UNITED STATES DISTRICT COURT
Western District of Texas
DEL RIO DIVISION

UNITED STATES OF AMERICA

v.

Case Number DR-09-CR-820(5)-AM
USM Number 37781-180

VICTOR ESQUIVEL
AKA: "Youngster"

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, VICTOR ESQUIVEL, was represented by Charles King.

The defendant was found guilty on Count(s) One, Five and Six of the Indictment by a jury verdict on July 6, 2011 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Offense Ended	Count (s)
18 U.S.C. § 1962(d)	Conspiracy to Conduct the Affairs of an Enterprise Through a Pattern of Racketeering	Beginning around 2004, the exact date unknown, and continuing on the date of the Indictment	One
18 U.S.C. § 1959	Violent Crimes in Aid of Racketeering	July 19, 2008	Five
18 U.S.C. § 1959	Violent Crimes in Aid of Racketeering	July 13, 2008	Six

As pronounced on April 12, 2012, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 16th day of May, 2012.

ALIA MOSES
United States District Judge

Arresting Agency: FBI and HSI

Defendant: VICTOR ESQUIVEL
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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for two terms of the defendant's life on each of Counts One and Five, and a term of 120 months on Count Six, all to run consecutively, with credit for time served since July 24, 2009.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years on each of Counts One and Five, and three years on Count Six, all to run consecutively.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment; and shall comply with the following additional conditions:

X The defendant shall abstain from the use of alcohol and/or all other intoxicants during the term of supervision.

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CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not unlawfully possess a controlled substance.

3) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

4) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

6) The defendant shall cooperate in the collection of DNA as directed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

7) If convicted of a sexual offense and required to register under the Sex Offender and Registration Act, that the defendant comply with the requirements of the Act.

8) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

9) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month, or as directed by the probation officer.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family obligations, and shall comply with the terms of any court order or order of an administrative process requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living.

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time, at home or elsewhere, and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications, and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sex offense as described in the Sex Offender Registration and Notification Act or has a prior conviction of a State or local offense that would have been an offense as described in the Sex Offender Registration and Notification Act if a circumstance giving rise to federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) The defendant shall participate in a cognitive behavioral treatment program as directed by the probation officer, and if deemed necessary by the probation officer. Such program may include group sessions led by a counselor or participation in a program administered by the probation office. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

18) The defendant shall participate in workforce development programs and services as directed by the probation officer, and if deemed necessary by the probation officer, which include occupational/career development, including but not limited to assessment and testing, education, instruction, training classes, career guidance, job search and retention services until successfully discharged from the program. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

19) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

20) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

21) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

22) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

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The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

1) **Community Confinement:** The defendant shall reside in a Community Corrections Center for a period of _____ months to commence on _____. Further, once employed, the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.

Location Monitoring Program:

2) ***Radio Frequency Monitoring:*** The defendant shall participate in the Location Monitoring Program with Radio Frequency Monitoring for a period of _____ days/months. You shall abide by the rules and regulations of the Participant Agreement Form. During this time, you will remain at your place of residence except for employment and other activities approved in advance by your probation officer. You will maintain a telephone at your place of residence without "caller ID," "call forwarding," "call waiting," "call back/call block," a modem or a portable cordless telephone for the above period as directed by the probation officer. You will wear an electronic monitoring device and follow location monitoring procedures specified by your probation officer. You shall pay all or part of the costs of the program based on the ability to pay as directed by the probation officer.

3) ***Global Positioning Satellite (GPS):*** The defendant shall participate in the Location Monitoring Program for a term not to exceed _____ days/months, which will include remote location monitoring using ____Active ____Passive Global Positioning Satellite (GPS) tracking. You shall abide by the rules and regulations of the Participant Agreement Form. During this time, you will remain at your place of residence except for employment and other activities approved in advance by your probation officer. You will maintain a telephone at your place of residence without "caller ID," "call forwarding," "call waiting," "call back/call block," a modem or a portable cordless telephone for the above period as directed by the probation officer. At the direction of the probation officer, you shall wear a transmitter and be required to carry a tracking device. You shall pay all or part of the costs of the program based on the ability to pay as directed by the probation officer.

4) **Community Service:** The defendant shall perform ____ hours of community service work without pay, at a location approved by the probation officer, at a minimum rate of four hours per week, to be completed during the first ____ months of supervision.

5) **Sex Offender Search & Seizure Condition:** If required to register under the Sex Offender Registration and Notification Act, the defendant shall submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

6) **Standard Search & Seizure Condition:** The defendant shall submit his or her person, property, house, residence, vehicle, papers, [computers as defined in 18 U.S.C. Section 1030(e)(1), other electronic communications or data storage devices or media,] or office to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search must be conducted at a reasonable time and in a reasonable manner.

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CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 111 E. Broadway, Suite100 Del Rio, Texas 78840.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTAL:	$300.00	$0	$0

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $300.00. The debt is incurred immediately.

Fine

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

VICTOR ESQUIVEL,	§	
Petitioner,	§	
	§	**Civil No. DR:15-CV-120–AM**
v.	§	**Criminal No. DR:9-CR-820(5)-AM**
	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

ORDER

Pending before the Court is the Petitioner Victor Esquivel's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 768), along with his memorandum in support (ECF No. 769) and his supplement to his § 2255 Motion (ECF No. 770). Also pending is his Motion to Compel his Attorney Charles King to Surrender the Case File in Cause No. DR-09-CR-820-AM. (ECF No. 757.) After reviewing the filings, the Court finds that Esquivel is not entitled to any relief, as explained in full below.

I. BACKGROUND

A. Relevant Facts and Procedural History

On July 14, 2009, Esquivel and eleven others were charged in a six-count indictment, where Esquivel was charged with three of the six counts:

> (1) Conspiracy to conduct the affairs of an enterprise through a pattern of racketeering, 18 U.S.C. § 1962(d) (Racketeer Influenced and Corrupt Organizations Act or "RICO" conspiracy), through:
>
> a) the murder of Jose Damian Garza, in violation of Texas Penal Code sections 7.01, 7.02, 15.02, 15.03, and 19.02;
>
> b) conspiracy to interfere with commerce by extortion

under 18 U.S.C. § 1951 (the "Hobbs Act"); and

c) conspiracy to distribute narcotics, in violation of 21 U.S.C. §§ 841 and 846;

(2) Racketeering-related murder of Jose Damian Garza under the Violent Crimes in Aid of Racketeering Act ("VICAR"), 18 U.S.C. § 1959(a)(1); and

(3) Conspiracy to commit the racketeering-related murder of Jose Damian Garza under VICAR, 18 U.S.C. § 1959(a)(5).

