United States v. Chacon-Lara

United States Court of Appeals for the Fifth Circuit

May 26, 2020, Filed

No. 19-40072

Reporter
806 Fed. Appx. 322 *; 2020 U.S. App. LEXIS 17043 **

UNITED STATES OF AMERICA, Plaintiff-Appellee v. MANUEL CHACON-LARA, Defendant-Appellant

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Southern District of Louisiana. USDC No. 7:18-CV-31, USDC No. 7:14-CR-1871-1.

United States v. Chacon-Lara, 690 Fed. Appx. 166, 2017 U.S. App. LEXIS 9612 (5th Cir. Tex., May 31, 2017)

Disposition: COA DENIED; AFFIRMED.

Core Terms

ineffective, sentence, movant

Counsel: For United States of America, Plaintiff - Appellee: Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Houston, TX.

Manuel Chacon-Lara, Defendant - Appellant, Pro se, Post, TX.

Judges: Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

Opinion

[*323] PER CURIAM:*

Manuel Chacon-Lara, federal prisoner # 19198-198, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion challenging his sentence for possession with intent to distribute methamphetamine. In his § 2255 motion, Chacon-Lara claimed that counsel rendered ineffective assistance by failing to request a "fast track" sentencing reduction.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court has denied the claims on the merits, "[t]he [movant] must demonstrate that reasonable jurists would find the district court's assessment of the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

constitutional claims debatable or wrong" or that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotation marks and citation [**2] omitted). Chacon-Lara has not met this standard with respect to his ineffective assistance claim and has therefore not shown an entitlement to a COA.

We construe his motion for a COA with respect to the district court's denial of an evidentiary hearing as a direct appeal of that issue, *see Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016), and affirm.

COA DENIED; AFFIRMED.

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App'x B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MANUEL CHACON-LARA	)	CIVIL ACTION NUMBER
	)	M-18-031
VS.	)	
	)	CRIMINAL NUMBER
UNITED STATES OF AMERICA	)	M-14-1871

ORDER OF DISMISSAL

The Court, having adopted the conclusions in the Report and Recommendation of United States Magistrate Judge Juan F. Alanis in Order of even date herewith, is of the opinion that Respondent's Motion to Dismiss should be granted and this cause of action should be dismissed.

It is, therefore, ORDERED, ADJUDGED and DECREED that Movant's Motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED, and that this cause of action is hereby DISMISSED.

The Court further ORDERS that no Certificate of Appealability be issued.

The Clerk shall send a copy of this Order to Movant and counsel for Respondent.

DONE on this 11th day of December, 2018, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

App'x C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MANUEL CHACON-LARA Movant,	§	
	§	CIV. NO. 7:18-cv-00031
VS.	§	
	§	CRIM. NO. 7:14-cr-01871
UNITED STATES OF AMERICA Respondent.	§	

REPORT & RECOMMENDATION

Movant, Mr. Manuel Chacon-Lara, a federal prisoner proceeding pro se, initiated this action by filing a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Civ. Dkt. No. 1.) This case was referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b). On October 12, 2018, Respondent filed an answer to Movant's motion. (Civ. Dkt. No. 12.) This case is ripe for disposition on the record.

Movant claims only that his attorney rendered ineffective assistance of counsel by failing "to request a fast track sentence mitigation in light [of] Chacon's eventual deportation to Mexico after the completion of his sentence." (Civ. Dkt. No. 1 at 4.)

As will be discussed further below, Movant's claim is without merit. In the Southern District of Texas, fast-track programs are only authorized to be used for felony illegal reentry offenses and transportation or harboring of alien cases. Movant pleaded guilty to a drug offense, which is not authorized to receive the benefits of a fast-track program. Therefore, any purported failure by Movant's attorney to argue for a fast-track program could not have prejudiced the Movant and resulted in ineffective assistance of counsel.

After a careful review of the record and relevant law, the undersigned recommends that Respondent's Motion to Dismiss (Civ. Dkt. No. 12) be **GRANTED** and Movant's § 2255 motion (Civ. Dkt. No. 1) be **DENIED**. It is further recommended that Movant's § 2255 motion (Civ. Dkt. No. 1) be **DISMISSED** with prejudice, and the case be closed. Finally, it is recommended that that the District Court **DECLINE** to issue a certificate of appealability in this matter.

