FILED: August 25, 2020

S COURT OF APPEALS
HE FOURTH CIRCUIT

No. 20-6490
(1:12-cr-00255-AJT-6)
(1:16-cv-01291-AJT)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSE DELORES VANEGAS, a/k/a Chivito

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6490

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE DELORES VANEGAS, a/k/a Chivito,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:12-cr-00255-AJT-6; 1:16-cv-01291-AJT)

Submitted: August 20, 2020 Decided: August 25, 2020

Before GREGORY, Chief Judge, WYNN, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Jose Delores Vanegas, Appellant Pro Se. Marc Birnbaum, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jose Delores Vanegas seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Vanegas has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOSE DELORES VANEGAS Petitioner, v. UNITED STATES OF AMERICA Respondent.	)	Civil Case No. 1:16-cv-1291 (AJT) Criminal Case No. 1:12-cr-255-AJT-6

ORDER

Pending before the Court is *pro se* Petitioner Jose Delores Vanegas's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 653] ("Motion") and Motion to Expedite 28 U.S.C. § 2255 Pursuant to 28 U.S.C. §§ 1657 & 2243 [Doc. 688] ("Motion to Expedite"). On January 15, 2013, Petitioner was found guilty of conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 846, and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). On June 7, 2013, the Court sentenced Petitioner to a total term of 120 months' imprisonment, comprised of 60 months for each conviction, to run consecutively. In the Motion, Petitioner challenges the validity of that sentence on the grounds that his trial counsel was ineffective in his representation. Upon consideration of the Motion and the memoranda in support thereof and in opposition thereto, the Court finds that an evidentiary hearing is unnecessary as the record conclusively demonstrates that Petitioner is not entitled to the relief he

seeks. *See* R. Gov. § 2255 Proc. 8(a). For the reasons stated below, the Petitioner's Motion is **DENIED** and Petitioner's Motion to Expedite is **DENIED** as moot.[1]

I. BACKGROUND

Petitioner was one of twenty-eight defendants charged as part of a broad conspiracy to import and distribute cocaine within the United States. Petitioner first came to the attention of law enforcement through a related investigation concerning an individual named Samuel Benitez-Penida ("Benitez-Pineda"). Benitez-Pineda received powdered cocaine from couriers arriving from Honduras with household goods and shoes containing concealed cocaine. Upon receiving the hidden cocaine, Benitez-Pineda distributed the drugs to others, including Petitioner, for distribution in, among other places, the Eastern District of Virginia. As part of their investigation into Benitez-Pineda, law enforcement, with judicial approval, tapped Benitez-Pineda's cellphone and recorded approximately 217 conversations between Benitez-Pineda and Petitioner between February 18, 2012 and May 9, 2012. Approximately half of those calls were related to cocaine sales.

Armed with this information, on May 10, 2012, law enforcement officers executed an arrest warrant on Petitioner at his residence in Arlington, Virginia. Upon executing the warrant, these officers arrested Petitioner and once arrested asked Petitioner if he kept any weapons in his home. [Doc. 668-1 ("Trial Transcript") at 46:11-22, 148:1-13]. Petitioner motioned towards a nearby closet, where the officers later found a handgun. *Id.* at 149:17-150:20; 151:16-23. Thereafter, the officers transported Vanegas to the Arlington County Police Department to conduct an interview. *Id.* at 46:17-47:14.

[1] Also pending is Petitioner's Motion to Set Evidentiary Hearing Date [Doc. 682]. This Motion is also **DENIED** as moot.

The officers who effected the arrest issued *Miranda* warnings to Petitioner shortly after arriving at the police station, *id.* at 47:10-48:14, after which Petitioner informed the officers that he could understand English, he understood his rights, and that he was willing to speak with law enforcement without an attorney present. To memorialize this agreement, Petitioner signed an "advice of rights" form. *Id.* 48:21-49:16. The officers then asked Petitioner to consent to a full search of his apartment, which he provided in a separate written form. *Id.* at 50:12-52:10.

