APPENDIX

1) Fifth Circuit denial of Certificate of Appealability for Pedro Alvarado. July 27, 2021.

2) Fifth Circuit denial of en banc, for Pedro Alvarado. September 9, 2021.

3) District Court's Adoption of Magistrate's Report and Recommendation.

4) Report and Recommendation for Arnoldo Alvarado (substantively similar for Pedro Alvarado). March 2, 2020.

5) Objections to Report and Recommendation.

6) Fifth Circuit Opinion
United States v. Pedro Alvarado and Arnoldo Alvarado, 630 Fed. App'x 271 (5th Cir. 2015).

APPENDIX EXHIBIT 1

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 27, 2021
Lyle W. Cayce
Clerk

No. 20-40361

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PEDRO ALVARADO,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court
for the Southern District of Texas
USDC No. 7:17-CV-104

ORDER:

IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED.

JAMES C. HO
United States Circuit Judge

Ex 1

APPENDIX EXHIBIT 2

United States Court of Appeals for the Fifth Circuit

No. 20-40361

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PEDRO ALVARADO,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:17-CV-104

ON PETITION FOR REHEARING EN BANC

Before STEWART, HAYNES, and HO, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

EX 2

APPENDIX EXHIBIT 3

PEDRO ALVARADO VS. UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, MCALLEN DIVISION
2021 U.S. Dist. LEXIS 187237
CIVIL ACTION NUMBER M-20-0347
September 29, 2021, Decided
September 29, 2021, Filed, Entered

Editorial Information: Prior History

Alvarado v. United States, 2021 U.S. Dist. LEXIS 189154 (S.D. Tex., May 21, 2021)

Counsel {2021 U.S. Dist. LEXIS 1}**Pedro Alvarado**, Petitioner, Pro se, BEAUMONT, TX.

For United States of America, Respondent: Appellate Division, LEAD ATTORNEY, U.S. Attorney's Office, Southern District of Texas, Houston, TX; Michael Anthony Hylden, LEAD ATTORNEY, US Attorney's Office, Houston, TX.

Judges: Ricardo H. Hinojosa, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: Ricardo H. Hinojosa

Opinion

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court has reviewed the Magistrate Judge's Report and Recommendation regarding Petitioner's 28 U.S.C. § 2241 petition. After having reviewed the said Report and Recommendation, the Court is of the opinion that the conclusions in said Report and Recommendation should be adopted by this Court.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the conclusions in United States Magistrate Judge J. Scott Hacker's Report and Recommendation entered as Docket Entry Number 7 are hereby adopted by this Court.

The Clerk shall send a copy of this Order to the parties.

DONE on this 29th day of September 2021, at McAllen, Texas.

/s/ Ricardo H. Hinojosa

Ricardo H. Hinojosa

U.S. DISTRICT JUDGE

Y1944279

Ex 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ARNOLDO ALVARADO	§	CIVIL ACTION NO. 7:17-cv-00110
VS.	§	CRIM. ACTION NO. 7:12-cr-01136-2
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION

Movant Arnoldo Alvarado, a federal prisoner proceeding pro se, initiated this action pursuant to 28 U.S.C. § 2255 by filing a Motion to Vacate, Set Aside, or Correct Sentence. (Docket No. 1.).[1] Movant was sentenced to a 72-month term of imprisonment and a 120-month term of imprisonment, to run consecutively, after a jury found him guilty of aggravated assault of a federal agent with a deadly weapon and unlawful use of a firearm during and in relation to a crime of violence. Movant committed these crimes during an early-morning high-speed car chase. Movant's father drove their pickup truck while Movant and his younger brother fired shots at a vehicle driven by a federal agent. Multiple gunshots hit the agent's vehicle, and one bullet struck the agent in the back—puncturing a lung and narrowly missing his heart. Movant admitted his involvement in the shooting, and the guns he and his brother fired were found during a search of their home.

In his § 2255 motion, Movant argues that he is entitled to relief on two grounds: (1) ineffective assistance of appellate counsel for failing to challenge the District Court's ruling that the consent to search his family's home was voluntary; and (2) ineffective assistance of trial and

[1] Docket entry references are to the civil action, unless otherwise noted.

appellate counsel for failing to move for the recusal of the District Court Judge who presided over Movant's criminal case. (Docket No. 1, at 4.)

Respondent United States has filed a motion for summary judgment, arguing that Movant is not entitled to relief. (Docket No. 5.) Movant responded with two briefs opposing the motion. (Docket Nos. 11, 12.) Later, Movant filed two pleadings in which he is essentially attempting to assert a new claim based on the Supreme Court's ruling in *United States v. Davis*, 139 S. Ct. 2319 (2019). (*See* Docket Nos. 16, 19.) Respondent opposes that request. (Docket No. 18.)

After carefully considering Movant's § 2255 motion, the record of Movant's criminal case, and the applicable law, the undersigned concludes that Movant's § 2255 motion should be denied. As explained further below, Movant fails to show that he was denied constitutionally adequate representation. Both of Movant's ineffective assistance claims are meritless. Movant's attempt to add a new claim based on *Davis* should be denied as futile since such a claim would clearly lack merit. Accordingly, it is recommended that the District Court grant the Government's summary judgment motion, deny Movant's § 2255 motion, and dismiss this action.

I. BACKGROUND

A. The Underlying Criminal Charge[2]

In the early morning hours of July 3, 2012, Jean-Paul Reneau, a special agent with Homeland Security Investigations (HSI), received information from a confidential source that a

[2] The facts in the next two sections are drawn from multiple sources, including Movant's Presentence Investigation Report (PSR), the suppression hearing held on April 10, 2013, the trial held March 17-21, 2014, the sentencing hearing held June 5, 2014, and the opinion from the Fifth Circuit Court of Appeals affirming Movant's conviction and sentence. (*See* Cr. Docket Nos. 471, 527-28, 530-33, and 589.) As reflected by the factual overview that follows above, "[o]n collateral review, we view the facts in the light most favorable to the verdict." *United States v. Drobny*, 955 F.2d 990, 992 (5th Cir. 1992) (citing *United States v. Marcello*, 876 F.2d 1147, 1149 (5th Cir. 1989)).

large load of marijuana was being loaded onto a commercial tractor trailer at a location in Hargill, Texas. The source described the tractor trailer, including its license plate number, and gave its general location. Agent Reneau subsequently located the suspected tractor trailer and requested that more agents be called to the scene to assist with surveillance.

