United States Court of Appeals
for the Fifth Circuit

No. 19-40475

A True Copy
Certified order issued Aug 04, 2020

Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RAFAEL CRUZ,

Defendant—Appellant.

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

ORDER:

Rafael Cruz, federal prisoner # 52237-379, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his guilty-plea conviction for conspiracy to commit hostage taking. He argues that (1) his due process rights were violated because the district court's statements at rearraignment coerced him to plead guilty; and (2) his trial counsel was ineffective because (a) counsel erroneously advised Cruz that the elements of hostage taking were like harboring illegal aliens and that Cruz could dispute the factual basis at or before the sentencing hearing; and (b) counsel did not investigate and obtain evidence, including videos and witnesses, showing that one of the victims,

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who alleged Cruz sexually assaulted her, was with Cruz voluntarily, used his cellphone, and did not suffer any bruising or injuries.

In his COA motion, Cruz does not raise the following claims: (1) his trial counsel was ineffective because (a) counsel did not subpoena a favorable witness; (b) counsel did not adequately prepare to establish a vigorous defense; (c) counsel erroneously advised Cruz that he would be sentenced to less than 25 years if he pleaded guilty; (d) counsel did not promote the affirmative defense of harboring the aliens and did not move to sever the hostage-taking counts in the indictment; (e) counsel did not subject the prosecution's case to meaningful adversarial testing; (f) counsel did not cross-examine a witness as to her rape allegation against Cruz; (g) counsel did not negotiate a reasonable plea deal; and (h) counsel's primary interest was to have Cruz plead guilty; and (2) he was denied due process because the Government failed to prove the elements of the offense. Cruz has abandoned these claims by failing to brief them adequately in his COA motion. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

For the first time in his COA motion, Cruz argues that his 480-month sentence was cruel and unusual in violation of the Eighth Amendment. This court will not consider an issue raised for the first time in a COA motion. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018), *cert. denied*, 140 S. Ct. 859 (2020).

To obtain a COA, Cruz must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied relief on the merits, a movant must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues he presents "are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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Cruz has not made such a showing concerning these claims. Accordingly, Cruz's COA motion is DENIED. His motion for leave to proceed in forma pauperis on appeal is also DENIED.

ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

RAFAEL CRUZ	§	
	§	CIVIL ACTION NO. M-16-493
Plaintiff	§	
VS.	§	CRIMINAL ACTION NO. M-13-1444
	§	
UNITED STATES OF AMERICA	§	

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GRANTING DISMISSAL

The Court has reviewed the magistrate judge's Report and Recommendation regarding Movant Rafael Cruz's action pursuant to 28 U.S.C. § 2255, and Movant's objections thereto. After having reviewed the said Report and Recommendation, and after appropriate review of Movant's objections thereto, the Court is of the opinion that the conclusions in said Report and Recommendation should be adopted by this Court.

It is, therefore, **ORDERED, ADJUDGED** and **DECREED** that the conclusions in United States Magistrate Judge Juan F. Alanis' Report and Recommendation entered as Docket Entry No. 13 are hereby adopted by this Court.

FURTHER, the Court, having adopted the magistrate judge's conclusions, is of the opinion that Movant's Motion for Discovery be **DENIED**, Respondent's Motion to Dismiss should be **GRANTED**, the Motion to Vacate Sentence under 28 U.S.C. § 2255 should be **DISMISSED**, and that a certificate of appealability should be **DENIED**.

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

SO ORDERED this 18th day of March, 2019, at McAllen, Texas.

Randy Crane
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

RAFAEL CRUZ Movant,	§	
	§	CIV. NO. 7:16-cv-00493
VS.	§	
	§	CRIM. NO. 7:13-cr-01444
UNITED STATES OF AMERICA Respondent.	§	

REPORT & RECOMMENDATION

Movant, Mr. Rafael Cruz, 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 February 10, 2017, Respondent filed an answer to Movant's motion. (Civ. Dkt. No. 6.) This case is ripe for disposition on the record.

Movant claims his attorney rendered ineffective assistance of counsel on 10 separate grounds. (Civ. Dkt. No. 1-1 at 5-24.) Movant also claims that he was denied due process when the Court "mentally coerced" him to plead guilty. (*Id.* at 25-27.) Lastly, Movant claims that he was denied due process and the "government failed to prove elements 1 and 2" of the crime Movant pleaded guilty to, therefore making "Movant's agreement to plea unintelligent, thus, a manifest injustice exists." (*Id.* at 28.)

After a careful review of the record and relevant law, the undersigned recommends that Respondent's Motion to Dismiss (Civ. Dkt. No. 6) 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. It is also further

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recommended that Movant's related Motion for Discovery (Civ. Dkt. No. 11) be **DISMISSED**. Finally, it is recommended that that the District Court **DECLINE** to issue a certificate of appealability in this matter.

PROCEDURAL OVERVIEW

On December 10, 2013, the federal grand jury for the Southern District of Texas, McAllen Division, returned a twelve count second Superseding Indictment against Movant and his brother Roberto Cruz. (Crim. Dkt. No. 59.) Count One charged the offense of "conspiracy to take hostage" as follows:

> From on or about September 2, 2013, to on or about September 9, 2013, in the Southern District of Texas and within the jurisdiction of the Court, defendants, **RAFAEL CRUZ and ROBERTO CRUZ** did knowing and intentionally conspire and agree together and with other persons known and unknown to the Grand Jurors, to seize and detain and threaten to kill, injure, and continue to detain an individual, in order to compel a third person to do an act, that is, to pay a sum of money, as an explicit and implicit condition for release of the person detained. In violation of Title 18, United States Code, Sections 1203.

(Crim. Dkt. No. 59 at 1) (emphasis original). The remainder of the indictment charged Movant and Roberto Cruz, Movant's brother, with Hostage Taking in violation of 18 U.S.C. § 1203 (Counts 2-4); Conspiracy to transport undocumented aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) (Count 5); Transporting an undocumented alien for financial gain in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) (Counts 6-8); Conspiracy to harbor undocumented aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) (Count 9); and Harboring an undocumented alien for financial gain in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) (Counts 10-12). (*Id.* at 1-7; *see also* Crim. Dkt. No. 60, Government's Criminal Docket Sheet.)[1]

[1] As will be set forth below, Movant's sister, Jisel Emery Cruz, was charged in the original indictment and the first superseding indictment by a grand jury with conspiracy to harbor illegal aliens and the related substantive counts; but she was never charged with conspiracy to commit hostage taking or related substantive hostage taking counts as her brothers. (Crim. Dkt. No.'s 35, 36, 49 & 50.)

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On February 4, 2014, Movant, accompanied by his attorney Mr. Gregorio R. Lopez ("Counsel"), appeared before the Honorable U.S. District Judge Micaela Alvarez and entered a plea of guilty to Count 1 of the second Superseding Indictment pursuant to a written plea agreement. (Crim. Dkt. No. 139 at 38:20-22; Crim. Dkt. No. 86.)[2] Pursuant to the plea agreement, the Government agreed to recommend a two-level sentence reduction if Movant clearly demonstrated acceptance of responsibility and to dismiss all remaining charges against Movant. (Crim. Dkt. No. 86 at 1.)

On May 21, 2014, the Court sentenced Movant to 480 months' imprisonment and five-year term of supervised release. (Crim. Dkt. No. 140 at 78:24-79:2; Crim. Dkt. No. 116.) The Court also ordered Movant to pay a special assessment of $100 and $6,390.00 in restitution to the victims. (*Id.* at 79:8-14.) Two other co-defendants, the Movant's sister and brother, were sentenced at the same hearing and all three where held jointly and severally liable for the restitution.[3] (*Id.*) Pursuant to the plea agreement, the Court dismissed the remaining charges against Movant. (Crim. Dkt. No.'s 86, 116.)

Movant filed a notice of appeal on May 28, 2015. (Crim. Dkt. No. 108.) On appeal, Movant claimed that his guilty plea was involuntary because the Court improperly participated in the plea negotiation in violation of Fed. R. Crim. P. 11(c)(1). (Crim. Dkt. No. 169 at 1.) Specifically, Movant claimed that the Court made statements to Roberto Cruz ("Co-defendant")

[2]Crim. Dkt. No. 139 and 140 are, respectively, transcripts from re-arraignment and sentencing hearings.

[3]The Movant's brother, Roberto Cruz, also plead guilty to the same charge as Movant and was sentenced to 360 months in custody and a five-year term of supervised release. (Crim. Dkt. Data Entry, dated Feb. 04, 2014; Crim. Dkt. No. 118.) The Movant's sister, Jisel Emery Cruz, plead guilty to Count 9 of the first Superseding Indictment, Conspiracy to harbor illegal aliens, and was sentenced to 46 months in prison and a three-year term of supervised release. (Crim. Dkt. Data Entry, dated Nov. 25, 2013; Crim. Dkt. No. 114.)

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at the re-arraignment proceeding explaining that a lesser sentence could result from a guilty plea. (*Id.* at 1-2.) The Court of Appeals found the following:

> Rafael Cruz fails to show that the district court participated in any discussions during plea negotiations. The statements of which he complains were made by the district court after Rafael Cruz's plea agreement had been negotiated by the parties and disclosed to the district court. There is nothing in the record to show a reasonable probability that the district court's remarks to Roberto influenced Rafael Cruz's decision to plead guilty. Thus, he fails to show error, much less reversible plain error, by the district court. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

(*Id.* at 2.) The Court of Appeals affirmed the judgement on May 11, 2015 and the mandate was issued on June 2, 2015. (*Id.*)

Movant did not file a petition for certiorari review by the Supreme Court. On August 15, 2016, Movant filed the §2255 petition (Civ. Dkt. No. 1.) Respondent's Motion to Dismiss was filed on February 10, 2017. (Civ. Dkt. No. 6.) Movant filed a reply on April 19, 2017 and request for discovery on March 8, 2018. (Civ. Dkt. No.'s 9, 11.)

BACKGROUND

I. The Offense Conduct[4]

On September 9, 2013, HSI officials received information from CBP about an undocumented alien who was being held against his will in Edinburg, Texas. Upon arrival at the location in Edinburg, HSI officials encountered 12 individuals, all undocumented aliens. Six of the individuals (identified by their initials as M.V., R.L., J.A., N.M., C.H., and H.M.) were held as material witnesses.

[4] This section is based on the Presentence Investigation Report ("PSR") completed by the U.S. Probation Office and last revised on April 2, 2014. (Crim. Dkt. No. 91, ¶¶ 11-37.) The PSR included details of the offense committed by Movant that were provided by federal agents with U.S. Department of Homeland Security from Homeland Security Investigations ("HSI"), Immigration and Customs Enforcement ("ICE"), in McAllen, Texas and U.S. Customs and Border Protection ("CBP"). (*Id.* ¶ 11.)

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The witnesses stated that they had been smuggled into the United States by a smuggler known as "Maria" and were subsequently taken to a stash house in Mercedes, Texas, to await transportation elsewhere within the United States. While waiting at the stash house, the Movant, along with co-defendants Roberto Cruz and Manuel Rios-Maldonado ("Rios"), abducted the 12 individuals at gunpoint and moved them to a separate location. Sometime shortly after being moved to this location by the Movant and the co-defendants, the twelve individuals were then subsequently transported to a second and final location.

After being abducted, the witnesses claim that Movant, along with Roberto Cruz and Rios, threatened them by demanding that they call their families to ask for money or else they would be killed. Movant's sister, Jisel Cruz, was also at the second and final stash house and was in charge of keeping track of the money received.

