APPENDIX A

United States of America, Appellee, v. James Alfred Miller, Appellant.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
91 F.3d 1160; 1996 U.S. App. LEXIS 19483; 45 Fed. R. Evid. Serv. (Callaghan) 386
No. 95-2210EA
June 10, 1996, Submitted
August 6, 1996, Filed

Editorial Information: Subsequent History

{1996 U.S. App. LEXIS 1} Rehearing and Suggestion for Rehearing En Banc Denied September 17, 1996, Reported at: 1996 U.S. App. LEXIS 24477.

Editorial Information: Prior History

On Appeal from the United States District Court for the Eastern District of Arkansas.

Disposition:

Affirmed Miller's convictions, vacated his sentence, and remanded this case to the District Court for resentencing.

Counsel Counsel who presented argument on behalf of the appellant was Blake Hendrix of Little Rock, Arkansas.

Counsel who presented argument on behalf of the appellee was Patrick Harris of Little Rock, Arkansas. In addition the name of Paula J. Casey as United States Attorney appears on the brief of the appellee.

Judges: Before RICHARD S. ARNOLD, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and ROSENBAUM, * District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment of the United States District Court for the Eastern District of Arkansas, which convicted him of conspiring to distribute and to possess with intent to distribute methamphetamine, 21 U.S.C.S. § 846, distributing methamphetamine, 21 U.S.C.S. § 841(a)(1), and distributing methamphetamine to a pregnant person, 21 U.S.C.S. § 861(f), and sentenced him under U.S. Sentencing Guideline Manual § 3B1.1(a).A conviction for drug-related conspiracy was proper where defendant sold resale amounts, but sentencing as an organizer or leader was improper where there was no evidence that he controlled the resale in any way.

OVERVIEW: Defendant was convicted of conspiring to distribute and to possess with intent to distribute methamphetamine, 21 U.S.C.S. § 846, distributing methamphetamine, 21 U.S.C.S. § 841(a)(1), and distributing methamphetamine to a pregnant person, 21 U.S.C.S. § 861(f). The district court sentenced him as the organizer or leader of a criminal activity that involved five or more participants pursuant to U.S. Sentencing Guideline Manual § 3B1.1(a). In affirming defendant's conviction, the court held that evidence that defendant sold resale quantities of drugs was sufficient to convict him of conspiracy. The district court's denial of a continuance based on the government's failure to timely notify defendant of certain witnesses' criminal backgrounds was not an abuse of discretion where it did not prejudice defendant. While the district court's refusal to allow extrinsic evidence of a witness's prior inconsistent

statement was error, it was harmless given the weight of other evidence. The court reversed and remanded for resentencing because there was no evidence that defendant controlled his buyers or their resale. Therefore, application of § 3B1.1(a) was error.

OUTCOME: The court affirmed defendant's conviction because evidence that he sold resale amounts of drugs was sufficient to convict on conspiracy and failure to grant a continuance or allow extrinsic evidence of a witness's prior inconsistent statement was not prejudicial. The court remanded for resentencing because sentencing defendant as an organizer or leader was error where he did not control any resale.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > General Overview
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > Elements

To convict of conspiracy, the government has to establish that an agreement to engage in distributing drugs existed between two or more people, including the defendant. Although numerous sales of small amounts for personal use are insufficient to support a conspiracy conviction, evidence of multiple sales of resale quantities of drugs is sufficient in and of itself to make a submissible case of conspiracy to distribute.

Criminal Law & Procedure > Pretrial Motions > Continuances

A district court has wide discretion in ruling on motions for continuances, and a district court's exercise of that discretion will rarely be overturned.

Criminal Law & Procedure > Witnesses > Impeachment
Evidence > Scientific Evidence > Toxicology
Evidence > Testimony > Credibility > Impeachment > General Overview
Evidence > Testimony > Credibility > Impeachment > Prior Inconsistent Statements

A party may introduce extrinsic evidence of a witness's prior inconsistent statement if the witness is given a chance to explain the inconsistency, the opposing party is afforded an opportunity to question the witness about the inconsistency, and the inconsistent statements are material to the substantive issues of the trial. Fed. R. Evid. 613(b).

Evidence > Relevance > Parol Evidence
Evidence > Testimony > Credibility > General Overview
Evidence > Testimony > Credibility > Impeachment > General Overview
Evidence > Testimony > Credibility > Impeachment > Bad Character for Truthfulness > General Overview
Evidence > Testimony > Credibility > Impeachment > Bad Character for Truthfulness > Opinion & Reputation
Evidence > Testimony > Credibility > Impeachment > Bad Character for Truthfulness > Specific Instances

Although Fed. R. Evid. 608(a) permits a party to introduce evidence regarding a witness's reputation for

truthfulness, Fed. R. Evid. 608(b) does not permit specific instances of a witness's conduct to be proved by extrinsic evidence.