At approximately 1:30 a.m., several HSI agents, including Special Agent Kelton Harrison, arrived and established a perimeter around the general area of the tractor trailer. In its opinion on Movant's direct appeal, the Fifth Circuit described what happened next:

> Around 3:00 am . . . [an individual named] Rene Garcia—who was allegedly casing the area in preparation for a drug heist—contacted Pedro [Alvarado] and informed him that a suspicious vehicle was parked under a tree on the Alvarado family's property. Pedro told [his son] Arnoldo [Movant], then 18 years old, and his other son Marques, then 16 years old, to join him to investigate. Arnoldo and Marques each retrieved a gun and the three got into Pedro's pickup truck and drove down the road towards the suspicious vehicle. The suspicious vehicle was actually the unmarked Jeep of Special Agent Kelton Harrison, who was parked with his engine on and his lights off conducting an undercover stakeout as part of an ongoing Homeland Security investigation. Agent Harrison testified that, upon seeing Pedro's pickup truck slowly approaching, he attempted to leave the property, but he soon heard shots ring out and felt the impact of bullets on both sides of his vehicle. As he accelerated in an attempt to escape, another truck, later discovered to be driven by [Rene] Garcia and his coconspirators, blocked his Jeep from leaving. Agent Harrison was able to get around Garcia's truck and drive off the property and onto Route 493, but the Alvarados and Garcia continued to pursue Agent Harrison for about three miles. It is undisputed that Arnoldo and Marques continued to shoot their firearms, but there is conflicting testimony about whether the Alvarados fired at Harrison's Jeep once they left their family's property: Arnoldo testified that after Harrison pulled onto Route 493 he only shot into the air in an attempt to scare the driver away. Ultimately, Agent Harrison's truck was struck by approximately 12 bullets, one of which struck the agent in the back. Agent Harrison continued north on 493 until he came to a T-intersection, where his vehicle hit a fence and crashed into a field. Agent Harrison ran from his vehicle and hid in a brush of trees for a short period, then crawled back to his vehicle and called for help.

United States v. Alvarado, 630 F. App'x 271, 272-73 (5th Cir. 2015).[3]

[3] As the Fifth Circuit noted, Agent Harrison was initially parked under a tree that was on property owned by Movant's relative:

Specifically, Agent Harrison contacted Agent Reneau. Agent Reneau and other agents were able to locate Agent Harrison and transport him to a hospital to receive medical care. (Cr. Docket No. 534, Suppression Hrg. Tr., at 38–40.) Agent Harrison's Jeep had been "severely damaged," including multiple bullet holes. (*Id.* at 40.) Bullet casings were found at the intersection of Route 493 and 11th Street and at the intersection of Route 493 and Highway 186, which was about three and a half miles from where Agent Harrison had been conducting surveillance. (*Id.* at 41.)

Later the same morning (July 3), a confidential source told Agent Reneau that Rene Garcia was possibly involved in the shooting of Agent Harrison. (*Id.* at 40.) Based that information, an HSI supervisor sent Special Agent Adrian Olivarez to look for Garcia at a residence located at Route 493 and 11th Street.[4] (*Id.* at 73–75, 77, 87–88.) This residence turned out to be the home where Movant lived with his family (the "Alvarado residence"). (*Id.* at 74–75.)

Agent Olivarez, along with about 13 other HSI agents and a Texas state trooper, arrived at the Alvarado residence at around noon on July 3. (*Id.* at 73–75, 94.) Agent Olivarez, several HSI agents, and the trooper approached the gate to the property, while the other agents waited across the street. (*Id.* at 76, 94–95.) Movant and Marques came to the locked gate and the officers

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> More specifically, Pedro was informed that a suspicious vehicle was parked under a tree near Arnoldo and Marques's aunt's house, at the intersection of 11th Street (Cemetary Road) and Route 493 in Hargill, TX, which is approximately a quarter mile from the Alvarados' home. Marques testified that the aunt had moved away and left the house in his family's care.

Id. at 272 n.1. The Fifth Circuit's ruling is also docketed in Movant's criminal case. (Cr. Docket No. 589).

[4] At trial, Agent Olivarez testified that his supervisor sent him to this address "to look for a subject named Rene Garcia." (Cr. Docket No. 537, Day Two of Jury Trial Tr., at 124–125.)

identified themselves. (*Id.* at 76.) The agents asked for consent to search "the house and the property." (*Id.*) Movant and/or Marques then went to retrieve their father, Pedro. (*Id.*) When Pedro came out to the gate, the officers again identified themselves and Agent Olivarez asked Pedro for consent to search his property. (*Id.* at 77.) Agent Olivarez told Pedro they had information that there were illegal aliens inside his home, even though this was not true and was a ruse to obtain Pedro's consent to search his property.[5] (*Id.*) Pedro replied that he had two illegal

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[5] During the suppression hearing, Agent Olivarez was candid that the request to search based on the presence of illegal aliens was a ruse:

MR. ALANIZ:	Okay. And so what happens when he goes and—when this young man gets his father?
AGENT OLIVARES:	His dad comes out. We identified ourselves again. He states his name is Pedro. I asked him for consent of his—of the—his property as well.
MR. ALANIZ:	Did you tell him why you were there?
AGENT OLIVARES:	No, sir.
MR. ALANIZ:	Did you give him any information about—did you have a ruse to get into—to try to get into the property?
AGENT OLIVARES:	Yes, sir. I told him we had information there's illegal aliens inside his property.
MR. ALANIZ:	Okay. That was not true.
AGENT OLIVARES:	Correct.
MR. ALANIZ:	Okay. So when you tell him that, what does he say?
AGENT OLIVARES:	He states that he does have two illegal aliens inside his house.
MR. ALANIZ:	And does that—at that point, do you ask for oral consent?

aliens inside his home, and Agent Olivarez again asked for consent to search the Alvarado residence. (*Id.* at 78.) Pedro then gave verbal consent to search his house, opened the gate, and informed the officers that the illegal aliens were most likely in the attic. (*Id.*) The agents entered the home and found two undocumented aliens in the attic, just as Pedro had predicted. (*Id.*)

After the aliens were removed from the Alvarado residence, the agents performed a quick protective sweep of the home. (*Id.* at 79.) No items were recovered during the protective sweep. (*Id.* at 79, 95.) Agent Olivarez and the rest of the agents then exited the home and stood outside. (*Id.* at 95.) Agent Olivarez told Pedro that he was being detained for harboring aliens. (*Id.* at 78–79, 96.) Agent Olivarez then asked Pedro if an individual named Rene Garcia lived at Pedro's home. (*Id.* at 79.) Pedro said no but stated that he "knew of Rene Garcia that lived up the road." (*Id.*) Pedro gave Agent Olivarez directions to Garcia's house. (*Id.*) At that point, Agent Olivarez left some agents at the Alvarado residence and he, along with some other agents, went to Garcia's purported residence. (*Id.* at 80.)

