Appendix A

Rodriguez v. United States

United States Court of Appeals for the Eleventh Circuit

February 12, 2020, Decided

No. 19-10335-B

Reporter
2020 U.S. App. LEXIS 4641 *

WEYLIN O. RODRIGUEZ, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.

Prior History: [*1] Appeal from the United States District Court for the Middle District of Florida.

United States v. Rodriguez, 589 Fed. Appx. 513, 2015 U.S. App. LEXIS 49 (11th Cir. Fla., Jan. 5, 2015)

Counsel: ***Weylin O. Rodriguez***, Petitioner - Appellant, Pro se, Coleman, FL.

For United States of America, Respondent - Appellee: Roberta Josephina Bodnar, U.S. Attorney's Office - FLM, Ocala, FL; U.S. Attorney Service - Middle District of Florida, Tampa, FL.

Judges: Elizabeth L. Branch, UNITED STATES CIRCUIT JUDGE.

Opinion by: Elizabeth L. Branch

Opinion

ORDER:

Weylin O. Rodriguez's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Elizabeth L. Branch

UNITED STATES CIRCUIT JUDGE

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Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Weylin O. Rodriguez,

Petitioner,

v. **Case No: 8:16-cv-798-MSS-AEP**

USA,

Respondent.
_____/

ORDER ON RODRIGUEZ'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

This matter is presented to the Court on the Motion of Petitioner Weylin O. Rodriguez ("Rodriguez") to Vacate, Set Aside, Or Correct Sentence Pursuant to 28 U.S.C. § 2255.[1] Civ. Doc. 1.[2] For the reasons that follow, Rodriguez's Motion is **DENIED**.

I. BACKGROUND

Rodriguez was indicted on one count of conspiring to engage in sex trafficking, in violation of 18 U.S.C. §1594(c) (Count One); four counts of sex trafficking, in violation of 18 U.S.C. §§ 1591(a)(1) and (a)(2) and 2 (Counts Two, Four, Five, and Six); two counts of using and carrying a firearm during and in

1 Rodriguez has subsequently offered numerous supplemental pleadings and notices of supplemental authority, Civ. Docs. 14, 20, 21, which the Court has considered and determined have no persuasive bearing on this proceeding.

2 References to filings in criminal case number 8:12-cr-136-MSS-AEP are cited as "Doc. [document number]." References to filings in this civil case are cited as "Civ. Doc. [document number]."

relation to, and possessing a firearm in furtherance of, the offenses charged in Counts Two and Counts Six, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Counts Three and Seven); one count of transporting a minor for prostitution, in violation of 18 U.S.C. §§ 2423(a) and 2 (Count Eight); one count of coercing an individual to travel in interstate commerce to engage in prostitution, in violation of 18 U.S.C. §§ 2422(a) and 2 (Count Nine); and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (Count Ten). Doc. 35. Rodriguez pled not guilty, Doc. 41, and proceeded to trial, Doc. 229, Doc. 231, Doc. 232, Doc. 234, Doc. 235, Doc. 237, Doc. 238, Doc. 240. After the Court denied Rodriguez's motion for a judgment of acquittal on all counts, Doc. 238 at 152–57, the jury found him guilty on all counts except Count Three. Doc. 165; Doc. 240 at 105–09.

The Court sentenced Rodriguez to concurrent terms of life imprisonment on Counts One, Two, Four, Five, Six, and Eight; 240 months' imprisonment on Count Nine; and 120 months' imprisonment on Count Ten, all followed by a consecutive term of 60 months' imprisonment on Count Seven. Doc. 192; Doc. 194 at 2; Doc. 241 at 55–56.

Rodriguez subsequently appealed his conviction and sentence. Doc. 195. On January 5, 2015, in an exhaustive opinion, the Eleventh Circuit Court of Appeals affirmed Rodriguez's conviction and sentences. Doc. 261, Doc. 262. Rodriguez timely filed his section 2255 motion on March 31, 2016.

A. Statement of facts

1. Rodriguez's crimes

Weylin Rodriguez preyed upon young girls by sexually exploiting and physically abusing them for his prurient interest and financial gain. "Get Money Bitch" ("G.M.B.") was the name of his organization, and, while running it, Rodriguez ultimately coerced and forced numerous girls into prostitution, using beatings and humiliation of them and others in their presence to create a climate of fear. His reign of violence and criminal activity spanned from central Florida up through Charlotte, North Carolina.