Esquivel elected to proceed to trial, along with his co-defendant Javier Guerrero, and on July 6, 2011, a jury convicted him of all three counts. Thereafter, he was sentenced to life in prison for count one, life in prison for count five, and ten years of imprisonment for count six, all to run consecutively.

Trial testimony established that Esquivel a/k/a Youngster was a mid-level member of the Texas Mexican Mafia ("TMM"), a gang which engaged in drug trafficking and extortion. The TMM established its dominance throughout parts of Texas by demanding a ten percent fee, called the "dime," based on the value of illicit activity taking place within the TMM's territory. Non-TMM members paying the dime are promised protection from other gangs, among other services. Oftentimes, TMM members implement violence, including murder, to collect the dime from those who resist paying, or to scare others into paying.

On July 13, 2008, Javier Guerrero, a co-defendant and lieutenant[1] of the "830" area[2] of the TMM, called a meeting in Sabinal, Texas. The meeting was attended by numerous TMM members,

[1]The TMM is a paramilitary organization with hierarchical leadership.

[2]The 830 area includes the towns of Uvalde, Hondo, Sabinal, Crystal City, Del Rio, and Eagle Pass.

including Esquivel. As a show of force, Guerrero ordered the murders of at least two individuals who refused to pay the dime, and several TMM members. In pertinent part, Arturo "Pollo" Villarreal, the lieutenant of the Eagle Pass area, volunteered for the murder of Enrique "Buck" Garza or his brother Jose Damian Garza. Villarreal then assigned the murder to Esquivel and Juan Alfredo "Freddy" Gloria-Perales.[3]

On July 18, 2008, Esquivel and Gloria-Perales traveled from Eagle Pass to Hondo, Texas, broke into Jose Damian Garza's home while wearing masks (and while Garza's daughter and her two friends were present), and jointly fatally shot Garza a total of at least nine times before returning to Eagle Pass. Shortly after the fatal shooting, law enforcement detained Esquivel, who then provided agents with his cell phone number. Based on cell phone data, law enforcement was able to confirm Esquivel's presence near the meeting in Sabinal and Garza's home in Hondo at the time of the shooting.

Esquivel proceeded to a joint trial with Guerrero. All other co-defendants pleaded guilty, with some testifying against Guerrero and Esquivel. After a six-day trial, the jury found Guerrero and Esquivel guilty of all counts.

Because Esquivel's convictions involved murder, he faced a mandatory sentence of life in prison. Then, while awaiting sentencing, Esquivel attacked a prison guard. At sentencing, this attack was taken into account, and Esquivel was sentenced to terms of life imprisonment for counts one and five, and a term of 120 months for count six, all to run consecutively to each other. The Fifth Circuit Court of Appeals confirmed his conviction, and on November 12, 2014, the Supreme

[3]To secure a higher rank in membership in the TMM, a member is required to commit some form of violence, usually murder, which Esquivel had yet to do.

Court denied certiorari.

Throughout the district court proceedings, Esquivel filed various pro se motions, including: (1) a motion to withdraw appointed counsel; (2) a motion for a new trial; (3) a motion for recusal; and (4) a motion for extension of time to file a notice of appeal. Although the motions contained Esquivel's purported signature, they were all unquestionably drafted by Jose Cristobal Cardona, a fellow TMM member and federal inmate convicted of drug trafficking serving a 40-year sentence in an unrelated case. The motion to withdraw appointed counsel was denied as moot, but the motion for a new trial, motion for recusal, and motion for extension of time were denied because the Court declined to allow Esquivel to file pro se motions while represented by counsel.

On March 30, 2015, prior to filing a § 2255 motion, Esquivel filed a motion to compel his attorney, Charles King, to turn over his case file. (ECF No. 757.) According to Esquivel, he needed the file to prepare a § 2255 motion. He contends that he requested the documents from King, but King did not respond.

B. Section 2255 Motion

On November 2, 2015, Esquivel, acting pro se, filed the present motion to vacate under § 2255 (ECF No. 768) and a memorandum in support (ECF No. 769), arguing that counsel: (1) failed to investigate a defense or call witnesses suggested by him; (2) failed to move to recuse the Court after demonstrating personal bias against him; (3) failed to file a motion for a new trial; (4) failed to object to the government's pretrial discovery violations, despite its withholding potentially exculpatory evidence of interviews with cooperating informants; (5) failed to appeal the denial of his motion to suppress; (6) failed to appeal the violation of his right to a fair trial when he was forced to disrobe and present his tattoos to the jury; (7) failed to appeal the denial of his motion to sever his

trial from his co-defendant; (8) failed to appeal the denial of his motion for judgment of acquittal; (9) failed to argue that the use of gang expert testimony linking him to the Texas Mexican Mafia violated his right to a fair trial; (10) failed to appeal the Court's refusal to address the merits of his pro se motions; (11) failed to appeal that the jury instructions did not require the jury to determine all of the elements of the offenses; and (12) failed to argue that consecutive life sentences were unreasonable.

On November 10, 2015, he filed a supplement to his § 2255 motion (ECF No. 770), arguing that: (1) the Court denied him counsel during trial by denying him the appointment of two attorneys and by failing to appoint new counsel to argue a motion for new trial; (2) the Court denied him counsel at the appellate phase, arguing that appointed counsel was adversely affected by a conflict of interest; (3) counsel failed to subject the prosecution's case to meaningful adversarial testing because of fear of the Court; (4) prosecutorial misconduct based on Assistant United States Attorney Joey Contrera's correspondence with Jose Cardona, who claimed he would testify on behalf of Esquivel that he ordered someone else to collect the dime from Garza, who then shot Garza in self-defense; (5) counsel was ineffective for failing to challenge the application of the Hobbs Act to his case; (6) counsel was ineffective for failing to object to expert testimony that two people shot at the victim Jose Damian Garza, thus usurping the function of the jury; (7) counsel failed to inform the jury that he was incarcerated from June 30, 2005, to June 13, 2008; (8) counsel failed to object to his prior conviction for misprision of a felony to show his guilt in a drug conspiracy predicate act; and (9) the Court lacked the jurisdiction to sentence him because of a pending interlocutory appeal on the issue of a motion for new trial.