Criminal Law & Procedure > Sentencing > Guidelines
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Penalties

Typically, the enhancement under U.S. Sentencing Guideline Manual § 3B1.1(a) applies to a defendant who employs or otherwise arranges for intermediaries to sell his drugs. The terms "organizer" and "leader" are broadly interpreted. Thus, the defendant need not "directly control" his intermediaries. But, if the words "organizer" and "leader" are to have their ordinary meaning, a defendant must do more than sell for resale.

Criminal Law & Procedure > Sentencing > Guidelines

Applying a plain-meaning approach to "leader" and "organizer," their definitions relate to supervision of people only. Leader is defined as a person who leads as a commander. Organizer is defined as a person who travels for the purpose of establishing new organizations. A commander commands people, and organizations are composed of people. Unlike a manager, a leader's or organizer's actions must directly affect other people. Consequently, a leader or organizer must control or influence other people.

Opinion

Opinion by: RICHARD S. ARNOLD

Opinion

{91 F.3d 1161} RICHARD S. ARNOLD, Chief Judge.

James Alfred Miller was convicted of three drug-related felonies and sentenced to a prison term of twenty-four years and four months. We affirm these convictions, but remand this case to the District Court for resentencing.

I.

At trial, the government introduced evidence showing that from January 1993 through April 1994, James Miller sold methamphetamine to a number of people. One of Miller's principal buyers was Don Roe, who was a drug dealer. Roe testified that he generally bought four ounces of methamphetamine at a time, at a cost of $ 5,000 per purchase. On two occasions, Roe purchased one-pound quantities. The defendant sometimes "fronted" these drugs, that is, he gave them to**{1996 U.S. App. LEXIS 2}** Roe and did not demand payment until a later date. Roe testified that on September 5, 1993, he and Jackie Bingham Williams went to Miller's house to buy methamphetamine. Roe took this purchase back to his home, where the police discovered it later that day.

A number of witnesses corroborated Roe's testimony. Lisa Gulledge stated that she accompanied Roe, whom she described as a well-known drug dealer, on trips to Miller's house to purchase methamphetamine. Mark Kenyon, who sold methamphetamine for Roe, testified that in early 1993, he and Roe purchased methamphetamine from Miller. Donna Carter said that she bought

methamphetamine from Roe, and had seen the defendant dispense this drug to Gulledge, Kenyon, and Kathy Reeves. Also, Jackie Bingham Williams confirmed Roe's account of the events of September 5, 1993.

Two other important witnesses were Jerry Wilson and Veronica Simone. Wilson testified that, beginning in the spring of 1993, he purchased one-eighth of an ounce of methamphetamine from Miller every month. Eventually, he started buying a pound at a time. The defendant sometimes fronted these drugs to Wilson, who resold them. Veronica Simone testified that when she was seven{**1996 U.S. App. LEXIS 3**} and one-half months' pregnant, Miller sold her methamphetamine.

{**91 F.3d 1162**} The jury convicted Miller of conspiring to distribute and to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, distributing methamphetamine, 21 U.S.C. § 841(a)(1), and distributing methamphetamine to a pregnant person, 21 U.S.C. § 861(f). Determining that Miller was the "organizer or leader of a criminal activity that involved five or more participants," U.S.S.G. § 3B1.1(a), the District Court increased Miller's base offense level by four levels and sentenced him to a prison term of twenty-four years and four months.

II.

On appeal, Miller argues that there was insufficient evidence to support his conspiracy conviction, and that the District Court erred by refusing to grant his request for a continuance and by not permitting a number of proposed defense witnesses to testify. Miller also asserts that in sentencing him, the District Court should not have applied a four-level enhancement.

A.

We begin with Miller's claim that the government did not produce enough evidence to support his conspiracy conviction. At trial, the government introduced evidence that Miller sold one-pound quantities of methamphetamine, {**1996 U.S. App. LEXIS 4**} worth $ 10,000 each, to Don Roe, a known drug dealer, and to Jerry Wilson. The government argues that the jury could have inferred that because Miller made such large sales, he knew that his purchasers were reselling the methamphetamine. According to the government, the fact that Miller "fronted" the methamphetamine to Roe, Wilson, Mark Kenyon, and Kathy Reeves also shows that Miller knew that the methamphetamine was being resold, because the only way that Miller's buyers could have paid him back was to resell the drugs.