Rodriguez obtained girls for prostitution through a variety of mechanisms, including (1) fraudulent representations promising them jobs as models; (2) manipulation by pretending to be charming and romantically interested in the girls; (3) intimidation; and (4) outright violence. Once he had physical possession of the girls, he maintained possession and coerced them into prostitution through a cycle of "cupcaking" and violence. "Cupcaking" is an "industry" term denoting a process by which, Rodriguez would woo and romance underage and adult women, engage in ostensibly consensual sexual intercourse with them, and play favorites, ultimately manipulating and enticing them to do what he wanted. More often , though, Rodriguez used brute force and intimidation by subjecting the girls and others in their presence to beatings, threats of beatings, and threats with firearms. Through the manipulative and violent environment he created, each girl worked as a prostitute for him and they were required to provide him with all their cash

proceeds.

2. Rodriguez's sentencing

In the Presentence Investigation Report ("PSR"), the United States Probation Office recommended that the Court divide Rodriguez's counts of conviction into eight groups. PSR ¶¶ 64–118. Rodriguez ultimately had a total offense level of 46, PSR ¶ 124. With a criminal history category of VI based on 16 criminal history points, PSR ¶ 141, he faced a United States Sentencing Guidelines sentence of life imprisonment, to be followed by a mandatory consecutive term of at least five years' and up to life imprisonment on Count Seven. PSR ¶¶ 125, 190. He also faced statutory maximum terms of life imprisonment on Counts One, Two, Four, Five, Six, and Eight, 20 years' imprisonment on Count Nine, and 10 years' imprisonment on Count Ten. PSR ¶¶ 184–189.

At sentencing, the United States objected to the probation office's failure to recommend, among other things, a two-level increase in Rodriguez's offense level pursuant to USSG §3C1.1 for obstruction of justice. Doc. 241 at 8. The United States presented evidence that, after their arrests, Rodriguez had written to co-conspirator Pria Gunn ("Gunn")[3], warning her that "loose lips sink ships" and that "doubt leads to destruction" and urging her to "stay solid" and to "[j]ust wait and hold out," because he "would never turn [his] back on [her]." Doc. 241 at 26–28; Gov't Sent. Exhs. 1–3. The United States also pointed to trial evidence that

3 Pria Gunn was a named co-conspirator in the initial Complaint, (Doc. 1), who was ultimately charged in a separate action.

Rodriguez, in code, had directed his co-defendant Tatjuana Joye ("Joye")[4] to move his guns after his arrest. Doc. 241 at 28–29; see Doc.232 at 44–45; GXs 7A, 7B. The Court found Rodriguez's letters to Gunn inadequate to establish obstruction but imposed a one-level increase, based on Rodriguez's directions to Joye. Doc. 241 at 31.

Rodriguez objected to the probation office's recommendation of a two-level increase for undue influence, stating, "Our position is that this was voluntary conduct" on the victims' part. Doc. 241 at 21. The Court overruled that objection. Doc. 241 at 22. The Court also overruled Rodriguez's objection to the aggravating-role increase, which Rodriguez argued was unfair because Joye and Gunn, whom he asserted were equally culpable, had not received that increase. Doc. 241 at 21.

After resolving all of the objections, the Court concluded that Rodriguez's total offense level was 47 and he had a criminal history category of VI, for an advisory guidelines sentence of life imprisonment. Doc. 241 at 38; USSG Ch.5, Pt.A. One of the victims and two of the victims' mothers then testified to the devastating effect Rodriguez had had on their lives, after which the United States urged the Court to impose a life sentence. Doc. 241 at 39–49.

During an exchange with defense counsel, the Court asked if Rodriguez wanted to speak in allocution. Doc. 241 at 49. Defense counsel responded: "No.