On November 20, 2015, despite having already filed a § 2255 motion and a supplement to

the motion, Esquivel filed a motion for extension of time to file a § 2255 motion. (ECF No. 772.) Finally, on May 17, 2016, now represented by counsel, Esquivel filed a motion for leave to file an amended or supplemental § 2255 motion (ECF No. 807), which was granted by the Court, arguing that he was constructively denied counsel when he moved for a new trial and requested new counsel based on ineffective assistance of counsel, but that same attorney was appointed to represent him on direct appeal, and that attorney then filed an *Anders* brief (signifying there was no merit to the appeal).

II. SECTION 2255 STANDARD

Under § 2255, a petitioner may move to vacate, set aside, or correct his sentence or conviction "for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). A petitioner is entitled to relief if he can establish: (1) the sentencing court imposed his sentence in violation of the Constitution or the laws of the United States; (2) the court lacked jurisdiction to impose the sentence; (3) the sentence imposed exceeded the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996); § 2255(a)-(b).

A defendant may not bypass a direct appeal and raise an issue for the first time in a § 2255 motion without showing both cause for his procedural default and actual prejudice resulting from the error. *United States v. Guerra*, 94 F.3d 989, 993 (5th Cir. 1996). The "cause" standard requires one "to show that 'some objective factor external to the defense' prevented him from raising on direct appeal the claim he now advances." *Id.* (quoting *Romero v. Collins*, 961 F.2d 1181, 1183 (5th

Cir. 1992)). "Objective factors that constitute cause include interference by officials that makes compliance with the procedural rule impracticable, a showing that the factual or legal basis for the claim was not reasonably available to counsel at the prior occasion, and ineffective assistance of counsel in the constitutional sense." *Id.* "Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding." *Vaughn*, 955 F.2d at 368.

When bringing an ineffective assistance of counsel claim, a petitioner must establish that counsel's performance was so deficient that he or she was not functioning as the "'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to do so, "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Counsel's representation is deficient if it "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. There exists a strong presumption that the assistance provided by a defendant's counsel is reasonably professional. *Id.* at 689. To satisfy the "prejudice" prong, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.*

III. LEGAL ANALYSIS

A. Motion to Compel

First, Esquivel moves the Court to compel defense counsel Charles King to produce Esquivel's entire case file, which the Court construes as a motion for discovery. Under Rule 6(a) of the Rules Governing § 2255 Cases, "A judge may, for good cause, authorize a party to conduct

discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law." Under Rule 6(b), "[a] party requesting discovery must provide reasons for the request." A court "must allow discovery . . . only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief . . . ." *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994).

The Court finds no good cause to allow discovery. Due to the sensitive nature of this case, which involved a dangerous gang and numerous murders and threatened murders of informants, the Court previously ordered defense counsel for TMM members not to provide the defendants with a copy of the discovery. Therefore, counsel wisely disregarded Esquivel's request.[4] Moreover, Esquivel, an unrepentant convicted murderer and dedicated member of the TMM, has provided no specific grounds why the Court should endanger the lives of any more victims by allowing open access to discovery. Accordingly, Esquivel's nonspecific and overly broad request, amounting to nothing but a fishing expedition, will not be permitted. *See id.; see also United States v. Webster*, 392 F.3d 787, 801-02 (5th Cir. 2004).

B. Section 2255 Motion[5] [6]

1. Appointed Counsel

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[4]According to counsel's affidavit, he indeed responded to Esquivel's request, telling Esquivel he was prohibited by the Court from releasing discovery.

[5]In his § 2255 motion, Esquivel appears to be relying on affidavits submitted by Jose Cardona and Jesse Ramirez in support of Javier Guerrero's § 2255 motion. These documents, however, were not made a part of Esquivel's record, are not properly before the Court, and will not be considered. Notwithstanding, for the same reasons as detailed in full in the order denying Guerrero relief in his § 2255 motion, the affidavits likewise would not have provided Esquivel with any relief.

[6]Many of the arguments presented by Esquivel were waived by failing to raise the issues on direct appeal—for example, those related to court errors. However, because Esquivel also challenges defense counsel's effectiveness on appeal, and because many of the claims are interrelated, the Court will nonetheless address these waived arguments.

Several of Esquivel's § 2255 claims pertain to Charles King, appointed counsel at trial and on appeal. As background, Ricardo Calderon was initially appointed as sole counsel for Esquivel. Charles King was then appointed as supplemental counsel on November 18, 2010, because Calderon faced a potential conflict of interest involving a co-defendant. (ECF No. 448.) On April 21, 2011, Esquivel filed a motion to withdraw appointed counsel, arguing that Calderon and King had "tag teamed" against him to force him to plead guilty, presumably pursuant to a plea agreement, despite his assertions of innocence. Esquivel claimed that trust was broken and asked for the appointment of two new lawyers versed in capital crimes, pursuant to 18 U.S.C. § 3005. (ECF No. 469.) Mr. Calderon then filed a motion to withdraw as counsel, disputing Esquivel's allegations and claiming he was surprised by Esquivel's motion. (ECF No. 470.) On April 27, 2011, after a hearing, Calderon was terminated as Esquivel's attorney, King remained the sole attorney of record, and Esquivel's motion was orally denied as moot.

a. Motion for New Counsel

Esquivel now claims that the Court erred in failing to grant his motion to withdraw counsel, and also by failing to appoint new counsel on appeal. "An indigent criminal defendant has no right to appointed counsel of his choice." *Faretta v. California*, 422 U.S. 806, 812 n.8 (1975). Unless "there is a demonstrated conflict of interests or counsel and defendant are embroiled in an irreconcilable conflict that is so great that it resulted in a total lack of communication preventing an adequate defense, there is no abuse of discretion in denying a motion [to withdraw]." *United States v. Cole*, 988 F.2d 681, 683 (7th Cir. 1993) (internal quotations omitted) (cited favorably in *United States v. Wild*, 92 F.3d 304, 307 (5th Cir. 1996)).