Shortly thereafter, law enforcement officers conducted a thorough search of Petitioner's apartment. *Id.* at 148:4-21. When carrying out this earch, officers consulted with Petitioner's family members, including Petitioner's stepdaughter, Beverly Esteves, who signed a search consent form at the time of the search. *Id.*; *see also* [Doc. 668-2]. During their search, the officers recovered a nine-millimeter semiautomatic pistol; a blue pistol case; a black box; a glass jar containing a white, powdery substance; a box of ammunition; small "zip lock type" bags; drug paraphernalia; digital scales; and a one-dollar bill with white, powdery residue on it. *Id.* at 150:17-151:19, 155:25-156:11. The gun case held ammunition (nine-millimeter in caliber) and two loaded magazines (the same brand as the pistol previously found in Petitioner's apartment). *Id.* at 157:20-158:16. The officers also seized Vanegas' iPhone and two micro SD memory cards. At that time, the officers copied the data from the iPhone and cards using a Cellebrite machine. *Id.* at 166:9-168:7.

On September 27, 2012, the government charged Petitioner with conspiracy to distribute cocaine under 21 U.S.C. § 841(b)(1)(A) and possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A). [Doc. 293] (Third Superseding Indictment). Petitioner proceeded to trial on both counts. Trial counsel did not file any pretrial motions.

At trial, the government introduced the testimony of Carl Thomas Walsh, Jr. ("Walsh"); Benitez-Pineda; and Concepcion Benitez-Pineda ("Concepcion"), Benitez-Pineda's wife. Walsh testified that he had purchased cocaine from Petitioner between 15 and 25 times, beginning in early 2012 through March or April of that same year, and had exchanged numerous text messages regarding those transactions with Petitioner, which the government admitted into evidence. *Id.* at 63:4-24. Benitez-Pineda, Petitioner's source for the cocaine, also testified and identified Petitioner as one of his customers. *Id.* at 94:18-25. Benitez-Pineda added that after selling Petitioner fourteen grams of cocaine in their first meeting, the two would meet approximately every two to three days to supply Petitioner with cocaine, selling amounts ranging from one to fourteen grams. *Id.* at 98:11-16, 99:25-101:1. Benitez-Pineda also testified that Petitioner told him that he was distributing the amounts of cocaine purchased for resale in the Northern Virginia area, that he had seen Petitioner with a firearm, and, on at least one occasion, Petitioner had offered Benitez-Pineda ownership of the gun in exchange for a credit toward cocaine sales. *Id.* at 104:9-18, 107:13-14, 108:3-109:11. Concepcion also testified at trial. She stated that after her husband and Petitioner spoke about cocaine, she would thereafter personally deliver to Petitioner, in amounts that would be typical for individuals engaged in drug trafficking given that the quantities were too large for personal use. *Id.* at 203:19-204:23; *see also id.* at 217:13-227:20 (expert testimony regarding drug amount).

At trial, the government also admitted images downloaded from Petitioner's iPhone, recovered during law enforcement's search of his apartment; and that these images included a debit card bearing Petitioner's name. *Id.* at 168:15-169:22. The government also introduced evidence pertaining to Petitioner's telephone number at trial, establishing his communications with Benitez-Pineda. Finally, the government introduced the testimony of a drug chemist, who

confirmed that the white, powdery substance found in Petitioner's apartment had tested positive for both marijuana and cocaine. *Id.*

Petitioner did not put on any evidence at trial, and on January 15, 2013, the jury found Petitioner guilty as to both charged counts [Doc. 418]. On June 6, 2013, after denying Petitioner's motions for acquittal and a new trial, *see* [Doc. 515], the Court sentenced Petitioner to 60 months' imprisonment for each count of conviction, to run consecutively, with credit for time served. [Doc. 530 at 2]. At sentencing, Petitioner, for the first time, argued that the evidence taken from his cell phone was illegally obtained and Walsh's testimony, whose identify derived from the communications found on Petitioner's cellphone, was fruit of the poisonous tree. *See* [Doc. 672-4 at 7:12-8:20]. The Court denied Petitioner's argument. *Id.*

Thereafter, Petitioner appealed his sentence as to the § 924(c) conviction, challenging the sufficiency of the evidence as well as a related jury instruction provided at trial. [Docs. 526, 567]. The United States Court of Appeals for the Fourth Circuit affirmed Petitioner's conviction on March 10, 2014 [Doc. 568], and subsequently denied his requests for a rehearing and rehearing *en banc* [Doc. 570]. On October 14, 2014, the Supreme Court granted Petitioner's petition for certiorari and remanded his matter for the Fourth Circuit to consider Petitioner's case in light of *Riley v. California*, 134 S. Ct. 2473 (2014), wherein the Supreme Court held that a warrant is generally required prior to a search of a cell phone, even if the phone is seized incident to an arrest, *id.* at 2493. *Vanegas v. United States*, 135 S. Ct. 377 (2014).