One of the people found at the residence identified himself as Rene Garcia. (*Id.* at 82.) Agent Olivarez asked Garcia if he knew why the agents were there and Garcia replied, "Yes, probably because of the shooting last night." (*Id.*) Garcia proceeded to tell Agent Olivarez that the previous night he observed several suspicious vehicles around the neighborhood and that he

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AGENT OLIVARES:	Correct.
MR. ALANIZ:	Okay. And when you asked him for consent, what does he say?
AGENT OLIVARES:	He gives us consent and he opens the gate.

(Cr. Docket No. 534, Suppression Hrg. Tr., at 77–78; note that the suppression hearing transcript spells the agent's name "Olivares," while elsewhere in the record his name is spelled "Olivarez.")

had also observed a suspicious vehicle near his friend "Pete's" house. (*Id.*) "Pete" was later identified as Pedro Alvarado. (*Id.* at 82–83.) Garcia stated that he had called Pedro and told him that there was a "suspicious vehicle" by his home. (*Id.* at 83.) Garcia told Agent Olivarez that he then got into his truck and drove south on Route 493 toward Pedro's house. When he got close to Pedro's house, he saw a Jeep heading northbound on Route 493 at a high rate of speed with the lights off; Pedro's truck was behind the Jeep and someone was shooting at the Jeep. (*Id.*) Garcia thought that Pedro and his two sons (Arnoldo and Marques) were in Pedro's vehicle and that Pedro was driving. (*Id.*)

After receiving this information, Agent Olivarez sent agents back to Pedro's home to detain Pedro and his sons and to inform the agents at Pedro's residence that "the kids might be involved—the sons might be involved and to keep them all separated." (*Id.* at 83, 90.) Agent Olivarez did not personally return to the Alvarado's residence. (*Id.* at 83.)

HSI Special Agent Victor Hugas was one of the agents who was present at Garcia's home. (*Id.* at 105.) Agent Hugas learned that "the individual down the street, Pedro at a house where they had already been, that he was—that him and his sons were involved or had knowledge of the shooting." (*Id.* at 105–106.) Agent Hugas and about other five other agents went from Garcia's residence to the Alvarado residence "just to make sure that the individuals were still there and that it was secure." (*Id.* at 106, 149.)

Agent Hugas arrived at the Alvarado residence "sometime after lunchtime" and was informed by other agents that they had cleared the house "for bodies" (the illegal aliens) but had not thoroughly searched it. (*Id.* at 109, 110.) Agent Hugas—who was wearing "full raid gear" with "all of [HSI's] markings on it"—then approached Pedro, who was standing next to the front door of the house. (*Id.* at 107, 110.) Movant and Marques were "right next to" Pedro at the front

door and were sitting on what appeared to be "the rear seat of . . . a minivan[.]" (*Id.* at 108.) Agent Hugas identified himself and asked Pedro if he was the owner of the residence, which Pedro confirmed. (*Id.* at 110.)

Agent Hugas then asked Pedro if he had any weapons or guns in the home, and Pedro responded that he did not. (*Id.* at 110–111.) Because the agents at the house had previously done only a protective sweep, Agent Hugas asked Pedro if he would consent to a search of his home. (*Id.* at 110–111.) Pedro verbally consented to a search of his home and also signed a written consent-to-search form. (*Id.* at 111.)

Agent Hugas and two or three other agents then entered the Alvarado residence. (*Id.* at 112.) One of the agents saw "some rounds" on a table in the foyer. (*Id.*) Agent Hugas and another agent entered a different room and found some more rounds in a closet, as well as a 9mm magazine and 9mm rounds inside a dresser. (*See id.* at 112, 155–156.) Upon the discovery of these items, and before completing a more thorough search, Agent Hugas directed all the agents to leave the house. (*Id.* at 112.) After exiting the house, Agent Hugas confronted Pedro about the ammunition found in the house and asked whether Pedro owned a pickup truck. (*Id.* at 113.) Pedro told Agent Hugas that he wanted to speak to him in private about why the agents were there. (*Id.* at 114–115.) Agent Hugas then contacted the FBI command center and was instructed to bring Pedro to the command center so that the interview could take place at the FBI office. (*Id.* at 116–117.)

Agent Hugas transported Pedro to the FBI office; other law enforcement agents transported Movant and Marques separately to the FBI office for questioning. (*Id.* at 118, 126.) At the FBI office, Movant waived his Miranda rights and gave a statement admitting his role in pursuing and firing shots at Agent Harrison's vehicle. An FBI team later conducted a more thorough search of

the Alvarado residence and found a 9mm pistol and a .22 caliber rifle hidden in the attic. A scale was also found in the living room, along with small quantities of marijuana.

B. Criminal Proceedings

On July 4, 2012, Movant and Pedro were named in a criminal complaint filed in the Southern District of Texas, McAllen Division.[6] (Cr. Docket No. 1.) Movant was charged with assault of a federal agent in violation of 18 U.S.C. §§ 111(a)(1), 111(b) and 18 U.S.C. § 2, and unlawful use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(iii), and 18 U.S.C. § 2. (*Id.*)

On July 24, 2012, a federal grand jury returned a three-count indictment charging Movant and Pedro with: (1) attempted murder of a federal agent in violation of 18 U.S.C. §§ 1114(3), 1113 and 18 U.S.C. § 2; (2) assault of a federal agent in violation of 18 U.S.C. §§ 111(a)(1), 111(b), and 18 U.S.C. § 2; and (3) unlawful use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1), 924(c)(1)(A)(iii), and 18 U.S.C. § 2. (Cr. Docket No. 23.) On April 30, 2013, a four-count third superseding indictment was filed charging Movant and Pedro in counts 1-3 with the same crimes alleged in the initial indictment. (*See* Cr. Docket No. 240.) The superseding indictment also included a fourth count charging Rene Garcia and others, including David Olivarez (not to be confused with HSI Special Agent Adrian Olivarez), for their role in the attempt to steal a load of over 1,000 kilograms of marijuana on the night of the shooting.[7] Movant's case was randomly assigned to U.S. District Judge Randy Crane.

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[6] Movant's brother, Marques, was 16 years old at the time he and Movant fired shots at the agent. Marques was prosecuted in state court.

[7] The fourth count of the third superseding indictment charged Rene Garcia, Julio Armando Davila, Arnoldo Adan Davila, Miguel Angel Romo, and David Olivarez with conspiracy to possess with intent to distribute over 1,000 kilograms of marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). (*See* Cr. Docket No. 240.)

Prior to trial, counsel for Movant filed a motion to suppress, seeking to exclude (among other things) all the evidence seized by law enforcement from the Alvarado residence and statements made by Movant on July 3, 2012.[8] (*See* Cr. Docket No. 48.) On April 10, 2013, the District Court held a suppression hearing during which eight witnesses testified. (*See* Cr. Docket Minute Entry for 4/10/2013; Cr. Docket Nos. 280, 534.) After considering the evidence presented at the hearing, the Court found that Pedro voluntarily gave consent to search his home and denied the motion to suppress. (*See* Cr. Docket No. 534, Suppression Hrg. Tr., at 163, 220–221.)