Esquivel has presented no grounds as to how Mr. King met the criteria for withdrawal. The

only reason provided in Esquivel's motion to withdraw was that Calderon and King were forcing him to plead guilty. Esquivel, however, proceeded to trial and clearly was never forced to plead guilty. Tension arising from a disagreement over a plea agreement is insufficient grounds for withdrawal, without showing that representation lapsed in some way and that the two were unable to work together. *Wild*, 92 F.3d at 307. The Court conducted a hearing and was persuaded that Mr. King was fully able to represent Esquivel and his best interests. Moreover, Esquivel never moved for the appointment of new counsel on appeal and has provided no grounds as to why new counsel should have been appointed sua sponte. Accordingly, there is no merit to this claim.

b. Conflict of Interest

Next, Esquivel argues that a conflict of interest between him and Mr. King violated his constitutional rights. Liberally construing Esquivel's motion, he appears to argue that a conflict of interest arose for two reasons. First, counsel wanted to pursue one strategical route (plea), while Esquivel wanted to pursue another (trial). Second, King's self-interest in protecting his reputation prevented him from filing motions or issues on appeal that pertained to his own ineffectiveness.

"The representation to which a defendant is entitled under the Sixth Amendment of the Constitution must be free from any conflict of interest." *United States v. Burns*, 526 F.3d 852, 856 (5th Cir. 2008). "As a general rule, a conflict exists when defense counsel allows a situation to arise that tempts a division in counsel's loyalties." *Id.* "To establish a Sixth Amendment violation on the basis of a conflict of interest the defendant must demonstrate: (1) that his counsel acted under the influence of an actual conflict; and (2) that the conflict adversely affected his performance at trial." *Id.* An actual conflict cannot be a speculative or potential conflict, is one that adversely affects counsel's performance, and only exists when counsel must choose between divergent or competing

interests. *Id.*

Conflict of interest claims generally arise in cases involving joint representation. However, a claim may also arise when an attorney's self-interest conflicts with that of his client. In joint representation cases, prejudice is presumed, but in self-interest cases, as here, prejudice must be established. *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995) (citing to *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and distinguishing self-interest cases from joint representation cases).

Assuming there was an actual conflict between Esquivel and King, Esquivel has not demonstrated any prejudice from any purported conflict. Again, Esquivel proceeded to trial and was not actually forced to plead guilty. Moreover, Esquivel does not contend that a conflict adversely affected counsel's performance at trial. And to the extent that Esquivel argues that counsel should have, but could not, raise issues of his own incompetence on appeal, "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding an ineffective assistance." *Massaro v. United States*, 538 U.S. 500, 504 (2003). Esquivel, now represented by retained counsel, was able to raise any ineffective assistance of counsel claims he wanted. Thus, Esquivel suffered no prejudice from any conflict, if there was one.

c. Section 3005

Esquivel also argues he was entitled to the appointment of two attorneys under § 3005, which reads:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours.

18 U.S.C. § 1959, under which Esquivel was charged, allows for punishment by death for racketeering-related murder, thus constituting a capital crime.

The Court finds no merit to Esquivel's claim. On December 23, 2009, the Government filed a notice that it did not intend to seek the death penalty. (ECF No. 223.) Esquivel has not pointed to any Fifth Circuit authority that shows § 3005 applies after the Government files formal notice that it does not intend to seek the death penalty.

2. Motion for New Trial, Failure to Investigate a Defense, and Failure to Call Witnesses Suggested by Him

Esquivel raises several interrelated arguments pertaining to his motion for a new trial and the fairness of his trial, arguing that witnesses suggested by him were not investigated or allowed to testify on his behalf. These arguments involve Jose Cristobal Cardona, a federal inmate serving a 480-month sentence for a drug conviction in an unrelated case who is presently housed at the same facility as Esquivel. Cardona, a TMM member, has a storied past with the Fifth Circuit. Since his conviction, Cardona has filed numerous law suits on his own behalf and drafted countless motions on behalf of fellow inmates, many that were handwritten with a distinct and easily identifiable penmanship. Cardona has received in excess of six strikes against him for frivolous filings.

In relation to the present case, Cardona filed a motion to proceed as next friend of Javier Guerrero, Esquivel's co-defendant, which the Court denied. Cardona also wrote a letter to Joey Contreras, the Assistant United States Attorney assigned to prosecute Esquivel and Guerrero's case, indicating he directed a man named Pablo Acosta to collect money from Jose Damian Garza, and Acosta killed Garza in self-defense after Garza opened fire. Contreras responded to the letter with skepticism, saying that Cardona provided no specific facts or additional evidence in support of his

claim. And because Cardona had been in continuous custody since well before the date of the murder, Cardona's claims were implausible. Contreras also indicated that other letters from Cardona had been intercepted in which Cardona vowed to interfere in the prosecution of TMM members in any way possible, including by lying. He also noted that Cardona was serving a very lengthy sentence, would not live long enough to be released from prison, and therefore had little to lose by lying. Those factors, along with the fact that no agent knew of any person named Pablo Acosta, convinced Contreras that Cardona's contentions were fabricated and without merit.

On June 21, 2011, Mr. King filed a motion for continuance, stating that he too received a letter from Cardona. (ECF No. 510.) Cardona indicated in the letter that he, a man named Jesse Ramirez, and an unnamed man in Mexico had exculpatory evidence to offer that Esquivel was innocent. The Court denied the motion without prejudice, holding, "without more than a bald assertion of potential evidence that could assist the defendant is not good cause to continue the trial." (ECF No. 512.)

On July 18, 2011, after he was convicted, Esquivel, acting pro se, filed a motion for a new trial—a motion that was unmistakably drafted by Cardona. (ECF No. 572.) In the motion for a new trial, Esquivel accused the Court of bias against Cardona and argued that a new trial was warranted because: (1) the Court denied him the right to subpoena available material witnesses by writ of ad testificandum; (2) Cardona would present favorable evidence at a new trial that would "put an entire (sic) different face to the matter;" and (3) because counsel was ineffective by failing to object to the impartiality of the Court in denying witnesses. The Court denied the motion because Esquivel was represented by an attorney and had no right to file pro se motions. (ECF No. 577.) The Court also noted similarities in substance and form to other motions previously filed by Cardona in other

matters. Mr. King did not file a separate motion for a new trial.