BACKGROUND AND PROCEDURAL HISTORY

On September 1, 2015, Movant was charged by a grand jury with a two-count indictment for conspiracy to possess with intent to distribute a controlled substance and possession with intent to distribute a controlled substance. (Crim. Dkt. No. 14.) Movant pleaded guilty to the second count, possession with intent to distribute 500 grams or more of methamphetamine, on March 2, 2015 in accordance with a written plea agreement. (Crim. Dkt. No. 38[1]; Crim. Dkt. No. 23.)

On November 24, 2015, the Honorable U.S. District Judge Ricardo H. Hinojosa sentenced Movant to 108 months' confinement and imposed no term of supervised release. (Crim. Dkt. No. 35.) Movant filed a notice of appeal on December 4, 2015. (Crim. Dkt. No. 36.) The Fifth Circuit affirmed the sentence on May 31, 2017. (Crim. Dkt. No. 65.) Movant filed a petition for certiorari, which was subsequently denied on October 10, 2017. (Crim. Dkt. No. 70.) The conviction thus became final on October 10, 2017. *See United States v. Wheaten*, 826 F.3d 843, 846 (5th Cir. 2016) (stating that a conviction becomes final when the Supreme Court denies a petition for a writ of certiorari) (quoting *Clay v. United States*, 537 U.S. 522, 527 (2003)).

Movant filed his § 2255 motion on January 29, 2018, well within the one-year statute of limitation imposed by § 2255(f)(1). (Civ. Dkt. No. 1.)

[1] Crim. Dkt. No. 38 is the Judgment in Movant's criminal case. The Judgment currently states Movant's offense as "[p]ossession, with intent to distribute, 500 *kilograms* or more, that is approximately 2 kilograms of methamphetamine." (Crim. Dkt. No. 38 (emphasis added)). The undersigned finds that the emphasized "kilograms" is a clerical mistake and should instead be "grams" as read on the indictment. (Crim. Dkt. No. 14.)

SUMMARY OF THE PLEADINGS

Pending before the Court is Movant's § 2255 motion (Civ. Dkt. No. 1) where Movant claims a single ground for relief by alleging ineffective assistance of counsel. (Civ. Dkt. No. 1 at 4.) Movant claims his attorney rendered ineffective assistance for not seeking application of a fast-track sentencing program. (*Id.*)

In response, Respondent argues that Movant's counsel could not have rendered ineffective assistance in regard to the motion for a fast-track program because "there is no 'Fast-Track' program available for the narcotics crimes of which [Movant] was convicted." (Civ. Dkt. No. 12 at 4.) Therefore, Movant could not have been prejudiced by his counsel's representation. (*Id.*)

APPLICABLE LAW & ANALYSIS

I. 28 U.S.C. § 2255

To obtain collateral relief pursuant to 28 U.S.C. § 2255, a movant "must clear a significantly higher hurdle" than the plain error standard that would apply on direct appeal. *United States v. Frady*, 456 U.S. 152, 166 (1982). "Following a conviction and exhaustion or waiver of the right to direct appeal, [courts] presume a defendant stands fairly and finally convicted." *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998) (citing *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991)).

With this in mind, there are four limited grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) constitutional issues; (2) challenges to the District Court's jurisdiction to impose the sentence; (3) challenges to the length of a sentence in excess of the statutory maximum; and (4) claims that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

A movant must show both cause for his procedural default and actual prejudice resulting from the error "[w]hen raising these issues of jurisdictional or constitutional magnitude for the first time on collateral review." *Arnold v. United States*, 2013 WL 12227401, at *3 (S.D. Tex. July 11, 2013) (citing *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998)). "This cause and actual prejudice standard presents a significantly higher hurdle than the plain error standard [applied] on direct appeal" as noted above. *Id.* (citing *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir. 1992)).

II. Ineffective Assistance of Counsel

Movant claims that he was denied effective assistance of counsel. Ineffective assistance claims are properly made in a § 2255 motion because they raise an issue of constitutional magnitude and generally cannot be raised on direct appeal. Claims of ineffective assistance of counsel are analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To satisfy the burden established in *Strickland*, Movant would have to show (1) that his attorney's performance was deficient and (2) that the deficient performance prejudiced his defense. *Id.* at 678.