Movant persisted in pleading not guilty and proceeded to trial. Movant took the stand at trial and testified that in the early morning hours of July 3, 2012, his father (Pedro) woke him up and told him to grab his gun. Movant admitted that he shot at Agent Harrison's Jeep with a 9mm pistol as Pedro chased the Jeep with his truck, although Movant claimed that he did so essentially in self-defense. An agent who interviewed Movant testified that Movant admitted that they had stored drugs in their home multiple times and that the perpetrators of a prior home invasion were attempting to steal drugs from them.[9] Other evidence at trial further confirmed Movant's role in the shooting, including, for example, the following testimony:

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[8] Pedro's counsel also filed a motion to suppress in his pending criminal case, specifically arguing that the search of the Alvarado residence lacked consent. (Cr. Docket No. 47).

[9] Movant told the agents that earlier in the evening on the night of the shooting, he saw a white pickup truck arriving at his house as he was leaving to go to a movie. Movant assumed that the truck was there to deliver drugs because the same pickup truck had been used to deliver drugs on previous occasions. When he returned from the movie, Movant assumed that the drugs had already been moved from his house because there were no drugs in his room. They usually left the drugs in his bedroom. During Movant's trial testimony, he denied that he had told agents that drugs had been stored in his home; instead, he testified that he told them he "didn't know nothing about drugs." While perhaps an understandable attempt to protect his father (and himself), Movant's trial testimony on this point appears suspect. For example, during the search of the Alvarado residence, small quantities of marijuana were found, and a large-capacity scale was seized from the living room. In addition, as the District Court noted during Pedro's sentencing,

- Agent Harrison described how a pickup truck approached the location where he was conducting surveillance and then chased him at high speed for several miles during which his Jeep was hit by multiple shots, one of which struck him in the back;

- Codefendant David Olivarez, who was a passenger in the pickup truck driven by Rene Garcia, stated that he saw Pedro's pickup truck chasing the Jeep and observed the occupants (Pedro and his sons) shooting at the Jeep with a rifle and a pistol;

- an FBI forensics expert described the numerous bullet holes and impacts that he found on Agent Harrison's Jeep; and

- an FBI ballistics expert testified that a bullet and bullet fragments recovered from the Jeep were shot from the 9 mm pistol found at the Alvarado residence; also, several bullet casings recovered at two locations were fired from the same pistol.

On March 21, 2014, the jury found Movant and Pedro guilty as to Counts Two and Three of the third superseding indictment.[10] (Cr. Docket Minute Entry for 3/21/2014.) The District Court ordered the Probation Office to prepare a Presentence Investigation Report (PSR). The PSR calculated Movant's base offense level at 14, which was enhanced 7-levels because the victim (Agent Harrison) sustained a permanent or life-threatening bodily injury. Movant also received a 2-level enhancement because he was convicted under 18 U.S.C. § 111(b), thus bringing his total offense level to 23. The PSR calculated Movant's criminal history at category I,[11] which resulted in a Guidelines imprisonment range of 46 to 57 months for Count Two. The PSR noted that pursuant to 18 U.S.C. § 924(c)(1)(A)(iii) and U.S.S.G. § 2K2.4(b), the Guidelines range for imprisonment for Count Three was 120 months, which was the statutory minimum sentence that must run consecutively to the sentence imposed in Count Two.

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multiple cooperating defendants confirmed Pedro's involvement in drug trafficking, which included storing drugs at his house. (*See* Cr. Docket No. 541, Sentencing Tr., at 4, 7-8.).

[10] The jury was unable to reach a unanimous verdict on Count One, which the Government later dismissed. (Cr. Docket Nos. 483, 484.)

[11] Movant did not have any criminal history points.

Movant's counsel, Carlos A. Garcia, filed written objections to the PSR, arguing (among other things) that the 7-level enhancement under U.S.S.G. § 2A2.2(b)(3)(C) should not be applied. (*See* Cr. Docket No. 470.) Counsel argued that there was insufficient evidence at trial upon which the Court could determine that Movant was actually the person who shot the bullet that struck Agent Harrison. Counsel also requested a variance from the applicable Guidelines range because Movant's "actions in this case were of limited duration and planning." (*Id.* at 2.)

At the sentencing hearing, Mr. Garcia reasserted his written objections to the PSR and argued on Movant's behalf for a lower sentence. (*See* Cr. Docket No. 533, Sentencing Tr., at 4–8.) The District Court, however, did not accept those arguments. The Court rejected counsel's objection to the 7-level enhancement and denied counsel's request for an acceptance of responsibility credit. (*Id.* at 5–8.) Mr. Garcia then argued that a downward variance pursuant to § 5K5.2 for aberrant behavior was appropriate; however, the Court again disagreed and rejected counsel's request. (*Id.* at 11–15.) The Court adopted the Guidelines range as calculated in the PSR: 46 to 57 months' imprisonment for Count Two and 120 months' imprisonment for Count Three. (*Id.* at 28.) The Court then decided that a departure from the Guidelines was appropriate, stating:

> So, it's really a range of 166 to 177 months would be his range. And that's the range that he would be at if this incident stopped at the tree, at the initial intersection, and I think this case is much more aggravating than that. The really callous and unrelenting pursuit of this fleeing individual I think merits a variance upward from these guideline ranges. It is fortunate that Mr.—Agent Harrison was not killed. That was the attempt in this case. That was what Mr. [Arnoldo] Alvarado was attempting to do and I, therefore, feel that a greater punishment is merited under these circumstances.
>
> . . .
>
> I believe that the 3553(a) factors merit an upward variance to promote respect for the law, to be a just deterrent for others and adequate punishment for this particular crime, given its very serious nature.

(*Id.* at 28–29.) The Court ultimately sentenced Movant to 72 months' imprisonment as to Count Two and to 120 months' imprisonment as to Count Three, to run consecutively. (*Id.* at 29; Cr. Docket No. 487; Cr. Docket No. 488.)

