UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO: PE:16-CR-00523(1)-DC
	§	PE:19-CV-00006
(1) JEREMIAH YBARRA	§	

FINAL JUDGMENT

On this day, the Court entered an Order Adopting the Report and Recommendation of the Magistrate Judge after *de novo* review and dismissing Movant's Motion to Vacate, filed pursuant to 28 U.S.C. §2255. The Court now enters its Final Judgment pursuant to Federal Rule of Civil Procedure 58.

Accordingly, it is hereby **ORDERED** that, after *de novo* review, the Report and Recommendation of the Magistrate Judge is **ADOPTED IN ITS ENTIRETY**, and Movant's Motion to Vacate, filed pursuant to 28 U.S.C. §2255, is **DENIED AND DISMISSED**.

It is further **ORDERED** that the above-captioned cause is **DISMISSED WITH PREJUDICE** with the Parties to bear their own costs.

It is finally **ORDERED** that all other pending motions are **DENIED AS MOOT AND A CERTIFICATE OF APPEALABILITY WILL NOT ISSUE IN THIS CASE**.

It is so **ORDERED**.

SIGNED this 24th day of March, 2021.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO: PE:16-CR-00523(1)-DC
	§	PE:19-CV-00006
(1) JEREMIAH YBARRA	§	

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AFTER *DE NOVO* REVIEW

Before the Court in the above-styled and numbered cause is Movant Jeremiah Ybarra's Motion to Vacate. [docket number 129]. *See* 28 U.S.C. §2255. Movant's Motion to Vacate was referred to the United States Magistrate Judge for findings and recommendations. [docket number 133]. *See* 28 U.S.C. §636(b). The Magistrate Judge held an evidentiary hearing on the matters raised in the Motion to Vacate on January 8, 2021. [docket number 189]. The Magistrate Judge then signed the Report and Recommendation on February 1, 2021, in which he found and recommended that Movant's Motion to Vacate should be denied. [docket number 191]. The Clerk of the Court then re-mailed Movant a copy of the Magistrate Judge's Report and Recommendation on March 10, 2021, via certified mail return receipt requested, as per the Order contained within the Magistrate Judge's Report and Recommendation. [docket number 201]. On March 15, 2021, Movant received his certified mail copy of the Magistrate Judge's Report and Recommendation. [docket number 203]. On March 16, 2021, Movant mail-filed his 14-page set of Objections. [docket number 204].

The Court has considered Movant's extensive Objections and in light of those Objections, the Court has undertaken a *de novo* review of the entire case file. The Court overrules the Objections.

The Court finds and concludes that the Magistrate Judge's Report and Recommendation is correct and should be accepted and adopted for the reasons stated therein. *See* Fed. R. Civ. P. 72.

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C.

§2253(c)(1)(A). A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2).

The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the denial of Movant's Motion to Vacate on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not be issued.

It is **ORDERED** that Movant's Objections to the Report and Recommendation are **OVERRULED**.

It is also **ORDERED** that the Report and Recommendation of the United States Magistrate Judge filed February 1, 2021 is **ACCEPTED AND ADOPTED.**

It is further **ORDERED** that Movant's Motion to Vacate, filed pursuant to 28 U.S.C. §2255, is **DENIED**.

It is finally **ORDERED** that a Certificate of Appealability is **DENIED**.

It is so **ORDERED**.

SIGNED this 24th day of March, 2021.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JEREMIAH YBARRA,	§	
Petitioner,	§	
	§	**PE:16-CR-523-1-DC-DF**
v.	§	**PE:19-CV-6-DC-DF**
	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE

TO THE HONORABLE DAVID COUNTS, U.S. DISTRICT JUDGE:

BEFORE THE COURT is Petitioner Jeremiah Ybarra's ("Ybarra") Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (hereafter, "Motion to Vacate"). (Doc. 129). This matter is before the U.S. Magistrate Judge for the Pecos Division pursuant to an Order of Referral from the District Judge, 28 U.S.C. § 636, and Appendix C of the Local Rules. (Doc. 133). After due consideration, the undersigned **RECOMMENDS** Ybarra's Motion to Vacate be **DENIED**. (Doc. 129).

I. BACKGROUND

On November 9, 2016, Ybarra was charged by criminal complaint with knowingly and intentionally possessing with intent to distribute approximately 45.2 grams of methamphetamine, aided and abetted by others, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (hereafter, "Count One"). (Doc. 2). On November 16, 2016, Federal Public Defender Louis Wayne Correa (hereafter, "Attorney Correa") was appointed to represent Ybarra. (Doc. 5). On December 13, 2016, a federal grand jury indicted Ybarra on Count One. (Doc. 11).

On March 6, 2017, Attorney Correa filed a Motion to Withdraw as Counsel due to Ybarra's allegations of ineffective assistance of counsel. (Doc. 27). In response, the Court

appointed Attorney Mimi Smith (hereafter, "Attorney Smith") to represent Ybarra and terminated Attorney Correa. (Doc. 29). On May 31, 2017—after several delays—Ybarra's jury trial was held in front of U.S. District Judge Philip R. Martinez. (Doc. 85). Ybarra was found guilty as to Count One. (Doc. 88).