On remand, the Fourth Circuit again affirmed Petitioner's conviction [Doc. 611], concluding that because Petitioner had failed to timely file a motion to suppress the fruits of the search of his cellphone, he waived the suppression arguments raised on remand and that he lacked "good cause" to excuse the waiver, *id.* at 3-4 (citing Fed. R. Crim. P. 12(b)(3)(C)).

Petitioner again petitioned the Supreme Court for certiorari, which the Supreme Court denied on October 6, 2015. On October 4, 2016, less than one year after the judgment of conviction became final, Petitioner submitted his Motion. Accordingly, Petitioner's Motion is timely. *See* 28 U.S.C. § 2255(f)(1).

II. STANDARD OF REVIEW

Under 28 U.S.C. § 2255, a prisoner in federal custody may challenge his conviction or sentence on the grounds that: (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. "Section 2255 is designed to correct fundamental constitutional or jurisdictional error which would otherwise 'inherently result[ ] in a complete miscarriage of justice.'" *Matthews v. United States*, 514 F. Supp. 2d 827, 832 (E.D. Va. 2007) (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)). The petitioner has the burden of proving all of his claims by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958). The court may dismiss a motion pursuant to 28 U.S.C. § 2255 without an evidentiary hearing where the "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).

Generally, claims not raised on direct appeal are procedurally defaulted on collateral review unless the petitioner can show cause for not raising the issue on appeal and actual prejudice resulting therefrom. *United States v. Frady*, 456 U.S. 152, 165–67 (1982). However, a petitioner need not have raised an ineffective assistance of counsel claim on direct appeal to raise it in a subsequent § 2255 motion. *Massaro v. United States*, 538 U.S. 500, 509 (2003); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997) ("[I]t is well settled that a claim of ineffective

assistance should be raised in a 28 U.S.C. § 2255 motion in the district court rather than on direct appeal, unless the record conclusively shows ineffective assistance.") (internal quotation and citations omitted). As such, the Court now reviews Petitioner's ineffective assistance of counsel claims, the only type of claims he raises here.

III. ANALYSIS

A. Ineffective Assistance of Counsel

The Sixth Amendment to the Constitution of the United States provides that "the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const, amend. VI. The Supreme Court has interpreted the right to counsel as providing a defendant "'the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)) (emphasis added). To obtain relief based on an allegation of ineffective assistance, a petitioner must establish both that: (1) trial counsel's performance fell below an objective standard of reasonableness; and (2) trial counsel's inadequate performance caused the petitioner prejudice. *Id.* at 687-88. The first prong is known as the "performance prong"; the second is known as the "prejudice prong." "[U]nsubstantiated and largely conclusory statements are insufficient to carry a petitioner's burden as to the two prongs of the Strickland test." *United States v. Turcotte*, 405 F.3d 515, 537 (7th Cir. 2005).

The *Strickland* standard is a "high bar" and courts must assess trial counsel's efforts with "scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process that the right to counsel is meant to serve." *Jackson v. Kelly*, 650 F.3d 477, 493 (4th Cir. 2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). Accordingly, the "performance prong" requires a showing that "counsel's representation fell below an objective standard of

reasonableness." *Richardson v. Branker*, 668 F.3d 128, 139 (4th Cir. 2012) (quoting *Strickland*, 466 U.S. at 687-88). And deficient performance is one in which counsel "made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. But trial counsel's performance is not limited to trial. As stated in *Strickland*, a defendant's counsel must also make reasonable decisions in determining when "particular investigations [are] necessary." *Id.* at 691; *see also Tice v. Johnson*, 647 F.3d 87, 104 (4th Cir. 2011). And this duty to investigate a case adequately applies to information that is both uncovered and is within the trial counsel's case file. *Tice*, 647 F.3d at 104.

To satisfy the "prejudice prong," a petitioner must "affirmatively prove prejudice" which requires that a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (quoting *Strickland*, 466 U.S. at 693-94). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A failure to make the required showing under either prong defeats any claim for ineffective assistance of counsel, and a court may consider the two prongs in either order. *Id.* at 697. For this reason, it is not necessary to determine whether counsel performed deficiently if the claim is readily dismissible for lack of prejudice. In other words, courts can first evaluate *Strickland* claims under the prejudice prong. *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004).

