IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-40143

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GABRIEL CARDONA-RAMIREZ, also known as Pelon, also known as Gaby,

Defendant-Appellant

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

O R D E R:

Gabriel Cardona-Ramirez, federal prisoner # 95282-179, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his conviction and sentence for conspiracy to kill and kidnap in a foreign country. He also moves for leave to proceed in forma pauperis (IFP) on appeal. The district court denied Cordona-Ramirez's § 2255 motion because it was untimely and was barred by an appellate waiver.

To obtain a COA, Cardona-Ramirez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). He may satisfy "this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-*

El, 537 U.S. at 327; *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court's denial of federal habeas relief is based on procedural grounds, this court will issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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*, 529 U.S. at 484. When, as here, a district court denies relief on procedural grounds and, in the alternative, on the merits, the applicant "must show *both* that jurists of reason could debate the validity of the procedural [] ruling *and* that those same jurists could debate the validity of the merits ruling." *Cardenas v. Stephens*, 820 F.3d 197, 201 (5th Cir. 2016).

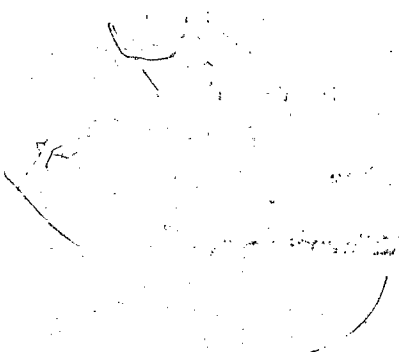
In addition to the issues discussed below, Cardona-Ramirez requests a COA to appeal the district court's time-bar ruling. As Cardona-Ramirez's "claim[s] easily fail on the merits, we need not address the procedural[] ruling." *Id.*

Cardona-Ramirez argues the merits of his § 2255 claims and contends that reasonable jurists could debate the district court's determination that his § 2255 claims were barred by his appellate waiver. He contends that (1) the district court should not have made a sua sponte determination that the waiver applied; (2) his plea agreement and appellate waiver were not made knowingly and voluntarily because he did not sign or acquiesce to the plea agreement containing the waiver; (3) the district court informed him at sentencing that he could raise ineffective assistance of counsel claims during his § 2255 proceedings; and (4) trial counsel coerced him to plead guilty and rendered his plea involuntary by allegedly misinforming him that the Government could file a superseding indictment seeking the death penalty if he chose to proceed to

trial. These arguments do not meet the standard for obtaining a COA. *See Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. at 484.

Accordingly, Cardona-Ramirez's motion for a COA is DENIED. His IFP motion is also DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE



Appendix A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 12, 2020

Mr. David J. Bradley
Southern District of Texas, Laredo
United States District Court
1300 Victoria Street
Room 1131
Laredo, TX 78042

No. 19-40143 USA v. Gabriel Cardona-Ramirez
USDC No. 5:19-CV-18

Dear Mr. Bradley,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Angelique B. Tardie

By: _____
Angelique B. Tardie, Deputy Clerk
504-310-7715

cc w/encl:
Mr. Gabriel Cardona-Ramirez
Ms. Carmen Castillo Mitchell

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GABRIEL CARDONA-RAMIREZ	§	
	§	
Petitioner	§	
VS.	§	CIVIL ACTION NO. 5:19-CV-18
	§	Criminal Case No. 5:08-cr-244-6
UNITED STATES OF AMERICA	§	

OPINION AND ORDER

Pending before the Court is a Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence By A Person in Federal Custody[1] filed by Gabriel Cardona Ramirez ("Cardona"). The Court has carefully reviewed all pertinent matters in this case. Based on this review and the application of governing legal authorities, the Court **DISMISSES** the motion.

I BRIEF BACKGROUND

In and around 2005 and 2006, the Gulf Cartel drug trafficking organization was involved in a battle to keep control of its territory. Through its enforcement arm, the "Zetas," it engaged in a series of murders, or attempted murders in the Laredo, Texas and Nuevo Laredo, Tamaulipas, Mexico area.[2] Laredo and Nuevo Laredo sit adjacent to each other with only the Rio Grande River separating these cities. Although technically stationed on the Mexican side, the Cartel operated on the United States side as well. The

[1] Dkt. No. 1.
[2] The facts in this section are pulled primarily from the Pre-Sentence Investigation Report and the factual admissions made at the time of the plea in this case in Criminal Case No. 5:08-cr-244-6. All docket references hereafter are to this criminal case unless otherwise noted.