One witness, M.V., told officials during an interview that Movant removed her from the stash house at gunpoint, took her to the location they were first taken to after the kidnapping, and subsequently sexually assaulted her. M.V. stated that this happened five nights in a row. M.V.'s story was collaborated by R.L., J.A., and N.M. R.L stated that M.V. was taken from the stash house every night and returned the next morning. R.L. also noticed that M.V. was "crying the first time she returned." Both J.A. and N.M. stated that M.V. was removed from the stash house each night and returned in the morning. N.M. noticed that the first night M.V. returned, she had bruises on her arms and legs.

Approximately a week after being held against their will, the individuals located a cell phone, contacted police, and gave them the license plate for the vehicle driven by their abductors. After finding the location of the individuals, agents were able to trace the license plate number to Movant.

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Movant was arrested on September 11, 2013. Movant waived his Miranda Rights and admitted to going with Roberto Cruz and Rios to the stash house where the 12 undocumented aliens were located. Movant stated that Rios was the individual who had a gun and threatened a smuggler with it. Movant also stated that Rios and Roberto Cruz went into the residence and secured the undocumented aliens while Movant waited in the vehicle. Movant then transported four of the undocumented aliens in his vehicle to another stash house location.

Movant also admitted receiving money from the undocumented aliens' families on two or three occasions. Movant admitted that his sister, Jisel Cruz, also received money and kept a ledger at the direction of Rios. Movant admitted that Jisel Cruz and Rios made threatening calls to the families of the individuals they abducted, and one occasion, even utilized his phone. Movant also claimed that he had consensual sex with M.V. on three occasions.

Roberto Cruz was arrested on November 26, 2013. After waiving his Miranda Rights, Roberto Cruz admitted to going to the stash house where the undocumented aliens were located with Movant and Rios. Roberto Cruz stated that he did not know he was going to participate in a kidnapping until after he got to the property and that Rios was the only individual with a gun. Roberto Cruz also admitted that on at least one occasion, he witnessed Rios "point his handgun at a couple of the undocumented aliens while attempting to extort money." (Crim. Dkt. No. 91, ¶ 33.) Lastly, Roberto Cruz admitted that Movant removed M.V. from the stash house on at least one occasion and brought her back to their house but did not know what occurred between Movant and M.V.

II. Final Pretrial Conference and Rearraignment

The original indictment in this matter from October 1, 2013, initially charged only the Movant and his sister, Jisel Emery Cruz, respectively, with conspiracy to transport illegal aliens,

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three substantive counts of transporting aliens, conspiracy to harbor illegal aliens and three substantive counts of harboring aliens for a total of eight counts. (Crim. Dkt. No.'s 35, 36.) On October 22, 2013, a superseding indictment was issued by a grand jury setting forth additional allegations of conspiracy to commit hostage taking and three related substantive counts of hostage taking only against Movant for a total of 12 counts against Movant. (Crim. Dkt. No.'s 49, 50.) The Movant's brother was formally added to the indictment on the second Superseding Indictment issued on December 10, 2013. (Crim. Dkt. No. 59.)

On February 4, 2014, after several pre-trial announcements and continuances to allow for discovery, Movant, alongside Counsel, appeared before the Court and announced, "ready to proceed with a plea . . . [to] Count One of the Second Superseding Indictment." (Crim. Dkt. No. 139 at 3:7-9.)

Movant's Co-defendant, Roberto Cruz, had filed a "Notice of Intent to Plea" the night before but had a change of heart before the hearing and was then undecided if he would plead. (*Id.* at 3:12-15.) On the morning of February 4, 2014, the Court decided to address Roberto Cruz first and described to him his right to a jury trial. (*Id.* at 4:7-9.) The Court stated:

> It is your choice, and you saw me go through this plea before and I cover certain things and I ask at the end, . . . is it . . . because you want to plead, are you doing this freely and voluntarily. Your lawyer can give you the best advice in the world and . . . you can present a case to 20 lawyers and all of those 20 lawyers might say, "You should enter a plea, the jury is going to find you guilty." But it has to be your decision. You know, maybe . . . 20 lawyers would say the jury is going to find you guilty, but you still want to take . . . your case to trial, you are entitled to take your case to trial, okay?
>
> Having said that, of course, there are some advantages to entering plea because most often, now there's no guarantee, but most often you get a somewhat lesser sentence if you do enter a plea. No guarantee, but that's the case.

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(*Id.* at 4:10-25.) The Court then went on to state that Roberto Cruz's counsel, Mr. Montalvo, "is an experienced attorney [and] he's not afraid to try a case." (*Id.* at 6:3-4.) After Roberto Cruz stated he had no further questions, he then announced he was willing to plea. (*Id.* at 6:15.)

Following a recess to allow Co-defendant time to sign the plea agreement, both Co-defendant and Movant announced they were ready to plead guilty and were sworn in by the Court. (*Id.* at 8:1-8.) The Court warned that "once you enter a plea of guilty it is very difficult to come back and change it. That's why I go through this process with you to make sure you understand what you are doing." (*Id.* at 8:16-19.) The Court then asked if either of the defendants had seen a doctor concerning mental health issues. (*Id.* at 10:12-15.) Movant stated that he had seen a doctor for anxiety. (*Id.* at 10:17.) Following this, the Court asked:

> **COURT:** Has that caused you any problems as far as this case itself in that you have had difficulty communicating with your lawyer or understanding what he tells you or being able to ask questions or anything like that?
> **MOVANT:** Some trouble, yeah, but it takes – it takes time for me to understand the circumstances.
> **COURT:** Okay, a little difficulty, but with time you are able to understand?
> **MOVANT:** Yeah. Yeah.

(*Id.* at 11:15-23.)

And the Court noted the following to the Movant and Counsel:

> **COURT:** Okay. I don't think there's any problem with going forward here, but if you – if you're standing here and, you know, this can be very nervous for you, so as you are standing there if you have anything come up please let me know right away, we'll see how we need to handle it, okay?
> **MOVANT:** Okay.
> **COURT:** All right, now as far as your communications with Mr. Rafael Cruz, Mr. Lopez [Counsel for Movant], has the fact that he suffers from anxiety in any way interfered with your ability to communicate with him?
> **MR. LOPEZ:** No, your honor.
> **COURT:** Has he has been responsive to your questions and has been able to from what – your perspective, understand what you explain to him?
> **MOVANT:** Yes.
> **MR. LOPEZ:** Yes, your Honor.

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COURT: And you don't have any questions as far as competency here?
MR. LOPEZ: No, my client is competent, your Honor. We can proceed today.

(*Id.* at 12:3-22.)

The Movant and Co-defendant then advised the Court that neither were under any medications at the time of the re-arraignment and that both individuals had an opportunity to talk to their respective attorneys. (*Id.* at 13:3-15.)

The Court then carefully explained the charge in Count One of the second Superseding Indictment, that being conspiracy to hostage taking in in violation of 18 U.S.C. § 1203. (*Id.* at 13:20 to 14:13.)

The Court clarified both conspiracy and the agreement at issue:

> A conspiracy is an agreement to do something that is illegal and it is the agreement itself that the law makes a crime. So when you enter into the agreement then, by law, you can be charged with a crime.

(*Id.* at 14:14-17.)

The Court continued:

> The agreement here was for you, either each one of you or along with others, to basically – we use the terms "seize and detain." You know, basically in some manner to hold an individual and threaten to either kill, injure or to continue to detain that individual in order to get somebody else to do something, in this case, to pay some money for an individual and that was a condition of release for this individual.

(*Id.* at 14:18-25.)

After explaining the charge, Movant asked for the charge to be read again. (*Id.* at 15:5-8.) The Court did so, and this time with more explanation into the individual elements that must be proven. (*Id.* at 15:9 to 17:14.)

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After setting forth the allegation of the date of the offense as well as jurisdiction of the court, the Court explained that the Movant and Co-defendant had to know what they were doing and that there was an agreement "to do an illegal act." (*Id.* at 16:8 to 17:6.)

The Court advised that Movant and Co-defendant were charged with knowingly entering into an agreement "to seize and detain and threaten to kill, injure, and continue to detain an individual" (*id.* at 17:7-8), and this was done "in order get somebody else to do an act" (*id.* at 17:10), and that "act" was to compel someone to provide "money [that] was required before you [defendants] released the other person"; and then asked if the Court needed to explain the elements once again. (*Id.* at 17:13-16.) Movant expressed confusion by stating he believed he was pleading "guilty to kidnapping, not exactly . . . that whole thing you read." (*Id.* at 17:17-19.)

Again, the Court explained that the charge was for conspiracy and not the act of kidnapping itself, which Movant stated he understood, as follows:

> **COURT:** Well, the two of – you know, sometimes we use shorthand language for something so it may be that, you know, if your lawyer or the Government may have used the term "kidnapping," when we think of kidnapping it basically is that you sort of kidnapped somebody to get somebody else to pay money, okay? So the two of you, this is the conspiracy, not the kidnapping, I'm using the shorthand term "kidnapping." But it's the conspiracy, the agreement itself that's been charged here, not the actual kidnapping. Does that make sense to you?
> **MOVANT:** Yeah.

(*Id.* at 17:20 to 18:5.)

Movant then talked with Counsel and stated, "-- like I understand I'm pleading guilty, but I have like certain evidence that --" (*id.* at 18:18-20), Counsel then interjected and clarified that Movant had "some things he would like to tell the Court" and that Counsel explained that Counsel would have an opportunity to object to the pre-sentence investigation report on behalf of Movant. (*Id.* at 18:21 to 19:1.) The Court clarified and explained that the only facts necessary that Movant

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had to agree to were those facts that set forth the "elements of the charge" to establish that Movant is guilty of the charge he is pleading guilty to at that time. (*Id.* at 19:14-23.) Movant was then told that any other evidence about why a crime was committed could be brought up during sentencing. (*Id.* at 19:24 to 20:2.) Movant then responded: See ID 20; 20-25

> **MOVANT:** Okay. So then my understanding is at the time of sentencing I can still bring up my evidence, witness and like –
> **COURT:** As far as the particulars, okay?
> **MOVANT:** Okay.

(*Id.* at 20:24 to 21:3.)

The Court further noted that there was no need for an overt act to be committed in connection with the conspiracy to commit hostage taking, just evidence of an agreement between two or more individuals to commit the crime; however, an act by an individual can be sufficient to prove that the individual was aware of and participated in the agreement. (*Id.* at 21:13 to 22:9.)

The Court continued:

> So in this case now we may have some acts present, but the only thing presented is sufficient to prove the agreement itself. And then you can tell me at the time of sentencing the other things that you think the Court should consider before I decide the kind of a sentence to impose, and I never decide the sentence until after I've heard some evidence.

(*Id.* at 22:10-16.) When asked if that made sense, the Movant responded in the affirmative. (*Id.* at 22:18-19.) The Court then asked:

> **COURT:** So coming back to your question that you thought you were pleading to the kidnapping, it very well may be that in the facts that's what's presented and that's how that agreement itself is proven. Does that make sense to you?
> **MOVANT**: Yes.
> **CO-DEFENDANT**: Yes.

(*Id.* at 22:22 to 23:3.) When asked if Movant had any additional questions to the charge, the Movant answered in the negative. (*Id.* at 23:4-6.)

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The Court explained each defendants' right to counsel, right to enter a plea of not-guilty, and right to a jury trial—including rights associated with a jury trial such as cross-examination of witnesses, right to present witnesses, right to remain silent and that the burden of proof at trial is on the government. (*Id.* at 23:10 to 24:23.) Movant and Co-defendant each answered in the affirmative that they understood this explanation. (*Id.* at 24:24 to 25:2.)