B. Petitioner's Claims

Here, Petitioner asserts nine ineffective assistance of counsel claims.[2] More specifically, Petitioner alleges that trial counsel (Bruce Cooper) failed to adequately investigate his case as to nine separate issues, including his failure:

1. to investigate the execution of Petitioner's arrest warrant, which Petitioner claims was executed illegally [Doc. 653 at 15];

2. to investigate the warrantless sweep of Petitioner's residence that took place at the time that the arrest warrant was executed, including search of Petitioner's closet, *id.* at 29-36;

3. to investigate law enforcement's questioning of Petitioner allegedly without advice of his *Miranda* rights, *id.* at 38-40;

4. to investigate the FBI's unlawful personal seizure of Petitioner's family members at the time of his arrest and after, *id.* at 43-44;

5. to investigate the FBI's search of the apartment with allegedly invalid consent from Petitioner's step-daughter, *id.* at 46-48;

6. to investigate an FBI Special Agent's statement, *id.* at 60-61;[3]

7. to investigate the FBI's unlawful search of Petitioner's cell phone and SD Media Cards, *id.* at 35-46;

8. to obtain copies of the Application for court order and search warrant pursuant to 18 U.S.C. § 2703(c)(1)(A), directing AT&T to provide location information of Petitioner's cellphone to the FBI, *id.* at 46;

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[2] Petitioner alleges nine errors at one point in his Motion, but then alleges ten errors at a later point. *Compare* [Doc. 653 at 24], *with*, *id.* at 28. In the Court's review of the Motion, the Court identifies nine alleged errors, as does the government, *see* [Doc. 668 at 10-11].

[3] Petitioner identifies trial counsel's failure to investigate certain statements made by FBI Special Agent Michael T. Adkins on an FBI FD-302 form as a basis for an ineffective assistance of counsel claim, *see* [Doc. 653 at 60-61]. However, Petitioner does not identify the statement or explain why or how trial counsel's failure to investigate the statement was prejudicial to the outcome of his trial. As such, the Court finds no merit as to this claim. *See Sandoval v. United States*, 2010 U.S. Dist. LEXIS 134248, at *17, 2010 WL 5300818 (E.D. Va. Dec. 17, 2010) (Post-trial, self-serving conclusory statements, without accompanying facts, made by a prisoner in a § 2255 petition should be viewed with great suspicion and not given much deference. A Court may discount "unsupported, conclusory statements" in an affidavit) (citing *United States v. Perez*, 393 F.3d 457, 464 (4th Cir. 2004)).

9. to investigate statements made by one of his co-defendants, Benitez-Pineda, in which Benitez-Penida allegedly stated that Petitioner was not a member of the conspiracy, and that everyone implicated in the conspiracy was "going down" with Benitez-Pineda, *id.* at 46-49.

As set forth below, each of Petitioner's claims are **DENIED** on the merits.

i. Execution of the Arrest Warrant

Petitioner alleges that the FBI Special Agents who executed the arrest warrant on May 10, 2012 deprived him of his rights under Fed. R. Crim. P. 4(c)(3)(A) and the Fifth Amendment by failing to inform Petitioner of the cause or grounds for the arrest or the existence of the arrest warrant. [Doc. 653 at 28].[4] And based on trial counsel's failure to object to this violation, Petitioner argues that trial counsel provided ineffective assistance of counsel sufficient to warrant this Court to vacate his sentence. *Id.* The government, in opposition, contends that Petitioner cannot demonstrate prejudice based on any violation of the rules governing the execution of the arrest warrant. [Doc. 668 at 11]. According to the government, the rule Petitioner cites (Fed. R. Crim. P. 4(c)(3)(A)) refers to the procedure law enforcement officers must follow at the time of arrest but says nothing about the collection of evidence or its suppression at trial. *Id.* at 12.

The Court agrees with the government. Petitioner has failed to demonstrate how trial counsel's failure to investigate the arrest warrant's execution would have prejudiced the trial. Suppression of evidence, which Petitioner argues would have been available had his counsel investigated this rule violation, is not a cognizable remedy for failure to adhere to the requirements of "knock-and-announce" arrest warrant execution. *See Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (holding that suppression is not an appropriate remedy for knock-and-announce violations occurring in the execution of search warrants); *United States v. Martinez*,

[4] Petitioner's handwritten motion is combined with his typed memorandum into a single ECF entry at Doc. 632. As each document maintains an independent page numbering system, the Court cites to the ECF page numbers for ease of reference.