[illegible]

[illegible]

[illegible]

Zetas, through its "sicarios" (hired killers) successfully targeted rivals of the Gulf Cartel killing and or wounding several individuals on both sides of the Rio Grande.

Cardona, identified as "Pelon" was charged with various interrelated counts pertaining to the drug trafficking and murders. He was one of the Zetas' sicarios involved on both the United States and Mexican side. Cardona was involved in the murder of Bruno Alberto Juarez-Orozco on or about June 8, 2005;[3] the murder of Moises Garcia and wounding of Diana Loera on or about December 8, 2005;[4] in an attempt to kill Michael David Lopez which resulted in the murder of Noe Flores on or about January 8, 2006;[5] and the murders of Jesus Resendez and Mariano Resendez on April 12, 2006.[6] These murders, although part of the charges in federal court, resulted in state court convictions.

On or about March 30, 2006, Cardona was also involved in the kidnapping and murder of Jorge Alfonso Aviles and Inez Villarreal. These murders occurred in Nuevo Laredo, Tamaulipas, Mexico but involved a communication to Cardona while he was in the United States. Jorge and Inez were kidnapped from a nightclub in Nuevo Laredo and taken to another location in Nuevo Laredo. Cardona traveled from the United States into Mexico to participate in the murders. By Cardona's own admission, Jorge and Inez were beaten and then Cardona slashed each with a broken bottle. He then "grabbed a little cup and . . . filled it with blood and . . . dedicated it to the 'Santisima Muerta.'" Jorge and

[3] Case No. 2005 CRN 630, in the 49th Judicial Court, Laredo, Webb County, Texas.
[4] Case No. 2005 CRN 952, in the 49th Judicial Court, Laredo, Webb County, Texas.
[5] Case No. 2005CRN 441, in the 49th Judicial Court, Laredo, Webb County, Texas.
[6] Case No. 2005CRN 770, in the 49th Judicial Court, Laredo, Webb County, Texas.

Inez each died from the beating and from being slashed. They were then "cooked"[7] and their bodies never recovered. Cardona was later recorded bragging about these murders.

On August 11, 2008 although charged on twenty-four counts, Cardona pled to only Count 32, conspiracy to kill and kidnap in a foreign country (the Count related to the murders of Jorge and Inez).[8] As part of a plea agreement, Cardona waived his right to appeal and his right to file a 28 U.S.C. § 2255 motion.[9] Nonetheless, Cardona filed and appeal, and it was considered on the merits by the Fifth Circuit Court of Appeals. On December 23, 2009, the Fifth Circuit affirmed the conviction and on June 17, 2010, the United States Supreme Court denied a petition for writ of certiorari.

From June 17, 2010 to the end of 2018, Cardona file absolutely nothing with this Court. Yet on January 28, 2019, Cardona filed the instant motion. Cardona, recognizing that his motion was filed long after his judgment became final, asserts that it is timely pursuant to 28 U.S.C. § 2255(f)(2) and/or (4). The Court address the timeliness issue first and then addresses another reason why Cardona's motion should be dismissed.

II. DISCUSSION

Cardona's motion under 28 U.S.C. §2255 is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Before AEDPA, criminal defendants could file motions attacking their

[7] A method used by the Cartel to dispose of bodies whereby they are deposited into a large barrel, doused with flammable liquid and set on fire.
[8] Minute Entry dated August 11, 2008.
[9] Dkt. No. 279.

conviction and sentence under 28 U.S.C. § 2255 at any time. After AEDPA, by contrast, motions under § 2255 are subject to a one-year limitations period.[10]

In most cases, the one-year statute of limitations begins to run on the date the conviction in the underlying criminal case becomes final. Generally, if an appeal has been taken, the conviction becomes final at the conclusion of the appellate process. Here, the appellate process ended when the Supreme Court denied the petition for writ of certiorari on June 17, 2010. However, if "governmental action in violation of the Constitution or laws of the United States" creates an impediment to making a motion, then the one-year statute of limitations begins to run on the date when the impediment is removed.[11]