To convict Miller of conspiracy, the government had to "establish that an agreement to engage in distributing drugs existed between two or more people, including the defendant." *United States v. Rodgers*, 18 F.3d 1425, 1428-29 (8th Cir. 1994). Although "numerous sales of small amounts . . . for personal use are insufficient to support a [conspiracy] conviction," *United States v. Eneff*, 79 F.3d 104, 105 (8th Cir. 1996), we have held that "evidence of multiple sales of resale quantities of drugs is sufficient in and of itself to make a submissible case of conspiracy to distribute." *Ibid.* 1 The government did show that Miller sold resale quantities of drugs. {**1996 U.S. App. LEXIS 5**} This evidence was, therefore, sufficient to convict Miller of conspiracy.

B.

Next, Miller asserts that the District{**1996 U.S. App. LEXIS 6**} Court erred by not granting his request for a continuance. There is "little question that a district court has wide discretion in ruling on motions for continuances, and a court's exercise of that discretion will rarely be overturned." *United States v. Pruett*, 788 F.2d 1395, 1396 (8th Cir. 1986). We do not believe that the District Court abused its discretion in this case.

Miller based his request for a continuance, which he made on the morning of trial, on three grounds.

First, Miller noted that the prosecution had not disclosed that its principal witness, Don Roe, had been arrested in 1993 for drug possession and had tried to bribe the police officers who had arrested him. (The government says that its failure to disclose these facts was inadvertent.) Miller's counsel did discover this information the week before trial and was able to use it to **{91 F.3d 1163}** cross-examine Roe. Miller suffered no prejudice from the Court's failure to grant a continuance.

The same is true of the other two grounds on which Miller based his motion for a continuance -- that the prosecution had not told Miller until the day before trial that Charlotte Kirks, a government witness, had a criminal record, and that**{1996 U.S. App. LEXIS 7}** the prosecution did not disclose that Jackie Bingham Williams, another government witness, had lost custody of her child. In each case, the prosecution's failure to disclose the information, which it says was inadvertent, did not interfere with the ability of Miller's counsel to use these facts during cross-examination. Thus, the District Court's refusal to grant a continuance was not an abuse of discretion.

C.

We now address Miller's evidentiary claims. The District Court did not permit Miller to call a number of witnesses who, Miller asserts, would have impeached the testimony of Don Roe. Weldon Davis, the Jailor of Pulaski County, Arkansas, would have testified that on September 6, 1993, when Roe was detained on state drug charges, Roe told a fellow prisoner that only two people, neither of whom was Miller, knew about the pound of methamphetamine the police had discovered in his house on September 5. Roe testified that he never made this statement.

We believe that the District Court erred by refusing to allow the defendant to question Weldon Davis. A party may introduce extrinsic evidence of a witness's prior inconsistent statement if the witness is given a chance to explain**{1996 U.S. App. LEXIS 8}** the inconsistency, the opposing party is afforded an opportunity to question the witness about the inconsistency, and the inconsistent statements are material to the substantive issues of the trial. Fed. R. Evid. 613(b); *United States v. Roulette*, 75 F.3d 418, 423 (8th Cir. 1996). Miller's lawyer asked Roe to explain his prior statement, and the government had the opportunity to question Roe on redirect examination. Also, Weldon Davis's testimony would have been relevant to whether Miller sold Roe the methamphetamine that the police found in Roe's house -- certainly a substantive trial issue.

However, this error does not cause us to reverse Miller's conviction. Jackie Bingham Williams testified that she accompanied Roe on his trip to Miller's house to purchase the one pound of methamphetamine that the police discovered on September 5. Williams's testimony corroborates Roe's account of the events of September 5 and leads us to conclude that the District Court's refusal to allow Weldon Davis to testify was harmless error.

The defendant also asserts that he should have been permitted to call as witnesses three police officers who would have testified that Roe had attempted to bribe**{1996 U.S. App. LEXIS 9}** them. The officers' testimony would not have shown that Roe had made an inconsistent statement material to whether Miller was guilty of the crimes for which he was being tried. Instead, the officers' statements would have been used purely to attack Roe's character. Trials are about charges in the indictment, not the character of the witnesses. Thus, although Federal Rule of Evidence 608(a) permits a party to introduce evidence regarding a witness's reputation for truthfulness, Rule 608(b) "does not permit specific instances of a witness's conduct to be proved by extrinsic evidence." *United States v. Johnson*, 968 F.2d 765, 766 (8th Cir.), *cert. denied*, 506 U.S. 980, 121 L. Ed. 2d 386, 113 S. Ct. 481 (1992) (citation omitted). We agree with the District Court that the proposed testimony of the three officers was inadmissible.

D.