4 Co-Defendant Tatjuana Joye pleaded guilty to Count One of the Indictment in the underlying criminal action. Doc. 98.

We stand on *Mitchell* [*v. United States*, 526 U.S. 314, 119 S. Ct. 1307 (1999)], he has the right to remain silent and that not be used against him. We'd ask the Court to allow him to do that." Doc. 241 at 49. Defense counsel then urged the Court to deviate downward to the statutory minimum sentence of 15 years' imprisonment, followed by the mandatory consecutive 5 years on Count Ten, for a total sentence of 20 years' imprisonment. Doc. 241 at 50. Counsel referred to his sentencing memorandum, in which he had identified portions of the record that he argued supported his continued insistence that the victims had been willing participants. Doc. 241 at 51–52; *see* Doc. 189. Counsel further argued, as he had fully articulated in his memorandum, that Rodriguez's mother had been a prostitute and his father a pimp, he argued that Rodriguez had been "doomed for failure." Doc. 241 at 53. He pointed out that Rodriguez had witnessed his mother prostituting and had been assigned to steal from her "john,' while observing his mother in these horribly compromising circumstances. *Id.*; *see* Doc. 189 at 13 (describing Rodriguez's "turbulent . . . childhood" as the son of a drug-addicted prostitute and a pimp with connections to organized crime). He also argued that a sentence of life imprisonment would unfairly exceed Gunn's four-year sentence and Joye's sentence of time-served. Doc. 241 at 54; *see* Doc.186 at 14–15.

Stating that it had considered the PSR, the parties' sentencing memoranda, the evidence at trial, the jury's findings, and the victims' statements at the sentencing hearing, this Court sentenced Rodriguez to a total term of life imprisonment plus five years. Doc. 241 at 56. The Court explained that, having

considered the sentencing guidelines and the 18 U.S.C. § 3553(a) factors, it found its sentence sufficient but not greater than necessary to comply with the statutory purposes of sentencing. Doc. 241 at 58. The Court noted in particular the heinous facts of Rodriguez's offenses of conviction, his apparent lack of remorse (expressly unrelated to his decision not to allocute[5]), and his extensive criminal history, all of which led this Court to find that no other sentence would suffice to protect the community. Doc. 241 at 58–59.

Rodriguez's counsel objected to both the procedural and substantive reasonableness of the sentence. Doc. 241 at 60–61.

II. DISCUSSION

A. Burden of proof

In general, on collateral review the 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) (collecting cases), 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).

Rodriguez cannot meet this burden.

B. Timeliness and Cognizability

5 The Court expressly did not consider Rodriguez's decision to remain silent in evaluating his lack of remorse, stating "The Court does not begrudge the Defendant his right to remain silent." Doc. 241 at 59. Instead, Defendant's lack of remorse was determined based upon "his demeanor in [the] proceedings" and "his behavior after he was incarcerated," which included "writing letters continuing to attempt to engage in this sort of conduct," all of which suggested to the Court a defendant who had not been moved by the effect of his conduct. *Id.*

The Government concedes the timeliness and cognizability of Rodriguez's claims.

Rodriguez's judgment of conviction became final on April 5, 2015, when the time for seeking certiorari review had expired, therefore, he had until April 4, 2016, to file his section 2255 motion. *See Kaufmann v. United States*, 282 F.3d 1336, 1338 (11th Cir. 2002) (if prisoner does not petition for certiorari, conviction becomes final upon expiration of ninety-day period for seeking certiorari) Rodriguez timely filed his section 2255 motion on March 31, 2016. *See Washington v. United States*, 243 F.3d 1299,1301 (11th Cir. 2001) (prison mailbox rule applies when movant is pro se).

Section 2255 authorizes an attack on a sentence on four grounds: (1) it was imposed in violation of the Constitution or laws of the United States; (2) it was imposed without jurisdiction; (3) it exceeds the maximum authorized by law; or (4) it is otherwise subject to collateral attack. 28 U.S.C. § 2255. Rodriguez's claims that counsel was ineffective by failing to conduct pretrial investigation, failing to mount a credible defense at trial and failing to counsel defendant appropriately at sentencing are grounded in the Sixth Amendment and are, therefore, cognizable under 28 U.S.C. § 2255. *See, e.g., Lynn v. United States*, 365 F.3d 1225, 1234 n.17 (11th Cir. 2004) (ineffective assistance claims should be decided in section 2255 proceedings).

C. Merits

The Government challenges the claims as meritless, however.

To succeed on an ineffective assistance of counsel claim, a petitioner must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). When evaluating performance, this Court must apply a "strong presumption" that counsel has "rendered adequate assistance and [has] made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. . . . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc; quoting *White v. Singletary*, 972 F.2d 1218, 1220–21 (11th Cir.1992)).

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).