Movant filed a direct appeal of his conviction and sentence, arguing that (1) the District Court erred by declining to charge the jury with a self-defense instruction, (2) the District Court violated his Sixth Amendment right of confrontation when it refused to allow cross-examination of Agent Harrison on the issue of the federal agents' "bungled operation"; and (3) the District Court erred when it overruled his objection to the instruction in the jury charge that he need not have known he was assaulting a federal agent. The Fifth Circuit rejected Movant's challenge to his conviction and sentence and affirmed the District Court's judgment on November 12, 2015. (Cr. Docket Nos. 588, 589.) Movant filed his § 2255 motion on March 17, 2017.[12]

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[12] It appears that Movant's § 2255 motion is untimely. A motion made under § 2255 is subject to a one-year statute of limitations, which, in most cases, begins to run when the judgment becomes final. *See* 28 U.S.C. § 2255(f)(1). A judgment becomes final when the applicable period for seeking review of a final conviction has expired. *Clay v. United States*, 537 U.S. 522, 532 (2003); *United States v. Gamble*, 208 F.3d 536, 536–37 (5th Cir. 2000) (per curiam). Unlike Pedro, it does not appear that Movant filed a petition for a writ of certiorari with the Supreme Court. Movant's conviction therefore became final by February 11, 2016 (the day after the time for filing a petition for certiorari expired). *Dodd v. United States*, 545 U.S. 353, 355 (2005) (finding that when a defendant does not file a petition for certiorari, the conviction becomes final 90 days after the court of appeals issues its decision) (citing *Clay v. United States*, 537 U.S. 522, 525 (2003)). Thus, the one-year statute of limitations period expired by February 11, 2017. Because Movant filed his § 2255 on March 17, 2017, it was filed over one month too late. Although the Government has not challenged the timeliness of Movant's original § 2255 motion, in a habeas case a court may—on its own initiative—consider whether the petition is time barred. *Wood v. Milyard*, 566 U.S. 463, 466 (2012) ("Our precedent establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition."); *see also Day v. McDonough*, 547 U.S. 198, 209 (2006) ("we hold that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition"). A court has discretion to raise the timeliness issue sua sponte unless there has been a "deliberate waiver of a limitations defense." *Milyard*, 566 U.S. at 472-73; *see also United States v. Pierce*, 489 F. App'x 767 (5th Cir. 2012) (holding that the district court abused its discretion in overriding the government's "deliberate waiver of the limitations defense"). Here, it is unnecessary to address

C. Movant's Allegations and the Government's Response

Movant proceeds pro se. Pro se pleadings are held to less stringent standards than those drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Pleadings filed by a pro se litigant are entitled to a liberal construction. *United States v. Pena*, 122 F.3d 3, 4 (5th Cir. 1997) (citing *Nerren v. Livingston Police Dep't*, 84 F.3d 469, 473 n.16 (5th Cir. 1996)).

Movant asserts two grounds for relief in his § 2255 motion.[13] First, Movant claims that his appellate counsel provided ineffective assistance when he failed to challenge the District Court's ruling that Pedro's consent to search the Alvarado residence was voluntary. (Docket No. 1, at 4, 18–44.) Second, Movant claims that both his trial and appellate counsel were ineffective for failing to move to recuse U.S. District Judge Randy Crane under 28 U.S.C. § 455.[14] (*Id.* at 4, 45–47.)

Respondent United States has filed a motion for summary judgment, arguing that Movant's claims lack merit and should be dismissed. (Docket No. 7.) Movant filed both a response and a reply to the Government's summary judgment motion. (*See* Docket Nos. 11, 12.)

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whether the Government has deliberately waived the limitations defense since Movant's claims clearly lack merit (as will be discussed in Part II of this report).

[13] Movant's father, Pedro Alvarado, was charged, tried, and convicted along with Movant. Pedro has filed his own § 2255 motion. *See Pedro Alvarado v. United States*, Case No. 7:17-cv-104 (S.D. Texas, McAllen Div.). Pedro's § 2255 motion and related filings are nearly word-for-word the same as Movant's motion and filings, except that Pedro asserts an additional claim that does not apply to Movant. The undersigned has filed a report and recommendation addressing the claims asserted by Pedro, which (not surprisingly) is very similar to this report. (*See* Case No. 7:17-cv-104, Docket No. 16.)

[14] In its motion for summary judgment, the Government construes this claim as Movant asserting that his counsel provided ineffective assistance for failing to argue that both the district court judge and the prosecutor should have been recused. In his response, Movant clarifies that he did not raise any issue about the prosecutor in his § 2255. (Docket No. 12, at 15.)

In addition, on July 15, 2019, and on August 7, 2019, Movant filed documents titled "Notice of New and Controlling Authority" and a "Motion for Leave to Brief Davis." (Docket Nos. 16, 19.) In those pleadings, Movant essentially requests permission to amend his § 2255 motion to include a new claim based on the Supreme Court's recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). Respondent filed an opposition to the attempted amendment. (Docket No. 18.)

Movant's claims will be addressed in the context of the standard of review for § 2255 actions.

II. ANALYSIS

A. 28 U.S.C. § 2255

To obtain collateral relief pursuant to 28 U.S.C. § 2255, a petitioner "must clear a significantly higher hurdle" than the plain error standard that would apply on direct appeal. *United States v. Frady*, 456 U.S. 152, 166 (1982). "Following a conviction and exhaustion or waiver of the right to direct appeal, [courts] presume a defendant stands fairly and finally convicted." *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998) (citing *United States v. Shaid*, 937 F.2d 228, 231–32 (5th Cir. 1991)). "As a result, review of convictions under section 2255 ordinarily is limited to questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on collateral review without a showing of cause and prejudice." *Cervantes*, 132 F.3d at 1109. Stated differently, relief under § 2255 is "reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). Subject to these constraints, there are only four limited grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) constitutional issues;

(2) challenges to the District Court's jurisdiction to impose the sentence; (3) challenges to the length of a sentence in excess of the statutory maximum; and (4) claims that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

B. Ineffective Assistance of Counsel Claims

Movant claims that his trial and appellate attorneys rendered ineffective assistance in multiple ways. (*See* Docket Nos. 1, 11, 12.) An ineffective assistance of counsel claim is properly made for the first time in a § 2255 motion because it raises an issue of constitutional magnitude and generally cannot be raised on direct appeal. *United States v. Bass*, 310 F.3d 321, 325 (5th Cir. 2002); *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir. 1992).

Ineffective-assistance claims are analyzed under the well-established standard set forth in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To prevail under this standard, a defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced as a result of the alleged deficiency. *Strickland*, 466 U.S. at 687; *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). If the movant fails to prove one prong, it is not necessary to analyze the other. *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one.").

To demonstrate deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This is a "highly deferential" inquiry in which "counsel is strongly presumed to have rendered adequate assistance" and that the challenged conduct was the product of reasoned trial strategy. *Id.* at 689–90. To establish the requisite 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." *Id.* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693).

Ineffective–assistance claims lodged against appellate counsel are also governed by the *Strickland* standard. *See Smith v. Murray*, 477 U.S. 527, 535–36 (1986). To establish that appellate counsel's performance was deficient in this context, the defendant must show that his attorney was objectively unreasonable in failing to find arguable issues to appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). If the defendant succeeds in such a showing, then he must establish actual prejudice by demonstrating a "reasonable probability" that, but for his counsel's deficient performance, "he would have prevailed on his appeal." *Robbins*, 528 U.S. at 259.