On June 28, 2017, the Court held an Attorney Status Hearing where the Court terminated Attorney Smith and appointed Attorney Damian Castillo (hereafter, "Attorney Castillo") to represent Ybarra. (Doc. 96). On September 8, 2017, Judge Martinez sentenced Ybarra to 120 months of imprisonment, an eight-year term of supervised release, and a $100.00 special monetary assessment. (Doc. 109). The same day, Ybarra filed his notice of appeal to the Fifth Circuit Court of Appeals. (Doc. 111). The Fifth Circuit affirmed Ybarra's judgment on November 8, 2018. (Doc. 129).

On November 29, 2018, Ybarra filed the instant Motion to Vacate. (Doc. 129). The Government responded on May 17, 2019. (Doc. 146). On April 17, 2020, the Court ordered the Government to provide further briefing and affidavits from Ybarra's attorneys. (Doc. 163). The Government responded on May 7, 2020. (Doc. 166). Ybarra filed objections to the Government's response on May 20, 2020. (Doc. 168). The Court originally set this matter for a hearing on December 11, 2020, however due to Ybarra's diagnosis with COVID-19, the hearing was not held until January 8, 2021. (Docs. 183, 186, 189). This matter is now ready for disposition.

II. LEGAL STANDARD

To obtain collateral relief under 28 U.S.C. § 2255, a defendant "must clear a significantly higher hurdle" than the standard that would exist on direct appeal. *United States v. Frady*, 456 U.S. 152, 166 (1982). Once a defendant has been convicted and has exhausted or waived his right to appeal, a court may presume that he "stands fairly and finally convicted." *United States*

v. Willis, 273 F.3d 592, 595 (5th Cir. 2001). Relief under § 2255 is limited to "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. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (quoting *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994)). A court's ability to reduce or modify a sentence of imprisonment once it has been imposed is restricted. *United States v. Lopez*, 26 F.3d 512, 515 n.4 (5th Cir. 1994).

There are four grounds on which a defendant may move to vacate, set aside, or correct his sentence under § 2255: (1) a sentence was imposed in violation of the Constitution or laws of the United States; (2) the district court lacked jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). Thus, "[a] defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.3d 228, 232 (5th Cir. 1991) (citations omitted).

Claims of ineffective assistance of counsel raise constitutional issues and may be brought in a collateral proceeding under § 2255. *Massaro v. United States*, 538 U.S. 500, 504 (2003). The standard for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a § 2255 motion based on ineffective assistance of counsel, the movant must prove that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 686–691; *see also Missouri v. Frye*, 566 U.S.134, 146–50 (2012). In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge in a strong presumption that counsel's conduct falls within a wide range of reasonable

assistance, or that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. Further "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697; *see also United States v. Stewart*, 207 F.3d 750, 751 (5th Cir. 2000). To show prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011), and a movant must prove that counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 686).

Thus, judicial scrutiny of ineffective counsel claims is highly deferential and the petitioner must overcome a strong presumption that his counsel's conduct falls within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Stated differently, the question is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (quoting *Strickland*, 466 U.S. at 690).

In those situations where the record of a given case does not conclusively demonstrate whether a petitioner's counsel was effective, the Fifth Circuit has recognized the necessity of holding an evidentiary hearing. *See United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007). At such a hearing, "[t]he defendant has the burden of supporting the allegations in a § 2255 action by a preponderance of the evidence." § 635 Procedure at Hearing, 3 Fed. Prac. & Proc. Crim. § 635 (4th ed.) (citing *Wright v. U.S.*, 624 F.2d 557 (5th Cir. 1980)). Further, petitioners have no right to be present at their evidentiary hearing. *See Sanders v. United States*, 373 U.S. 1, 20 (1963).

III. Discussion

Ybarra raises the following nine grounds on which he claims that he is being held in violation of the Constitution, laws, or treaties of the United States: (1) he challenges the validity of the Criminal Complaint for Fourth and Sixth Amendment violations; (2) he asserts that the Government committed *Brady* and Jencks violations by withholding potentially exculpatory evidence; (3) he asserts that agent testimony at his trial was improper to demonstrate probable cause to arrest; (4) he asserts ineffective assistance of counsel and appellate counsel claims; (5) he asserts selective prosecution and Equal Protection Clause violations; (6) he asserts there was insufficient evidence to support his conviction; (7) he asserts he experienced a due process violation; (8) he asserts there were errors in the grand jury proceedings and misconduct by the Assistant United States Attorney for the Government; and (9) finally, he asserts he experienced a Sixth Amendment violation under the Confrontation Clause. (Doc. 129). The undersigned will address each in turn.