1. Failure to Conduct Pretrial Investigation

Rodriguez claims ineffective assistance of counsel for failure to conduct pretrial investigation. Civ. Doc. 1-1. He appears to contend that counsel failed to file pre-trial motions, obtain an expert witness, obtain a favorable plea agreement, or in the alternative prepare for trial. *Id.*

Rodriguez's defense counsel, Assistant Federal Public Defender A. Fitzgerald Hall provided an affidavit in response to Rodriguez's claims. Defense counsel's affidavit as well as the court record belies Rodriguez's contentions that his counsel failed to prepare for trial. Hall's affidavit details extensive efforts he and his office undertook to prepare for trial and mount a defense on Rodriguez's behalf. In addition to filing numerous pretrial motions, *see* Docs. 46, 51, 64, 68, 69, 75, 83, 91, 95, 96, 120, and 121, Hall met with Rodriguez multiple times to prepare a defense in the case; traveled to Orlando, Florida, to investigate the alleged crime scenes; and spoke with Rodriguez's relatives to obtain additional information about the criminal allegations.

Defense counsel must perform a "reasonable" investigation or make a "reasonable" decision that such an investigation is not warranted. *Mitchell v. Kemp*, 762 F.2d 886, 888 (11th Cir. 1985); *Strickland*, 466 U.S. at 691. 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. *Id.* at 689. No absolute duty exists to investigate particular facts or a certain line of defense. *Chandler*,

218 F.3d at 1317. *Strickland's* approach toward investigation "reflects the reality that lawyers do not enjoy the benefit of endless time, energy, or financial resources." *Chandler*, 218 F.3d at 1318 n.22 (citing *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994)). The duty to investigate "does not . . . compel defense counsel to investigate comprehensively every lead or possible defense . . . or to scour the globe on the off-chance something will turn up." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). To show counsel's performance was unreasonable, a defendant has the burden of proving that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 496 F.3d 1270, 1281 (11th Cir. 2007).

Given the foregoing, Rodriguez has not demonstrated that AFPD Hall's pretrial investigation and preparation for trial were unreasonable under the circumstances. Moreover, Rodriguez has not demonstrated any prejudice resulting from the alleged inadequate pretrial investigation. He does not detail the "information he allegedly provided to defense counsel" nor how that information would have changed the outcome of his case, but for counsel's alleged deficiency.

Rodriguez alleges that his counsel was ineffective for failing to obtain a plea agreement with a sentence of determinate length. Civ. Doc. 1-1 at 6. No evidence exists, however, to support Rodriguez's allegations that counsel failed to negotiate a plea on his behalf. The Government was under no obligation to extend a plea offer to Rodriguez, "[t]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." *Lafler v. Cooper*, 132 S. Ct. 1376, 1395

(Mar. 21, 2012) citing *Weatherford v. Bursey,* 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). AFPD Hall, however, correctly attests that he did contact the prosecutor about resolving the case short of trial. *See* Civ. Doc. 9-1. Defense counsel was advised that Rodriguez would be required to plead guilty to a human trafficking charge, in violation of 18 U.S.C. §1591(a), as well as two counts of using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §924(c). The plea agreement proposed by the government carried a forty-five year mandatory sentence. There is no reason to believe that Rodriguez's experienced defense counsel would not have discussed with him the ramifications of choosing to plead guilty versus proceeding to trial.

In fact, AFPD Hall's effort to negotiate a plea on Rodriguez's behalf and Rodriguez's decision not to plead guilty are supported by the record. Specifically, on October 9, 2012, at a hearing at which Rodriguez was present, the Court inquired as to the possibility of a plea. Doc. 227 p. 3. At that time AFPD Hall advised the Court there would be no plea. *Id.* The following exchange then occurred:

THE COURT:	All right.
MR. HALL:	For the record, the Government's offer is two 924(c)s and a plea to one of the substantive counts of sex trafficking of a minor. Regardless of scoring the sex trafficking of a minor, the two 924(c)s will start at 30 years in this case and Mr. Rodriguez has declined that.
MS. HARRIS:	Your Honor, just to clarify, the Government did not provide a formal offer. The defense counsel asked if

there would be a plea offer, what would it be, and that is what he was advised, but no plea agreement has been prepared. We've always been told that he did not want a plea agreement, so no formal offer in writing has been provided to the Defendant.

THE COURT: But you would agree that, at a minimum, those demands would be required in such a plea?

MS. HARRIS: That is correct, and that did expire approximately three weeks ago.

THE COURT: All right.

Id.

At no time during that proceeding did Rodriguez ever advise that he wanted to plead guilty. Undoubtedly, Rodriguez received a lengthier sentence than he likely would have received had he pled guilty. Rodriguez, however, chose to proceed to trial after being fully advised by counsel of his potential sentencing exposure and the evidence against him.