Esquivel, again pro se, untimely appealed the denial of the motion for new trial. (ECF No. 598.) The notice of appeal was also clearly drafted by Cardona. The Court denied Esquivel an extension of time to file the notice of appeal, again based on the fact that Esquivel was represented by counsel and was not permitted to file pro se motions. The Court also called out Cardona on drafting the motion, and enjoined Cardona from filing anything else without receiving prior written permission from a district court judge in the Western District of Texas. (ECF No. 602.)

a. Denial of Counsel

First, Esquivel argues that the Court denied him counsel at critical stages of the criminal proceeding by denying the pro se motions drafted by Cardona. Esquivel, however, was fully represented by counsel at all times and was not denied the right to counsel. Rather, the Court refused to recognize hybrid representation—which is not mandated by the Constitution and is within the Court's discretion—and disallowed the filing of pro se motions by Esquivel while represented by counsel. *See Myers v. Johnson*, 76 F.3d 1330, 1335 (5th Cir. 1996) ("[T]here is no constitutional right to hybrid representation.").[7]

b. Jurisdiction

Second, Esquivel argues that the Court had no authority to sentence him while the denial of his motion for new trial was on appeal. Even if this were true, the Court denied an extension of time to file a notice of appeal on September 26, 2011. Therefore, there was no appeal pending at the time the Court sentenced Esquivel in 2012.

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[7]Indeed, the Fifth Circuit refused to acknowledge hybrid representation on appeal, wholly disregarding Esquivel's pro se appellate brief.

c. Motion for New Trial

Third, Esquivel argues that Mr. King was ineffective for failing to file a motion for new trial. Under Rule 33 of the Federal Rules of Criminal Procedure, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a).

Esquivel does not present any specific grounds that Mr. King should have presented in a motion for new trial. Assuming Esquivel means to argue that a motion should have been filed based on the same arguments presented in the Esquivel/Cardona motion for a new trial, King's motion would not have succeeded. All of the grounds for a new trial related to Esquivel's inability to call Cardona as a witness at trial. The Compulsory Process Clause of the Sixth Amendment grants a defendant the right to offer the testimony of favorable witnesses and to compel their attendance at trial. To exercise the compulsory right, a defendant must show that the testimony would be material, favorable to the defendant, and not merely cumulative. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-83 (1982). The Court, however, never prohibited any witness from testifying. Rather, the Court held that Esquivel's "bald assertion of potential evidence" did not warrant a continuance. Counsel's motion for continuance was denied without prejudice, yet counsel never followed up with more substantial assertions from Cardona or Ramirez.

To the extent that Esquivel attempts to place blame on counsel for failing to follow up with more substantial assertions, it is notable that despite Cardona's omnipresence in this case, he continues to present nothing but vague assertions of Esquivel's innocence. If Cardona is unwilling to provide specifics about his testimony, then counsel could not have acted deficiently for failing to seek a new trial based on speculative testimony.

d. Failure to Investigate a Defense and Call Suggested Witnesses

Relatedly, Esquivel argues that counsel was ineffective for failing to investigate a defense and for failing to call witnesses suggested by him. According to Esquivel, he did not know the individuals involved in his case, he was innocent of the charged murder, and despite potential witnesses that could provide exculpatory testimony, counsel failed to investigate a defense or call those potential witnesses.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Harrington v. Richter*, 562 U.S. 86, 108 (2011).

"[C]omplaints based upon uncalled witnesses [are] not favored because the presentation of witness testimony is essentially strategy and thus within the trial counsel's domain," and because "speculations as to what these witnesses would have testified is too uncertain." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (citing *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983)). A petitioner seeking to show ineffective assistance of counsel must therefore "name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir.2009).

Esquivel provides no specific facts to support his claim, such as the names of any potential witnesses who counsel should have called to testify. Liberally construing the motion, the Court can presume that Esquivel means counsel should have investigated and called Cardona and perhaps

Ramirez to testify. However, as previously explained, despite numerous filings by Cardona himself, he has yet to provide any specific details to the Court about what he would have testified to and has provided no evidence to support his claim of Esquivel's innocence, a claim that was rebutted at trial by numerous witnesses.

As for Ramirez, the only known information comes from an affidavit which Esquivel attached as an exhibit to his § 2255 motion. (ECF No. 775 at 3.) The affidavit, signed by Ramirez, was initially filed in a wholly unrelated case, *United States v. Jesse Salazar Ramirez*, SA:2-CR-621(3)-FB.[8] In the affidavit, Ramirez indicates that Contreras, the prosecutor in Ramirez's case as well, made comments to him that if he did not plead guilty, he would lose at trial because the United States Attorneys, DEA agents, magistrate judges in San Antonio, district court judges in San Antonio, and Judge Prado (the presiding district court judge at the time) were all part of an "unbeatable 'tag team.'" (*Id.*) Esquivel also cites to the trial transcript in SA:2-CR-621 where Contreras, in response to Judge Prado's comment about "help from the peanut gallery," says, "Tag team." (*Id.* at 5.)

Ramirez's purported involvement in this case is merely tangential, where Contreras purportedly pressured Ramirez into pleading guilty in an unrelated case in a different division. The affidavit is wholly irrelevant to Esquivel's innocence in this case. Moreover, there is no indication that Ramirez was willing or able to testify, or to what he would have testified. Thus, there is no merit to this claim.

3. Court Bias

[8]After a jury trial, Ramirez was convicted of money laundering and various drug charges and sentenced to life in prison.

a. Motion for Recusal

Next, Esquivel raises several interrelated arguments pertaining to court bias. The first argument is that counsel was ineffective for failing to file a motion for recusal. Esquivel, while represented by Mr. King but acting pro se, filed a post-trial motion for recusal—which was unquestionably drafted by Cardona—based on the Court's purported failure to allow Esquivel to call witnesses on his behalf. (ECF No. 573.) Like the motion for new trial, the motion was denied because Esquivel was represented by counsel at the time. (ECF No. 577.) At no time prior to or subsequent to that did Mr. King file a separate motion for recusal.