1. Validity of the Criminal Complaint and Fourth and Sixth Amendment Violations

Ybarra first asserts that his Fourth and Sixth Amendment rights were violated because the criminal complaint (hereafter, "Complaint") used to arrest him was deficient for the following three reasons: (1) it contained a false statement to possibly broaden the scope; (2) it was not supported by an affidavit to demonstrate that Ybarra had violated any law; and (3) it was not made under penalty of perjury. (*See* Docs. 129 at 4; 129-1 at 7). Ybarra specifically argues that the amount of methamphetamine found on his person listed on the complaint—42.5 grams—was inaccurate because of undercover officer Javier Bustamante's testimony at trial that the amount of methamphetamine found on Ybarra at the time of his arrest was actually 21 grams. (Doc. 129-1 at 7). Ybarra reasons that the allegedly inaccurate Complaint was then relied on by the

undersigned in signing the warrant for Ybarra's arrest, violating Ybarra's Fourth Amendment rights. *Id.* at 8. Ybarra notes that no affidavit was attached to the complaint. *Id.* Ybarra further argues that he was unable to discredit the warrant at his trial because Drew Walker, the agent who signed the Complaint, neither provided an affidavit supporting the Complaint nor appeared for cross examination, purportedly violating the Sixth Amendment's Confrontation Clause. *Id.* at 8–9. Finally, Ybarra asserts Attorney Castillo was ineffective for failing to raise this ground on appeal. *Id.*

In response, the Government begins by noting that while it "does not concede any of [Petitioner's claims] and wholly disputes them, Petitioner's attack on his Complaint is without merit because the indictment following Petitioner's arrest 'remedied any defect in the complaint and arrest warrant.'" (Doc. 146 at 7) (citing *Denton v. United States*, 465 F.2d 1394, 1395 (5th Cir. 1972)). At least one court in the Western District of Texas has similarly held that attacks on the criminal complaint are meritless because indictment and ultimate conviction "transforms any defect in either . . . into harmless error, because the conviction established proof beyond a reasonable doubt of [the] petitioner's guilt." *See Conlan v. United States*, No. A-11-CR-451(1) LY, 2015 WL 8362905, at *2 (W.D. Tex. Dec. 7, 2015) (citing *Cusamano v. Donelli*, No. 06 Civ. 6047 (PAC) (THK), 2010 WL 2653653, at * 3 (S.D.N.Y. July 1, 2010)). The Government further argues that Ybarra's allegation of ineffective assistance of counsel premised on his counsel's purported failure to raise this argument on appeal is meritless because such an argument would be frivolous and "[c]ounsel cannot be deficient for failing to press a frivolous point." (Doc. 146 at 7) (citing *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995)). Considering the foregoing discussion, the undersigned finds that Ybarra's argument against the complaint is without merit.

2. *Allegation of* Brady *and Jencks violations*

Ybarra next asserts that a *Brady* violation occurred when the Government did not disclose any evidence to him. (Doc. 129-1 at 9). Specifically, Ybarra alleges that the Government withheld the following potentially exculpatory evidence: all of the police reports made by each agent involved; the phone records of undercover agent Bustamante; the witness that inculpated Ybarra; the other people involved; and "other *Brady* and Jencks material not known" to him. (Doc. 129 at 5).

In response, the Government notes the evidentiary hearing that took place before the undersigned on May 9, 2017, where it was decided that the Government would not be compelled to produce Bustamante's phone records. (*See* Docs. 146 at 8; 57) The Government further asserts that "Bustamante was cross-examined extensively by [Ybarra's] trial counsel regarding his telephone communication." (Doc. 146 at 8). Therefore, according to the Government, Ybarra has failed to establish a *Brady* violation because he "has not identified what type of favorable evidence was withheld." *Id.*

A *Brady* violation occurs when prosecutorial nondisclosure of evidence is "so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). "To establish a *Brady* violation, a defendant must show that: (1) favorable evidence (2) was suppressed by the prosecution (3) that was material to guilt or punishment." *United States v. Vasquez-Hernandez*, 314 F. Supp. 3d 744, 764 (W.D. Tex. 2018) (citing *Pippin v. Dretke*, 434 F.3d 782, 789 (5th Cir. 2005)). However, as noted by the Government, "[c]onclusory or 'purely speculative' claims of *Brady* violations are insufficient to obtain collateral relief." (Doc. 146 at 8) (citing *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000)). Somewhat similarly, "[t]he Jencks Act, codified at 18 U.S.C. § 35004,

requires the Government to disclose a prior recorded witness statement in its possession relating to the subject matter of that witness's testimony." *United States v. Montgomery*, 210 F.3d 446, 450–51 (5th Cir. 2000).

Here, Ybarra has not met his burden to establish a *Brady* violation. Ybarra fails to allege any facts that create a reasonable probability that the allegedly suppressed evidence would have produced a different verdict. Rather, Ybarra merely provides a laundry list of apparently undisclosed evidence. Ybarra has also failed to allege any facts tending to indicate a violation of the Jencks Act. Therefore, the undersigned finds that Ybarra's assertion of a *Brady* or Jencks violation is without merit.

