Appx - A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

YANNIER ARIAS,

Petitioner,

v.

Case Nos: 18-cv-2599-T-24AAS
15-cr-328-T-24AAS

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE comes before the Court on Petitioner Yannier Arias's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Doc. 1). The Government filed a response in opposition to the motion (Doc. 10), to which Petitioner filed a reply (Doc. 7).

Having carefully considered the parties' submissions together with the record in Petitioner's criminal case proceedings, the Court finds that Petitioner's section 2255 motion is due to be denied.

I. PROCEDURAL HISTORY

Petitioner was charged by indictment with one count of conspiracy to commit access-device fraud and aggravated identity theft, in violation of 18 U.S.C. § 371; nine counts of access-device fraud, in violation of 18 U.S.C. §§ 1029(a)(1) and 2; five counts of aggravated identity theft, in violation of 18 U.S.C. §§ 1029(a)(1) and (b)(2), 1028A, and 2; an additional count of conspiracy to commit access-device fraud, in violation of § 371; and one count of possession of 15 or more counterfeit and unauthorized access devices, in violation of 18 U.S.C. §§ 1029(a)(3)

and 2. (Cr-Doc. 111.)[1] Petitioner moved to sever counts one through nine of the indictment from the remaining counts (Cr-Doc. 57), this Court denied the motion (Cr-Doc. 73) and, after a trial, the jury found Petitioner guilty as charged (Cr-Doc. 90).

In advance of Petitioner's sentencing, the United States Probation Office in a Pre-Sentence Investigation Report determined that Petitioner had a total guidelines offense level of 24 and a criminal history category of III, for an advisory range of imprisonment on the access-device fraud convictions of 63 to 78 months. (PSR ¶¶ 71, 79, 120). Petitioner also faced a mandatory consecutive two-year term of imprisonment for at least one of the aggravated identity theft convictions under 18 U.S.C. § 1028A(b)(4). (*Id.* at ¶ 119). The Probation Office did not include any reduction to Petitioner's offense level for acceptance of responsibility pursuant to USSG §3E1.1, but Petitioner submitted a "Statement of Acceptance of Responsibility," wherein he purported to explain his role in the offenses. (*See* Cr-Doc. 108, 126).

At sentencing, this Court rejected Petitioner's request for any reduction to his offense level based on acceptance of responsibility or on his claimed minor role in the offense, determined that he had a guidelines offense level of 24 and a criminal history category of III, and sentenced him—at the high-end of the guideline range—to serve 78 months' imprisonment to be followed by a two-year consecutive term of imprisonment. (Cr-Doc. 126 at 17–18, 29–30).

Petitioner, through counsel, appealed his conviction and sentence. (Cr-Doc. 116). He challenged: 1) this Court's denial of his pretrial motion to sever; 2) the admission of evidence of his high-speed flight from a traffic stop during which officers had found counterfeit credit cards

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[1] References to filings in Petitioner's criminal case number 8:15-cr-328-T-24AAS are cited throughout this Order as "Cr-Doc. [document number]." References to filings in this civil case are cited as "Doc. [document number]."

and driver licenses; 3) the sufficiency of the evidence; 4) this Court's denial of his request for acceptance of responsibility guidelines reduction; 5) this Court's calculation of his guidelines offense level and denial of a minor role reduction; 6) the calculation of his criminal history category; and, finally, 7) the substantive reasonableness of his sentence. The Eleventh Circuit Court of Appeals rejected all of these claims and affirmed Petitioner's conviction and sentence. *United States v. Arias*, 713 F. App'x 998 (11th Cir.). (Cr-Doc. 132; *see also* Doc. 6, Ex. 1 Ex. C (Petitioner's appellate brief)).

Petitioner's judgment of conviction became final on March 19, 2018, when his petition for certiorari review was denied by the United States Supreme Court. (Cr-Doc. 140). Petitioner timely filed his instant section 2255 motion on October 22, 2018. *Washington v. United States*, 243 F.3d 1299, 1300 (11th Cir. 2001) (if prisoner timely petitions for certiorari review, section 2255 one-year limitation period "begins to run when the Supreme Court denies certiorari or issues a decision on the merits").