584 Fed. App'x 113, 114 (4th Cir. 2015) (extending *Hudson* to execution of arrest warrants). Moreover, both the Supreme Court and the Fourth Circuit have expressly concluded that law enforcement may, as was the case here, enter a home to effectuate an arrest warrant after announcing provided the intended arrestee is believed to be inside the home. *United States v. Young*, 609 F.3d 348, 352-53 (4th Cir. 2010) (citing *Payton v. New York*, 445 U.S. 573, 603 (1980)). Therefore, Petitioner's ineffective assistance claim as to the execution of the arrest warrant is unavailing.

ii. Warrantless Sweep of Petitioner's Residence, Including Closet

Next, Petitioner argues that his trial counsel was ineffective because his counsel failed to argue that law enforcement conducted a warrantless sweep of Petitioner's residence in violation of the Fourth Amendment. [Doc. 653 at 30]. In this regard, Petitioner adds that the protective sweep exception, an exception to the Fourth Amendment's warrant requirement, does not apply because the government cannot demonstrate, as it must, that the arresting officers had a reasonable belief that Petitioner had any co-defendants or co-conspirators in his apartment who could immediately launch an attack or destroy evidence, *id.* at 32-36.

But Petitioner's argument is unpersuasive. The legality of searches under the Fourth Amendment does not depend on the subjective motivations of law enforcement, but rather depends on whether there was an objectively reasonable basis for the search. *Whren v. United States*, 517 U.S. 806 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"). Thus, the question here is not why the officers conducted the protective sweep of Petitioner's apartment but whether the totality of the circumstances established a reasonable basis for them to do so.

"A protective sweep is a quick and limited search of premises' . . ." which may be conducted "incident to an arrest and for the purpose of protecting the safety of the police or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990). Accordingly, law enforcement is entitled to conduct a limited search of "closets and other spaces immediately adjoining the place of arrest form which an attack could be immediately launched" as a matter of course without a warrant. *Id.* at 334. Moreover, this restriction is extended beyond immediately adjoining places when law enforcement has "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene," *id.*

Here, the arresting officers asked Petitioner at the time of his arrest whether there were weapons in the apartment and where any such weapons were located. In response, Petitioner motioned to a nearby closet, from where the officers subsequently recovered a black Sig Sauer P239 handgun (a nine millimeter handgun). Trial Transcript at 151:8-23. Under these circumstances, law enforcement was entitled to search Petitioner's closet, as an extension of its protective sweep of the apartment at the time of his arrest. Because that evidence was not recovered illegally, trial counsel's failure to further investigate the search or file a motion to suppress the search's fruits would not have prejudiced Petitioner's right to a fair trial. Therefore, Petitioner's ineffective assistance claim as to the protective sweep search is unavailing.

iii. Law Enforcement's Questioning of Petitioner without *Miranda* warnings

Next, Petitioner contends that the law enforcement officers executing his arrest warrant violated his Fifth Amendment rights when they inquired about the presence of a weapon in his home without first administering his *Miranda* rights. Trial counsel's failure to investigate the

arresting officers' questioning, Petitioner adds, constitutes ineffective assistance of counsel. [Docs. 653 at 39; 654 at 7, 8].

In *Miranda v. Arizona*, the Supreme Court determined that the coercive nature of custodial interrogations implicates a defendant's Fifth Amendment right to be free from compelled self-incrimination. 384 U.S. 436, 458. Thus, to protect this right, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. However, the Supreme Court has also articulated a public safety exception to this requirement. *New York v. Quarles*, 467 U.S. 649, 654-55 (1984). This exception applies when "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. *See also United States v. Mobley*, 40 F.3d 688, 691-92 (4th Cir. 1992). The use of the term "public safety" encompasses the safety of law enforcement officers. *Quarles*, 467 U.S. at 658-59, n.8.

Here, even assuming the police violated Petitioner's Fifth Amendment right against self-incrimination when they failed to administer Petitioner *Miranda* warnings at the time of his arrest, Petitioner cannot demonstrate any prejudice to the outcome of his case as a result. As indicated above, Petitioner objects to trial counsel's failure to contest this alleged *Miranda* violation because the questioning ultimately revealed a firearm, which was introduced against Petitioner at trial. *See* [Doc. 653 at 39-40]. But, as recognized by the Supreme Court, physical fruits of *Miranda* violations are not subject to suppression. *United States v. Patane*, 542 U.S.