1. Timeliness

a. *Section 2255(f)2)*

In this case, Cardona claims that the statute of limitations did not begin to run when his conviction became final in June 2010 but rather, commenced in February 2018, when the government-created impediment was removed. More specifically, Cardona argues that from February 2010 to October 22, 2018 he was incarcerated in a Texas prison that had no copies of the "USSG Manual or an annotated manual version such as *Federal Sentencing Law and Practice*." Cardona further contends that it was not until February 2, 2018 that he received a copy of *Federal Sentencing Law and Practice* and that he was unable to work on the instant motion until after May 5, 2018 because of a

[10] 28 U.S.C. § 2255(f).
[11] 28 U.S.C. § 2255(f)(2).

[illegible]

[illegible] The Supreme Court [illegible]

[illegible]

state-habeas appeal on which he was working. Generally then, Cardona complains of the inadequacy of the law library and legal materials available to him. Under certain circumstances, such a claim may satisfy § 2255(f)(2).

However, to invoke tolling under § 2255(f)(2), Cardona "must show that: (1) he was prevented from filing a petition (2) by [government] action (3) in violation of the Constitution or federal law."[12] Nonetheless, simply alleging that the library was inadequate will not suffice. The Supreme Court has stated that "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense . . . . [T]he inmate must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Similarly, the Fifth Circuit requires something more than just a claim of the inadequacy of the law library. A petitioner must at least "allege facts as to why the [] facility's lack of legal materials prevented him from filing a timely habeas application."[13] In *Krause*, the Fifth Circuit held that a petitioner's failure to "allege that he had no knowledge of AEDPA's statute of limitations before he was transferred to the [] facility which he claims had an adequate library" was fatal to his tolling argument.[14] Similarly, in *Balawajder v. Johnson,* the Fifth Circuit held that the absence of AEDPA from a prison library was not an impediment where the record reflected the prisoner's actual awareness of AEDPA before the tolling

[12] See *Egerton v. Cockrell,* 334 F.3d 433, 436 (5th Cir.2003) (addressing § 2244(d)(1)(B), the equivalent state habeas provision).
[13] *Krause v. Thaler*, 637 F.3d 558, 560–62 (5th Cir. 2011).
[14] *Id.* at 561.

[illegible]

[illegible]

[illegible]

period expired.[15] Even in *Egerton,* the case most often cited for the proposition that an inadequate law library may toll limitations, the Fifth Circuit remanded on the issue of whether Egerton was aware of the existence of AEDPA prior to the expiration of the limitations period.[16]

Here, the record reflects that Cardona knew of his ability to file a § 2255 motion as early as August 2008, when he pled in this case. At the re-arraignment hearing, the Court discussed with Cardona his waiver of the right to file a § 2255 motion. In very specific terms the Court advised Cardona that he "agreed to give up [his] right to . . . what is called a collateral attack sometimes referred to as a 2255."[17] The Court went on to elaborate that he was giving up the right to "come back to this court to claim that there was an error made. And it's not every kind of error, not every kind of mistake. But certain kinds of mistakes that you can claim by coming directly to this court, and if it turns out that there was an error made, it could change your conviction. It could change your sentence."[18] When Cardona responded that he was not aware he was giving up those rights, the Court granted Cardona the opportunity to withdraw his plea agreement but the Government declared that without a waiver, it would not enter into another plea agreement.[19] Cardona then replied that he would "go ahead and give up [his] right to appeal."[20] The Court then explained further the waiver of a § 2255 motion and

---

[15] *Balawajder v. Johnson,* 252 F.3d 1357, 2001 WL 422873, at *1 (5th Cir.2001) (unpublished).
[16] *Egerton,* 334 F.3d at 435.
[17] Dkt. No. 442, p. 33.
[18] *Id.* at pl 34.
[19] *Id.* at p. 35.
[20] *Id.* at p. 36.

emphasized the one year statute of limitations.[21] The Court gave Cardona the opportunity to discuss the matter further with his lawyer but Cardona chose to go forward with his plea understanding that he was waiving the right to file a § 2255 motion.[22] From this record, it is clear that Cardona knew long before January 2018, that (absent the waiver) he had a right to file a § 2255 motion and that it must be filed within one year.