Importantly, the *Strickland* test also applies to claims of ineffective assistance of counsel arising out of the plea negotiation process. *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). The prejudice test in the context of the plea process "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* At 59. Rodriguez must demonstrate that, but for his counsel's alleged ineffectiveness, he would have chosen not to go to trial, would have pled guilty, and would likely have received a lower sentence. Rodriguez's unsupported claims do not withstand scrutiny and should be discounted. *See United States v. Purdy*, 245 F. Supp. 2d 411, 416 (D. Conn. 1999)

("'[a defendant's] self-serving, post-conviction statement was insufficient by itself to meet [his] burden of proving the 'reasonable probability' that [the defendant] would have in fact accepted the [plea] offer.'") Rodriguez rejected the government's offer and exercised his right to a trial in front of a jury of his peers, who convicted him of his crimes. He is now regretting not having accepted the government's original offer of forty-five (45) years because, following his trial and conviction, he was sentenced to multiple life sentences.

As such, Rodriguez fails to meet the first prong of the *Strickland* test.

2. Failure to Mount a Credible Defense at Trial

Rodriguez next argues that his counsel's failure to investigate the government's witnesses in an effort to develop impeachment material and call defense witnesses constitutes ineffective assistance. Civ. Doc. 1-1 at 8–11.

Rodriguez incorrectly asserts that the government's witnesses had significant and serious criminal histories. *Id.* at 8. Prior to trial, the United States filed a Motion *in Limine* to Exclude Evidence of Criminal History Pursuant to Rules 608 and 609 of the Federal Rules of Criminal Procedure. Doc. 125. This motion specifically sought to limit defense counsel from eliciting evidence regarding any of the victims' or co-defendants' (1) arrests which did not result in criminal convictions, (2) criminal convictions that were neither felonies nor crimes of dishonesty, or (3) criminal convictions committed when the testifying witness was a juvenile. The Court granted the Government's motion to the extent that it precluded defense counsel from inquiring about certain criminal offenses. Doc.

132. The Court, however, allowed defense counsel to inquire into the witnesses' prior prostitution history. Despite the Court limiting the scope of defense counsel's cross-examination of the government's witnesses, undersigned counsel cross-examined the witnesses extensively and impeached them where appropriate. *See* Doc. 231, Doc. 232, Doc. 234, Doc. 235, Doc. 237.

Again, AFPD Hall attests that he conducted extensive trial preparation, including traveling to Orlando, Florida, to investigate the crime scenes and interviewing the defendant's relatives in an effort to identify defense witnesses. *See* Civ. Doc. 9-1. Defense counsel decided not to call defense witnesses at trial because their information was not helpful to the defendant's case. *Id.* This strategic decision of an experienced defense counsel was reasonable under the circumstances.

"Counsel will not be deemed unconstitutionally deficient because of tactical decisions." *McNeal v. Wainwright*, 722 F.2d 674, 676 (11th Cir. 1984) (citations omitted). Because of the strong presumption that counsel's performance was reasonable and adequate, great deference is shown to choices dictated by reasonable strategy. *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). Thus, a court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at of the time of counsel's conduct. *Strickland*, 466 U.S. at 690; *see also Stanley v. Zant*, 697 F.2d 955, 964 (11th Cir. 1983) (choosing a specific line of defense to the exclusion of others is a matter of strategy); *Crawford v. Head*, 311 F.3d 1288, 1312

(11th Cir. 2002) ("Deliberate choices of trial strategy and tactics are within the province of trial counsel after consultation with his client. In this regard, this court will not substitute its judgment for that of trial counsel."); *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001). Thus, even if in retrospect it is contended that counsel chose the wrong course, which has not been demonstrated here, that fact will not render his assistance ineffective. *Adams v. Balkcom*, 688 F.2d 734, 739 (11th Cir. 1982). Furthermore, the presumption of reasonable performance is "even stronger" when the court is "reviewing the performance of an experienced trial counsel[,]" such as AFPD Hall. *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005).

Further, even if it could be argued that counsel was somehow deficient for deciding not to call defense witnesses at trial, Rodriguez has failed to demonstrate prejudice. At trial, defense counsel cross-examined all of the government's witnesses and zealously argued for Rodriguez's acquittal. Ultimately, the fact finders rejected the Defendant's case and found Rodriguez guilty of nine out of ten counts. Rodriguez has failed to explain why the jury verdict would be different had defense counsel interviewed the government's witnesses prior to trial and elected to call defense witnesses.