USSG Advisory -

Finally, Miller argues that the District Court should not have given him a four-level enhancement for being the "organizer or leader of a criminal activity that involved five or more participants." U.S.S.G. § 3B1.1(a). Typically, this enhancement applies to a defendant who employs or otherwise arranges for intermediaries to sell his drugs. See, e.g., *United States v. McMullen*, **{1996 U.S. App. LEXIS 10}** 86 F.3d 135, 138 (8th Cir. 1996); *United States v. Logan*, 54 F.3d 452, 456 (8th Cir. **{91 F.3d 1164}** 1995); *United States v. Greene*, 995 F.2d 793, 802 (8th Cir. 1993). We have, however, "broadly interpreted the terms 'organizer' and 'leader,'" *United States v. Maxwell*, 25 F.3d 1389, 1399 (8th Cir.), *cert. denied*, 513 U.S. 1031, 115 S. Ct. 610, 130 L. Ed. 2d 519 (1994). Thus, the defendant need not "directly control" his intermediaries. *Ibid.* But, if the words "organizer" and "leader" are to have their ordinary meaning, a defendant must do more than sell for resale. See *United States v. Rowley*, 975 F.2d 1357, 1364 n.7 (8th Cir. 1992) ("we have always required evidence that the defendant directed or procured the aid of underlings").

Miller was not the "organizer" or "leader" of a conspiracy. Although Miller sold large enough quantities of methamphetamine that it is reasonable to infer that he knew the drugs were being resold, Miller did not have any involvement in the resales. There is no evidence that Miller controlled his buyers in their resale of the methamphetamine. The government contends that the four-level enhancement should, nevertheless, apply because Miller supplied the drugs that his co-conspirators**{1996 U.S. App. LEXIS 11}** later resold. But, as the Fifth Circuit has explained, controlling property does not make one an "organizer" or a "leader":

> Applying a plain-meaning approach to "leader" and "organizer," we note that their definitions relate to supervision of people only. Leader is defined as a person who leads as a commander. Webster's Third New International Dictionary 1283 (1981). Organizer is defined as a person who travels for the purpose of establishing new organizations. *Id.* at 1590. A commander commands people, and organizations are composed of people. Unlike a manager, a leader's or organizer's actions must directly affect other people. Consequently, a leader or organizer must control or influence other people. *United States v. Ronning*, 47 F.3d 710, 712 (5th Cir. 1995). We therefore agree with Miller that the District Court should not have applied a four-level enhancement on this record.

III.

For these reasons, we affirm Miller's convictions, vacate his sentence, and remand this case to the District Court for resentencing.

Footnotes

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A number of circuits disagree with this view. See *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir.) ("to show a conspiracy, the government must show not only that [the defendant] gave drugs to other people knowing that they would distribute them, but also that he had an agreement with these individuals to so further distribute the drugs."), *cert. denied*, 513 U.S. 856, 130 L. Ed. 2d 100, 115 S. Ct. 162 (1994); *United States v. Lechuga*, 994 F.2d 346, 347 (7th Cir.) (en banc) (the sale of "large quantities of controlled substances, without more, cannot sustain a conspiracy conviction"), *cert. denied*, 510 U.S. 982, 126 L. Ed. 2d 433, 114 S. Ct. 482 (1993); *United States v. Howard*, 966 F.2d 1362, 1364 (10th Cir. 1992) ("the huge quantity of crack cocaine involved in this case permits an inference of conspiracy, but by itself this is not enough to convict defendant"). Nevertheless, as a

panel, we are not free to depart from our precedents.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2561

Adalberto Martinez-Ramirez

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:18-cv-00490-RFR)

ORDER

The petition for rehearing by the panel is denied.

March 15, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2561

Adalberto Martinez-Ramirez

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:18-cv-00490-RFR)

JUDGMENT

Before GRUENDER, WOLLMAN, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

November 02, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. ADALBERTO MARTINEZ-RAMIREZ, Defendant.	**8:16CR196** **MEMORANDUM AND ORDER**

This matter is before the Court on Adalberto Martinez-Ramirez's ("Martinez-Ramirez") Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Filing No. 227). The government opposes (Filing No. 237) post-conviction relief. For the reasons stated below, Martinez-Ramirez's § 2255 motion is denied.

I. BACKGROUND

On July 19, 2016, a federal grand jury charged Martinez-Ramirez and others with drug trafficking and money laundering in an eleven-count Superseding Indictment (Filing No. 71). Martinez-Ramirez retained attorney Bassel F. El-Kasaby ("El-Kasaby") to defend him.

Through counsel, Martinez-Ramirez moved to suppress (Filing No. 102) the custodial statements he made to law enforcement following his arrest and all evidence obtained as a result of those statements. On November 4, 2016, the Court granted (Filing No. 115) Martinez-Ramirez's motion and suppressed the challenged evidence.