The first prong requires a movant to show that the alleged errors of counsel were so serious that the assistance received was "below the constitutional minimum guaranteed by the Sixth Amendment." *United States v. Faubion*, 19 F.3d 226, 228 (5th Cir. 1994) (citing *Strickland*, 466 U.S. at 686). In that regard, the "constitutional minimum is measured against an objective standard of reasonableness." *Id.* (citing *Strickland*, 466 U.S. at 688). In reviewing these claims, "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. An ineffective assistance claim focuses on "counsel's challenged conduct on the facts of the particular

case, viewed as of the time of counsel's conduct," because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." *Id.* at 689-90.

The second prong requires that a movant "must demonstrate that her counsel's performance so prejudiced her defense that the proceeding was fundamentally unfair." *Faubion*, 19 F.3d at 228 (citing *Strickland*, 466 U.S. at 688). This test requires that the movant show that, but for counsel's errors, the result would have been different. *Id.* (citing *United States v. Kinsey*, 917 F.2d 181, 183 (5th Cir. 1990)). A movant, in particular, must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

It should be noted that if a movant fails to prove one prong, it is not necessary to analyze the other. *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one."). "Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim." *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997) (citing *Strickland*, 466 U.S. at 687).

III. Fast-Track Sentence Program

Movant claims that counsel rendered ineffective assistance by failing to request application of a fast-track sentencing program. (Civ. Dkt. No. 1 at 4.) The Fifth Circuit has noted that "fast-track programs originated in the Southern District of California and later spread to other districts along the southwest border" where "[t]he United States Attorneys . . . created . . . programs that offered defendants who violated 8 U.S.C. § 1326 an array of options, such as plea agreements and recommendations for reduced sentences, in return for the defendants' waiver of various rights, including: indictment by a grand jury, trial by jury, presentation of a pre-sentence report, and appellate review of the sentence." *United States v. Gomez-Herrera*, 523 F.3d 554, 559 (5th Cir.

2008). Section 5K3.1 of the United States Sentencing Guidelines provides for a reduction of a defendant's offense level based on his participation in an early disposition (or fast-track) program, stating that "*[u]pon motion of the Government*, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides." U.S.S.G § 5K3.1. Whether a fast-track program is offered to a particular defendant is left entirely to the prosecutor's discretion. *Gomez-Herrera*, 523 F.3d at 561. "Even in a fast track jurisdiction, a defendant is not automatically entitled to the benefits of the program." *Id.*

Beyond the discretion to use the program, the Department of Justice has promulgated requirements for the fast-track program that limit or deny eligibility to certain defendants. *Department Policy on Early Disposition or "Fast-Track" Programs*, U.S. Department of Justice (Jan. 31, 2012), https://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf. United States attorneys are directed to use prosecutorial discretion to "limit or deny a defendant's participation in a fast-track program based on . . . [t]he defendant's prior violent felony convictions (including murder, kidnapping, voluntary manslaughter, forcible sex offense, child-sex offenses, drug trafficking, firearms offenses, or convictions which otherwise reflect a history of serious violent crime) [and] [t]he defendant's number of prior deportations." *Id.*

Fast-track programs are also limited to defendants who have been convicted of certain crimes. In the Southern District of Texas, only those individuals convicted of felony illegal reentry offenses and transportation or harboring of alien cases are eligible for the fast-track program. (Civ. Dkt. No. 12, Attach. 1, at 23; Attach. 2, at 26; Attach. 3, at 29; and Attach. 4, at 32.)[2] This is unlike other jurisdictions such as the District of Arizona and Southern District of

[2] The Government attachments are Memorandums from the Deputy Attorney General setting forth the fast-track policy. The first one pertains to authorization of the fast-track program for those individuals charged with illegal re-

California that have been given authorization from the Deputy Attorney General to utilize a fast-track program for those individuals convicted of drug trafficking crimes "arising along the border" and the District of New Mexico that have been given authorization for "drug backpacking cases." (Civ. Dkt. No. 12, Attach. 2, at 26; Attach. 3, at 29; and Attach. 4, at 32-33.)