Esquivel cannot show any prejudice arising from Mr. King's failure to file a motion for recusal on his behalf. 28 U.S.C. § 455(a) states that any judge "shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned." Assuming Mr. King had filed a motion for recusal based on the same grounds raised in Esquivel/Cardona's motion for recusal, there would have been no merit to the motion. The Court did not at any time prevent any witness from testifying on Esquivel's behalf and never denied any writs. Rather, the Court denied a last-minute motion for continuance, *without* prejudice, based on a lack of good cause to delay trial.

b. Jose Cardona

Esquivel also points to two instances where he alleges that the Court showed bias towards Jose Cardona, which, according to Esquivel, means that the Court interfered with his rights to a fair trial and the right to counsel at critical stages. First, in correspondence from the Court to Jose Cardona, the Court prohibited Cardona from acting as next friend to Javier Guerrero, Esquivel's co-defendant. (ECF No. 775 at 18.) Second, he contends that the Court failed to docket other correspondence in which Cardona sought to proceed on behalf of Esquivel.

The Supreme Court has recognized "presumptive bias" as requiring recusal under the Due Process Clause. *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008). Presumptive bias occurs when a judge may not actually be biased, but has the appearance of bias such that "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Supreme Court has found a judge's failure to recuse constitutes presumptive bias in three situations: (1) when the judge "has a direct personal, substantial, and pecuniary interest in the outcome of the case;" (2) when she "has been the target of personal abuse or criticism from the party before [her];" and (3) when she "has the dual role of investigating and adjudicating disputes and complaints." *Buntion*, 524 F.3d at 672 (quotations omitted).

To be entitled to relief on this basis, Esquivel must show that the alleged bias or prejudice "stem[med] from an extra-judicial source and result[ed] in an opinion on the merits on some basis other than what the judge learned in the presentation of the case." *United States v. Reeves*, 782 F.2d 1323, 1325 (5th Cir. 1986). "[J]udicial rulings alone almost never constitute a valid basis" for granting relief based on a claim of bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Instead, a petitioner must show a "deep-seated favoritism or antagonism that would make a fair judgment impossible." *Id.* Conclusory allegations of trial court bias are insufficient to establish a claim for relief under § 2255. *United States v. Flores*, 135 F.3d 1000, 1006 n.22 (5th Cir. 1998).

Esquivel's claim of bias is unsubstantiated and without merit. His claim is premised upon the idea that: (1) Cardona should be allowed to file frivolous motions on behalf of a defendant while that defendant is represented by counsel; (2) by not allowing it, the Court must be biased against Cardona; and (3) that bias made a fair judgment impossible for Esquivel. Esquivel, however, does

not actually contend that the Court erred in its ruling prohibiting Cardona from acting as next friend of Guerrero. Nor does he contest the Court's ability to bar a prisoner such as Cardona from filing documents in other defendants' cases without receiving prior permission from a judge. Nor has he shown that any bias made a fair judgment impossible for Esquivel. Esquivel's right to a fair trial was not dependent upon being able to receive help from Cardona—a non-attorney prisoner— and especially not dependent on *Guerrero's* ability to receive help from Cardona. Indeed, a defendant is not entitled to counsel of his choice, *Faretta*, 422 U.S. at 812 n.8, much less non-counsel of his choice. Thus, there is no merit to Esquivel's claim of bias.

c. Tag Team

Esquivel also claims there exists an "unbeatable tag team" in the Western District of Texas involving the Department of Justice and judges. In support, Esquivel submitted the affidavit from Jesse Ramirez, described above, in which Ramirez claims that Contreras, in an unrelated case, warned Ramirez that if he did not plead guilty, he would lose at trial because of the unbeatable tag team. According to Esquivel, attorneys are aware of this tag team and are terrified of it, thus intentionally failing to subject the prosecution's case to meaningful adversarial testing. Citing to *United States v. Cronic*, 466 U.S. 648 (1984), Esquivel argues that counsel's failure to subject the tag team to meaningful adversarial testing constitutes the denial of counsel and denial of a fair trial.

In *Cronic*, the Court affirmed that "a trial is unfair if the accused is denied counsel at a critical stage of his trial." 466 U.S. at 659. The Court also held that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* Because "no amount of showing of want of prejudice would cure" such an error, no specific showing of

prejudice is required. *Id.* However, as *Cronic* explains, "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Id.* at 662. For example, in *Powell v. Alabama*, 287 U.S. 45 (1932), counsel was appointed last minute in a capital case, had no opportunity to prepare a defense, and was not granted a continuance.

The circumstances justifying a presumption of prejudice are not present here. The crux of Esquivel's claim is that not a single defense attorney in the Western District of Texas can be deemed reasonably competent because of a universal fear of judges, prosecution, and law enforcement within the district. Aside from this being a brazen assertion, Ramirez's affidavit and trial citation pertain to a separate case in a different division and in no way implicates the Court or Esquivel's counsel. Indeed, counsel had almost two years to prepare a defense. Under these facts, Esquivel has not established any deficiency on the part of counsel that warrants a presumption of prejudice. By failing to point out specifically how defense counsel himself "was not able to provide [him] with the guiding hand that the Constitution guarantees," *Id.* at 663, Esquivel has not demonstrated any ineffective assistance of counsel.

4. Exculpatory Information

Esquivel vaguely contends that the prosecution failed to reveal exculpatory information concerning witnesses, resulting in prosecutorial misconduct. He claims that the government *may* have "failed to disclose impeachment information for me as to various witnesses including Will Davalos, Eli Valdez and Orlando Guerrero," three TMM members who testified against Esquivel at trial. (ECF No. 769 at 6.)

Seemingly related to this claim, Esquivel also argues that counsel was ineffective for withdrawing an objection to the presentence investigation report ("PSR"). Counsel for Javier Guerrero objected to Guerrero's PSR, arguing that the prosecution had withheld favorable evidence from him. Mr. King initially joined in the argument, but then withdrew the objection at sentencing, admitting that (1) there was no indication that the prosecution had failed to be forthcoming with exculpatory evidence, and (2) he was able to adequately cross-examine witnesses. Esquivel now argues that counsel was ineffective for withdrawing the objection, saying, "despite the fact the government has withheld potentially exculpatory information concerning [its] witnesses, counsel failed to object, and conceded that the defense was able to adequately cross examine government witnesses despite not being provided with the exculpatory materials." (ECF No. 769 at 14.)