II. PETITIONER'S CLAIMS FOR RELIEF

Petitioner asserts four claims of ineffective assistance of counsel in his section 2255 motion. The first two claims are based on sentencing issues, where Petitioner claims that counsel "could have but did not object" to 1) a two-level enhancement for "device-making equipment," and 2) using "the ostensible total loss" from a "multi-defendant conspiracy" instead of "jointly undertaken criminal activity." (Doc. 1, pp. 3–5). The third claim asserts alleged ineffective assistance of counsel in the "plea process[.]" (*Id.* at 5–7). Petitioner claims that counsel failed to provide the "constitutionally minimum advice necessary, in Cuban Spanish language [that] he could understand" and advised Petitioner that he "would and could only receive an additional 12 months sentence if he rejected the plea agreement capped at 36 months

by the government." *(Id.)* His fourth claim alleges that counsel failed to file pretrial motions to dismiss and suppress, failed to investigate "exculpatory evidence and testimony at trial," and failed to object to jury instructions or "improper argument by the government." (*Id.* at 7–9).

III. LEGAL STANDARDS

On collateral review, a petitioner bears the burden of proof and persuasion on each and every aspect of his claim, *see In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016), which is "a significantly higher hurdle than would exist on direct appeal" under plain error review, *see United States v. Frady*, 456 U.S. 152, 164–66 (1982). Petitioner's section 2255 motion raises four claims of ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court created a two-part test for determining whether a defendant received ineffective assistance of counsel. First, a defendant must demonstrate that his attorney's performance was deficient, which requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* Second, a defendant must demonstrate that the defective performance prejudiced the defense to such a degree that the results of the trial cannot be trusted. *See id.*

To succeed on an ineffective assistance of counsel claim, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The reasonableness of an attorney's performance must be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *See id.* at 690. The movant carries a heavy burden, as reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered a sound trial strategy." *Id.* at 689 (citation and internal quotation marks omitted).

Simply showing that counsel erred is insufficient. *See id.* at 691. A movant must establish that there was a reasonable probability that the results would have been different but for counsel's deficient performance. *See id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

To establish deficient performance, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." *See Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*). A petitioner demonstrates prejudice only when he establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* If the petitioner fails to establish either of the *Strickland* prongs, his claim fails. *See Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1319 (11th Cir. 2005).

III. DISCUSSION

For the following reasons, Petitioner fails to meet his burden on each of his ineffective assistance of counsel claims:

1. Claims One and Two

Petitioner argues that counsel "could have but did not object" to 1) a two-level enhancement for "device-making equipment," and 2) using "the ostensible total loss" from a "multi-defendant conspiracy" instead of Petitioner's "jointly undertaken criminal activity." (Doc. 6 at 3–5). As the Government points out, counsel did, however, raise these issues, and others, in her initial objections to the PSR (*see* Doc. 6, Ex. 2, ¶¶ 1–2), but then counsel strategically decided to raise a minor role objection to the PSR and for Petitioner to make a statement of acceptance of responsibility, despite Petitioner having proceeded to trial, in attempt

to get a two-level departure. (*Id.*; Ex. 1 at ¶ 11; Cr-Doc. 108). Counsel was not able to get the guideline sentence reduced. Counsel then unsuccessfully appealed the reasonableness of Petitioner's sentence. (*See* Doc. 6, Ex. 1, at ¶¶ 11, 13, 14, Ex. C). The unsuccessful arguments, however, do not render counsel's representation ineffective.

As counsel states in paragraph 7 of her affidavit, an objection to the two-level enhancement for using device-making equipment was not legally or factually correct (Doc. 6, Ex. 1). The evidence introduced at trial against Petitioner included the computers, blank cards, skimming devices, encoder, and embosser used by Petitioner and his co-conspirator Lopez, which law enforcement seized from Lopez. (*See* Doc. 6, Ex. 1 at ¶ 11; Cr-Doc. 92). An objection to the device-making enhancement would have been meritless and counsel does not render deficient performance by failing to assert a meritless argument. *See, e.g Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990) ("Counsel cannot be labeled ineffective for failing to raise issues which have no merit.").

Petitioner also argues that the loss included in his base offense level should be "ONLY Mr. Arias' 'jointly undertaken criminal activity'." This claim is without merit inasmuch as the Court did use that loss figure to calculate his sentence—i.e., all amounts attributable to the criminal activity that Petitioner jointly participated in with his coconspirators, Sardinas-Lopez and Vera. Counsel attests that she tried to explain the law of conspiracy and loss to Petitioner on several occasions, including two emails attached as Exhibit A to her affidavit. (*See* Doc. 6, Ex. 1, ¶ 8, Ex. A). Petitioner fails to even identify what loss figure he thinks is attributable only to him, how that loss would be calculated or how it would change his sentence in any way, much less reduce it.

For these reasons, Petitioner is not entitled to relief on Claims One and Two.