Following successful plea negotiations, Martinez-Ramirez pled guilty on March 31, 2017, to Counts I and X of the Superseding Indictment. Count I charged him with conspiring to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and

(b)(1) and 846. Count X charged him with conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h). Under the terms of Martinez-Ramirez's written plea agreement (Filing No. 169), the government agreed to dismiss the remaining charges against him at sentencing, and Martinez-Ramirez agreed to limit his rights to appeal and collaterally attack his conviction and sentence. In changing his plea, Martinez-Ramirez testified under oath that El-Kasaby had done everything he had asked him to do and that Martinez-Ramirez did not have any concerns or complaints about El-Kasaby or his representation.

At a contested sentencing hearing on October 10, 2017, the Court accepted Martinez-Ramirez's plea agreement with the government. Upon hearing the extensive evidence presented at the hearing, reviewing the presentence investigation report ("PSR") the probation office prepared on Martinez-Ramirez (Filing No. 204), and analyzing the 18 U.S.C. § 3553(a) sentencing factors, the Court sentenced Martinez-Ramirez to 324 months imprisonment on Count I and 240 months on Count X, to run concurrently. Martinez-Ramirez did not appeal.

On October 16, 2018, Martinez-Ramirez timely moved for relief under § 2255, alleging El-Kasaby provided ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution. The Court set the matter for an evidentiary hearing and appointed Michael J. Wilson to represent Martinez-Ramirez under the Criminal Justice Act of 1964, as amended, 18 U.S.C. § 3006A.

At the hearing on February 21, 2020, Martinez-Ramirez, who participated by phone with the assistance of an interpreter, and El-Kasaby both testified. The government also admitted into evidence eight exhibits consisting of emails and attachments exchanged between El-Kasaby and the government during plea negotiations and law-firm records of El-Kasaby's representation of Martinez-Ramirez. After carefully considering that

evidence and the balance of the record in this case, the Court finds Martinez-Ramirez is not entitled to any relief.

II. DISCUSSION

A. Allegations of Ineffective Assistance of Counsel

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel at all critical stages of a criminal proceeding, including plea negotiations, sentencing, and appeal. U.S. Const. amend. VI; *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1964 (2017). Section 2255(a) authorizes a federal prisoner whose "sentence was imposed in violation of" that right to move the Court "to vacate, set aside or correct [his] sentence."

Martinez-Ramirez so moves, asserting El-Kasaby was unconstitutionally ineffective in failing to (1) file an appeal as directed, (2) object to the inclusion of certain offense-level adjustments under the United States Sentencing Guidelines ("U.S.S.G. or "Guidelines") in his PSR, and (3) timely communicate a more-favorable plea offer from the government that Martinez-Ramirez says he would have accepted. To establish ineffective assistance of counsel, a prisoner generally must meet the familiar two-part test articulated in *Strickland v. Washington* by showing counsel's representation was both deficient and prejudicial. 466 U.S. 668, 687-88 (1984) (explaining counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"). In other words, the prisoner must show his "counsel's representation fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 688, 694.

The prisoner's burden is a heavy one. *See United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). He must overcome "a strong presumption that [his] counsel's conduct falls within the wide range of reasonable professional assistance" and could be

considered sound strategy. *Strickland*, 466 U.S. at 689. "It is not sufficient for [him] to show that the error had some 'conceivable effect' on the result of the proceeding because not every error that influences a proceeding undermines the reliability of the outcome of the proceeding." *Odem v. Hopkins*, 382 F.3d 846, 851 (8th Cir. 2004) (quoting *Strickland*, 466 U.S. at 693). Martinez-Ramirez does not meet his burden.

1. Failure to File an Appeal

Martinez-Ramirez first argues El-Kasaby was ineffective in failing to file a notice of appeal despite Martinez-Ramirez's instructions to do so. That claim is a little different than the others. "[A]n attorney's failure to file a notice of appeal after being instructed to do so by his client constitutes ineffective assistance entitling petitioner to section 2255 relief, no inquiry into prejudice or likely success on appeal being necessary." *Barger v. United States*, 204 F.3d 1180, 1182 (8th Cir. 2000). "Even if the client waived his right to appeal as part of a plea agreement, prejudice is presumed if the client asked his attorney to file a notice of appeal and the attorney did not do so." *United States v. Sellner*, 773 F.3d 927, 930 (8th Cir. 2014).