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "[T]he *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 689–690).

1. Failure of Appellate Counsel to Raise Alleged Fourth Amendment Violation

Movant argues that his appellate attorney provided ineffective assistance when he failed to challenge the District Court's ruling that Pedro's consent to search their home was voluntary.[15] (Docket No. 1 at 4). Movant's principal argument is that Pedro's consent was not voluntary

[15] The Government does not argue that Movant would have lacked standing to challenge whether Pedro's consent to search was voluntary. Because Movant has failed to show that his appellate counsel could have raised a viable challenge to the Court's ruling (as will be discussed above), it is unnecessary to address the standing issue.

because the HSI agents used a "ruse" to gain entry into his home—i.e., the agents falsely told Pedro that they had information that illegal aliens were inside.[16] (*See* Docket No. 1, at 18–44.)

Applying the *Strickland* standard in the context of appellate counsel, the Fifth Circuit has repeatedly cautioned that "[a]ppellate counsel is not deficient for not raising every non-frivolous issue on appeal." *United States v. Reinhart*, 357 F.3d 521, 525 (5th Cir. 2004) (quoting *United States v. Phillips*, 210 F.3d 345, 348 (5th Cir. 2000)); *see also United States v. Williamson*, 183 F.3d 458, 462-63 (5th Cir. 2000) (same). "Instead, to be deficient, the decision not to raise an issue must fall 'below an objective standard of reasonableness.'" *Phillips*, 210 F.3d at 348 (quoting *Strickland*, 466 U.S. at 688). "Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *Phillips*, 210 F.3d at 348 (citing *Williamson*, 183 F.3d at 462-63). Here, to prevail on his claim alleging ineffective assistance of appellate counsel, Movant must first show that the consent-to-search issue was a "solid, meritorious" argument that should have been raised on appeal. This he has not done.

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[16] Movant challenges only the first consent search of his family's home (led by Agent Olivarez). Movant argues that because consent was not voluntarily given for this first search, "everything" after the allegedly illegal initial search should have been suppressed as "fruit of the poisonous tree," including (among many other things) the firearms and ammunition later found in the Alvarado residence. (*See* Docket No. 1, at 43-44 (listing "Evidence to be Suppressed").) Movant is wrong. The initial consent search resulted in the discovery and seizure of the two illegal aliens; no other evidence was taken, and the agents left the home after removing the aliens. The second consent search—resulting in the discovery of firearms and ammunition (among other things)—was conducted only after the agents received information from Rene Garcia that Pedro and his sons were involved in the shooting. Garcia lived a short distance from the Alvarado residence, and it is reasonable to conclude that the agents would have found him even if Pedro had not given them directions. Pedro consented to the second search in writing and does not contend that his consent to this search was involuntary. Under such circumstances, one or more of the exceptions to the exclusionary rule would have applied, even if Pedro's consent to the initial search had been involuntary. *See Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (reaffirming that suppression of evidence "has always been our last resort" and discussing three exceptions to the exclusionary rule). But this issue need not be addressed further since (as discussed above) Movant has failed to show that the District Court erred in ruling that Pedro's initial consent was voluntary.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. AMEND IV. Warrantless searches are "per se unreasonable, subject to certain exceptions." *United States v. Gonzalez-Garcia*, 708 F.3d 682, 686 (5th Cir. 2013). A search pursuant to consent, however, is "one of the well-settled exceptions to the Fourth Amendment warrant requirement." *United States v. Tompkins*, 130 F.3d 117, 121 (5th Cir. 1997); *see also United States v. Davis*, 749 F.2d 292, 294 (5th Cir. 1985) ("It is well-settled that a warrantless search will be valid if it is conducted pursuant to the defendant's voluntary consent.").

Movant argues that the search of his home was not voluntary because the HSI agents used a "ruse" to obtain Pedro's consent. Agent Olivarez admitted at the suppression hearing that—contrary to what he told Pedro—he was not there to look for illegal aliens; rather, he was there to look for Rene Garcia. But the mere fact that law enforcement uses a deceptive tactic to obtain consent does not mean that consent was not voluntarily given. "[T]rickery and deceit is only prohibited to the extent it deprives the suspect 'of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"[17] *Soffar v. Cockrell*, 300 F.3d 588, 596 (5th Cir. 2002) (en banc) (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)).

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[17] The Fifth Circuit has consistently applied this principle. *See United States v. Avila-Hernandez*, 672 F. App'x 378, 381-82 (5th Cir. 2016) (rejecting defendant's claim that her consent was invalid due to "deceit and trickery" and explaining that "[t]he issue to be decided is whether, looking at all of the circumstances, the [person's] will was overborne") (quoting *United States v. Davis*, 749 F.2d at 294); *United States v. Fernandes*, 285 F. App'x 119, 125 (5th Cir. 2008) (holding that "the Detectives' misrepresenting their reasons for being at [the defendant's] apartment is of no moment" since it did not overcome the defendant's "will so as to render his confession involuntary"); *United States v. Andrews*, 746 F.2d 247, 249 n.3 (5th Cir. 1984) (holding that defendant's consent was voluntary, "even assuming such trickery [by police]"), *overruled on other grounds by United States v. Hurtado*, 905 F.2d 74 (5th Cir. 1990). Other federal courts of appeals have taken the same approach. *See United States v. Spivey*, 861 F.3d 1207, 1214 (11th Cir. 2017) ("The Fourth Amendment allows some police deception so long as the suspect's 'will was [not] overborne[.]'") (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)); *Pagan-*

"The voluntariness of consent depends upon the totality of the circumstances surrounding the search." *United States v. Mendez*, 431 F.3d 420, 429 (5th Cir. 2005). In determining whether consent was voluntary, courts consider six factors: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *Id.*; *see also United States v. Arias-Robles*, 477 F.3d 245, 248 (5th Cir. 2007). No one factor is dispositive. *Mendez*, 431 F.3d at 429; *Arias-Robles*, 477 F.3d at 248.

In the context of Movant's § 2255 motion, the critical issue is not whether Pedro's consent to search was voluntary, although that is certainly part of the inquiry. Rather, the key issue is whether Movant's appellate counsel was deficient in failing to challenge the District Court's finding that Pedro's consent was voluntary.[18] To answer that question, the evidence must be viewed through the same lens that appellate counsel would have faced if he had challenged the Court's ruling; in other words, the evidence in the record must be considered in the context of the standard of review that would have been applied on appeal.

Gonzalez v. Moreno, 919 F.3d 582, 593–94 (1st Cir. 2019) ("[D]espite the broadly framed objections of courts to deception by known government agents, the general consensus in the case law is that such deception, including lying about the purpose of an investigation, is not categorically off-limits in obtaining consent to search. The question instead is whether the deception in context rendered the consent involuntary.") (internal footnote omitted).