The Court then explained the rights that Movant and Co-defendant were waiving by pleading guilty including the right to a jury trial and right to remain silent and each responded in the affirmative that they respectively understood the Court's admonishments. (*Id.* at 25:3-20.) Both Movant and Co-defendant affirmed that each desired to give up these rights. (*Id.* at 25:21-26:4.) The Court advised Movant and Co-defendant of the maximum sentence each faced by pleading guilty (life), the maximum fine ($250,000) and the term of supervised release (five-years), to which each stated they understood. (*Id.* at 26:11 to 27:25.) The Court further explained how sentencing works with the United States Sentencing Guidelines and the Court's discretion to set a sentence outside of the Guideline range, and the Movant and Co-defendant stated they each understood. (*Id.* at 28:1 to 29:21.) Each defendant also stated they understood that the Court would decide the appropriate Guideline range at time of the sentencing hearing. (*Id.* at 29:22 to 30:23.)

The terms of the plea agreement were then read in open court by the government, which included that both Movant and Co-defendant each agreed to plead guilty to Count One of the second Superseding Indictment in exchange for all other charges, including those from the first two indictments, being dropped and a recommendation for a sentence reduction due to acceptance of responsibility. (*Id.* at 31:9-16.) The Court reiterated the agreement with Movant and

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explained that it was not required to accept the acceptance of responsibility reduction but would consider it at sentencing. (*Id.* at 34:2-7.)

The Court then asked the following:

> **COURT:** Now other than what has been acknowledged - - summarized here and it says, "as it is reflected here in the Plea Agreement," do either one of you think you have any other sort of promise made to you in exchange for your plea of guilty from anybody, whether that be the government, your lawyer, or anybody else that has made you any other sort of promise in exchange for your plea of guilty?
> **CO-DEFENDANT:** No, your Honor.
> **MOVANT:** No.
> **COURT:** Has anybody threatened you or tried to force you or coerce you into entering a plea of guilty?
> **CO-DEFENDANT:** No, your Honor.
> **MOVANT:** No.
> **COURT:** Do you wish to enter a plea of guilty freely and voluntarily?
> **MOVANT:** Yes.

(*Id.* at 36:2-17.) One last time, the Court asked if either Movant or Co-defendant had any final questions. (*Id.* at 37:6-9.) Movant, again, asked if he would be able to present evidence and witnesses before his sentencing. (*Id.* at 37:10-15.) The Court explained the sentencing process and what kind of evidence is presented at sentencing. (*Id* at 37:16 to 38:14.) After stating he had no further questions, Movant plead guilty to Count One of the second Superseding Indictment and Co-defendant did the same. (*Id.* at 38:19-25.)

The prosecutor then stated the factual basis to support Movant's guilty plea, as follows:

> From on or about September 2nd of 2013 to on or about September 9th of 2013, the Defendants Rafael Cruz and Roberto Cruz, knowingly and intentionally conspired and agreed with others known and unknown to the Grand Jurors, to knowingly and intentionally seize and detain and threaten to kill, injure, and continued to detain individuals in order to compel a third person to pay a sum of money as an explicit and implicit condition for the release of said individuals.
>
> To-wit, on the dates in question several individuals were abducted at gunpoint from an alien stash house and detained by the Defendants Rafael Cruz, Roberto Cruz and another unindicted co-defendant in Edinburg, Texas. Sometime later family members of the individuals received a demand for money as an explicit condition

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> for the release of the abducted individuals. Family members and the abducted individuals were told that if they did not comply with their demands the Defendants would injure and continue to detain the abducted individuals. The abducted individuals that were detained are noncitizens of the United States. The Defendants knew the unlawful purpose of the agreement and joined in it unlawfully; that is, with the intent to further the unlawful purpose.
>
> The Defendant Rafael Cruz furthered the unlawful purpose of the agreement by providing food and water to the abducted individuals and acting as a lookout and caretaker while they were at the location pending the receipt of money from the family.
>
> The Defendant Roberto Cruz furthered the unlawful purpose of the agreement by collecting the money from the family members that they had sent for the release of the abducted individuals and acting as a lookout or guard of the house where they were being kept in.

(*Id.* at 39:6 to 40:16.) Movant immediately stated he did not agree with the facts, specifically those pertaining to the "ransom money [and] keeping hostage part." (*Id.* at 40:18-24.) Movant claimed that there was not money demanded as part of a hostage situation but instead "[t]here was money asked from their families to take them up north." (*Id.* at 41:2-6.) ✓

The Court began to ask Movant about the facts he did agree to. (*Id.* at 41:10-20.) Movant agreed that certain individuals were abducted at gunpoint. (*Id.* at 41:17-21.) Movant and Co-defendant also agreed that money was "asked for" from the individuals abducted but that it was only to take the individuals up north and not as a condition for release. (*Id.* at 42:13 to 43:25.) In particular, Co-defendant Robert Cruz claimed there was "another man" and Movant explained that "[m]oney was asked for for the purpose of the people going up north." (*Id.* at 42:6-9.) The Court clarified, "[o]kay. So you were saying money was asked for. Okay, and I used the term 'demand,' but you say money was asked for, okay? And, again, a demand can be different depending on who is making it, but you are saying money was requested, money was asked for." Movant and Co-defendant answered in the affirmative. (*Id.* at 42:13-19.)

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After further responses from Movant and Co-defendant, the Court and the government counsel expressed concern for Movant's and Co-defendant's reason for asking the individuals for money. (*Id.* at 44:2-9.) After reviewing the elements, the Court asked the Movant and Co-defendant the following:

> **COURT:** Okay. At this point I don't know if you are admitting that that occurred because I've heard you, say, "Yes, where some of the money needed to be paid before we could take them up north, but if they didn't pay the money nothing was going to happen."
>
> So let me sort of ask it this way: Okay, and part of this you've admitted to I'll jump through the part that you admitted. You have admitted that some individuals were taken at gunpoint and they were then held.
>
> You've admitted that money was asked for in exchange for which these individuals would then be taken up north, and then I presume at some point in time up north they would be released to wherever it was that they were going.
>
> Do you agree with that?
>
> **MOVANT:** Yes, your Honor.
>
> **CO-DEFENDANT:** Yes.

(*Id.* at 47:18 to 48:8.)

As there continued to be some concern about Movant's and Co-Defendant's respective admissions in regard to whether or not release of an illegal alien was dependent on payment of money, each defendant was allowed to confer with counsel. (*Id.* at 48:9 to 49:3.)

The Court, utilizing an example of bank robbery, explained that as a member of a conspiracy one is guilty "even though you may not have done any of the acts, or you may not have known every detail of the agreement, if you participate in it, you agree to be involved in it, and you understand the nature of the unlawful agreement, that's sufficient." (*Id.* at 50:1-14.)

The Court further explained that, "sometimes with a conspiracy you don't know all the detail and so we, you know, talk about the evidence would show and it's, 'Well, I don't know specifically that he made a demand to kill somebody, but the evidence shows that, and I wasn't in front of him, you know, when he was on the telephone so I can't say that he did do it, but if the

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evidence shows it I'll agree that he did it," or something like that." (*Id.* at 51:6-12.) The Court also reiterated the following, "But, again, it has to be what you admit to okay? You know, I'm not telling you to admit to anything that you don't admit to." (*Id.* at 51:13-15.) The Court asked if each defendant understand that point and each replied in the affirmative. (*Id.* at 51:16-18.)

After Movant understood that he himself did not have to make the threatening demand to be guilty of conspiracy (but where evidence showed a co-conspirator had made the demand), Movant responded, "by understanding this, what the allegations that are being said, I agree to them." (*Id.* at 51:19-22.) Doc. 139 this is a question not that I'm accepting

The Court then reviewed the elements of the crime and the defendant's admissions:

> **COURT**: Again, the part of these things you've already agreed to. You know, several individuals, they were abducted at gunpoint. The – and I'll not use the word "demand" anymore because you seem to have a little bit of a difficulty with it, but then requests for the money was made, okay.
>
> The part on which we're struck on is was then the collection of the money a condition before these people would be released, at the very least released, and you know the charges includes a threat, but even just that they would continue to be detained, they would continue to be held until the money was paid. Do you agree?
>
> And, again, it's sufficient if it's one individual that was going to be detained until the money was held. You know, it doesn't have to be more than that, but it has to be at least one person that wouldn't be released, that person would continue to be detained until the money was paid. And it doesn't required that they had been detained for a year or two years or anything like that, you know, but detained until the money is paid.
>
> Do you agree with that?
>
> **CO-DEFENDANT:** Yes, your honor.
>
> **MOVANT:** Yes.

(*Id.* at 52:8 to 53:4.)

After a detailed discussion with the government and each defendant about whether or not each defendant was admitting to being part of a conspiracy to commit hostage taking in a situation

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where another co-defendant (Rios) was the one making the demands, based on statements of the material witnesses (*id.* at 54:17 to 59:11), the Court asked each defendant the following:

> **COURT:** Okay. So, let me ask you, Mr. Roberto, please, do you admit, even if it's from evidence that has been, you know, developed by the Government [based on statements of material witnesses], do you admit that it was a condition of the money being paid before these people would be released, even if they were released up north someplace?
> **CO-DEFENDANT:** Yes, your Honor.
> **COURT:** You do admit it.
> **CO-DEFENDANT:** Yes, your Honor.

(*Id.* at 59:12-20.)

The Court then asked the same of the Movant:

> **COURT:** I'll ask you the same way, Mr. Rafael Cruz. Again, it doesn't mean that you personally did it, but do you admit that it was a condition of the money being received – collected before these people would be released, even if it was to be released up north somewhere?
> **MOVANT:** Yes.

(*Id.* at 59:21 to 60:1.)

After the government counsel sought clarification (*id.* at 60:12-18), the Court then reviewed all the elements with each defendant.

> **COURT:** I think this was – no, I think that's what they have admitted to. They have admitted to – to the abduction at gun point, again, even if they physically weren't present there. They admit to that.
>
> They have admitted that these people were detained, that a request for money was made, and that the condition was that at least one of these individuals would not be released until the money was collected, and the release may have been up north, but until the money was collected.
>
> Is that correct, Mr. Rafael Cruz?
> **MOVANT:** Yes.
> **COURT:** Mr. Roberto Cruz?
> **CO-DEFENDANT:** Yes, your Honor.

(*Id.* at 60:19 to 61:6.)

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The Court then accepted the plea of guilty form each defendant and found that each defendant was competent and understood the nature of the charges. (*Id.* at 61:14-21.)

III. Sentencing Report

The PSR sets forth a base offense level of 32 according to U.S.S.G. § 2A4.1(a). (Crim. Dkt. No. 91, ¶ 48.) The offense level was increased by six levels to a level 38 since ransom demands were made pursuant to U.S.S.G. § 2A4.1(b)(1). (*Id.* ¶ 49.) There was an increase of two levels to a total level of 40 because of the use of a dangerous weapon pursuant to U.S.S.G. § 2A4.1(b)(3). (*Id.* ¶ 51.) The offense level was also increased by one to 41 since the victims were not released within seven days of being held hostage pursuant to U.S.S.G. § 2A4.1(b)(4)(B). (*Id.* ¶ 52.) Lastly, the offense level was increased by six because a victim was sexually exploited pursuant to U.S.S.G. § 2A4.1(b)(5). (*Id.* ¶ 53.) This resulted in a total offense level of 47 under the Sentencing Guidelines. (*Id.* ¶ 62.)

Movant's criminal history category was calculated at category VI. Movant received 15 criminal history points for prior state convictions of assault (2007), possession of marijuana (2007), domestic assault (2007), second-degree assault and fifth degree possession of marijuana out of Minnesota (2007), disorderly conduct (2008), theft (2008), obscene or harassing telephone calls (2008), fleeing from peace officer by means other than a vehicle (2008), domestic abuse (2009), failure to identify to police with intent to give false information (2011, 2012), and driving while intoxicated and misdemeanor possession of marijuana (2012). (*Id.* ¶¶ 62-77.) Since Movant was on misdemeanor probation at the time of the hostage taking, an additional two points were added to the criminal history, leading to a total score of seventeen and placing the Movant in criminal category history VI. (*Id.* ¶¶ 78,79.)