630, 637-38 (2004). Therefore, Petitioner's ineffective assistance claim as to the pre-*Miranda* interrogation is not meritorious.[5]

iv. FBI's Unlawful Personal Seizure of Petitioner's Family Members After Executing the Arrest

Next, Petitioner contends that the arresting officers violated his families' Fourth Amendment rights by remaining in the apartment after effecting his arrest, thereby "seizing" his family in violation of the Fourth Amendment. [Doc. 653 at 44-45]. Trial counsel's failure to investigate and raise this claim, Petitioner argues, constitutes ineffective assistance of counsel. *Id.*

Petitioner's claim, however, is groundless. Defendants cannot assert Fourth Amendment violations on behalf of others nor can they assert Fourth Amendment violations in places. *See Minnesota v. Carter,* 525 U.S. 83, 87-89 (1998); *United States v. Castellanos*, 716 F.3d 828, 832-33 (4th Cir. 2013) ("The Fourth Amendment protects people, not places."). As such, Petitioner's claim, made on behalf of his family and over his apartment, that the police violated their Fourth Amendment, either by seizing his family or by remaining in the apartment after his arrest, is unmeritorious. Indeed, had trial counsel raised such an argument before or at trial, the argument would have been unsuccessful. Therefore, Petitioner cannot show prejudice and accordingly, cannot succeed on this ineffective assistance of counsel claim.

[5] In any case, the arresting officers had, under *Quarles*, a justified basis to ask Petitioner about the presence of a firearm in the apartment without first administering his *Miranda* warnings given the obvious implication that such a firearm poses to the safety of the arresting officers as well others in the apartment at the time of the arrest. *See Quarles*, 467 U.S. at 657 ("The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it."). Therefore, the pre-*Miranda* answers and any fruit therefrom (*i.e.*, the firearm) are exempt from suppression and cannot satisfy *Strickland*'s prejudice prong. *Id.* at 655-56.

v. Validity of Post-Arrest Search of Apartment

Petitioner next contends that the police did not have valid consent to search his apartment post-arrest, either from his step-daughter, Beverly Esteves, or himself. [Doc. 653 at 45]. In this regard, Petitioner first argues that his step-daughter, whose name was on the lease, did not consent voluntarily and in support, notes that the government bears the burden of demonstrating that consent to a warrantless search was voluntary. *Id.* at 46. He also states that Beverly's signature was secured at 6:46 a.m., and the search began after that point but prior to Petitioner signing a consent to search the same apartment at the Arlington County Police Department. [Doc. 654 at ¶¶ 16-17]. On this point, Petitioner argues that his own consent, given at the Arlington County Police Department, was not voluntary because (1) the FBI agents did not inform him of the existence of the arrest warrant and the grounds for said warrant; and (2) the agents did not inform him that the FBI at his house had already started searching. *Id.* at 47. Petitioner thus argues that, had trial counsel investigated this claim further, "the outcome of the trial would have certainly been different because there is a reasonable probability that but for counsel errors, eyewitnesses would have been able to testify to [seeing] FBI Special Agents outrageous misconduct, thus, resulting in a judgment of acquittal." *Id.* at 68.

However, the post-arrest search of Petitioner's apartment was valid; and any testimony to the contrary would be of no significance. First, Petitioner himself provided consent to the Arlington County Police Department to affect a search of his property, post-arrest, thus rendering his argument as to Esteves' consent moot. [Doc. 653-1 at 50:12-52:10]. And second, at trial, the government clearly proved that Esteves' signature on the search consent form, *see* [Doc. 668-2], was voluntarily and validly entered. *See id.* at 148:16-20. In other words, Petitioner cannot argue

that trial counsel was ineffective to raise any issue with the search because any such challenge would not be successful and thus cannot be prejudicial.

vi. Search of Petitioner's Cell Phone and SD Media Card

Next, Petitioner argues that the government's search of his cell phone and media cards was not a lawful search for four reasons. *First*, the search was not a search-incident-to-arrest, as it took place after the Petitioner was removed from his apartment, and neither the cell phone nor media cards were in Petitioner's possession at the time of his arrest. [Doc. 653 at 51-54]. *Second*, because the search took place after the arrest and not incident to the arrest, it is not a search incident to a lawful arrest. *Id.* *Third*, the government had time to secure a search warrant and chose not to do so, in violation of the Fourth Amendment and Fed. R. Crim. P. 41. *Id.* And *fourth*, "there is no binding authority ruling that federal agents accessing cell phone was not a search requiring a warrant." *Id.* at 54. In support of these arguments, Petitioner cites to a report detailing the seizure and subsequent search pursuant to valid warrant over other defendants' cell phones, presumably to indicate that officers were aware of the process to get a search warrant for cell phone searches. *Id.* at 57-59. In opposition, the government argues that, even if Petitioner's counsel had succeeded in suppressing the evidence found on the cell phone, Petitioner would still have been convicted based on the overwhelming evidence presented at trial of Petitioner's drug trafficking activities, including Petitioner's own confession. [Doc. 668 at 16].