[18] Normally, a habeas petitioner may not raise a Fourth Amendment claim on collateral review. *See United States v. Cavitt*, 550 F.3d 430, 435 (5th Cir. 2008). But here, because "the viability of the Fourth Amendment claim is inextricably intertwined with [Movant]'s claim that his [appellate] counsel rendered ineffective assistance" by failing to challenge on appeal the District Court's suppression ruling, the Court's "inquiry into the errors claimed entails an assessment of [Movant's] putative Fourth Amendment claim." *Id.* (internal citations omitted).

The Fifth Circuit has described the applicable standard of review as follows:

> We do not reverse a finding that consent was voluntary unless it is clearly erroneous. *United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir.1993). "Where the judge bases a finding of consent on the oral testimony at a suppression hearing, the clearly erroneous standard is particularly strong since the judge had the opportunity to observe the demeanor of the witnesses." *Id.* (citation omitted). "[W]e view evidence in the light most favorable to the prevailing party—in this case the Government—and indulge all inferences in favor of the district court's denial of the motion to suppress." *United States v. Polk*, 118 F.3d 286, 296 (5th Cir.1997) (citation omitted).

United States v. Martinez (Anthony Gilbert Martinez), 410 F. App'x 759, 762 (5th Cir. 2011).

Each of the six factors will be examined in the context of this standard of review to determine whether Movant's appellate counsel was deficient in failing to challenge the Court's ruling.[19]

a. The Voluntariness of the Defendant's Custodial Status

Pedro was neither in custody nor detained at the time he gave Agent Olivarez consent to search his home. When Agent Olivarez asked Pedro for consent to search, he and the other officers stood outside the Alvarado's property and outside a locked gate. This factor weighs in favor of a

[19] Movant asserts that the Government has the burden of proof in applying the six factors. (Docket No. 10, at 24.) It is true that, in response to Movant's suppression motion, the Government had the burden to prove that Pedro's consent was voluntary. *See United States v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001) ("When the government searches or seizes a defendant without a warrant, the government bears the burden of proving, by a preponderance of the evidence, that the search or seizure was constitutional."); *United States v. Rivas*, 157 F.3d 364, 368 (5th Cir. 1998) ("The government bears the ultimate burden of proof when it searches without a warrant."). But here the Government met that burden to the satisfaction of the District Court, as shown by the Court's ruling. In this collateral proceeding attacking his conviction, the burden is on Movant to prove his claim alleging ineffective assistance of counsel. *Strickland*, 466 U.S. at 687 (to prevail on an ineffective assistance claim, "the defendant must show" both deficient performance and prejudice); *see also Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) ("In a section 2255 motion, a petitioner has the burden of sustaining his contentions by a preponderance of the evidence."). To meet that burden here, Movant must show that the consent-to-search issue would have been meritorious if raised on appeal. And, as noted above, to decide that it is necessary to take into account the standard of review that would have applied.

finding that consent was voluntarily given. *See United States v. Cota-Lopez*, 104 F. App'x 931, 933 (5th Cir. 2004) (affirming trial court's finding that consent was voluntary when defendant was not in custody when police officers sought his consent to search his residence); *United States v. Fang*, No. EP-04-CR-2753-PRM, 2005 WL 1404156, at *6 (W.D. Tex. May 20, 2005) ("Officers knocking at the front door of a residence and requesting to talk to a defendant does not constitute a custodial interrogation.") (citation omitted).

b. The Presence of Coercive Police Procedures

Movant argues that the HSI agents coerced Pedro's consent in two main ways: 1) the "government showed up in force with fifteen agents" who were "heavily armed"; and 2) the "agents lied about the purpose of their being there and about exigent circumstances." (Docket No. 10, at 21-29.)

As to Movant's first point, the presence of multiple law enforcement officers was not unduly coercive under the circumstances here. Although approximately 15 law enforcement officers arrived at the Alvarado residence, only about four accompanied Agent Olivarez in approaching the family's property. The other agents remained across the street from the Alvarado residence; they did not surround the property. The five who approached the Alvarado's property remained on the street outside a locked gate—and well away from the house. The presence of 15 law enforcement officers outside the Alvarado's property does not support the conclusion that Pedro was coerced to give consent. *See, e.g., United States v. Jones,* 475 F.2d 723, 724, 730 (5th Cir.1973) (holding that defendant's statement was not coerced where about ten FBI agents were present in the home where he was arrested and gave his statement); *Martinez (Anthony Gilbert Martinez)*, 410 F. App'x at 764 (holding that "the officers used no coercive

procedures" even though the defendant was in his living room "surrounded by police when he consented").

Although all the law enforcement officers wore identifying vests and carried firearms, there is no evidence that any of them drew or otherwise brandished their weapon. As the Fifth Circuit has recognized, "the mere presence of armed officers does not render a situation coercive." *United States v. Escamilla*, 852 F.3d 474, 483–84 (5th Cir. 2017) (quoting *Martinez (Anthony Gilbert Martinez)*, 410 F. App'x at 764); *see also United States v. Martinez (Selina Martinez)*, 537 F. App'x 340, 345 (5th Cir. 2013) ("we have previously held that the presence of uniformed officers does not create a coercive environment"; citing cases). Nor is there evidence in the record that Agent Olivarez (or any other agent) threatened Pedro, badgered him, yelled at him, or treated him rudely in any way.[20] *See United States v. Mata*, 517 F.3d 279, 291 (5th Cir. 2008) (finding voluntary consent when the "police did not have their weapons drawn" and "no officer threatened or yelled at [the defendant] or 'treated him rudely'"); *Cota-Lopez*, 104 F. App'x at 933 (affirming trial court's finding that consent was voluntary when the police did not use "coercive or forceful tactics"); *Jones*, 475 F.2d at 730 (noting that "the absence of intimidation, threats, abuse (physical or psychological), or other coercion is a circumstance weighing in favor of upholding what appears to be a voluntary consent"); *see also Martinez (Selina Martinez)*, 537 F. App'x at 345 (finding no coercion where there was no evidence that the agent "badgered [the

[20] In addition, the initial consent search was limited in duration and scope: the agents went into the residence, removed the two aliens from the attic, performed a quick protective search (not resulting in the seizure of any evidence), and then retreated from the house and remained outside (until Pedro gave a second consent some time later). These facts further confirm the absence of coercion. *See United States v. Santiago*, 410 F.3d 193, 200 (5th Cir. 2005) (finding that the district did not err determining that the defendant voluntarily consented to a forty-five-minute search); *see also Escamilla*, 852 F.3d at 484 (in conducting a consent search, "officers 'have no more authority than they have apparently been given by the consent'") (citations omitted).

defendant] into consenting"). In short, the record supports the conclusion that Pedro was not coerced to give consent.[21]

Movant's second point fares no better. Contrary to Movant's assumption, the mere fact that the agents used a ruse to obtain consent does not mean that Pedro's consent was involuntary. Again, the Fifth Circuit has recognized that "trickery and deceit is only prohibited to the extent it deprives the suspect 'of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"[22] *Soffar*, 300 F.3d at 596 (quoting *Moran*, 475 U.S. at 424); *see also supra* n.17 (citing additional authority). "It is objective facts, not the officer's subjective intent, that govern the Fourth Amendment analysis." *United States v. Gonzales*, 458 F. App'x 381, 382 (5th Cir. 2012) (per curiam) (citing *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc)). Viewed objectively, there was nothing coercive about Agent Olivarez' request for consent to search the Alvarado resident for illegal aliens.