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Under the sentencing guidelines, a total offense level of 47 and a criminal history category of VI yielded a sentencing range of imprisonment for life. (*Id.* ¶ 92.)

Movant's Counsel filed written objection to the PSR on April 15, 2014 on his behalf. (Crim. Dkt. No. 98.) The objections claim that Movant did not demand the victims to call their families to send money, did not use a dangerous weapon, and did not sexually assault M.V. (*Id.* at 1.) Movant also claimed he had a minor role in the crime, that he aided agents in finding Rios and that his criminal history is overstated. (*Id.* at 1, 2.)

IV. Sentencing Hearing

Movant's sentencing hearing was held on May 21, 2014. (Crim. Dkt. No. 140 at 1.) Counsel was not present at the start of the hearing which prompted Movant to ask the Court if he could change lawyers. (*Id.* at 4:15-21.) Counsel appeared approximately 30 minutes later, and Movant was sworn in to proceed with the matter.[5] (*Id.* at 8:5).

The Court first addressed Movant's primary objection to the PSR enhancement for the sexual assault of M.V. (*Id.* at 35:9-16.) Besides providing the Court with a written statement about the issue, Movant also wanted to cross-examine M.V. (*Id.* at 35:17-34.) The Court explained to Movant that if he wished to question M.V., that the Court would also have to allow the government to question Movant. (*Id.* at 36:8-18.) Movant eventually decided to let the Court decide the issue based on his written statement and the material already before the Court. (*Id.* at 40:1-21.) After reviewing the written statement by Movant[6] and all the evidence

[5] Movant was advised by the court that the fact that his attorney was late would not affect Movant's case. "In other words, what I do as far as your case is completely separate from what I do as far as the attorney for failure to show up. He has put work into this case." (Crim. Dkt. No. at 5:17-19.)

[6] In open court, Movant submitted notes for the court to review (Crim. Dkt. No. 140 at 43:4-16); court reviewed the notes and placed the notes under seal and marked as Crim. Dkt. No. 106. (*Id.* at 44:3-6.)

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presented in the PSR, the Court decided to sustain the enhancement based on finding that a sexual assault did occur. (*Id.* at 47:5-7.)

Counsel then set forth the objection for the sentencing assessment in connection with use of a firearm during the commission of the crime and that Movant was not the one with a weapon. Counsel also noted that the Court had ruled on this same argument when set forth by Co-defendant's counsel earlier in the hearing. (*Id.* at 47: 10-17.) The Court noted that Manuel Rios was the one who utilized the firearm (*id.* at 11:15-21), that it was reasonably foreseeable that a co-conspirator would utilize a firearm during a conspiracy to commit hostage taking (*id.* at 12:10-20) and that more than one witness observed the co-defendant (Rios) with the firearm (*id.* at 12:21-25), in overruling the objection (*id.* at 14:3) by Co-defendant's counsel. The same objection was also overruled as to Movant when the Court made its final sentencing assessment.

The Court then gave Movant a three-point reduction for acceptance of responsibility after the government moved for the third acceptance point. (*Id.* at 47:18 to 48:6.) That resulted in a total offense category of 44, but with a criminal history category of VI, the guideline recommendation was still life imprisonment. (*Id.* at 48:7:12.) Counsel then urged an objection for criminal history overrepresentation to which the Court overruled and found there was no criminal history over-representation. (*Id.* at 49:2-18.)

Movant was then given an opportunity to speak before the sentence was handed down. (*Id.* at 52:24-25.) Movant continued to state that the allegations against him were not true and that he did not kidnap anyone. (*Id.* at 53:1-25.) The Court intervened and began to explain to Movant the wrongfulness of his actions. (*Id.* at 54: 15 to 16:15.) Movant answered, "I understand that I committed a crime by smuggling – I told you in the beginning that we were smuggling these people, but it was never like the allegations." (*Id.* at 56:16-19.)

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The government then introduced the six material witnesses who each gave a statement about how the crime affected them. (*Id.* at 57:15 to 69:19.) After the statements by the material witnesses, the Court, upon request of government counsel, clarified an error in the PSR that Movant pointed a gun at M.V.'s chest. (*Id.* at 70:1-20.) M.V. only recalled seeing Movant with a gun and did not recall Movant pointing the gun at her. (*Id.*) The Court noted correction and stated, "that particular fact did not go into any of my considerations as far as the objections that were raised, but I will disregard it as far as the sentence that may be imposed." (*Id.* at 70: 17-20.)

The Court found all of the enhancements as set forth in the PSR were proper then moved to address each defendant. (*Id.* at 75:5-9). After sentencing Roberto Cruz and Jisel Cruz, the Court addressed Movant. (*Id.* at 77:21.) The Court stated that it was concerned with Movant's apparent reluctance to accept blame for anything more than smuggling. (*Id.* at 77:21 to 78:15.) The Court also noted that Movant's young age and the appearance that co-defendant Rios was the most culpable aggressor, weighed in Movant's favor. (*Id.* at 78:16-23.) Movant was then sentenced to 480 months in custody, a five-year term of supervised release and ordered to pay restitution to the victims in the amount of $6,390. (*Id.* at 78:24 to 79:14; Crim. Dkt. No. 116.) The government counsel moved to dismiss any and all remaining counts against Movant, as well as the co-defendants, pursuant to the plea bargain agreement in reach respective case. That motion was granted by the Court. (*Id.* at 80:8-11.)

JURISDICTION

Movant challenges the judgement of conviction and sentence entered on June 3, 2014. (Crim. Dkt. No. 116.) The Fifth Circuit affirmed the judgement of the District Court on May 11, 2015 and issued a mandate on June 2, 2015. (Crim. Dkt. No. 168.) Movant did not file a

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petition for certiorari. A conviction becomes final, for purposes of filing a § 2255 motion, when the deadline for filing a petition for certiorari expires. *Clay v. United States*, 537 U.S. 522, 525 (2003). Petitioners have until 90 days after the entry of judgement to file a petition for certiorari, and 69 days after the issuance of the appellate court's mandate. *See id.;* Sup. Ct. R. 13.1. Movant's judgement became final on August 10, 2015, the first business day following 90 days from the entry of judgement by the Fifth Circuit. Movant then had until August 10, 2016, one year from the judgment becoming final, to file a § 2255 motion. *See* 28 U.S.C. § 2255(f)(1). Movant, declared under penalty of perjury, that he placed the motion in the mail on August 8, 2016. (Civ. Dkt. No. 1 at 12.) The motion was received by the court on August 15, 2016. (*Id.*) Because, Movant placed this § 2255 motion in the prisoner mailing system on August 8, 2016, the motion is timely, and this court has jurisdiction under 28 U.S.C. § 2255.[7]

SUMMARY OF THE PLEADINGS

Pending before the Court is Movant's § 2255 motion (Civ. Dkt. No. 1) where Movant generally claims three grounds for his sentence to be vacated. (Civ. Dkt. No. 1 at 4-6.) Movant first claims ineffective assistance of counsel on ten separate issues. (*Id.* at 4; Civ. Dkt. No. 1-1 at 5-24.) In his second ground, Movant claims a variety of errors that were caused by the Court "mentally coerc[ing]" Movant. (Civ. Dkt. No. 1 at 5; Civ. Dkt. No. 1-1 at 25.) Lastly, Movant claims that there was an insufficient factual basis to support his guilty plea. (Civ. Dkt. No. 1 at 6; Civ. Dkt. No. 1-1 at 28.)

Respondent argues that Movant's first claim of ineffective assistance of counsel is meritless for lack of showing of cause and/or prejudice. (Civ. Dkt. No. 6 at 32-55.) Respondent

[7] Rule 3(d) of the Rules Governing Section 2255 Proceedings provides that "[a] paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mailing system on or before the last day for filing."

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Respt's See Pg. 17 ner stickynotes

argues that Movant second's claim, that of the mental coercion by the Court, is not supported by the record. (*Id.* at 56-66.) Lastly, Respondent argues Movant's final claim regarding the lack of a factual basis to support the plea is precluded from habeas review and is meritless. (*Id.* at 66.)

APPLICABLE LAW

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)). "[Section 2255] is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981) (citation omitted).

With that in mind, there are only 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).

"Ultimately, the movant bears the burden of establishing his claims of error by a preponderance of the evidence." *Segura v. United States*, 2012 WL 13094651, at *2 (W.D. Tex. April 20, 2012) (citing *Wright v. United States,* 624 F.2d 557, 558 (5th Cir. 1980)).

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II. Ineffective 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. Furthermore, there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Soffar v. Dretke*, 368 F.3d 441, 471 (5th Cir. 2004).

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

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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.

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).

ANALYSIS

I. Ineffective Assistance of Counsel – Ten claims by Movant (Ground One)

> A. **CLAIM ONE:** GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL FAILED TO SUBPOENA A FAVORABLE WITNESS UNDER RULE 17 (b) AND DOCUMENT i.e. RAPEKIT, SHE POSSESSED UNDER RULE 17 (c) AND PRESENT THE ABOVED TO THE COURT AND JURY. (Civ. Dkt. No. 1-1 at 5.)

Movant's first claim of ineffective assistance of counsel concerns the alleged failure of Counsel to subpoena a witness who had the sexual assault examination kit (referred to as "rape-kit" by Movant) and, thereafter, present the witness and sexual assault examination to the Court. Movant claims such testimony and evidence would "substantially disprove" the occurrence of a sexual assault. (Civ. Dkt. No. 1-1 at 5.)

As for the sexual assault, the victim, M.V., was "interviewed at the hospital in Mission, Texas, after being examined by a Sexual Assault Nurse Examiner in connection to the sexual assault allegation that occurred while at the stash house." (Crim Dkt. No. 91, ¶ 19.) During this interview, M.V. claimed that Movant sexually assaulted her for six straight nights while being held

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Exculpatory explanation of actual proximate causes.

hostage. (*Id.*) Two other material witnesses collaborated M.V.'s story and stated that she was bruised and crying after being brought back from Movant's house the morning after the first sexual assault. (*Id.* ¶ 16, 26.) Movant admits to taking M.V. from the stash house and having sex with her but claims it was consensual. (*Id.* ¶ 21.) There was sufficient evidence to support the sexual assault enhancement under the sentencing guidelines. what evidence

As for the sexual assault examination, the Court directly addressed that issue with Movant:

> Sadly, Mr. Cruz, a sexual assault does not always involve injury to the victim because in many respects a victim might physically give in to the sexual assault but if it's without consent it's still a sexual assault. So, the lack of any kind of physical injury does not mean that there is no sexual assault.

(Crim. Dkt. No. 140 at 44:14-21.) To subpoena a witness to testify to negative results would not have changed the evidence presented as the Court took those results into consideration; therefore, Counsel was not deficient in his representation in deciding not to subpoena said testimony and evidence nor can the Movant establish any prejudice for failure to present such evidence.

Pursuant pk

B. **CLAIM TWO:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL INADEQUATELY PREPARED TO ESTABLISH A VIGOROUS DEFENSE. (Civ. Dkt. No. 1-1 at 7.)

Movant complains that "[c]ounsel, counseled exclusively for a plea agreement, thus, precluded trial preparation on investigating evidence and a witness requested by [Movant]." (*Id.*) Movant also claims that Counsel purposefully did not show up at particular proceedings "to persuade the Movant to plead-out." (*Id.*) Movant is correct that Counsel did not appear at an arraignment on October 10, 2013 (Crim. Dkt. No. 154 at 3:14)[8] and was late to sentencing hearing (Crim. Dkt. No. 140 at 4:15-21). Counsel was also verbally reprimanded by the Honorable Judge

[8] Crim. Dkt. No 154 and 135, are, respectively, transcripts from arraignment and final pre-trial conference hearings.