Cardona has presented nothing to address how the absence of an adequate law library prevented him from asserting his right to file a § 2255 motion. Furthermore, the motion itself casts doubt on whether the absence of an adequate library prevented Cardona from filing a motion. Rather, the motion indicates the inadequacy of the law library simply prevented Cardona from addressing specific issues. Cardona indicates that the facility where he was housed did not have the United States Sentencing Manual or some similar material. Cardona then contends that "absent such materials Cardona could not conduct any research whatsoever into the USSGs nor prepare his § 2255 motion; all but one of Cardona's claims involve the correct interpretation and application of the USSGs."[23] Thus, it appears Cardona was aware of his right to file a § 2255 motion but simply had limited access to reference materials to support his claims.

The exhibits attached to Cardona's motion further support such a finding. Cardona attaches a form submitted to the law library on March 7, 2016 wherein he specifically requests a "Section 2255 form."[24] Even were the Court to consider that perhaps Cardona

---

[21] *Id.* at p. 38.
[22] The Court presents this colloquy here only to show Cardona's knowledge. The issue of waiver is addressed separately.
[23] Dkt. No. 1, p. 13.
[24] Dkt. No. 1, p. 28.

[illegible] Mass. [illegible]

[illegible]

[illegible] District cases of which this Court [illegible]

[illegible]

forgot what the Court explained to him, it is clear that Cardona knew at least by March 2016 that he could file a § 2255 motion. March 2016 is certainly more than one year before January 2019 when Cardona finally filed his motion.

Furthermore, Cardona certainly was aware of the right to file a habeas claim as of October 2016 when he filed a § 2254 motion in the Northern District of Texas.[25] In that case, originally filed with the state more than one year after the underlying state conviction had become final, Cardona made similar timeliness arguments. Significant to this Court's decision, in addressing the timeliness of that motion, Cardona claimed that throughout his incarceration he was housed in facilities with "either a woeful law library consisting of pamphlets of federal Rules of Procedure and *Fed. Sent. Guidelines Manual* or no law library."[26] Yet, here Cardona claims he had no access to any federal sentencing manual until February 2018. Nonetheless, a review of the record in the Northern District case reveals Cardona was aware of AEDPA long before he filed the instant case. There, Cardona specifically asserted he "did not know what AEDPA was until December 11, 2015 upon purchasing a Habeas Corpus book."[27] In that same case, Cardona submitted an exhibit dated July 2016 wherein he asserted he was "in active litigation and pursing a 2254 motion including a 2255 . . ."[28] Again, in December 2016, Cardona referenced AEDPA, claiming Texas prisons did not carry AEDPA materials in Spanish.[29] Thus, the record in the Northern District case, of which this Court can take judicial notice,

[25] See Case No. 7:16-cv-125, Cardona v. Davis, in the Northern District of Texas.
[26] *Id.*, Dkt. No. 1, p. 9.
[27] *Id.*
[28] *Id.*, Dkt. No. 15-1, p. 17.
[29] *Id.*, Dkt. No. 11, p. 9.

affirmatively shows Cardona knew of his right to file an AEDPA claim more than one year before he actually filed the instant motion.

Regardless of the inadequacy of the law libraries where Cardona was housed, it is clear from the record before this Court that Cardona knew of his right to file a § 2255 motion more than a year before he filed the instant motion. But even if this Court's record did not reveal such, Cardona fails to show how the inadequate law libraries prevented him from filing a § 2255 motion. At best Cardona shows that he had inadequate material to address the specific sentencing issues he wished to present, not that he was prevented from filing his motion. Furthermore, when viewed in light of the Northern District of Texas record,[30] any possible impediment was removed at least by December 2015.

For all of the foregoing reasons, the Court finds that Cardona was not prevented from filing his motion by some government-created impediment. The Court next considers Cardona's claim that the § 2255(f)(4) tolling provision should apply.

b. *Section 2255(f)(4)*

Section 2255(f)(4) provides that the one-year statute of limitations begins to run from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."[31] Thus, in order to come within this provision, Cardona must identify *the facts supporting his claims* that were recently discovered, and that he exercised due diligence to do so. The Supreme Court has

[30] See also the Fifth Circuit order in Case No. 17-10015, dated February 8, 2018 noting that Cardona "did not know what AEDPA was until December 2015, when he purchased a "Habeas Corpus book."
[31] 28 U.S.C. § 2255(f)(4).

explained that "diligence can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize" that he should act.[32] Here, Cardona does present some evidence to support a claim of diligence. More specifically, Cardona presents his requests to the law library asking for certain reference materials. The earliest of these requests is dated 2016, thus the Court is not convinced that Cardona exercised due diligence in light of the fact that Cardona was sentenced by this Court in 2009. However, assuming this demonstrates due diligence, such requests have nothing to do with the *discovery of facts supporting Cardona's claims*. At best, Cardona's requests support diligence in conducting research to support his claims but show nothing of when he discovered the facts supporting his claim.

