (internal citations omitted). “Mere conclusory allegations do not warrant an evidentiary hearing.” See Shah v. United States, 878 F.2d 1156, 1161 (9th Cir. 1989).

B. Procedural Default

“Habeas review is an extraordinary remedy and ‘will not be allowed to do service for an appeal.’” Bousley v. United States, 523 U.S. 614, 622, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998) (quoting Reed v. Farley, 512 U.S. 339, 354, 114 S. Ct. 2291, 2300, 129 L. Ed. 2d 277 (1994)). “Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ or that his is ‘actually innocent.’” Bousley, 523 U.S. at 622, 118 S. Ct. at 1611 (citations omitted). “In procedural default cases, the cause standard requires the petitioner to show that ‘some objective factor external to the defense impeded counsel’s efforts’ to raise the claim” on direct review. McCleskey v. Zant, 499 U.S. 467, 493, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986)). The prejudice prong requires that the petitioner show, “not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816 (1982). “To establish actual innocence, petitioner must demonstrate that, ‘in light of all the evidence,’ ‘it is more likely than not that no reasonable juror would have convicted him.’” Bousley, 523 U.S. at 623, 118 S. Ct. at 1611 (quoting Schlup v. Delo, 513 U.S. 298, 327-28, 115 S. Ct. 851, 867-68, 130 L. Ed. 2d 808 (1995)).

C. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are evaluated under the two-prong test set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80

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L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel under Strickland, a party must demonstrate both (1) that counsel's actions fell outside the range of professionally competent assistance, and (2) that petitioner suffered prejudice as a result. Id. at 687-90, 104 S. Ct. at 2064-66; see also United States v. Leonti, 326 F.3d 1111, 1120-21 (9th Cir. 2003); Anderson v. Calderon, 232 F.3d 1053, 1084 (9th Cir. 2000); United States v. Allen, 157 F.3d 661, 665 (9th Cir. 1998). The first prong of the test requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Judicial scrutiny of counsel's performance is highly deferential, and courts will not – as a general rule – second-guess the strategic choices made by counsel. See id. at 689, 104 S. Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Demonstrating prejudice under the second prong of the test requires more than a showing that the error in question might have had some conceivable effect on the outcome of the proceeding. Instead, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 1068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.; see also Roe v. Flores-Ortega, 528 U.S. 470, 482, 120 S. Ct. 1029, 1037, 145 L. Ed. 2d 985 (2000) (citations and internal quotation marks omitted, alteration removed) ("We normally apply a strong presumption of reliability to judicial proceedings and require a defendant to overcome that presumption by showing how specific errors of counsel undermined the reliability of the finding of guilt. Thus, in cases involving mere 'attorney error,' we require the defendant to demonstrate that the errors actually had an adverse effect on the defense."). "Because failure to meet either prong is fatal to [the petitioner's] claim, there is no requirement that [the court] 'address both components of the inquiry if the defendant makes an insufficient showing on one.'" Gonzalez v. Wong, 667 F.3d 965, 987 (9th Cir. 2011).

III. Analysis

In its Oppositions, the Government contends that Petitioners' claims of district court error are procedurally defaulted. Both Cazares and Martinez admit that they did not raise these claims on direct appeal, and they fail to demonstrate either cause or prejudice to excuse the procedural default. Nor do Petitioners establish that they are actually innocent. Petitioners' claims of error

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also fail on the merits. The record reflects that the Indictment was signed by the foreperson and, even if it did not, this issue does not implicate this Court's subject-matter jurisdiction over the crimes charged; Petitioners' convictions on Count One and Two are crimes of violence for purposes of Count Three; and the jury instructions on the elements of the crime charged in Count Two correctly stated the law. Additionally, Petitioner's hearsay and First Amended arguments are contrary to established law.

Petitioners' ineffective assistance of counsel claims fail because they do not show that their counsels' performance at trial or on appeal was objectively unreasonable or that such performance prejudiced their defenses. Finally, because Petitioners do not allege any claims that amount to error, they cannot show errors that accumulate to the level of a constitutional violation. In its Oppositions to Petitioners' efforts to supplement their 2255 Motions with additional grounds, the Government asserts that those supplemental grounds are untimely and, in the alternative, fail on the merits.

For all of the reasons articulated by the Government in its Oppositions to Petitioners' 2255 Motions and related filings, the Court denies the 2255 Motions. The Court additionally denies all of Petitioners' other pending motions and requests.

IV. An Evidentiary Hearing is not Required

Because the record conclusively demonstrates that Petitioners are not entitled to relief on any of the grounds set forth in their 2255 Motions, the Court finds that an evidentiary hearing would not be of assistance to the Court and therefore is not required. See, e.g., United States v. Mejia-Mesa, 153 F.3d 925, 929 (9th Cir. 1998) ("The district court has discretion to deny an evidentiary hearing on a § 2255 claim where the files and records conclusively show that the movant is not entitled to relief.").

Conclusion

For the foregoing reasons, Petitioners' 2255 Motions are denied and the actions are dismissed with prejudice. If Petitioners give timely notice of an appeal from this Order, such notice shall be treated as an application for a certificate of appealability, which will not issue because Petitioners have failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 F.3d 322 (9th Cir. 2003);

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Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004). The Court denies all other pending motions and requests. The Court will enter Judgments consistent with this Order.

IT IS SO ORDERED.

Attachment (Redacted Verdict Form)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA


ALEJANDRO MARTINEZ,
Petitioner-Defendant
v.
UNITED STATES OF AMERICA,
Respondent-Plaintiff,

No. CV 17-4723 PA
CR 04-415 PA
JUDGMENT

Pursuant to the Court's May 8, 2018 minute order denying dismissing the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 filed by petitioner-defendant Alejandro Martinez,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that petitioner-defendant's Motion Pursuant to 28 U.S.C. § 2255 is denied and this action is dismissed with prejudice.

DATED: May 8, 2018


Percy Anderson
UNITED STATES DISTRICT JUDGE