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Micaela Alvarez at a final pretrial conference on November 25, 2013 for not being prepared. (Crim. Dkt. No. 135 at 2:13 to 3:16.)

Movant asserts that Counsel's conduct was a tactic to persuade Movant to plead guilty. (Crim. Dkt. No. 1-1 at 7.) This claim is not supported by any evidence in the record. "[A] court cannot consider a habeas petitioner's bald assertions on a critical issue . . ., unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Joseph v. Butler*, 838 F.2d 786, 788 (5th Cir. 1988) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) (per curiam)). A defendant's testimony at a plea hearing under oath will, ordinarily, keep a defendant from refuting such testimony in a subsequent collateral proceeding. *United States v. Perez*, 227 Fed. App'x 357, 359 (5th Cir. 2007) (per curiam) (citing *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998)). "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977).

Movant, as set out above, *see supra* p. 13, under oath, stated that he was not forced or coerced in entering a plea of guilty and was entering the plea freely and voluntarily. Movant's mere assertions that Counsel coerced him into pleading guilty do not overcome his sworn testimony. Movant has failed to show that Counsel's conduct was deficient and, as will be set forth below, counsel did argue on Movant's behalf at the sentencing hearing.

C. **CLAIM THREE:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL PROVIDED ERRONEOUS ADVISE AS TO THE SENTENCE THE MOVANT WOULD RECEIVE i.e., LESS THAN 25 YEARS, IF HE PLEADED GUILTY, WHICH INDUCED HIM TO PLEAD-OUT. (Civ. Dkt. No. 1-1 at 8.)

Under the law, if defense counsel induces a guilty plea with an unkept promise, the plea may be invalid. *Perez*, 227 Fed. App'x at 359 (citing *Cervantes*, 132 F.3d at 1110). A

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defendant's testimony at a plea hearing under oath will, ordinarily, keep a defendant from refuting such testimony in a subsequent collateral proceeding. *Id.* As noted in regard to the previous claims, "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge*, 431 U.S. at 73-74. At Movant's re-arraignment, as noted above, *see supra* p. 13, Movant testified under oath that he was not made any promises by Counsel to plead guilty nor was he threatened or coerced to plead guilty. This creates "a strong presumption of verity." *See Blackledge*, 431 U.S. at 73-74. For Movant to overcome his own sworn testimony, Movant must prove "(1) the exact terms of the alleged promise, (2) exactly when, where, and by whom the promise was made, and (3) the precise identity of an eyewitness to the promise." *Perez*, 227 Fed. App'x at 360 (citing *Cervantes*, 132 F.3d at 1110). "If the defendant produces independent indicia of the likely merit of [his] allegations, typically in the form of one or more affidavits from reliable third parties, [he] is entitled to an evidentiary hearing on the issue." *Id.* (citations omitted). In this matter, Movant has presented the court with no evidence of the alleged promise made to him outside of his own claim presented in this § 2255 motion. In fact, not even an "independent indicia of the likely merit of [his] allegations" has been produced to warrant an evidentiary hearing. *Id.* Therefore, Movant has not produced sufficient evidence to refute Movant's own testimony made under oath.

In support of his claim, Movant cites *United States v. Grammas*, 376 F.3d. 433 (5th Cir. 2004). (Civ. Dkt. No. 1-1 at 8.) In *Grammas*, the Fifth Circuit remanded a § 2255 motion back to the district court to determine if the movant was prejudiced by his attorney's representation. The defense counsel in *Grammas*, "advised Grammas that he would, at most, be imprisoned for 6 to 12 months if he were to be convicted" due to a base offense level of eight. *Grammas*, 376 F.3d at 437. In fact, in that case, the base offense level was 21. *Id.* at 435. Because of this advice, Grammas decided to go to trial and was subsequently found guilty and sentenced to 70 months in

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prison. *Id.* The Fifth Circuit decided that Grammas' attorney's performance fell below an objective level of reasonableness because "[f]ailing to properly advise the defendant of the *maximum sentence* that he could receive falls below the objective standard required by *Strickland.* When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court." *Id.* at 436 (citing *Teague v. Scott*, 60 F.3d 1167, 1171 (5th Cir. 1995)) (emphasis added). Movant's situation is unquestionably different than that of Grammas' situation. As part of his re-arraignment, *see supra* p. 12, the Court informed Movant of his potential term of life in prison. Movant cannot claim to not have had knowledge of the maximum term of imprisonment. Therefore, Movant cannot show he was prejudiced by such lack of knowledge. Because Movant had knowledge of the potential sentence and has not set forth any facts to overcome his "solemn declarations" in open court, Movant's third claim of ineffective assistance of counsel is meritless.

D. **CLAIM FOUR:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL PROVIDED ERRONEOUS ADVISE PRIOR TO PLEA HEARING AND SUCH HEARING, THUS, MOVANT'S PLEA WAS UNINTELLIGENTLY AND INVOLUNTARILY ENTERED. (Civ. Dkt. No. 1-1 at 9.)

Movant claims that "[p]rior to the plea hearing counsel advised that the elements of hostage taking was akin to harboring illegal aliens." (*Id.*) Movant claims that the Court "reworded the statute" and that Counsel told him he could dispute the elements during sentencing. (*Id.* at 10.) According to Movant, these statements induced him to plea and made the plea unintelligent. (*Id.* at 9-10.) Movant also claims that during the plea hearing, Movant conferred with Counsel and was told he could dispute the elements of the offense he was pleading guilty to at sentencing. (Civ. Dkt. No. 1-1 at 10.) Movant cites to the re-arraignment transcript as support for his

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allegation. (*Id.*; *see also* Crim. Dkt. No. 139 at 18, 32 (setting forth when Movant conferred with counsel during the hearing)).

At Movant's re-arraignment, *see supra* p. 13, Movant testified under oath that he was not made any promises by Counsel to plead guilty nor was he threatened or forced to plead guilty. These responses creates "a strong presumption of verity." *See Blackledge*, 431 U.S. at 73-74. Similar to the last claim, Movant has not set forth any evidence besides the unsupported assertion that Counsel promised that Movant could challenge the elements of the crime at the sentencing hearing. Pg.139:16-25 *See also Perez*, 227 Fed. App'x at 360 (citing *Cervantes*, 132 F.3d at 1110). Additionally, through-out the re-arraignment hearing, *see supra* pp. 9-11 & 14-17, the Court clarified it was reviewing the elements of the crime for purposes of the guilty plea to conspiracy to commit hostage taking and engaged in a conversation with Movant to make sure Movant understood the proceedings. Even when having a chance to confer with his attorney, the Movant's primary focus was on the elements of hostage taking. The record reflects the Movant understood the proceedings and was seeking clarification on the elements of the crime even after consultation with his attorney.

Furthermore, the Court did not "reword" the statute but patiently set forth the elements of the crime to make sure Movant understood the elements of the charged offense. In doing so, the Court was able to decide if Movant had voluntarily agreed to each of the elements at part of his plea of guilty. *See supra* pp. 13-17. Movant's fourth claim should be dismissed as meritless.

E. **CLAIM FIVE:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL FAILED TO INVESTIGATE THE GOVERNMENT'S INCULPATORY EVIDENCE AND THE FACT'S UNDERLYING THE MOVANT'S AFFIRMATIVE DEFENSE OF HARBORING. AND BY THAT FAILED TO MOVE THE COURT TO

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SEVER THE HOSTAGE-TAKING COUNTS IN THE INDICTMENT. (Civ. Dkt. No. 1-1 at 11.)

Movant claims that the victims' objective was to be smuggled into the United States and that their "original complaint" did not speak of any "guns, ransom, threats, or hostage-taking." (*Id.*) Movant states that Counsel failed to promote his "affirmative defense of harboring the aliens by placing the six witnesses' original complaints (Ex. 11) before them as impeachment evidence." (*Id.* at 13.)

Movant pleaded guilty to conspiring with others to "seize and detain and threaten to kill, injure, and continue to detain an individual, in order to compel a third person to do an act, that is, to pay a sum of money, as an explicit and implicit condition for the release of the person detained", in violation of 18 U.S.C. §1203(a). (Crim. Dkt. No. 59 at 1; Crim. Dkt. No. 116.) There is no affirmative defense of harboring for this crime.

As set forth above, *supra* pp. 9-11 & 14-17, the Court reviewed in detail the elements of the crime, explained them to the Movant and Co-defendant, clarified the meaning of conspiracy and made sure both the Movant and Co-defendant, first, understood the charges and, second, voluntarily and willingly entered a plea of guilty based on the facts as outlined by the government.

The Court explained the concept of conspiracy (*id.* at 49:4 to 50:16) and then asked the Movant and Co-defendant, Roberto Cruz, the following:

> **COURT:** All right. So then the question here is that, you know, do you admit what, you know, what is covered here by the Indictment itself? And that, at this stage, as I said, that's all that required.
>
> You know, the issue about what we talk about at sentencing, we don't get there unless we have here enough to say this is the offense that occurred, this is the crime that occurred.
>
> So if this other person, I have no idea who this other person was, if this other person was the one that threatened, that made the demand, and all of that, but you're involved in the conspiracy then, again, that's sufficient for you.

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> And sometimes with a conspiracy you don't know all the detail and so we, you know, talk about what the evidence would show and it's, "Well, I don't know specifically that he made a demand to kill somebody, but the evidence shows that, and I wasn't in front of him, you know, when he was on the telephone so I can't say that he did do it, but if the evidence shows it I'll agree that he did it," or something like that. But, again, it has to be what you admit to, okay? You know, I'm not telling you to admit to anything that you don't admit to.
>
> Do you understand that?
>
> **CO-DEFENDANT:** Yes, your Honor.
>
> **COURT:** Okay.
>
> **MOVANT:** Okay, so then by understanding this, what the allegations that are being said, I agree to them, then I still say my part of my story with my evidence and everything?

(*Id.* at 50:18 to 51:22.)

The Court continued to explain to both Movant and Co-defendant that if there are not sufficient admissions in regard to the conspiracy charge of hostage taking, then the Court will proceed forward with a jury trial. (*Id.* at 51:23 to 52:7.) The Court clarified that the parties agreed that individuals were "abducted at gunpoint" and "then requests for money was made." (*Id.* at 52:8 to 52:12.) The part the Court believed the parties were stuck on at that time was whether or not the collection of money had to be made before the illegal aliens were released. (*Id.* at 52:13 to 52:18.)

The Court further explained the elements as Movant had issue with whether the demand of money was made, and receipt was needed before illegal aliens could be released. Movant stated at one point that the illegal aliens, "[r]ight there they were just going to be either turned into Immigration or be – just go back closest to the river." (*Id.* at 55:12-14.) Movant explained that while he "took them food and everything, this and that, they never mentioned nothing to me [about any ransom demands]." (*Id.* at 56:12-15.) The Court informed Movant and Co-defendant that the material witnesses were claiming a third unindicted co-conspirator (Rios) made ransom demands and both Movant and Co-defendant agreed with her on that point. (*Id.* at 56:25 to 57:5.)

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Eventually, as shown above, *see supra* p. 17, Movant agreed that "the condition was that at least one of these individuals would not be released until the money was collected." (*Id.* at 60:19 to 61:4.) Therefore, at the time Movant plead guilty, Movant was aware of the facts of the case and admitted to conspiracy to commit hostage taking as set forth above in open court and in the indictment.