Furthermore, Cardona does nothing more than reference § 2255(f)(4) in a conclusory fashion. His timeliness arguments all focus on the inadequacy of the law library and his attempts to obtain legal materials. Nowhere in the timeliness argument does Cardona identify any recently discovered facts supporting his claims. A review of the substantive sections of his motion make it clear that all the offense-related facts supporting his claims are facts that were know at the latest by the time of sentencing and that all the procedural facts were known at least by the time the appellate process was complete. Thus, Cardona fails to come within the tolling provisions of § 2255(f)(4).

Based on the foregoing, the Court finds that Cardona's Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence is barred by the one-year statute of

[32] *Johnson v. United States,* 544 U.S. 295, 308 (2005).

limitation which began to run on June 17, 2010 when the Supreme Court denied his petition for writ of certiorari. Nonetheless, the Court considers one other issue.

2. Waiver

As was noted earlier in this opinion, Cardona waived both his right to appeal and his right to collaterally attack his conviction and judgment. It is now well settled that defendant may waive his right to collaterally attack his conviction and sentence, so long as the waiver is knowing and voluntary.[33] Additionally, a court may sua sponte raise the issue of waiver and dismiss a motion where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.".[34] Thus, the Court considers whether Cardona's waiver bars the instant motion.

The Plea Agreement in this case included a waiver provision specifically providing that "the defendant is aware that Title 28, U.S.C. § 2255 affords the right to contest or 'collaterally attack' a conviction or sentence after the conviction or sentence has become final. The defendant waives the right to contest his/her conviction or sentence by means of any post-conviction proceeding."[35] The Plea Agreement was signed by Cardona on August 11, 2008. Additionally, Cardona confirmed that he had reviewed the Plea Agreement with his attorney before he signed it.[36] The Plea Agreement included an Addendum also signed by Cardona wherein he stated

---

[33] *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994); *United States v. Davila*, 258 F.3d 448, 451-52 (6th Cir. 2001); *see United States v. Bond*, 414 F.3d 542 (5th Cir. 2005) (holding that a "knowing and voluntary" standard applies to waiver of appeal).

[34] *United States v. Del Toro-Alejandre*, 489 F.3d 721, 723 (5th Cir. 2007).

[35] Criminal Case No. 5:08-cr-588-8, Dkt. No. 279, p. 4, ¶ 9.

[36] *Id.*, Dkt. 442, p. 43.

[illegible]

[illegible]

[illegible] right to an appeal and [illegible]

[illegible]

[illegible]

[illegible]

[illegible] to go forward with the view of [illegible]

[illegible]

> I have consulted with my attorney and fully understand all my rights with respect to the indictment pending against me. My attorney has fully explained and I understand all my rights with respect to the provisions of the United States Sentencing Commission's Guidelines Manual which may apply in my case. I have read and carefully reviewed every part of this plea agreement with my attorney. I understand this agreement and I voluntarily agree to its terms.

At the time of re-arraignment, the Court confirmed that Cardona had signed the Plea Agreement and specifically addressed the waiver provision. The Court admonished Cardona that he was giving up his right to an appeal and collateral attack.[37] After explaining the right to appeal, the Court advised Cardona that

> There's also something else that we refer to as a collateral attack. Sometimes we us the number 2255. That's a way that you can come back to this court to claim that there was an error made. And it's not every kind of error, not every kind of mistake. But certain kinds of mistakes that you can claim by coming directly to this court, you present your position to this court, and if it turns out that there was an error made, it could change your conviction. It could change your sentence. . . .Those are rights that you have without having to do anything special other than file the appropriate documents at the appropriate time. Those are rights that you have because this is a criminal proceeding. If you give up these rights, then that means that if I find you guilty, your conviction will stand. . . . Whatever sentence I give you, you will not be able to get that changed. Do you understand?"[38]