Esquivel provides no substantiation of these claims and does not allege any prejudice. Conclusory allegations and speculative claims unsupported by specifics are "subject to summary dismissal . . . ." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

5. Prosecutorial Misconduct—Intercepted Letters

Esquivel raises yet another prosecutorial misconduct claim, pointing to the letter from Contreras to Cardona. According to Esquivel, Cardona sought information pursuant to the Freedom of Information Act to determine whether any letters from Cardona were actually intercepted where Cardona vowed to interfere in TMM cases. Esquivel contends that no such letters exist, and Contreras's lie constitutes prosecutorial misconduct.

Contreras's letter to Cardona fails to establish prosecutorial misconduct. The existence or non-existence of letters from Cardona possibly goes to whether Cardona's claims of Esquivel's innocence were credible and thus material. However, Cardona's request for information under the

Freedom of Information Act was dismissed because Cardona failed to pay the required fee; no determination was ever made about the actual existence of the letters. (ECF No. 775 at 24.) Furthermore, Esquivel has not demonstrated any prejudice—again, Cardona has not substantiated his claim of Esquivel's innocence.

6. Ineffective Assistance of Counsel on Appeal

Next, Esquivel argues that counsel was ineffective on appeal where counsel, who filed only an *Anders* brief, failed to address the following issues: (1) the denial of his motion to suppress; (2) the violation of his right to a fair trial when he was forced to disrobe and present his tattoos to the jury; (3) the denial of his motion to sever his trial from his co-defendant; (4) the denial of his motion for judgment of acquittal; (5) the use of gang expert testimony linking him to the TMM, which violated his right to a fair trial; (6) the Court's refusal to address the merits of his pro se motions and constitutional claims; (7) the fact that the jury instructions failed to require the jury to determine all of the elements of the offense; and (8) consecutive life sentences were unreasonable.

It is important to note that although Mr. King initially filed an *Anders* brief, the Fifth Circuit indeed found the brief to be deficient. He was then ordered by the Fifth Circuit to supplement the brief to comply with the guidelines provided in *United State v. Flores*, 632 F.3d 229, 232-33 (5th Cir. 2011). (*United States v. Equivel*, Appeal No. 11-50907, DE No. 77.) Alternatively, he was permitted to file "a brief on the merits addressing any nonfrivolous issues that counsel deems appropriate." (*Id.* at 3.) Mr. King opted to file a merits brief, and on September 25, 2013, he raised the argument that the Court erred in denying Esquivel's motion to suppress. (DE No. 95.) The Fifth Circuit affirmed the Court's ruling. (DE No. 149.)

The distinction in briefing is important. Although under either scenario, a petitioner "must show a reasonable probability that, but for his counsel's failure, he would have prevailed on his appeal," it is often difficult to demonstrate that counsel was incompetent when counsel files a merits brief. *Smith v. Robbins*, 528 U.S. 259, 268, 288 (2000). When filing a merits brief, counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.* at 288 (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (cited favorably in *Smith*, 528 U.S. at 288). In contrast, where no merits brief is filed, "it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present." *Smith*, 528 U.S. at 288.

Here, counsel focused on a very important issue, one that if successful would have led to the suppression of evidence and possibly a new trial. The issue involved whether Esquivel's statement to law enforcement in which he provided his cell phone number should have been suppressed, along with any data derived from the phone number, such as Esquivel's location in Sabinal at the time of the meeting and Hondo at the time of the murder. Esquivel has not demonstrated that any other ignored issues would have maximized his chances on appeal. In fact, he (1) makes only conclusory allegations that counsel was ineffective, and (2) does not even attempt to explain how the Court's

rulings were erroneous. "Mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983).[9]

7. Failure to Challenge Underlying Predicate Acts of RICO Conspiracy

Next, Esquivel contends that counsel was ineffective for failing to challenge two of the three predicate acts for which he was charged under Count One, the RICO conspiracy count. Esquivel was charged under § 1962(d) with conspiring to violate § 1962(c). Section 1962(c) makes it a crime to participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity that affects interstate or foreign commerce. "Racketeering activity" is defined as two or more predicate criminal acts within a ten-year period that are (1) related and (2) "amount to or pose a threat of *continued criminal activity*." *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer,* 90 F.3d 118, 122 (5th Cir. 1996). The indictment alleges six distinct racketeering acts, three of which pertain to Esquivel: (1) the July 2008 murder of Jose Damian Garza; (2) conspiracy to interfere with commerce by extortion under the Hobbs Act, 18 U.S.C. § 1951, beginning in 2004; and (3) conspiracy to distribute narcotics, 21 U.S.C. §§ 841(a)(1)&(b)(1)(A) and 846, beginning in 2004.

a. Hobbs Act

First, Esquivel argues that counsel was ineffective for failing to challenge the application of the Hobbs Act to him as a predicate act. Esquivel contends that a Hobbs Act conspiracy must be

[9]To briefly address a few of Esquivel's arguments, the use of gang expert testimony is permissible, *see United States v. Chavful*, 100 F. App'x 226, 231 (5th Cir. 2004), as is requiring a defendant to display tattoos, *see United States v. Velasquez*, 881 F.3d 314, 334-39 (5th Cir. 2018), and imposing consecutive life sentences, *United States v. Martinez-Herrera*, 539 F. App'x 598, 603 (5th Cir. 2013).

based on activity prohibited by state law. He then argues that because extortion is not prohibited under Texas law, his conviction is unlawful.

There is no merit to the argument. Section § 1951, commonly referred to as the Hobbs Act., states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C.A. § 1951. Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 1951(b)(2).

RICO predicate crimes are listed in 18 U.S.C. § 1961(1), and in pertinent part, include "(A) Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . , which is chargeable under State law and punishable by imprisonment for more than one year," *or* "(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 (relating to interference with commerce, robbery, or extortion)." In other words, a RICO predicate act can be based on extortion under state law *or* extortion as defined by federal law under § 1951. Guerrero was charged with a predicate act under § 1951, not state law. Therefore, Texas law is not applicable or relevant.

b. Role in Conspiracy

Next, Esquivel argues that counsel was ineffective for failing to challenge the drug conspiracy predicate act, which he claims was improperly founded on a misprision of a felony. In January of 2005, during the span of the RICO conspiracy, Esquivel was arrested after law enforcement agents found approximately one kilogram of cocaine on his person. At the time of his arrest, Esquivel was known by law enforcement agents to be involved only in a local gang, not the TMM. Esquivel, however, had TMM-related tattoos and told an agent that he had made contact with the TMM while spending time in jail. After the arrest, he was convicted of a misprision of a felony for drug trafficking. This drug trafficking conviction was essentially the only evidence presented at trial to support Esquivel's involvement in the TMM drug conspiracy RICO predicate act.