3. Agents' Testimony

Ybarra next claims that the agents' testimony at trial "should not have been used to come upon probable cause to arrest." (Doc. 129 at 6). According to Ybarra, testimony made in court cannot be used to cure defects in the arrest affidavit. *Id.* However, similar to Ybarra's first count against his imprisonment, this allegation is also meritless as his indictment and ultimate conviction "transforms any defect in either . . . into harmless error, because the conviction established proof beyond a reasonable doubt of [the] petitioner's guilt." *Conlan*, 2015 WL 8362905, at *2 (citing *Cusamano*, 2010 WL 2653653, at *3). Accordingly, this ground for relief is also meritless.

4. Ineffective Assistance of Counsel and Appellant Counsel

Ybarra next asserts that his attorneys were ineffective. (Doc. 129 at 8). Ybarra claims his various counsel were ineffective for the following reasons: (1) they failed to investigate a factual defense; (2) they failed to cross examine a witness; (3) they failed to impeach a government witness; (4) they failed to file motions on behalf of Ybarra's defense; (5) they failed to object to

discovery issues; (6) they failed to subpoena a witness; and (7) they failed to object to the Confrontation Clause. *Id.* The Government responds by first reiterating that "any claim that Petitioner's trial or appellate counsel were ineffective for failing to make the argument that the criminal complaint issued to arrest him had a false statement, was not supported by an affidavit, and was not under the language of the law fails since it is a meritless argument." (Doc. 146 at 9) (citing *Womack v. United States*, No. CIV.A. 11-285-WS, 2012 WL 3206458, at *3 (S.D. Ala. June 6, 2012)). The Government also argues that Ybarra's assertion that his counsel was ineffective for failing to oppose being unable to present evidence in support of an entrapment defense is unsupported by the record. *Id.* The Government notes that Attorney Smith "not only presented an entrapment defense, but that Petitioner himself testified about his belief that he was entrapped." *Id.*

To prove a claim of ineffective assistance of counsel, a petitioner must meet the Supreme Court's two-part *Strickland* test and show: "(1) that his trial counsel's performance was deficient, and (2) that the deficient performance resulted in prejudice." *Murphy v. Davis*, 901 F.3d 578, 589 (5th Cir. 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "To demonstrate deficient performance, the defendant must show that, in light of the circumstances as they appeared at the time of the conduct, 'counsel's representation fell below an objective standard of reasonableness' as measured by 'prevailing professional norms.'" *Murphy*, 901 F.3d at 589 (citing *Rhoades v. Davis*, 852 F.3d 422, 431–32 (5th Cir. 2017)). However, in evaluating counsel's performance, courts are to "apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Id.* (internal quotations omitted) (citing *Harrington v. Richter*, 562 U.S. 86, 104 (2011)). Next, to show that the deficient performance resulted in prejudice, "[t]he 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 . . . [a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Murphy*, 901 F.3d at 590 (citing *Harrington*, 562 U.S. at 112). Ybarra has failed to meet his burden of demonstrating ineffective assistance of counsel as is demonstrated by the undersigned's evaluation of Ybarra's claims against each of his attorneys in turn.

i. Attorney Correa

Ybarra's claim that his first attorney, Attorney Correa, was ineffective is meritless because it hinges on attacking the sufficiency of the criminal complaint. As stated above, Ybarra's indictment and eventual conviction cured any defects with the criminal complaint. *Womack*, 2012 WL 3206458, at *3.

ii. Attorney Smith

Ybarra's claims of ineffective assistance of counsel against Attorney Smith are principally related to presentation of evidence during trial. Ybarra contends Attorney Smith was ineffective for failing to have certain witnesses present at the trial and for failing to investigate a factual defense. However, the record, Attorney Smith's affidavit, and Attorney Smith's testimony during the January 8, 2021 hearing all contradict Ybarra's assertions. (*See* Doc. 85).

To begin, Attorney Smith's purported failure to have certain witnesses testify was not for lack of trying. Attorney Smith testified that she worked extensively to have several witnesses testify at Ybarra's trial but that two of the witnesses—Cece Crespin and Blake Raley—had fled the State of Texas. Further, the other witness—Ybarra's alleged childhood friend—was unable to be found due to Ybarra's inability or unwillingness to produce a cell phone containing

purportedly exculpatory evidence and contact information. When Ybarra pressed Attorney Smith during the hearing on why she failed to file a Motion for Continuance of the trial to attempt to find the missing witnesses, she said she did not believe that Crespin's testimony would have done anything to prove Ybarra's innocence or contribute to his defense. Therefore, Attorney Smith's decision not to further pursue finding these witnesses was a trial decision within Attorney Smith's purview.