To succeed on this claim, Martinez-Ramirez "must show that he manifestly 'instructed [his] counsel to file an appeal.'" *Walking Eagle v. United States*, 742 F.3d 1079, 1082 (8th Cir. 2014) (alteration in original) (quoting *Barger*, 204 F.3d at 1182). Martinez-Ramirez's "bare assertion" that he made such "a request is not by itself sufficient to support a grant of relief, if" more-credible evidence indicates otherwise. *Barger*, 204 F.3d at 1182. Such is the case here.

Martinez-Ramirez testified he and El-Kasaby discussed the possibility of an appeal four times: (1) when he signed the plea agreement, (2) when he received his PSR, (3) immediately after the sentencing hearing, and (4) after the time to appeal had passed. According to Martinez-Ramirez, when he told El-Kasaby he was concerned about pleading guilty and getting a long sentence, El-Kasaby repeatedly assured him he could appeal no matter what happened in court. Martinez-Ramirez further testified that after he was

sentenced, El-Kasaby again told him not to worry about the length of his sentence because he would file an appeal but never did.

On cross-examination, Martinez-Ramirez claimed neither his plea agreement nor El-Kasaby ever said anything about waiving or limiting his right to appeal. He testified it was not until after he asked El-Kasaby why he had not appealed within the fourteen-day deadline that El-Kasaby told him there was no possibility of appeal and that nothing could be done. Martinez-Ramirez contends that before that, he fully expected El-Kasaby to file an appeal.

El-Kasaby denies Martinez-Ramirez instructed him to appeal. El-Kasaby testified he advised Martinez-Ramirez that pleading guilty would limit his appeal rights under the terms of his plea agreement. El-Kasaby explained that when Martinez-Ramirez raised the possibility of appeal after sentencing, El-Kasaby reminded him of his waiver and warned him an appeal could be risky if the appeal breached the plea agreement. According to El-Kasaby, Martinez-Ramirez never asked him to file an appeal after that and El-Kasaby never told him he would. El-Kasaby states that if Martinez-Ramirez had asked, he would have filed an appeal and a brief under *Anders v. California*, 386 U.S. 738 (1967).

While the supporting evidence does not weigh heavily either way, the Court finds El-Kasaby's testimony on this point to be more credible because it is more consistent with the record as a whole. For example, Martinez-Ramirez now says he expected all along that El-Kasaby would appeal and suggests he never knew of any limit on his appeal rights until after the time to appeal had expired. But in his signed plea agreement he "knowingly and expressly waive[d] any and all rights to appeal [his] conviction and sentence" with very limited exceptions. And in changing his plea, Martinez-Ramirez twice advised the Court he understood he was giving up nearly all his rights to appeal his conviction and sentence. In contrast, El-Kasaby credibly testified he explained to Martinez-Ramirez that

he had more to lose than gain from an appeal given his appeal waiver and that Martinez-Ramirez never asked him to appeal after that.

Martinez-Ramirez has not persuasively established he manifestly instructed El-Kasaby to appeal despite his appeal waiver.

2. Failure to Object to the Aggravating-Role Adjustment

Martinez-Ramirez's next argument relates to the application of a four-level aggravating-role increase he received under U.S.S.G. § 3B1.1(a) for being "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." In Martinez-Ramirez's view, El-Kasaby rendered ineffective assistance by failing to object to that increase on the grounds that Martinez-Ramirez was not a leader or organizer with respect to the money-laundering charge. The argument falls short.

Martinez-Ramirez's counts of conviction—Count I (drug conspiracy) and Count X (money-laundering conspiracy)—were grouped for Guideline-calculation purposes. *See* U.S.S.G. § 3D1.2(d). Under § 3D1.3(b), the Guideline for the money-laundering conspiracy—§ 2S1.1—provided the offense level for the group because it resulted in the highest offense level. Section 2S1.1(a)(1), in turn, required the Court to draw Martinez-Ramirez's base offense level from the underlying drug conspiracy because, as Martinez-Ramirez points out, he "committed the underlying drug crime and the Base Offense Level applicable thereto could be determined." After increasing Martinez-Ramirez's base offense level two levels under § 2S1.1(b)(2)(B) because Martinez-Ramirez was convicted under 18 U.S.C. § 1956, the Court added four levels under § 3B1.1(a) based on Martinez-Ramirez's role as a leader or organizer.

Martinez-Ramirez contends that was a mistake that El-Kasaby should have prevented. He bases the argument on Application Note 2(C) to § 2S1.1(a)(1), which provides that the "application of any Chapter Three adjustment shall be determined based on the offense covered by [§ 2S1.1] (i.e., the laundering of criminally derived funds) and

not on the underlying offense from which the laundered funds were derived." As Martinez-Ramirez sees it, "the sentencing record in this case" establishes (1) the Court erroneously applied the four-level increase under § 3B1.1(a) based *solely* on his role in the underlying drug offense, not the money-laundering offense, and (2) El-Kasaby failed to object to the calculation error, subjecting Martinez-Ramirez to a much longer sentence.[1] Martinez-Ramirez asserts the government never alleged he was "a leader or organizer with respect to the laundering Count . . . and has, therefore, waived such."