3. Ineffective Assistance at Sentencing

Rodriguez argues that his counsel was ineffective at sentencing because he advised Rodriguez not to make any statement in allocution, contrary to Rodriguez's wishes; failed to offer any evidence, particularly drug abuse and

mental health evidence, in mitigation of the proposed life sentence; and failed to challenge Rodriguez's sentence as substantially unreasonable. Civ. Doc. 1-1 at 12–18.

AFPD Hall points out that Rodriguez denied the charges alleged in the indictment and repeatedly advised that he did not commit the crimes alleged against the victims. *See* Civ. Doc. 9-1. Counsel correctly notes that post-trial, it would have been unwise for Rodriguez to apologize for crimes he claimed not to commit—especially in light of his desire to appeal his conviction. *Id.*

Additionally, as discussed with Rodriguez prior to sentencing, a defendant has the right to remain silent at sentencing and the court can draw no negative inferences from such silence. *See Mitchell v. United States*, 526 U.S. 314, 329, 330, 119 S. Ct. 1307, 1315, 1316 (1999) (holding "by holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination; the judgement of the Court of Appeals is reversed; the concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing). To the extent Rodriguez complains that his failure to allocute at sentencing, or express remorse to the victims in this case, was the reason he received multiple life sentences, he is mistaken. The sentencing guidelines range, Rodriguez's criminal history, the nature of the instant offenses, the facts adduced at trial concerning his psychological manipulation and explosive physical abuse of women and girls, and

his apparent lack of remorse, expressly unrelated to his decision not to allocute, all weighed in favor of the imposition of a life sentence.

The record establishes and Rodriguez ignores that defense counsel presented mitigating evidence on his behalf. The PSR, the Defense Sentencing Memorandum and the Sentencing transcript all detail Rodriguez's turbulent childhood, drug abuse and mental health history. Additionally, before sentencing, defense counsel file a report by a professor at the University of South Florida Department of Criminology, College of Behavioral and Community Sciences. *See* Doc. 186-1. In that report, the professor opined, based on his review of materials that defense counsel had provided him, that Rodriguez was the inevitable product of his "uniquely disadvantaged" childhood and adolescence. *See* Doc. 186-1. Accordingly, Rodriguez has failed to demonstrate either deficient performance or prejudice, both of which are his burden to prove. *See Harrington v. Richter*, 131 S.Ct. 770, 777-78 (2011) (to establish entitlement to relief based on the ineffective assistance of counsel, defendant must satisfy heavy burden of proving both deficient performance and prejudice.)

Rodriguez is not entitled to consideration of his argument that his defense counsel failed to challenge his sentence as substantially unreasonable because it was resolved against him in an earlier proceeding. "Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255." *See United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) (quoting *United States v. Natelli*, 553 F.2d 5, 7 (2d Cir.

1977)); *see also Olmstead v. United States*, 55 F.3d 316, 319 (7th Cir. 1995) (section 2255 motion is "neither a recapitulation of nor a substitute" for direct appeal; absent changed circumstances of fact or law, court will not reconsider an issue already decided on direct appeal). Subsequent to the sentencing in the instant matter, Rodriguez appealed his conviction and sentence. One of the grounds alleged on direct appeal was that his sentence was substantively unreasonable. On January 5, 2015, The Eleventh Circuit affirmed Rodriguez's conviction and sentence and concluded that all of the issues raised on appeal lacked merit. Doc. 261. Rodriguez's substantive reasonableness claim has been presented to the Court, decided on the merits, and rejected. It is improper for him to repackage his argument and resubmit it to this Court as a collateral attack under §2255.

Accordingly, this ground is factually and procedurally meritless.

D. Need for an Evidentiary Hearing

Rodriguez is not entitled to an evidentiary hearing. Rodriguez has the burden of establishing the need for an evidentiary hearing, *see Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984) (en banc), and he would be entitled to a hearing only if his allegations, if proved, would establish a right to collateral relief, *see Townsend v. Sain*, 372 U.S. 293, 307 (1963). No hearing is required when, as here, the record establishes that a section 2255 claim plainly lacks merit, *see United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984).

III. CONCLUSION

Accordingly, the Court hereby **ORDERS** that Rodriguez's motion to vacate, set aside, or correct his sentence, Civ. Doc. 1, is **DENIED**. The **CLERK** is directed to enter a judgment against Rodriguez, to **CLOSE** this case, and to enter a copy of this order in the criminal action.

DONE and **ORDERED** in Tampa, Florida, this 7th day of December, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person