During the January 8, 2021 hearing, Ybarra focused on his contention that Attorney Smith was ineffective for failing to obtain a cell phone with potentially exculpatory text messages on it from Ybarra's grandmother's house. However, Ybarra asserted during the hearing that it was never retrieved because he does not trust anyone to retrieve the phone for him. The text messages in question are screenshots of an exchange between Crespin and some other individual allegedly detailing that the methamphetamine was not actually an illicit substance but was rock salt. However, as noted by Assistant United States Attorney ("AUSA") Cannizaro during the hearing, Ybarra testified on his own behalf at trial. Therefore, had any one of the twelve individuals on the jury found Ybarra's story convincing, there would have at a bare minimum been a hung jury. This did not happen. Rather, as noted by the Fifth Circuit, the jury chose to disbelieve Ybarra's assertions—a decision entirely within their purview. *See United States v. Mora*, 994 F.2d 1129, 1137 (5th Cir. 1993) ("Generally speaking, a defendant's testimony cannot by itself establish entrapment as a matter of law because, absent unusual circumstances, the jury is almost always entitled to disbelieve that testimony."). Finally, Ybarra admitted during the hearing that Attorney Smith had gone to great lengths to obtain witnesses to testify on his behalf. Accordingly, the undersigned finds this claim to be meritless. Also directly rebutting Ybarra's allegations of Attorney Smith's failure to obtain evidence are the two pretrial

Motions for Discovery filed by Attorney Smith. (*See* Docs. 45, 61). While the undersigned ultimately denied both motions, Attorney Smith cannot be said to have failed to try to obtain evidence to present in Ybarra's favor.

Further, Ybarra's assertion that he was not permitted to present any evidence in favor of an entrapment defense is unequivocally contradicted by the fact that he obtained a *jury instruction* for entrapment during his trial. (*See* Doc. 125). The undersigned questions how said jury instruction was provided to the jury absent a presentation of at least *some* evidence tending to indicate that Ybarra had been entrapped. As Attorney Smith was Ybarra's trial counsel, the logical conclusion is that Attorney Smith *did* in fact present evidence supporting an entrapment defense and therefore the undersigned finds this complaint meritless. Ybarra additionally questioned why police reports of the incident were kept out of evidence during his trial. Attorney Smith asserted this was also a strategic decision as the police reports contained damning assertions regarding Ybarra's involvement in the drug sale that precipitated his arrest.

Ybarra's remaining complaints against Attorney Smith's representation go to her failure to file pre-trial motions regarding grand jury proceedings as well as failure to investigate a factual defense. For the same reasons stated throughout this Report and Recommendation, Ybarra's claim based on a failure to file pre-trial motions regarding grand jury proceedings is meritless as Ybarra's indictment and eventual conviction ultimately cured any defects in the grand jury process. Ybarra also asserts Attorney Smith was ineffective for failing to investigate a factual defense, however the undersigned determined during the hearing that Attorney Smith did more than enough to investigate Ybarra's allegation that the substance was not in fact methamphetamine. Ybarra was permitted to testify on his own behalf during his trial and his

failure to convince the jury of this "factual defense" is self-evident based on his eventual conviction. (Doc. 117 at 82). Therefore, the undersigned finds these claims to be without merit.

iii. Attorney Castillo

Attorney Castillo addressed Ybarra's allegations of ineffective assistance at length in his written affidavit and again during the hearing held on January 8, 2021. (*See* Doc. 166-4). During the hearing, Attorney Castillo stated that his conversations with Ybarra focused primarily on Ybarra's entrapment defense. Attorney Castillo further asserted that he discussed with Ybarra issues that could and could not be raised on appeal. While Ybarra does argue that Attorney Castillo "filed the appellate brief without his approval and also waived the right to oral argument on his own," Attorney Castillo responds that he was at all times under the impression that Ybarra understood that the appeal would be handled principally by Attorney Castillo. (Doc. 129-1 at 14). To that end, upon completion of the appellate brief, Attorney Castillo sent a copy to Ybarra followed by a copy of the Fifth Circuit's decision once it was rendered. Attorney Castillo conceded that he unilaterally waived oral argument on appeal, but emphasized that based on his extensive experience appealing cases to the Fifth Circuit, the court would have ordered oral argument despite Attorney Castillo's waiver had the court felt it was necessary—which it did not. Ybarra directly questioned Attorney Castillo regarding a letter that was allegedly sent to Attorney Castillo in September 2018 wherein Ybarra purportedly requested that Attorney Castillo file a writ of certiorari, however Attorney Castillo had no recollection of this letter and Ybarra failed to produce any evidence of this letter's existence. For the foregoing reasons, the undersigned finds Attorney Castillo did not render ineffective assistance of counsel.

5. Selective Prosecution and Equal Protection Clause Violations

Ybarra further asserts that he was the victim of selective prosecution by Assistant United States Attorney Monty Kimball (hereafter, "AUSA Kimball") because, according to Ybarra, he was singled out for prosecution when AUSA Kimball allegedly knew that others were involved in the incident. (Doc. 129 at 10). Ybarra claims that he suffered prejudice because the other individuals involved in the criminal enterprise were not present at his trial and that the witnesses he wanted called were never called at trial. (Doc. 129-1 at 14–15). Ybarra also asserts that AUSA Kimball threatened him with "ten plus years of prison" if he did not take a plea deal and that AUSA Kimball gave Ybarra a 21 U.S.C. § 851 sentencing enhancement after he chose to go to trial. *Id.* at 15. The Government responds with a lengthy recitation of case law supporting prosecutorial discretion and asserts that Ybarra does not show "any actions by AUSA Kimball or the agents that would lend any credibility to his bald claims of selective prosecution." (Doc. 146 at 12) (emphasis removed).