The government rejects Martinez-Ramirez's position. It notes "the Guidelines offense calculations in the PSR did not differentiate between Martinez-Ramirez's role in the drug conspiracy and the money laundering conspiracy." Although the government does not dispute that much of the discussion of the role enhancement at the sentencing hearing focused on Martinez-Ramirez's role as a leader and organizer in the drug conspiracy, the government maintains "Martinez-Ramirez has not shown that his counsel was ineffective concerning the role enhancement." Alternatively, the government states that "[e]ven assuming error, Martinez-Ramirez was not prejudiced because the evidence supported a role enhancement as to the money laundering conspiracy."

According to the government, Martinez-Ramirez fails to recognize the substantial overlap between the two conspiracies and ignores what would have happened if El-Kasaby had "objected to the manner in which the role enhancement was analyzed," including the presentation of additional evidence. In support, the government primarily relies on *Avila v. United States*, No. CR M-11-319-2, 2017 WL 1088354, at *12 (S.D. Tex. Feb. 17, 2017), *report and recommendation adopted*, No. 7:14-CV-50, 2017 WL 1079254 (S.D. Tex. Mar. 21, 2017), in which the court rejected a nearly identical argument based on Application Note 2(C) because the prisoner seeking relief under § 2255 could not establish his counsel's

[1]By Martinez-Ramirez's calculation, El-Kasaby's "unprofessional errors and omissions"—and the resulting increase in Martinez-Ramirez's offense level and Guideline range—caused Martinez-Ramirez to suffer a 62-month increase in his sentence.

representation was deficient and prejudicial. In reaching that conclusion, the *Avila* court reasoned the prisoner failed "to account for the practical effects of such an objection," such as a likely amendment to the presentence investigation report addressing the issue and a counter argument from the government. *Id.* at *11.

The *Avila* court further found the prisoner failed "to show that his sentence was improperly calculated or that the [sentencing court] lacked a sufficient, reliable factual basis to support the enhancement as applied." *Id.* Emphasizing that the prisoner did not cite any "binding or persuasive precedent saying that the [sentencing] court was required to separate [his] role in the concomitant criminal activities for each offense with . . . exacting surgical precision," the *Avila* court decided the sentencing court could "draw reasonable inferences from the" reliable, unrebutted facts in the presentence investigation report and reasonably conclude—based on that report and the facts in the record—that the prisoner "played a significant role in the money laundering—independent of the drug Count." *Id.* at 11-12.

The government presses similar arguments here. According to the government, Martinez-Ramirez's ineffective-assistance claim based on Application Note 2(C) fails because "[t]he two conspiracies" in this case "were intertwined" and the evidence overlapped. *See United States v. Robertson*, 883 F.3d 1080, 1086 (8th Cir. 2018) (explaining how drug-trafficking and money-laundering conspiracies can be intertwined). Highlighting key evidence from the contested sentencing hearing and the PSR, the government contends "[t]he same evidence supporting Martinez-Ramirez's role in the methamphetamine conspiracy also showed his role in the money laundering conspiracy." In particular, the government emphasizes the number of participants involved in both distributing the drugs and laundering the proceeds and their extensive use of a funnel account to move proceeds from Omaha to the Mexico border. The government maintains the aggravating-role enhancement was properly applied because the record evidence

establishes "[t]here were five or more participants in each conspiracy, each was otherwise extensive and Martinez-Ramirez acted as an organizer or leader in both."[2]

Having carefully reviewed the parties' arguments and the record in this case, including the factual basis for Martinez-Ramirez's guilty plea, the PSR, and the sentencing transcript, the Court finds Martinez-Ramirez has not shown he is entitled to relief on this claim. Martinez-Ramirez faults El-Kasaby for failing to object more specifically to the aggravating-role enhancement for the money-laundering count, but El-Kasaby vigorously objected to the enhancement as generally set forth in the PSR, describing it as the most important sentencing issue. At the sentencing hearing, El-Kasaby—perhaps more focused on money laundering than anyone—affirmatively challenged the factual basis for the enhancement as it related to the money-laundering charge. El-Kasaby specifically questioned the government's witnesses about the scope of the money-laundering conspiracy, Martinez-Ramirez's connection to the funnel account, and his alleged role as a leader or organizer of the money-laundering conspiracy.