Esquivel also points to Contreras's opening statement, where Contreras told the jury that Esquivel had a large racket going on. Esquivel, however, was incarcerated from January 30, 2005, until June 13, 2008, for the misprision of a felony conviction, and again from October 21, 2008, when his supervised release was revoked, to the present. According to Esquivel, he therefore could not have had a large racket going on, and counsel was ineffective for failing to explain that he was incarcerated the majority of the RICO conspiracy, which spanned from 2004 to 2008.

Esquivel cannot demonstrate any prejudice. Esquivel need not have personally committed or agreed to commit two or more predicate acts for a substantive RICO offense under § 1962(c). *Salinas v. United States*, 522 U.S. 52, 63 (1997). He also need not have agreed to undertake all the acts necessary for the crime's completion. *Id.* at 65. It is therefore irrelevant that he was convicted only of a misprision of a felony or that he was even convicted at all. It is also irrelevant that he only participated in the conspiracy for a short period of time, so long as he indeed participated in the

conspiracy. Evidence of the 2005 incident was sufficient to connect Esquivel to the TMM-related drug trafficking conspiracy.

8. Jury Instructions

Next, Esquivel argues that counsel was ineffective for failing to request a jury instruction that it had to agree unanimously on the predicate acts supporting the RICO conspiracy. The jury verdict form, however, indeed required the jurors to unanimously agree upon each of the three racketeering acts, which the jurors did. (ECF No. 565.) Therefore, there is no merit to this claim.

9. Failure to Object to Expert Testimony

Finally, Esquivel contends that counsel was ineffective for failing to object to testimony of an expert who concluded that, based on his expertise, two people shot at the victim Jose Damian Garza. He argues that this was improper fact finding that usurps the function of the jury.

Esquivel does not identify the witness. Presumably, Esquivel is referencing either the testimony of Dr. Stash, the medical examiner who performed the autopsy of Garza, or Troy Wilson, the Texas Ranger in charge of the Garza murder investigation. Dr. Stash testified about each bullet's entrance and exit paths and also testified that there were a total of ten bullets. Dr. Stash was then asked,

> Q: And based on your medical training, do you have an opinion as to what the cause of death was?
>
> A: Multiple gunshot wounds.
>
> Q. Okay. Would that be consistent with possible two weapons being used?
>
> A. It can be consistent with that, yes.

(ECF No. 689 at 158.) When the Texas Ranger was asked how many shooters shot at and killed Jose Damian Garza, he responded, "There was no shell casings found at the scene, so we were determining there'd be revolvers and multiple shooters." (ECF No. 690 at 19.)

Esquivel has not demonstrated ineffectiveness. Rule 702 of the Federal Rules of Evidence states,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Both witnesses gave opinions rationally based on their perception that more than one shooter *may* have been involved, in order to help the jury better understand the evidence. Esquivel does not question the witnesses' qualifications to testify, that the testimony was not based on sufficient facts, or that the testimony was not helpful. Esquivel, therefore, has not established any violation of Rule 702 and thus no deficiency of counsel for failing to object.

Esquivel likewise has failed to demonstrate any prejudice. Garza's daughter testified that two men, not one, opened fire on her father, and several other witnesses testified that Esquivel bragged about the murder. Cell phone records also placed Esquivel near the meeting in Sabinal on

July 13, and in Hondo on July 19 at the time of the murder. Thus, there was sufficient additional evidence upon which to convict Esquivel for the murder of Garza.

IV. CERTIFICATE OF APPEALABILITY

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11 of the Rules Governing Section 2255 Cases in the United States District Courts. A party may not appeal a final order in a § 2255 proceeding unless a judge or a circuit justice first issues a certificate of appealability. 28 U.S.C. § 2253(c)(1); *see also Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). "To obtain a certificate of appealability, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to [obtain a certificate of appealability] is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Id.* at 338 (quoting *Slack*, 529 U.S. at 484).

For the reasons stated in this Order, Esquivel has not made a substantial showing of the denial of a constitutional right. Accordingly, no certificate of appealability is warranted.

V. CONCLUSION

For the foregoing reasons, the Court concludes that Esquivel is not entitled to any relief. Accordingly, it is hereby **ORDERED** that:

(1) Esquivel's motion to compel is **DENIED**. (ECF No. 757.)

(2) Esquivel's motion to vacate is **DENIED**. (ECF No. 768.)

(3) Esquivel's motion for extension of time is **DENIED**. (ECF No. 772.)

(4) A certificate of appealability is **DENIED**.

The Court also **ORDERS** that the Clerk's Office shall issue a clerk's judgment, terminating the present cause of action.

SIGNED this 27TH day of March, 2019.

ALIA MOSES
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 19-50461

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VICTOR ESQUIVEL, *also known as* YOUNGSTER,

Defendant—Appellant.

Appeals from the United States District Court
for the Western District of Texas
USDC No. 2:15-CV-120

ORDER:

Victor Esquivel, federal prisoner # 37781-180, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion in which he attacked his convictions for one count of conspiracy to conduct the affairs of an enterprise through a pattern of racketeering and two counts of violent crimes in aid of racketeering. He was sentenced to two consecutive life terms and an additional consecutive term of 120 months in prison.

Esquivel contends that his right to counsel constructively was denied because there was an actual conflict between him and his counsel. He states that counsel—who represented him both at trial and on appeal—was inclined to operate in his self-interest and not raise on appeal the claims of ineffective

assistance of counsel that Esquivel asserted in his pro se motions for a new trial and for the appointment of new counsel on appeal. Esquivel also argues that his counsel was ineffective on direct appeal and did not raise potentially meritorious claims that had been preserved for appellate review.

A COA may issue if a movant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denied relief on the merits, a movant must establish that jurists of reason could debate the district court's resolution of his constitutional claims or that the issues raised deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Esquivel has not made the required showing. Accordingly, his motion for a COA is DENIED.

KURT D. ENGELHARDT
United States Circuit Judge