A prima facie case for selective prosecution must show: (1) that the defendant was "singled out for prosecution while others similarly situated who committed the same crime were not prosecuted;" and, (2) "that the government's discriminatory selection of [defendant] for prosecution was invidious or done in bad faith—i.e., that the government selected its course of prosecution 'because of' rather than 'in spite of' its adverse effect upon an identifiable group." *United States v. Jackson*, 22 F. Supp. 3d 636, 646 (E.D. La. 2014) (citing *United States v. Sparks*, 2 F.3d 574, 580 (5th Cir.1993)).

In an affidavit provided to the Court, AUSA Kimball asserts that Ybarra was not selectively prosecuted. (Doc. 166-1 at 1–2). AUSA Kimball notes that aside from evidentiary issues in prosecuting others involved in the sting operation, the Government "structured its

arrests and prosecutions with an eye on protecting sources and seeking cooperation from co-conspirators." *Id.* at 2. AUSA Kimball further asserts that while he did inform Ybarra that he would file an enhancement if Ybarra chose to go to trial, AUSA Kimball did not "interrupt a meeting between Ybarra and his defense counsel to threaten him." *Id.* AUSA Kimball's testimony is corroborated by Attorney Smith as Attorney Smith contends that she and Ybarra invited AUSA Kimball to meet with Ybarra. (Doc. 166-2 at 2). However, Attorney Smith does note that AUSA Kimball was "fairly aggressive in his exhortation that he was holding open the plea offer without enhancement." *Id.*

Here, Ybarra's claims are also meritless. To demonstrate selective prosecution, Ybarra must show that the decision to not prosecute others was based on "impermissible considerations" and be "invidious." *See U.S. v. Ortega-Alvarez*, 506 F.2d 455; *see also U.S. v. Ojala*, 544 F.2d 940. Ybarra has not put forth any evidence that would tend to indicate AUSA Kimball selectively prosecuted him. Further, AUSA Kimball's affidavit supports a finding that Ybarra was not selectively prosecuted. Therefore, the undersigned finds Ybarra's claim for selective prosecution is meritless.

6. *Insufficient Evidence*

Ybarra additionally broadly asserts that there was insufficient evidence to convict him of intent to distribute. (Doc. 129). Specifically, Ybarra contends that his trial attorney was ineffective for failing to investigate the DEA-7 form and failing to "bring up the fact that the evidence in the pictures were not in heat sealed bags[, and that] 99% purity of methamphetamine would be in liquid form." (Doc. 129-1 at 15). Ybarra asserts that these purported issues were not raised on appeal because of Attorney Castillo's allegedly ineffective assistance. *Id.*

Ybarra first takes issue with evidence regarding the quantity and purity of the methamphetamine he was convicted of possessing with intent to distribute. Ybarra challenges why lab reports were not presented to the grand jury. However, the requisite burden of proof to indict someone—probable cause—is significantly lower than that required to convict a person of a crime—beyond a reasonable doubt—and therefore evidence such as purity of a drug is not required to support an indictment. *See James v. Harris Cty.*, 508 F. Supp. 2d 535, 549 n.40 (S.D. Tex. 2007), *aff'd*, 577 F.3d 612 (5th Cir. 2009). During the hearing, Ybarra also asserted that Attorney Smith never gave him a chance to review the DEA-7 form nor the chain of custody. Attorney Smith responded that she shared any and all information she received regarding the case with Ybarra. The undersigned also noted at the hearing that chain of custody affects the *weight* of the evidence but not the *admissibility*. Essentially, because the jury found the evidence presented against Ybarra sufficient to convict him, this is a moot point. The affirmance of Ybarra's conviction on appeal only buttresses this line of reasoning as the Fifth Circuit found the evidence presented at trial legally sufficient to support Ybarra's conviction. (Doc. 146 at 12).

Ybarra also takes issue with Attorney Smith's alleged failure to introduce police reports from Ybarra's arrest as evidence during his trial. However, Attorney Smith explicitly told Ybarra during the hearing that she did not admit the police report because it would have been very damaging to Ybarra's case. In Attorney Smith's words, "the musings of 11 law enforcement agents against her client" would likely not have been beneficial to Ybarra. When Ybarra further pressed Attorney Smith on alleged inconsistencies between the police reports and agents' testimony at Ybarra's trial, Attorney Smith asserted that contesting every inconsistency within the agent's testimony would not have helped to establish the defense of entrapment.