2. Claim Three

Petitioner asserts that counsel was ineffective in the "plea process," because she failed to provide the "constitutionally minimum advice necessary, in Cuban Spanish language [that] he could understand," and she advised Petitioner that he "would and could only receive an additional 12 months sentence if he rejected the plea agreement capped at 36 months by the government." (Doc. 1 at 5–7). Counsel states in her affidavit, however, that she had no communication issues with Petitioner, and even wrote him letters in Spanish, which he acknowledged with his signature. (*See* Doc. 6 , Ex. 1, ¶¶ 5, 10, Ex. B). Counsel states, "[t]here was no communication issues.... Counsel speaks "Cuban" Spanish. I spoke only "Cuban" Spanish until I was 5 years old and later learned English, in elementary school. The Defendant never said he could not understand me. In addition, [counsel's] legal assistant is bilingual (Spanish–English). The Defendant would call the office and if I was not there my legal assistant would speak to him. The Defendant also never complained that he could not understand the Court-appointed interpreter." (*Id.* at ¶ 5). As to Petitioner's understanding of pleading guilty versus going to trial, counsel states that she explained to Petitioner "many times" the overwhelming nature of the evidence, and "encouraged him to plead guilty." (*Id.* at ¶ 4).

Further, the plea agreement offered to Petitioner contained an agreed loss figure—and even followed-up with a reverse proffer, at the request of his counsel, extending the deadline to sign the plea agreement. (*See* Doc. 6, Ex 3). Counsel indicated that Petitioner responded that he did not want to go to prison. (*Id.*) It is clear that counsel advocated a plea offer, but Petitioner refused until a plea agreement (or the original loss figure) was no longer available, and then he elected to proceed to trial.

Just before trial started, the Court questioned Petitioner about his decision to go to trial:

> THE COURT: Okay. Mr. Arias, when we were here last Wednesday, I asked you if it was your intent to proceed to trial today and I'm going to ask you that same question again. Is it your desire to proceed to trial today?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. And you discussed that with your attorney?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. And you understand that you have the option of entering a plea of guilty or entering the plea of not guilty and proceeding to trial.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. And it is your desire to proceed to trial?
>
> THE DEFENDANT: Yes.

(Cr-Doc. 123 at 4–5).

Therefore, Petitioner received warnings from counsel and this Court, and his decision to proceed to trial was knowing and well-informed. The Court agrees with the Government that Petitioner's claim is no more than "buyer's remorse."

For these reasons, Petitioner is not entitled to relief on Claim Three.

3. Claim Four

Here, Petitioner claims that counsel (1) failed to file pretrial motions to dismiss or to suppress evidence, (2) failed to investigate "exculpatory evidence and testimony at trial," and (3) failed to object to jury instructions or "improper argument by the government." (Doc. 1 at 7–9). As the Government asserts, each of these claims involves strategic or tactical decisions by counsel. Sound tactical decisions within the range of reasonable professional competence are not vulnerable to collateral attack. *See e.g., Mills v. Armontrout*, 926 F.2d 773, 774 (8th Cir. 1991) (decisions relating to a reasoned choice of trial strategy and tactics not cognizable in

federal habeas proceeding in the context of ineffective assistance of counsel); *United States v. Guerra*, 628 F.2d 410, 413 (5th Cir. 1980). A tactical decision amounts to ineffective assistance of counsel "only if it was so patently unreasonable that no competent attorney would have chosen it." *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983); *accord Strickland*, 466 U.S. at 690. Thus, a court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690.

In her affidavit, Petitioner's trial counsel lists three pretrial motions that she filed on his behalf—a motion to exclude a video, a motion in limine, and a motion to sever. Further, she avers that there "were no grounds to file a Motion to Suppress." (Doc. 6, Ex. 1 at ¶ 6). Petitioner fails to identify any evidence that could or should have been suppressed or any legal ground for suppression.

Petitioner claims that the indictment and superseding indictment should have been dismissed because "it was not presented or returned by the grand jury in open court. While both [ ] have a page saying that they were "filed in open court," neither document was signed by the Clerk." (Doc. 1 at 7). Petitioner is mistaken, however, inasmuch as the Clerk filed both the indictment and superseding indictment the same day the grand jury returned them in open court. (*See* Doc. 1 (filed and docketed on Aug. 25, 2015), 51 (filed and docketed on Mar. 29, 2016); *see also* docket sheet for 8:15-cr-328).