Movant pleaded guilty to possession with intent to distribute 500 grams or more of methamphetamine in March 2015. (Crim. Dkt. No. 38.) Movant was not convicted of a crime that was authorized to receive the benefits of a fast-track sentence in the Southern District of Texas. (*See* Civ. Dkt. No. 12, Attachment 3, at 29-30, dated May 1, 2014 and pertaining to authorization for the program for various Districts in regard to non-§1326 offenses.) Such a decision can only be authorized and moved for by the Government under the Guidelines. A review of the plea agreement reflects that it was not authorized for the Movant. (Crim. Dkt. No. 23; *see also Gomez-Herrera*, 523 F.3d at 561 ("Fast track disposition is generally commenced by an offer from the government to enter into a plea agreement."))

Therefore, the alleged failure of Movant's counsel to petition the court for the fast-track program cannot be said to have prejudiced Movant as the decision could not have changed the outcome of Movant's sentencing. *See Faubion*, 19 F.3d at 228 (citing *United States v. Kinsey*, 917 F.2d 181, 183 (5th Cir. 1990)) (stating that defendants must show that the results would have been different if not for counsel's errors). Movant's claim that counsel was ineffective by failing to argue for the application of a fast-track program is without merit in this matter as the Movant was never eligible for the program within the Southern District of Texas.

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entry after prior removal in violation of 8 U.S.C. §1326; the next three pertain to authorization of fast-track program for those individuals charged with other crimes as set forth in each respective memorandum. Attachment 1 is Memorandum from Deputy Attorney General ("DAG"), dated Jan. 31 2012; Attachment 2 is Memorandum from DAG, dated Mar. 31, 2012, authorizing "Early Disposition Programs for 2012" for non-§1326 violations; Attachment 3 is Memorandum from DAG, dated May 1, 2014, extending "Fast-Track" Programs for non-§1326 violations; and Attachment 4 is Memorandum from DAG, dated July 31, 2015, extending "Fast-Track" Programs for non-§1326 violations. (Civ. Dkt. 12, Attach. 1, at 22-24; Attach. 2, at 25-27; Attach. 3, at 28-30; and Attach. 4, at 31-33.)

CONCLUSION

Recommended Disposition

After a careful review of the record and relevant law, the undersigned recommends that Respondent's Motion for Summary Judgment (Civ. Dkt. No. 12) be **GRANTED** and Movant's § 2255 motion (Civ. Dkt. No. 1) be **DENIED**. It is further recommended that Movant's § 2255 motion (Civ. Dkt. No. 1) be **DISMISSED** with prejudice, and the case be closed.

Certificate of Appealability

It is recommended that the District Court deny a certificate of appealability. An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). The Rules Governing Section 2255 Proceedings instruct that the District Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." R. Gov. Sec. 2255 Cases 11. Because the undersigned recommends the dismissal of Movant's § 2255 action, it must be addressed whether Movant is entitled to a certificate of appealability ("COA").

A movant is entitled to a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). For claims denied on their merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment for the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (applying the *Slack* standard to a COA determination in the context of § 2255 proceeding). An applicant may also satisfy this standard by showing that "jurists could conclude the issues presented are adequate to deserve

encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *see also Jones*, 287 F.3d at 329. For claims that a district court rejects solely on procedural grounds, the prisoner must show both that "jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right and that jurists of reasons would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Movant fails to meet this threshold. Counsel was not ineffective for failing to request a fast-track program when such a program in the Southern District of Texas was not authorized for those convicted of drug trafficking crimes such as the Movant. Therefore, it is recommended that the District Court deny a COA.

Accordingly, Movant is not entitled to a COA.

Notice to the Parties

Within 14 days after being served a copy of this report, a party may serve and file specific, written objections to the proposed recommendations. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). Failure to file written objections to the proposed findings and recommendations contained in this report within 14 days after service shall bar an aggrieved party from *de novo* review by the District Court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the District Court, except on grounds of plain error or manifest injustice.

The Clerk shall send a copy of this Order to Movant and counsel for Respondent.

DONE at McAllen, Texas, this 16th day of Nov., 2018.

Juan F. Alanis
United States Magistrate Judge