Movant also submits that the six material witnesses' testimony had changed from that of their "original complaints" such that the testimony could not be trustworthy. (Civ. Dkt. No. 1-1 at 11-13.) Movant's cites to multiple sources to support his claim and specifically points out each witnesses' desire to be smuggled into the United States. (*Id.* at 11-12.) However, the fact that the material witnesses may have been smuggled into the United States does not have any effect on the crime Movant pleaded guilty to at the re-arraignment hearing. At the sentencing hearing, the Court clearly and succinctly explained that point:

> **COURT:** . . . Maybe there is still something very basic that you don't understand. Okay?
>
> It is a crime to smuggle aliens. But your charge is not smuggling aliens but hostage taking. But it is a crime to smuggle aliens. Aliens agree to it, okay? They come here. The cross. Nobody like puts a gun to their head to cross the river -- or most of the time they don't. Okay. And once they're here they agree to be held in whatever houses, you know, they hold them in. They agree to be smuggled through the brush. The agree to do all those things, okay? It's still a crime. So, the fact that they may agree to all of this doesn't make it a non-crime, okay? It is a crime.
>
> Now, here we have a different situation but you keep saying that they agreed to it. They may have agreed to come here illegally. They did not agree to get taken from the house where they were at. Okay. Now, the smugglers there may have agreed with you to have that happen, but the aliens did not agree to get taken from the house where they were at.
>
> They got jerked out of one place and taken to another. That was not by their agreement. So, you keep saying they all agreed to it; no, the aliens here did not agree to any of this. Whatever agreement you may have made with one of the other smugglers and for whatever reasons is separate and apart from the victims here. And these are the aliens here. They were not in agreement to what happened here.

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And maybe part of the reason, Mr. Cruz, that you still feel like you're not at fault is because you're thinking, "Well, they're here illegally, therefore anything we do to them is by their agreement." That is not the case.

MOVANT: Well, see, the thing is when -- the day that we picked them up supposedly the way we picked them up we simply told them that "migra"[9] was coming and they all got in the cars when we took them –

THE COURT: Sure they did. They're here illegally. They're going to agree to it. And there's still evidence about guns, but even so it doesn't matter what you tell them, they were not going with you willingly from this one house to this other house. You used the threat of "the migra" to get them to move.

So, again, you misunderstand the law here, Mr. Cruz. There's hostage cases where the -- you know, sadly we hear of situations where a parent agrees to have their child kidnapped for the, you know, insurance money. That doesn't mean that there's no crime committed. It's still kidnapping. So, you need to understand you have violated the law here, Mr. Cruz. And what I'm hearing from you is basically saying, "I didn't do anything wrong." And I don't think you quite comprehend that you have, in fact, committed a crime.

MOVANT: No, I understand that I committed a crime by smuggling -- I told you in the beginning that we were smuggling these people, but it was never like the allegations. Most of the stuff they're saying never happened and that's what -- it's affecting this case. That's what's affecting me and my brother to look bad in the court.

COURT: No, what you did is what's affecting you. It's not anything else, Mr. Cruz.

(Crim. Dkt. No. 140 at 54:15 to 56:23.)

The "original complaint" Movant cited does include the testimony of two material witnesses whom both mentioned being kidnapped at gunpoint and being demanded to call their relatives to wire money so that they may be released. (Crim. Dkt. No. 28 at 2-3.) Movant's claim completely misinterprets the law and the testimony in the case. Furthermore, the facts set forth above in the PSR, *supra*, which include statements by Movant, support the allegation of

[9] "Migra", is short for "migracion", which translates from Spanish into English as "migration" or "immigration"; it is a slang term when used in this context to set forth that U.S. Border Patrol Agents, "La Migra", are in close proximity and one is in danger of being arrested for illegal entry into the United States.

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conspiracy to hostage taking to which he plead guilty to in this matter.

"Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994.) Under these facts and circumstances, Movant has failed to show either deficient representation or prejudice needed to satisfy *Strickland* as there would have been no merit to any argument that harboring was an affirmative defense to hostage taking offense.

F. **CLAIM SIX:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL FAILED TO SUBJECT THE PROSECUTION CASE TO MEANINGFUL ADVERSA[RIA]L TESTING. (Civ. Dkt. No. 1-1 at 15.)

Movant sets forth that "prejudice should be presumed" under *United States v. Chronic*, 466 U.S. 648, 659 (1984) due to his counsel's alleged failure "to subject the prosecution's case to meaningful adversarial testing." (Civ. Dkt. No. 1-1 at 16.) As set forth by the Fifth Circuit in *Haynes v. Cain*, 298 F.3d 375, 380 (5th Cir. 2002) (quoting *Chronic*, 406 U.S. at 658), "[t]he Supreme Court's decision in *Chronic* created a very limited exception to the application of *Strickland's* two-part test in situations that 'are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified.'" Three particular situations have been implicated where prejudice will be presumed. Movant is claiming that his situation is when counsel's representation has entirely failed to subject the prosecution's case to "meaningful adversarial testing"; therefore, prejudice should be presumed.[10] *Id.*

Movant's claims lack any support as "the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot

[10] The other two situations are when a "petitioner is denied counsel at a critical stage of the proceeding" and "when the circumstances surrounding trial prevent a petitioner's attorney from rendering effective assistance of counsel." *Haynes*, 298 F.3d at 380 (citations omitted).

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create one and may disserve the interests of his client by attempting a useless charade." *Chronic,* 466 U.S. at 656 n.19 (citation omitted). In this case, Movant appears to be re-stating the same argument set forth above that he believed harboring is an affirmative defense to the convicted offense of conspiracy to commit hostage taking. For the reasons noted in the preceding paragraph, Counsel was not deficient in his representation of Movant as harboring is not an affirmative defense to the charged offense in the Judgement. For counsel to claim otherwise sets for "a charade" before the court.

Contrary to his claims, Counsel did represent Movant throughout these proceedings. During re-arraignment, Counsel advised the Court that there were issues Movant wanted the Court to consider at sentencing. (Crim. Dkt. No. 139 at 18:21 to 19:4.) At sentencing, those matters were considered including the denial of the sexual assault (Crim. Dkt. No. 140 at 35:17 to 47:7); the fact that the unindicted co-defendant utilized a weapon and not Movant (*id.* at 47:10 to 47:17); acceptance of responsibility (*id.* at 47:18 to 48:6); and criminal history over-representation (*id.* at 48:15 to 49:20), as set forth above. Movant was represented by Counsel throughout these proceedings. *See Haynes*, 298 F.3d at 380-381 (citations and internal quotations omitted) ("[W]hen applying *Strickland* or *Cronic*, the distinction between counsel's failure to oppose the prosecution entirely and failure of counsel to do so at specific points during the trial is a difference … not of degree but kind.")

When facing a potential life sentence and considering the evidence, a decision was made to plead guilty and argue objections at sentencing to various facets of the case. Such representation does not lead to a presumption of prejudice under *Chronic* and such representation is not deficient performance under *Strickland.* Therefore, Movant's sixth claim is also meritless.

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G. **CLAIM SEVEN:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GURANTEED BY THE 6TH AMENDMENT TO THE US CONST., WHERE COUNSEL FAILED TO CROSS-EXAMINE WITNESS [M.V.][11] AS TO HER RAPE ALLEGATIONS AGAINST RAFAEL CRUZ AS COUNSEL ADMITTED IN THE RECORD, HE WOULD CROSS-EXAMINE SUCH WITNESS, AFTER RAFAEL CRUZ OBJECTED TO SUCH ALLEGATIONS. (Civ. Dkt. No. 1-1 at 17.)

Movant states that "it was imperative for counsel to vindicate Rafael Cruz's objection to such rape as he stated he would." (*Id.*) Counsel attempted to do so by arguing the objection at sentencing and noted that Movant had delivered a written statement concerning the allegation of rape to the Court. (Civ. Dkt. No. 140 at 35:9 to 36:2.) The Court advised that the statement from Movant would be considered. (*Id.* at 36:3-6.) The Court further explained to Movant that if Movant wished to have material witness (M.V.) cross examined, he would also have to place himself on the stand to allow the Government to have the opportunity to ask questions and to allow the Court to judge the credibility of each witness. (*Id.* at 36:8 to 37:23.) Movant then stated, "I would like to cross examine." (*Id.* at 38:5-6.) After this statement, the Court advised Movant:

> You'll be called to testify, as well. And in that case – and that's where I say if I decided that you're lying, then that could cost you, not just the acceptance of responsibility points, but it could also cost you – I mean, again on the particulars, to maybe get a higher sentence than I might otherwise give you.

(*Id.* at 39:6-11.)

The Court continued:

> And also it's important that you understand Mr. Lopez [Counsel] can give you all the advice in the world. In many instances the attorney's the one that decides whether to call witnesses to testify or not, but on this issue, because it comes out to basically your word against here word, you'll really have to decide whether you are willing to put yourself on the stand, even though you may be standing only there to testify.

[11] Movant sets forth the name of the sexual assault victim in his petition; for purposes of this Report and Recommendation, she will be referenced as M.V.

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(*Id.* at 39:16-23.)

After understanding that he would have to testify himself if he wished to examine the witness and knowing the potential consequences, Movant decided not to cross-examine M.V. and only wanted the Court to use the letter and other information he wrote to the Court. (*Id.* at 40:1-21.)

> **COURT:** Do you understand, then, that what that means is that I'm not judging – we call it credibility – I'm not judging who's telling the truth by listening to them. I'm only going by what's written here. Do you understand that?
> **MOVANT:** Yes.
> **COURT:** And you are okay with that?
> **MOVANT:** Yes.
> **COURT:** And that's what you want me to do?
> **MOVANT:** Yes.
> **COURT:** All right. And you have something else that you've written to the Court?
> **MOVANT:** It's based on the PSI like some more stuff that I wrote down to better help you [the Judge] understand the report I gave you.

(Crim. Dkt. No. 140 at 40:13 to 41:1.)

The Court asked again of Movant, "[a]nd do you still want me to consider it based on the report and what you are submitting to me in writing?" (*Id.* at 42:25 to 43:3.) To which, Movant replied, "Yes", and then handed additional notes to the Court for review. (*Id.* at 43:4-16.) Counsel did object to the issue of the sexual assault and was ready to proceed to a hearing on the matter. Movant, when given an option to either testify or allow the Court to determine the facts based on the PSR as well as the statements Movant provided, chose the latter option.

Under the facts and circumstances of this case, Counsel's actions were not deficient. Movant, after reviewing the issue on the record, clearly decided not to go forward with any

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questioning; however, Counsel did go forward with the objection to the sexual assault allegation.[12] Such representation was not deficient.

H. **CLAIM EIGHT:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL FAILED TO PREPARE FOR SENTENCING BECAUSE HE BELIEVED HIS CLIENT WOULD NOT BE SENTENCED FOR HOSTAGE-TAKING, BUT ONLY HARBORING ILLEGAL ALIENS. (Civ. Dkt. No. 1-1 at 19.)