The Court agrees with the government. Even if counsel's failure to suppress the contents of the cell phone and data cards was deficient, counsel's failure to do so was not prejudicial to the outcome of the case. Indeed, throughout Petitioner's trial, the government introduced overwhelming evidence of Petitioner's drug-related activities, including his receipt of drugs, his distribution network, his proclivity for carrying weapons, and his routine and repeated

communications with, among others, Walsh, Benitez-Pineda, and Benitez-Pineda's wife, Concepcion. For instance, Benitez-Pineda testified about the quantity of cocaine he provided to Petitioner on a recurring basis, *id.* at 98:14-102:3, and the weapons Petitioner owned, *id.* at 108:3-110:14; Walsh testified that he had purchased cocaine from Petitioner (as had others), *id.* at 63:6-64:4, 65:7-15; and other witnesses testified as to Petitioner's drug distribution activities, *id.* at 200:14-202:14. As such, given the overwhelming evidence, Petitioner's contention that the cellphone (and its contents) should have been suppressed and trial counsel's failure to do so was prejudicial is unmeritorious.

vii. Warrantless GPS Tracking

Petitioner also argues that law enforcement GPS tracked his cell phone without a warrant. [Doc. 653 at 59]. In particular, he contends that "court appointed counsel['s] . . . failure to obtain copies of the Application for court order and search warrant pursuant to Title 18, United States Code, Section 2703(c)(1)(A), directing AT&T[] to provide any signaling information, including cell site information, precision location information, and factor installed Global Positioning System (GPS) information assigned to the AT&T brand cellular telephone bearing number (240) 447 9724" was prejudicial. More specifically, Petitioner contends that the warrantless search, *viz.* GPS tracking, tainted his arrest." *Id.* at 59-60. In opposition, the government notes that, at trial, one of the agents investigating Petitioner's case testified that he had received "court authorization to receive GPS data" relating to Vanegas' cellphone number. Trial Transcript at 28:12-18. The government also adds that Petitioner provided no evidence to dispute such testimony. [Doc. 668 at 16].

Again, the Court agrees with the government. The contested GPS data was taken pursuant to lawful judicial authorization, negating any contention that the tracking was in

violation of the Fourth Amendment. Moreover, Petitioner's remaining contention as to this point (that there was no lawful authorization to track his cellphone) lacks any support beyond conclusory allegations. *See United States v. Dyess*, 730 F.3d 354, 359 (4th Cir. 2013) ("[V]ague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the District Court.") (internal quotation marks and citation omitted).

viii. Statements of Co-Defendant Benitez-Pineda and Other Witnesses

Finally, Petitioner alleges that trial counsel failed to investigate the veracity and credibility of certain witnesses prior to trial, including "Melcy Yalexsy Guevara-Barrera, Jose Maria Benitez-Pineda, Mario Benitez-Pineda, who were witnesses at Northern Neck Regional Jail, Warsaw, VA, of Samuel Benitez-Pineda statement, stating: that he knew that many people that were arrested in connection to the conspiracy and were connected to him in the aforementioned conspiracy, they were actually innocent, because the relationship that he kept with many of them were just Seller-Buyer and they were not working with him or for him, and that if he have the opportunity to tell the [truth] to the authorities he will do that, and further that he acknowledged that Petitioner did not have any involvement in the conspiracy." [Doc. 653. at 61-62]. Additionally, Petitioner alleges that trial counsel should have investigated witnesses "Jose Lorenzo Saravia, Joaquin Avila-Rodriguez, Lindor Martinez, and Marvin Eduardo Escabor Barrios [who could have] and would have testified to witnessing Samuel Benitez-Pineda statement at Alexandria Detention Center, Alexandria, VA, after entering guilty plea and [] facing 25 years or a life sentence, stating: no one will go free in this conspiracy, if [I] I have to pay the price, every one else is going down with me, no one will go free in this." *Id.* In response, the government argues that, notwithstanding the fact that Petitioner has provided no evidence for

these claims apart from his own self-serving affidavits, Petitioner fails to demonstrate that the activity he alleges resulted in prejudice to his defense.