Regarding Attorney Castillo's representation on appeal, Attorney Castillo disagrees with Ybarra's allegations of ineffective assistance because "[a]t trial there was overwhelming evidence presented against [Ybarra] to prove the elements of the offense." (Doc. 166-4 at 3). During the January 8, 2021 hearing, Attorney Castillo reiterated his position that an appeal on the ground of insufficient evidence would have been frivolous. Moreover, Attorney Castillo did challenge the sufficiency of the evidence as it pertained to Ybarra's entrapment defense. The undersigned finds that in light of the Fifth Circuit's decision regarding the sufficiency of the evidence used to convict Ybarra, this claim for relief is also meritless.

7. Due Process Violation

Ybarra argues he suffered due process violations when he was not permitted to bring forth any evidence in his defense and further not permitted to see the evidence upon which the grand jury relied in indicting him. (Doc. 129-1 at 17). Ybarra argues Attorney Smith was ineffective for failing to argue that the U.S. Attorney did not demonstrate possession and distribution theory. (Doc. 129-1 at 20). Ybarra also contends that this issue was not raised on appeal because of alleged ineffective assistance of counsel by Attorney Castillo.

The Government argues that Ybarra's due process claim should be denied for three reasons: (1) Ybarra's alleged due process issues are not cognizable under 28 U.S.C. § 2255; (2) entrapment was reviewed by the Fifth Circuit and upheld; and (3) Ybarra has failed to show how the Court infringed upon his due process rights and has failed to present evidence thereof. (Doc. 166 at 3). The Government argues the record clearly indicates Ybarra was permitted to put on evidence of entrapment and further that the Court provided an entrapment jury instruction. *Id.* at 6 (citing Doc. 117 at 141). The Government contends Attorney Smith "effectively laid out the framework for an entrapment defense" prior to Ybarra taking the stand by not only eliciting

testimony from the undercover officer who ultimately arrested Ybarra, but by further establishing—via testimony from Ybarra's parole officer—that Ybarra was addicted to methamphetamine. *Id.* at 4–5. Further, while Ybarra contends he never took possession of the drugs or received remuneration for the transaction, Ybarra also thrice admitted during trial that he connected the buyer and seller. *Id.* at 6. The record is clear that Ybarra was permitted to introduce evidence on his behalf and therefore, his due process claim is meritless.

As noted by the Government, Ybarra makes several other allegations under the guise of due process violations. *Id.* These claims are neither cognizable as due process violations nor meritorious in their own right. For example, Ybarra's claim of "outrageous conduct" by the Government offers little in the way of concrete allegations. Likewise, Ybarra's allegation that others involved were not charged or convicted runs up against the standard jury instruction instructing members of the jury are advised not to consider the guilt or innocence of others who may have been involved. (Doc. 166 at 7). Finally, Ybarra's argument that he never had actual possession of the methamphetamine fails to consider the legal concept of constructive possession and therefore similarly fails. Accordingly, Ybarra's due process claims are meritless.

8. *Errors in the grand jury proceedings and misconduct by the U.S. Assistant Attorney for the Government*

Ybarra asserts that there is reason to believe that there was an error in the grand jury proceedings because there are no supporting facts in the indictment. (Doc. 129-1 at 21). Ybarra notes he has tried since 2017 to obtain the Grand Jury Records but has thus far been unsuccessful. *Id.* Ybarra also argues that grand jury proceedings are an adversarial process and therefore he was entitled to present evidence on his own behalf prior to indictment, however this mistakes how grand juries operate in the American legal system. *Id.*

The Government responds that "errors in the Grand Jury proceeding may not be raised during a post-conviction motion, and therefore [Ybarra's] claim is barred." (Doc. 146 at 12–13). In support, the Government argues that challenging the impaneling of a grand jury is akin to challenging a court's jurisdiction, and therefore—pursuant to Federal Rule of Criminal Procedure 12(b)(2)—it must be raised in a pre-trial motion. *Id.* (citing *U.S. v. Davis*, 411 U.S. 233 (1973)). The Supreme Court has further held that "a federal prisoner who had failed to make a timely challenge to the allegedly unconstitutional composition of the grand jury that indicted him could not after his conviction attack the grand jury's composition in an action for collateral relief under 28 U.S.C. [§] 2255." *Francis v. Henderson*, 245 U.S. 536 (1976) (quoting *Davis*, 411 U.S. at 233)). Accordingly, this ground for relief is also meritless.

The undersigned finds that Ybarra waived his right to challenge the grand jury proceedings by failing to raise the issue before trial. Claims asserting errors in the grand jury proceeding are waived as a matter of law by a movant's failure to raise them prior to trial. *See Martin v. United States*, No. 4:11CR127(16), 2017 WL 939025, at *5 (E.D. Tex. Jan. 30, 2017) (citing Fed. R. Crim. P. 12(b)(c), 12(c)); *see also Barrera Pineda v. United States*, No. 4:09CR194(15), 2019 WL 4470775, at *2 (E.D. Tex. Sept. 18, 2019)). Therefore, the undersigned finds that this claim for relief is also meritless.