Movant claims that "[s]imilar, to the holding in the case above [referencing *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985)] was counsel's erroneous belief that Rafael Cruz would not be sentenced to hostage-taking, but rather harboring illegal aliens." (*Id.*) Movant states that Counsel was unwilling to "subpoena videos and witnesses as mitigating evidence." (*Id.*) In *Blake v. Kemp*, the Eleventh Circuit held that a defense attorney who had not prepared for sentencing because he thought his client would be found not guilty by reason of insanity, provided ineffective assistance of counsel for not preparing any mitigating evidence for sentencing. *Blake*, 758 F.2d at 533-35. Movant's case is different from that of *Blake*. In *Blake*, there was clear evidence that the defendant's attorney did not expect to have a sentencing hearing because he thought his client would be found not guilty and the record reflected that said counsel did not seek out mitigating evidence for purposes of a sentencing hearing. (*Id.*)

That is not the situation in this case. First, the record reflects that both Movant and Counsel were clearly aware of what Movant was going to be sentenced due to Movant pleading guilty to the crime of conspiracy to commit hostage taking. *See supra,* pp. 6-18. Second, prior to the sentencing hearing, counsel filed objections under seal to address Movant's concerns about Movant's claimed minimal role in the hostage taking; Movant's claim that the unindicted co-

[12] The court, afterwards, granted the three-level reduction for acceptance of responsibility, in part, based on Movant's willingness to forgo the contested sentencing hearing on this issue. (Crim. Dkt. No. 140 at 47:18 to 48:6.)

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defendant (Rios) used a firearm and not Movant; Movant's claim that his relationship with M.V. was consensual; criminal history over-representation and Movant's claim that he "fully debriefed" when arrested by law enforcement. (Crim. Dkt. No. 98.) Counsel also advised the Court that Counsel was aware that Movant had sent a letter directly to the Court. (*Id.* at 2.) Third, Counsel, as noted above, brought up these issues with the Court. The fact that the Court did not agree with Counsel does not mean that counsel was deficient in his performance, let alone was not prepared for the sentencing hearing. In this matter, Counsel was ready and prepared for the hearing unlike counsel in *Blake*.

Movant also claims that Counsel failed to "subpoena videos and witnesses." (Civ. Dkt. No. 1-1 at 19.) Movant cites to the sentencing transcript for support that Counsel performed deficiently in this case. (*Id.* at 19-20.) At sentencing, the Court, after reading Movant's own statements concerning Counsel not retrieving video footage, said the following:

> The other issue he [Movant] brought up was that he [Movant] was wanting to get videotapes, I assume from Walmart, to show his presence with this material witness [M.V.]. And his statement then was that you [Counsel] had said that I would take his word for it. Well, not necessarily true, but even assuming that I believed, you know, that – so even assuming she's with you at the Walmart, okay, I'm saying it doesn't necessarily mean that there's no sexual assault because, again, there are many times when people are under some sort of threat or coercion that they continue acting physically as if they're agreeable to what's going on.
>
> So, even if it's true that she is with you at Walmart and has your cell phone, that doesn't mean that there is no assault here. And we have to keep in mind that when we're talking about these individuals, they're here illegally. They many times feel that they cannot go to law enforcement. And sadly, some of them come from countries where you cannot go to law enforcement because they're part of the organization that is abusing them to begin with.

(Civ. Dkt. No 140 at 45:8-25.)

The Court clarified to Movant that having the video tapes would not foreclose the existence of a sexual assault. (*Id.* at 46:1-3.) In other words, the tapes would not have made a difference

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to the Court. Counsel was not deficient in his representation and there is no prejudice for Counsel's decision not to submit the videotapes in question. This claim should also be dismissed as it is meritless.

I. **CLAIM NINE:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL FAILED TO NEGOTIATE A REASONABLE PLEA DEAL.[13] (Civ. Dkt. No. 1-1 at 21.)

Movant believes that Counsel was ineffective for negotiating "a plea deal that disfavored Rafael Cruz in a way that it mimicked the hostage-taking statute's punishment to a tee." (*Id.*) Movant also claims that:

> There is a reasonable possibility that, but for counsel deficient performance, supra, a more reasonable plea deal would've derived from counsel using his boardroom negotiating power with the mitigating evidence mentioned in the errors previously argued in this Ground. See Ground 1 of this memorandum i.e., error's 1-9.

(*Id.*) Movant cites *Lafler v. Cooper*, 566 U.S. 156 (2012), as support for this claim.

In *Lafler*, the Supreme Court held that a defendant received ineffective assistance of counsel when his trial attorney informed the defendant of an incorrect legal rule and advised the defendant to not take a plea deal. *Lafler*, 566 U.S. at 162. The defendant went to trial and received a sentence more than three times longer than that offered as part of the plea deal. *Id.*

Movant did not reject a plea deal but instead accepted one that had him plead guilty to only one of twelve counts in the indictment. Movant also received a three-point reduction to his offense level for acceptance of responsibility. The Court then departed from the PSR recommendation of life in prison to sentence Movant to 480 months in prison.

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[13] Movant, in setting forth this claim, believes he was "duped into a plea deal on the erroneous advice of a counsel who failed to conduct the appropriate legal investigation that would've of developed Rafael's Cruz's defense of harboring aliens which dwarfed counsel's competence." (*Id.* at 22.) As noted above, harboring is not affirmative defense to conspiracy to commit hostage taking; therefore, Counsel was not deficient in pursuing this meritless defense.

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Movant also claims that the mitigating evidence introduced in his previous errors support his claim that Counsel performed deficiently in securing a plea agreement. (Civ. Dkt. No. 1-1 at 21.) However, Movant does not set forth any mitigating evidence that would support his claims. Movant does not have any support for his claims that the negative results in a sexual assault examination or video tapes would preclude the existence of sexual assault, or that the material witnesses all created their story to gain citizenship in the United States. In fact, Movant's brother, Co-defendant Roberto Cruz, received the exact same plea deal with his own counsel. *Lafler* is thus inapplicable as it concerns the denial of a plea agreement upon advice of counsel. Movant agreed to the facts supporting the guilty plea as explained and was subsequently sentenced below the Guideline recommendation of life imprisonment. Counsel was not deficient in his performance nor has any prejudice been established in connection with Counsel's performance.

J. **CLAIM TEN:** MOVANT WAS DENIED EFFECTIVE ASSISTANCE AS GUARANTEED BY THE 6TH AMENDMENT TO THE U.S. CONST., WHERE COUNSEL TOOK AN ALTERNATIVE COURSE OF ACTION WHICH FURTHERED HIS PERSONAL INTEREST i.e., PLEA AGREEMENT, AND DIMINISHED THE MOVANT'S PENAL INTEREST, INFRA. (Civ. Dkt. No. 1-1 at 23.)

Movant claims that Counsel's primary interest "was to have the Movant plead-out." (*Id.*) Movant cites *Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997), as support for this claim. Movant's factual support for his claim is that Counsel failed to appear at certain hearings and Counsel "expressed during attorney-client conferences" that Movant should plead-out. (*Id.*)

In *Blankenship*, the Fifth Circuit granted a petitioner's habeas petition after finding that appellate counsel's assistance was ineffective. *Blankenship*, 118 F.3d at 314. The Court found that petitioner's appellate counsel had been elected county attorney after successfully arguing petitioner's appeal. *Id.* Counsel did not inform his client of this and after the prosecuting

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attorney sought discretionary review of the reversal, appellate counsel did nothing to assist petitioner. *Id.* The Court held that a petitioner "can prove ineffective assistance by showing that (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected his performance." *Id.* at 318.

Movant fails to introduce any evidence that "counsel actively represented conflicting interests." *See id.* at 318. Movant is correct that his counsel did not appear at an arraignment on October 10, 2013, and was late to the sentencing hearing. Counsel was also verbally reprimanded by the Court at a final pretrial conference on November 25, 2013 for not being prepared. Movant asserts that Counsel's conduct was evidence of Counsel's interest in securing a guilty-plea by Movant.

The record does not reflect a primary interest by Counsel in securing a guilty-plea. At a pre-trial conference on November 26th, Counsel announced he was ready to proceed to trial due to the lack of a plea agreement even though it was announced that Movant was prepared to plead guilty to certain counts in the indictment. (Crim. Dkt. No. 136 at 2:6-14.)

Likewise, Movant fails to show that any alleged conflict of interest adversely affected his performance. Movant asserts that Counsel's interest in a guilty-plea was the cause of the ineffective assistance asserted in claims 1-9 of this § 2255 motion. (Civ. Dkt. No. 1-1 at 23-24.) As already discussed above, Movant's previous claims are without merit as Counsel's representation was not deficient nor was there any prejudice established. Likewise, Movant's current claim is without merit. Part of effective representation is seeking to secure a fair plea deal especially in light of overwhelming evidence. Movant has not shown that Counsel's performance "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688.

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II. Denial of Due Process by Mental Coercion (Ground Two)

> MOVANT WAS DENIED 5TH AMENDMENT DUE PROCESS AS GUARANTEED BY THE U.S. CONST., WHERE THE COURT MENTALLY COERCED THE MOVANT TO CONFESS TO THE ELEMENTS OF 18 U.S.C. 1203 (a) BY INFRINGING HIS RIGHT TO REMAIN SILENT AFTER HE REPEATEDLY REFUSE[D] TO ACCEPT THE SAID ELEMENTS, WHICH ALSO CREATED A NON-FACTUAL BASIS FOR THE COURT TO CONTINUE THE RULE 11 COLLOQUY IN VIOLATION OF FED.R.CRIM.P. 11 (b) (3).

Movant claims that "the court's inquiry into the Movant's understanding of the crime charged was mentally coercive." (Civ. Dkt. No. 1-1 at 25.) Specifically, Movant claims that he "repeatedly refuse[d] to accept the 3 elements of 18 U.S.C. 1203(a), but instead of considering the Movant's unwillingness to plea-out to satisfy his Constitutional Right to trial and due process, the court would first reword the said U.S.C., a power vested solely in Congress . . . to establish a judge-made factual basis." (*Id.* at 25-26.) Further, Movant claims:

> [t]he court, obviously noticed that the Movant was either ill advise[d] or just plainly oblivious of the elements of the said U.S.C. [18 U.S.C. §1203(a)], where he continued to mistake the said U.S.C., with 18 U.S.C. 1324(a)(1)(A)(ii)(I). Needless to say, but once the Movant openly and in intervals disagreed with the elements of the said U.S.C., the court's inquiry should've stopped and, thus, rejected his plea and not continue to aggravate the Rule 11 hearing.

(*Id.* at 26.)

The purpose of Rule 11 is to "ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea." *United States v. Vonn*, 535 U.S. 55, 58 (2002). Under Rule 11, before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea. Fed. R. Crim. P. 11(b)(3). To make this determination, a court must "make certain that the factual conduct admitted by the defendant is sufficient as a matter of law to establish a violation of the statute to which he entered his plea." *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010).

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Movant first claims that the Court violated Rule 11(b)(3) by coercing Movant and cites *United States v. Johnson*, 546 F.2d 1225 (5th Cir. 1997), and *United States v. Rodriguez*, 197 F.3d 156, 159 (5th Cir. 1999), for support. (Civ. Dkt. No. 1-1 at 25.) In *Johnson*, it was held that a court must determine there is a factual basis for a plea before entering judgement on the plea. Fed. R. Crim. P. 11(b)(3); *Johnson*, 546 F.2d at 1226. In *Rodriguez*, it was held that a court must not participate in plea negotiations. Fed. R. Crim. P. 11(c)(1); *Rodriguez*, 197 F.3d at 158.

Movant appeared at the plea hearing ready to plead guilty with a plea agreement already negotiated. (*See* Crim. Dkt. No. 139 at 3:6-9) ("Good morning, your Honor. [Movant's attorney]. We're signed up and ready to proceed with a plea this morning your Honor, to Count – Count One of the Second Superseding Indictment."). Then, as detailed above, *see supra* pp. 6-17, the Court determined that Movant, as well as Co-defendant, were competent to plead guilty after asking them about their mental health and any related issues. Next, the Court went over Count One of the second Superseding Indictment with Movant. After Movant expressed confusion over the charge, the Court went into further detail and broke the charge down element by element with specific emphasis on the conspiracy element.