Petitioner vaguely claims that his attorney should have done more, but he fails to identify any exculpatory evidence, objections to government evidence and/or arguments, or jury instructions that would have changed the result. He also asserts a vague claim that counsel's alleged omissions resulted from a conflict of interest. Counsel, in fact, was a zealous advocate

for Petitioner. She made strategic objections at trial (some of which this Court sustained). (See Cr-124 at 149, 206, 209–11; Cr-125 at 6, 29; Cr-Doc. 128 at 23, 36). She conducted an adequate and thorough pretrial investigation and she presented a defense case (mistaken identity), including calling defense witnesses. Defense counsel's decisions regarding the level of investigation warranted must be viewed with a strong presumption of reasonableness at the time the decision regarding investigation was made, not with the benefit of hindsight. *Strickland,* 466 U.S. at 689. No absolute duty exists to investigate particular facts or a certain line of defense. *Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000). Finally, as to jury instructions, any objection raised by counsel would have been meritless because this Court used pattern jury instructions reviewed and approved by all parties. (Cr-Doc. 89; Cr-Doc. 125 at 212–218; Cr-Doc. 128 at 63–34). *See Card v. Dugger,* 911 F.2d 1494, 1520 (11th Cir. 1993). For these reasons, Petitioner is not entitled to relief on his fourth claim.

All of Petitioner's claims of ineffectiveness at trial are contradicted by the record, counsel's affidavit, and the attachments to the Government's response to Petitioner's section 2255 motion.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Petitioner Yannier Arias's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) is **DENIED**. The Clerk is directed to enter judgment against Petitioner in the civil case and then to close that case.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a motion to vacate has no absolute entitlement to appeal a district court's final order in a proceeding under section 2255. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a Certificate of Appealability ("COA"). *Id.* "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Petitioner has not made the requisite showing in these circumstances. Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

DONE AND ORDERED at Tampa, Florida, this 13th day of March, 2019.

Susan C. Bucklew

SUSAN C. BUCKLEW
United States District Judge

Copies to:
Counsel of Record
Pro Se Petitioner

Appendix "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11302-C

YANNIER ARIAS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Yannier Arias is serving a total 102-month sentence for conspiracy to commit access-device fraud and aggravated identity theft, 9 counts of access-device fraud, 5 counts of aggravated identity theft, conspiracy to commit access-device fraud, and possession of 15 or more counterfeit and unauthorized access devices. He now moves for a certificate of appealability ("COA") on four claims presented to the district court in his *pro se* 28 U.S.C. § 2255 motion to vacate. To warrant a COA, Arias must demonstrate that reasonable jurists would debate the district court's denial of the claims. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

First, because the Sentencing Guidelines impose a two-level enhancement if the offense involved use of any device-making equipment, and evidence at trial showed that Arias did so, counsel had no meritorious argument to object to this two-level enhancement being applied to his sentence, and counsel was not ineffective. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th

Cir. 1994); U.S.S.G. § 2B1.1(b)(11) & n.10(A). Second, as a co-conspirator, he was responsible for the losses resulting from the reasonably foreseeable acts of his co-conspirators, so counsel had no meritorious argument to object to his sentence being increased based on the total loss amount of the conspiracy. *See Bolender*, 16 F.3d at 1573; *United States v. Dabbs*, 134 F.3d 1071, 1082 (11th Cir. 1998).

Third, his claim that counsel did not communicate a plea effectively to him, because she did not speak in a language—"Cuban" Spanish—that he could understand, fails. Counsel spoke "Cuban" Spanish, the first language that she learned, to Arias, who did not express any contemporaneous complaints understanding her, and she encouraged him to enter a guilty plea. Additionally, the trial court ensured that he understood that it was his decision to plea or proceed to trial, and Arias responded to the judge that it was his choice to proceed to trial. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991).

Fourth, counsel had no meritorious objection to raise against the pattern jury instruction given, *see Bolender*, 16 F.3d at 1573, and Arias did not identify what exculpatory evidence counsel should have found, which is insufficient to present a claim, *see Tejada*, 941 F.2d at 1559. He also did not identify what evidence he wished counsel to file a motion to suppress against, *see Tejada*, 941 F.2d at 1559, and counsel had no meritorious basis to file a motion to dismiss the indictment and superseding indictment, which were properly returned in open court, *see Bolender*, 16 F.3d at 1573; *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987) (stating that "[t]here is a strong presumption that trial counsel's conduct is the result of trial strategy").

Because reasonable jurists would not find the district court's assessment of his claims debatable or wrong, or that the issues deserves encouragement to proceed further, Arias's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

Appendix "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11302-C

YANNIER ARIAS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Yannier Arias has filed a motion for reconsideration of this Court's June 27, 2019, order denying his motion for a certificate of appealability to review the denial of his motion to vacate, 28 U.S.C. § 2255. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.