9. Sixth Amendment Violation under the Confrontation Clause

Finally, Ybarra claims that he experienced a violation of his Sixth Amendment right to confront his accusers. (Doc. 129-1 at 23). Specifically, Ybarra contends that Attorney Smith failed to adequately represent him by failing to call a government informant as a witness. *Id.* Ybarra asserts that "the informant was more than a mere tipster," and makes broad allegations concerning prosecutorial impropriety and the possibility of collusion between the testifying

officers and the alleged informant. *Id.* at 24. The Government responds by first expounding on a trial counsel's decision-making autonomy as to 'sound trial strategy.' (Doc. 146 at 14). The Government notes that "[b]ecause deciding whether to call witnesses is a strategic trial decision, [the Fifth Circuit] has held that complaints of uncalled witnesses are 'disfavored' as a source of *Strickland* habeas review." *Id.* (citing *United States v. Harris*, 408 F.3d 186, 190 (5th Cir. 2005)). The Government continues that in order to prevail on a § 2255 claim of failing to call a witness, "a petitioner must show that the witness's testimony would have been favorable and that the witness would have testified at the trial." *Id.* (citing *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985)). Therefore, according to the Government, Ybarra has failed to make this demonstration and this claim should also be dismissed.

Ybarra asserts that during his trial, the Government established the existence of an informant who aided in Ybarra's prosecution. (Doc. 129-1 at 23). However, Ybarra contends the informant was never called as a witness, purportedly violating Ybarra's Sixth Amendment right to confront his accusers. *Id.* Ybarra continues by arguing that the police officers who testified at his trial could not rely on the informant's testimony because said testimony is inadmissible hearsay. *Id.* at 23–24. Ybarra argues Attorney Smith was ineffective for failing to address the informant's absence from his trial. *Id.* at 24. Ybarra also asserts Attorney Castillo was ineffective for failing to raise this issue on appeal. (Doc. 129 at 16).

The Government responds that Ybarra's allegation of Attorney Smith's ineffective assistance for failure to raise the issue of the informant during trial is "wholly unsupported by the record." (Doc. 146 at 14). The Government cites to Fifth Circuit precedent establishing that decisions of whether to call certain witnesses at trial are considered "strategic trial decisions" and

challenges to those decisions are generally disfavored. *Id.* (citing *Harris*, 408 F.3d at 190); *see also Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

The Fifth Circuit requires petitioners to demonstrate the following criteria to support a claim of ineffective assistance of counsel premised on failure to call a witness: "the petitioner must 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*, 566 F.3d at 538 (citing *Bray v. Quarterman*, 265 F. App'x 296, 298 (5th Cir. 2008)). However, such claims are "not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Id.* (citing *Bray*, 265 F. App'x at 298).

Here, Ybarra fails to satisfy even the first criteria as he omits the informant's name. *See Jurado-Rincon v. United States*, No. EP-11-CR-2195-KC-1, 2016 WL 6086185, at *4 (W.D. Tex. Aug. 8, 2016). In support of why the informant should have been called, Ybarra focuses on generalizations such as "[i]f the informer's testimony is buttressed by the testimony of the enforcement officers . . . every nexus between the informer's activities and the supporting testimony of the officer's should be probed for any inconsistencies." (Doc. 129-1 at 24). Ybarra's use of the word "if" is demonstrative of the speculative nature of the informant's potential testimony and fails to satisfy the Fifth Circuit's burden for establishing ineffective assistance of counsel for failure to call a witness. Accordingly, this ground for relief is also meritless.

IV. RECOMMENDATION

For the foregoing reasons, the undersigned **RECOMMENDS** that Ybarra's Motion to Vacate be **DENIED**. (Doc. 129).

V. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2255 Proceedings, the District Court must issue or deny a certificate of appealability when it enters a final order adverse to the movant.

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where the Court rejects a movant's constitutional claims on the merits, "the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

In this case, reasonable jurists could not debate the denial of Movant Ybarra's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Thus, a certificate of appealability shall not be issued. **Accordingly, IT IS RECOMMENDED** that Petitioner Jeremiah Ybarra's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 be **DENIED**. (Doc. 129).

IT IS FURTHER RECOMMENDED that all pending motions, if any, be **DISMISSED AS MOOT**, and that this case be **CLOSED**.

FINALLY, IT IS RECOMMENDED that a certificate of appealability be **DENIED**.

SIGNED this 1st day of February, 2021.

DAVID B. FANNIN
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND RIGHT TO APPEAL/OBJECT

In the event that a party has not been served by the Clerk with this Report and Recommendation electronically, pursuant to the CM/ECF procedures of this District, the Clerk is **ORDERED** to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b), any party who desires to object to this report must serve and file written objections within fourteen (14) days after being served with a copy unless the time period is modified by the District Judge. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made; the District Judge need not consider frivolous, conclusive, or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the U.S. Magistrate Judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a *de novo* determination by the District Judge. Additionally, a party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report

within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Judge. *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996).