The Court agrees. At the outset, Petitioner's claim that trial counsel failed to review or interview certain witnesses, as to what Benitez-Pineda said in jail, is mere speculation and rests exclusively on Petitioner's self-serving affidavits. *See* [Doc. 654 at ¶¶ 22-23]. As such, these post-trial self-serving statements, used to support this claim, are taken with great suspicion and are not to be given much deference. *See Perez*, 393 F.3d at 464. But, even if Petitioner's speculation is afforded merit, trial counsel's failure to investigate these suggested witnesses does not establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

First, Petitioner has failed to demonstrate that his trial counsel's failure to interview these witnesses falls below the objective standard of reasonableness. As the Fourth Circuit has stated, the question is not "what the best lawyer would have done or even what most good lawyers would have done, but instead whether some reasonable lawyer ... could have acted, in the circumstances, as defense counsel acted." *Gilbert v. Moore*, 134 F.3d 642, 655 (4th Cir. 1998) (citing *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (internal quotations omitted). And here, there was no proven basis, prior to or at trial, that Benitez-Pineda made such jailhouse statements that were potential exculpatory as to Petitioner. Thus, it cannot be said that trial counsel acted in a manner no other reasonable lawyer could have acted under similar circumstances. Indeed, trial counsel thoroughly cross-examined Benitez-Pineda, and his relationship to Petitioner, at trial, *see* Trial Transcript at 136-146.

Second, Petitioner has failed to demonstrate any prejudice arising from trial counsel's failure to investigate. Indeed, even if Benitez-Pineda's statements were introduced at trial, the

evidence against Petitioner was overwhelming as to his involvement in a drug trafficking conspiracy. [Doc. 668 at 17]. As discussed above, the trial evidence from FBI Special Agents, who testified as to their surveillance methods, use of confidential informants, and controlled purchases from members of the conspiracy, the testimony of Concepcion Benitez-Pineda, and the testimony of Walsh, taken together, were overwhelming in proving Petitioner's guilt of both counts. And in addition, the government introduced authorized wiretapped conversations between Benitez-Pineda and Petitioner, which conversations were confirmed by trial witnesses, regarding proposed drug transactions between the two.

Under these circumstances, the conduct of Petitioner's attorney was "within the range of competence normally demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687. And at no point does Petitioner point to "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" or that he was prejudiced from such conduct. *Id.*

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that Petitioner Jose Delores Vanegas' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 653] be, and the same hereby is, **DENIED**; and it is further

ORDERED that Petitioner Jose Delores Vanegas' Motion to Set Evidentiary Hearing Date [Doc. 682] be, and the same hereby is, **DENIED** as moot; and it is further

ORDERED that Petitioner's Motion to Expedite 28 U.S.C. § 2255 Pursuant to 28 U.S.C. §§ 1657 & 2243 [Doc. 688] be, and the same hereby is, **DENIED** as moot.

This is a Final Order for the purposes of appeal. An appeal may not be taken from the final order in a § 2255 proceeding unless a circuit justice or judge issues a certificate of appealability, which will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requirement is satisfied only when reasonable jurists could debate whether "the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). The Court finds that Petitioner has failed to satisfy this standard and therefore expressly declines to issue a certificate of appealability.

The Clerk is directed to send a copy of this Order to *pro se* Petitioner and all counsel of record.

Anthony J. Trenga
United States District Judge

Alexandria, Virginia
March 23, 2020

Appendix D

Phone Examination Report Properties

Selected Manufacturer:	Apple
Selected Model:	iPhone 4/4S GSM
Detected Model:	MC318
Device name:	MB_User's iPhone
Revision:	5.1 (9B176)
IMEI:	012654009843095
Serial Number:	871156BLA4S
MSISDN:	+1 (240) 447-9724
ICCID:	89014103254833240843
IMSI:	310410483324084
Bluetooth Address:	d8:9e:3f:bc:76:df
Wi-Fi Address:	d8:9e:3f:bc:76:e0
Unique Device ID:	4794458ea81edab0dc925b5d92f18aa38c6fa0fd
Extraction start date/time:	05/10/12 09:57:37
Extraction end date/time:	05/10/12 10:10:57
Connection Type:	USB Cable
UFED Version:	Software: 1.1.9.2 UFED , Full Image: 1.0.2.9 , Tiny Image: 1.0.2.2
UFED S/N:	5574071
Department:	FBI

GOVERNMENT EXHIBIT
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