At one point, Movant stated "[s]o I was thinking I was going to plead guilty to kidnapping, not exactly the – that whole thing you read." (Crim. Dkt. No. 139 at 17:17-19.) The Court again explained that Movant had agreed to plead guilty to a conspiracy charge and not the underlying act itself, to which Movant replied that he understood. Movant then stated "[o]kay, my lawyer has just informed me that any objections goes – like I understand I'm pleading guilty, but I have certain evidence that --." (*Id.* at 18:18-20.) The Court explained that at sentencing, Movant could present evidence on particulars of the crime and why he did what he did. Following this, the Court appropriately covered Movant's rights as required by Fed. R. Crim. P. 11(b)(1). The

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Court then asked if Movant received any promises to plead guilty and if he was forced or coerced to plead guilty, to which he answered in the negative, and asked if he entered the plea freely and voluntarily to which he answered in the positive. After the Court concluded that Movant was entering the plea voluntarily, Movant pleaded guilty.[14]

After the guilty plea, the Court, in compliance with Rule 11(b)(3), determined if there was a factual basis for the plea. Fed. R. Crim. P. 11(b)(3). It is here that Movant appears to claim that the Court coerced him.

Movant originally disagreed with the facts presented by the government and questioned the elements of the crime he pleaded guilty to as set forth above. Movant contends now and then that he only committed the crime of harboring aliens. However, this matter was reviewed with Movant at the re-arraignment hearing. Movant also admitted at the plea hearing that he believed he was pleading guilty to a kidnapping charge. (Crim. Dkt. No. 139 at 17:17-19.) In response, the Court recited the elements of the conspiracy charge multiple times to make sure the Movant, as well as Co-defendant, understood everything. At one point, the Court, and the government, both expressed concern whether either Movant or Co-defendant agreed to the factual basis

To clarify the matter pursuant to Fed. R. Crim. P. 11(b)(3), the Court further explained that when an individual pleads guilty to a conspiracy charge that particular individual did not have to be the person who performed each element but only agreed to it. To illustrate the point, the Court utilized the issue of conspiracy to commit bank robbery where one individual is the driver of the vehicle and another individual actually enters into the bank to commit the robbery. The driver,

[14] Should Movant be claiming once again that the Court participated in plea negotiations based on citation to *Rodriguez*, that matter is foreclosed as it was the primary issue on appeal in this matter. In affirming the case, the appellate court noted that Movant "fails to show that the district court participated in any discussions during plea negotiations." (Crim. Dkt. No. 169 at 2; Case No. 14-40558.) *See United States v. Fields*, 761 F.3d 443, 466 (5th Cir. 2014) (citing *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986)) (barring a movant's claim because it had already been decided on direct appeal).

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by agreeing to participate in the crime, is guilty of the bank robbery even though the other individual was the one who actually committed the crime. The Court then carefully explained to Movant that only he could admit to the facts and that the Court could not force him to admit to the facts.

After this further explanation and after clarifying that Movant understood the concept of conspiracy and the elements of the crime as explained by the Court, Movant admitted to the facts in support of conspiracy to commit hostage taking in violation of 18 U.S.C. §1203(a). Movant and Co-defendant admitted that each agreed together and with others including an unindicted co-defendant (conspiracy) to knowingly and intentionally to seize and detain others ("abducted at gun point") in order to compel another person to pay a sum of money by demand ("that a request for money was made") before said person would be released ("at least on of these individuals would not be released until the money was collected"). *See supra,* pp. 13-17. *Johnson* actually supports the Court's actions as the Fifth Circuit noted the following:

> [F]actual basis for a guilty plea must be precise enough and sufficiently specific to show that the accused's conduct on the occasion involved was within the ambit of that defined as criminal. Before a guilty plea can be validly accepted, the district court *must* insure that the conduct admitted by the accused constitutes the offense charged in the information. This factual basis *must* appear on the record.

Johnson, 546 F.2d at 1226 (citations omitted) (emphasis added). Contrary to his claims, Movant voluntarily pled guilty to conspiracy to commit hostage taking and knowingly agreed with the factual basis to support the plea after being advised of his rights, understanding that he was waiving his right to trial and right to remain silent, and after a very thoughtful and clear explanation of the criminal charge by the Court.[15] The three core concerns of Rule 11, which are absence of

[15] To prove hostage taking, "the government must establish that the appellants (1) seized or detained another person, and (2) threatened to kill, injure, or continue to detain that person, (3) with the purpose of compelling a third person

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coercion, understanding the accusations, and knowledge of the consequences of the plea, were met in this proceeding. *See Untied States v. Green*, 882 F.2d 999, 1005 (5th Cir. 1989). Movant's second ground in his § 2255 motion for being denied due process on account of "mental coercion" by the District Court should be denied as the claim is inherently meritless.

III. Denial of Due Process by Failing to Prove Elements of Crime (Ground Three)

> MOVANT WAS DENIED 5TH AMENDMENT DUE PROCESS, WHERE THE GOVERNMENT FAILED TO PROVE ELEMENTS 1 AND 2 OF 18 U.S.C. [1203] (a), DURING RULE 11 COLLOQUY DUE TO THE COURT'S CONSTRUCTIVE AMENDMENT THAT RENDERED THE MOVANT'S AGREEMENT TO PLEA UNINTELLIGENT, THUS, A MANIFEST INJUSTICE EXISTS, BECAUSE INSUFFICIENT FACTAL BASIS FOR CHARGE. (Civ. Dkt. No. 1-1 at 28.)

Movant brings this claim before the court for the first time after not raising it upon direct appeal. "[T]he voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley v. United States*, 523 U.S. 614, 621 (1998). If a challenge to a plea is not raised first on direct appeal, the claim is procedurally barred. *Id.* "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' . . . or that he is 'actually innocent.'" *Id.* at 622 (quoting *Murray v. Carrier*, 477 U.S. 478, 485, 496 (1986)).

To establish "cause" a movant must show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim on direct review. *Murray*, 477 U.S. at 488. Such external factors may include that the "factual or legal basis for a claim was not reasonably

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to act in some way as an 'explicit or implicit condition for release of the person detained.'" *United States v. Ibarra-Zelaya*, 465 F.3d 596, 602 (5th Cir. 2006) (quoting 18 U.S.C. § 1203(a)). "Conspiracy requires direct or indirect agreement to commit hostage taking, knowledge of the purpose of the agreement was unlawful, and joinder in the agreement to further its unlawful purpose." *Id.* at 603 (quoting *United States v. De Jesus-Batres*, 410 F.3d 154, 160 (5th Cir. 2005)). As noted in detail, the court went over these elements with Movant in regard to conspiracy to commit hostage taking.

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available to counsel" or if an official interfered and made compliance impracticable. *Id.* If a movant fails to establish cause, federal courts may still retain authority if there is a fundamental miscarriage of justice, such as that of convicting an innocent defendant. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

Movant has not set forth any evidence of an external factor that could establish cause for his failure to present his claim on direct review. Movant's only support for the claim is the record, itself, which was available to appellate counsel at the time of direct review. Movant has not provided the court any evidence of cause or actual prejudice for why this ground is not procedurally barred, or any evidence that he is actually innocent of the charged criminal offense.[16] Therefore, Movant's third ground should be dismissed as it is procedurally barred from habeas review.

DISCOVERY ORDER & EVIDENTIARY HEARING

Movant, on March 8, 2018, filed a Motion for Discovery requesting discovery of his September 11, 2013, interrogation in support of his claim that his counsel was ineffective in regard to his conviction and the subsequent sentencing enhancement for sexual assault of M.V. (Civ. Dkt. No. 11.) In the motion, Movant claims that there was a conversation between Movant and M.V.'s brother-in-law that was cordial in nature. Such collegiality between Movant and M.V.'s brother-in-law, according to Movant, is proof that there was no hostage taking or sexual assault of M.V. since M.V. "never told" the brother-in-law of either issue. Further, according to Movant, M.V. was in constant contact with the brother-in-law and thus would have time to inform the brother-in-law of her dire situation. (*Id.* at 3-4.)

[16] Even if this claim was considered, for the reasons set forth above in regard to Ground Two, *supra*, Movant knowingly and voluntarily plead guilty to conspiracy to commit hostage taking after the court complied with Fed. R. Crim. P. 11 and advised Movant of his rights, reviewed the allegations, made sure Movant was competent and accepted the plea after determining there was a factual basis, agreed to by Movant, to support the plea of guilty.

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A petitioner in a § 2255 litigation may "invoke the process of discovery available under the Federal Rules of Civil Procedure if, and to the extent, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." *Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997) (citing *Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996)). The court "must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in petitioner's favor, would entitle him to relief." *Ward v. Whitlery,* 21 F.3d 1355, 1367 (5th Cir. 1994). "Conclusional allegations are insufficient to warrant discovery; the petitioner must set forth allegations of fact." *United States v. Webster*, 392 F.3d 787, 801-802 (5th Cir. 2004) (citing *Ward*, 21 F.3d at 1367.) There is no good cause to allow for discovery in this matter.

First, even assuming M.V.'s brother-in-law was cordial with Movant during a phone call, that would not resolve any factual dispute or establish that Counsel was ineffective in his representation. Based on Movant's motion it appears that the brother-in-law in question was not present in south Texas and was only contacted by phone by M.V. or Movant. (Civ. Dkt. No. 11 at 2.) As such, the brother-in-law is not a direct eye-witness who could to contradict the statements and evidence of the conspiracy provided by the material witnesses and gathered by the government during the investigation. *See supra* pp. 4-6. It would not be unreasonable for an attorney to consider the more direct evidence of a crime over very indirect and circumstantial evidence when counseling his client on how to proceed with a case. The fact that an individual was cordial with the Movant on a telephone call is for all intents and purposes irrelevant to the charges in the indictment based on the facts of the case. Nor would it be ineffective for counsel to discount such a claim in light of the other evidence set forth by the government.

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Secondly, whether or not M.V. advised her brother-in-law of the sexual assault is also irrelevant nor would it resolve a factual dispute. The Court dealt with this very issue at the sentencing hearing:

> **COURT:** I read to here – you talk about, you know, the fact that she didn't tell anybody what was going on until such time as law enforcement shows up. She's with –
>
> **MOVANT:** Can I say something real quick?
>
> **COURT:** You need to wait, okay?
>
> She's with a group of all males known of whom are her family members, and as I understand it, this a very difficult thing for a victim of a sexual assault to reveal that in many instances. And in particular because in many instances a victim feels that somehow that she is at fault for the assault and it's a combination of shame and fear that many times keeps them from revealing anything, and especially in a situation where she is not yet out of your reaches. So that again does not necessarily mean that there was no sexual assault.

(Crim. Dkt: No. 140 at 46:4-19.) Similarly, the fact that M.V. may or may not have told her brother-in-law about the sexual assault would not resolve the factual dispute in regard to the sentencing enhancement in question. Therefore, Movant has not set forth "good cause" to grant the request for discovery and the motion should be dismissed.

Based on review of the Movant's § 2255 motion, response, and discovery request, along with Respondent's response, for the reasons set forth above, there is no need for an evidentiary hearing in this matter since the claims are "either contrary to law or plainly refuted by the record." *Green,* 882 F.2d at 1008 (citations omitted).

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. 6) be **GRANTED** and Movant's §

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2255 motion (Civ. Dkt. No. 1) be **DENIED**. It is also further recommended that Movant's related Motion for Discovery (Civ. Dkt. No. 11) 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

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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 since his claims concerning ineffective assistance of counsel are without merit and fail to establish that counsel was deficient in the representation of Movant. The second ground concerning mental coercion by the district court is also without merit as Movant voluntarily plead guilty to the charges and said plea was supported by an appropriate factual basis. The final ground contesting his plea is procedurally barred from review. 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 4th day of January, 2019.

Juan F. Alanis
United States Magistrate Judge

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