Cardona replied that he did understand but did not wish to give up those rights.[39] The Court then inquired whether the Government was willing to go forward with the plea agreement in the absence of a waiver and the Government responded that it would not.[40] After the Court explained that meant Cardona would remain set for trial, Cardona responded that he wished to go forward with the plea agreement. The Court again

---

[37] *Id.*, p. 33.
[38] *Id.* pp. 34-5.
[39] *Id.* p. 35.
[40] *Id.*

reviewed the right to appeal and to collaterally attack his conviction and sentence and what it meant to waive those right.[41] The Court also offered Cardona more time to talk to his attorney about any questions he might have. The Court confirmed that Cardona had no questions, did not need more time to talk with his attorney, understood his rights, understood the waiver and wished to waive his rights.

Cardona now contends that his plea was involuntary in that it was coerced by counsel. Generally, Cardona argues that his attorney repeatedly advised him that he should plead guilty because the Government intended to supersede the indictment to seek a life sentence[42] or the death penalty. The Supreme Court has held that "[w]here, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' "[43] The Supreme Court further explained that "a defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*' "[44] *McMann* generally holds that such a defendant "is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.[45]

---

[41] *Id.* pp. 36-40.
[42] Cardona was already subject to a maximum term of life imprisonment.
[43] *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985) (Citing *McMann v. Richardson,* 397 U.S. 759, 771 (1970).
[44] *Id.*, at 267 (Citing *Tollett v. Henderson,* 411 U.S. 258 (1973)).
[45] *McMann v. Richardson*, 397 U.S. 759, 774 (1970).

[illegible] without this protection [illegible] taken [illegible]

[illegible] having [illegible]

[illegible]

[illegible] Cautions [illegible]

[illegible] office to [illegible]

[illegible]

[illegible] constituted a serious danger on or [illegible]

[illegible]

Cardona makes no attempt to meet this burden, and in fact he cannot. The record makes clear that Cardona was actually facing a maximum term of life in prison thus advising him that the Government might argue for life in prison cannot render his plea involuntary. The record also reveals that Cardona was charged in a case where the Government could charge the death penalty. The Court specifically stated as much at the time of sentencing.[46] Additionally, Cardona's attorney confirmed that he had simply communicated the government's offer to Cardona, and the possibility that the Government would seek to supersede the indictment to seek the death penalty if Cardona did not accept the plea offer. Cardona has not alleged, much less shown that counsel's advice was erroneous.

The Court has reviewed the Rule 11 plea colloquy in its entirety to insure the voluntariness of the plea. The record reveals that the Court specifically asked Cardona whether anybody had threatened him or tried to force or coerce him into entering a plea of guilty and he responded "No, Your Honor."[47] Cardona also stated that he wished to enter a plea of guilty freely and voluntarily.[48] Additionally, as already noted, the Court gave Cardona the opportunity to withdraw his plea agreement and proceed to trial. The Court finds no Rule 11 violations that would render Cardona's plea involuntary and Cardona presents none other than his attorney's advice. Yet, Cardona does not even allege that the advice constituted a serious dereliction of counsel's duties.

---

[46] Dkt. No. 544, p. 4, 6.
[47] Dkt. No. 442, p. 45.
[48] *Id.*

Even if the record revealed some errors at re-arraignment, "the rule is that every alleged Rule 11 violation must be tested under the harmless error standard of Rule 11(h), and [a court] may not create reversible error out of a series of harmless errors unless the cumulative effect would sustain a conclusion that the voluntariness of [a] plea was materially affected. Here, it plainly will not sustain such a conclusion."[49]

III CONCLUSION

For the foregoing reasons, Cardona's Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence By A Person in Federal Custody is DISMISSED with prejudice. Should Cardona seek a certificate of appealability, same is DENIED. Additionally, the motion to proceed in forma pauperis is DISMISSED AS MOOT.

IT IS SO ORDERED.

DONE at McAllen, Texas, this 7th day of February, 2019.

Micaela Alvarez
United States District Judge

[49] *United States v. Cuevas-Andrade*, 232 F.3d 440, 445 (5th Cir. 2000), as amended on reh'g (Dec. 29, 2000).