At this point, the question is not whether El-Kasaby could have done more to challenge the enhancement or articulate the precise issue; the question is whether El-Kasaby's "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Court concludes it did not. In these circumstances, any error in failing to more effectively object to the aggravating-role enhancement for the money-laundering offense was not so serious that El-Kasaby "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

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[2]The Court notes the government's position aligns (at least to some degree) with *United States v. Lozano*, 745 F. App'x 466, 467 (3d Cir. 2018) (unpublished), in which the Third Circuit rejected the defendant's argument that Application Note 2(C) "precluded the District Court from considering his role as a supplier in deciding if the four-level organizer adjustment under U.S.S.G. § 3B1.1(a) applied to him" and upheld the court's determination that the defendant "was an organizer or leader of *both* the drug conspiracy and the money laundering conspiracy."

Even assuming Martinez-Ramirez could establish El-Kasaby's objection was deficient, he still fails to show prejudice. When all is said and done, the Court is not convinced there is a reasonable probability that Martinez-Ramirez would have received a lower sentence even if El-Kasaby had made Martinez-Ramirez's proposed objection based on Application Note 2(C). *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). The evidence presented at the sentencing hearing fairly established that Martinez-Ramirez was a leader or organizer in both conspiracies under § 3B1.1(a).

3. Failure to Timely Relay a More-Favorable Plea Offer

Martinez-Ramirez last argues El-Kasaby "was ineffective for failing to timely communicate a plea offer" from the government in January 2017 that he calculates would have reduced his sentencing exposure by 62 months. Martinez-Ramirez states he first learned about the offer when reviewing the materials in the case file he obtained from El-Kasaby. Martinez-Ramirez avers he would have accepted the more favorable offer had he known about it before it expired.

The government does not dispute that the offer was made or that El-Kasaby had a duty to convey it. *See Missouri v. Frye*, 566 U.S. 134, 145 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). The issue is whether El-Kasaby conveyed the offer to Martinez-Ramirez. El-Kasaby says he did; Martinez-Ramirez says he didn't.

Although El-Kasaby's record keeping leaves a lot to be desired, *see, e.g.*, *Rodriguez v. United States*, No. 3:10-CR-05018-DGK, 2016 WL 1531819, at *3 (W.D. Mo. Apr. 14, 2016) (finding defense counsel's testimony rebutting his client's "allegations that he failed to forward all plea offers to him is particularly trustworthy because it [wa]s corroborated by numerous emails exchanged between Counsel and the prosecutor"), the Court is

satisfied he did convey the offer and Martinez-Ramirez rejected it. At the § 2255 hearing, El-Kasaby credibly testified that—consistent with his standard practice—he conveyed every offer the government made to Martinez-Ramirez (including the January 2017 offer) shortly after receiving it. El-Kasaby further testified at some length about his discussions with Martinez-Ramirez about his plea negotiations with the government. According to El-Kasaby, he advised Martinez-Ramirez to accept the January 2017 offer because of the overwhelming evidence against him, but Martinez-Ramirez refused at that time to accept any deal that required him to serve more than five years in prison.

The Court does not believe Martinez-Ramirez's claim that El-Kasaby never relayed the offer in question and that the only time he discussed a plea offer with El-Kasaby was when he signed his plea agreement on March 26, 2017. Martinez-Ramirez's hearing testimony reveals that he frequently makes absolute statements that fail to withstand closer scrutiny. Those dubious statements and his admitted inability to fully recall his meetings with El-Kasaby undermine his credibility.

B. No Certificate of Appealability

Martinez-Ramirez cannot appeal the denial of his § 2255 motion without a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b). This Court cannot issue a certificate of appealability unless Martinez-Ramirez "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He can make such a showing "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 v. Cockrell*, 537 U.S. 322, 327 (2003). Upon careful review, the Court finds Martinez-Ramirez has not made the necessary showing; therefore, the Court will not issue a certificate of appealability.

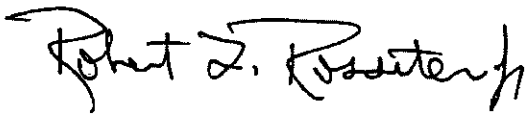
In light of the foregoing,

IT IS ORDERED:

1. Adalberto Martinez-Ramirez's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Filing No. 227) is denied.
2. No certificate of appealability will issue.
3. A separate judgment will be entered.
4. The Clerk of the Court is directed to mail a copy of this Memorandum and Order and the Judgment to Adalberto Martinez-Ramirez at the address of record for his current place of incarceration.

Dated this 28th day of May 2020.

BY THE COURT:



Robert F. Rossiter, Jr.
United States District Judge

Additional material from this filing is available in the Clerk's Office.