Attempting to avoid this conclusion, Movant argues that the agents lied not only about their purpose in being at his residence, but also "about exigent circumstances." (Docket No. 10, at 21.)

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[21] In *United States v. Hernandez*, 670 F.3d 616, 622-23 (5th Cir. 2012), the Fifth Circuit held that a defendant's consent to search and statement were not voluntary. There, multiple law enforcement officers had approached the defendant's residence at midnight, "banged on the doors and windows," and "one of the officers broke the glass pane of the screen door with a baton." *Id.* at 618. In finding that a reasonable person would have believed she was "not free to leave or to decline the officers' request," the Fifth Circuit emphasized the following facts: "the attempt to gain entry into the residence through the use of force in the middle of the night, the presence of several officers, and the fact that the officers had their weapons drawn." *Id.* at 622. The circumstances in the instant case are in stark contrast to the facts that led the Fifth Circuit to find coercion in *Hernandez*.

[22] At the same time, trickery and deceit by law enforcement is not irrelevant. To the contrary, "any misrepresentation by the Government is a factor to be considered in evaluating the circumstances." *United States v. Andrews*, 746 F.2d 247, 250 (5th Cir. 1984), *overruled on other grounds by United States v. Hurtado*, 905 F.2d 74 (5th Cir. 1990).

It is true that some types of ruses are inherently coercive; for example, where officers lie about having a search warrant in order to enter the defendant's residence. *See Bumper v. North Carolina*, 391 U.S. 543, 548–50 (1968) (holding that consent was not voluntary when police officers falsely told homeowner they had a warrant to search her home). Courts have also recognized the need to "be especially cautious" when a law enforcement officer's "deception creates the impression that the defendant will be in physical danger if he or she refuses to consent to the search." *United States v. Harrison*, 639 F.3d 1273, 1279 (10th Cir. 2011). In *Harrison*, for example, the Tenth Circuit affirmed a finding that the defendant's consent to search was coerced where "the Agents' statements implied a bomb may have been planted in [his] apartment." *Id.*; *see also United States v. Giraldo*, 743 F. Supp. 152, 154 (E.D.N.Y. 1990) (holding consent was not voluntary when police officers'—masquerading as gas company workers—request for entry into defendant's apartment to check for a non-existent gas leak led defendant "to believe there was a life-threating emergency"). Coercion may also be found in other circumstances in which the ruse causes the person to believe that they have no choice but to consent. *See United States v. Gallegos-Espinal*, No. CR H-17-678, 2019 WL 2225025, at *10-*11 (S.D. Tex. May 23, 2019) (finding that coercion factor favored defendant where government agent obtained consent to search a cell phone by implying that child protective services officers would take away the defendant's siblings if he refused consent).

Here, however, there is nothing about Agent Olivarez' ruse that created exigent circumstances. He simply requested consent to search for evidence of a crime, i.e., harboring aliens. The agent's ruse could not have caused Pedro reasonably to fear that he was in physical

danger if he refused consent, nor did it suggest any other exigent circumstance that could be said to have coerced Pedro into giving his consent to search.[23]

For all these reasons, the coercion factor weighs in favor of the District Court's finding of voluntariness.

c. The Extent and Level of the Defendant's Cooperation with the Police

The record reflects that Pedro was very cooperative with the HSI agents. Pedro provided verbal consent for the agents to search his home, and he freely volunteered the information that the illegal aliens were likely in the attic.[24] This factor weighs in favor of a finding of voluntariness.

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[23] The Tenth Circuit suggested the following standard in considering the effect of deceit and trickery by law enforcement officers:

> Not all deceit and trickery is improper, but "when the police misrepresentation of purpose is so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy ... the consent should not be considered valid." 2 Wayne R. LaFave et al., Criminal Procedure § 3.10(c) (3d ed. 2007).

Harrison, 639 F.3d at 1280. There was nothing "so extreme" here such that it would serve to invalidate Pedro's consent.

[24] Pedro now claims that he "did not readily volunteer that there were aliens in his residence. Rather, after it became apparent that the agents would not allow me to refuse to search, I agreed to the search out of fear and the belief that if they took the illegal aliens with them, they would not harm my family, children, or me." (Docket No. 10, at 28.) But Pedro makes these assertions in the declaration he filed in this action (dated November 6, 2017). (*Id.* at 37-40.) These statements are not in the record of Movant's criminal case and could not have been relied on by his appellate counsel in objecting to the District Court's finding that Pedro's consent was voluntary. *See Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999) ("An appellate court may not consider new evidence furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling."). Thus, Pedro's new evidence is not relevant to whether Movant's appellate counsel was deficient in failing to challenge the Court's ruling on appeal and need not be addressed further.

d. The Defendant's Awareness of His Right to Refuse Consent

During Agent Olivarez' suppression hearing testimony, he did not state (and was not asked) whether he informed Pedro of his right to refuse consent.[25] At first blush, this factor tends to support the conclusion that Pedro's consent was not voluntary.

In his § 2255 and supporting filings, Movant relies on Pedro's statement that he is "not very knowledgeable about [his] constitutional rights"; according to Pedro: "[i]f I had known I could refuse to consent to the search and nothing would happen to me or my family solely because of my refusal to consent to the search, I would have refused to consent to the search." (Docket No. 10, Pedro's Decl., dated Nov 6, 2017, at 4.) Assuming it is appropriate to consider Movant's new evidence on this issue, it is not persuasive.[26]

At the time he consented to the search, Pedro was no stranger to the criminal justice system. In 1994, Pedro pleaded guilty to third degree sale of a controlled substance in a Minnesota state court, and in 2003, Pedro pleaded guilty to felony charges of conspiracy to traffic in marijuana and cocaine in a South Carolina state court. (*See* Cr. Docket No. 473, at 16–17, ¶¶ 73–75.) Given these experiences, it seems unlikely that he is "not very knowledgeable" about his constitutional rights. "[E]xperience in the criminal justice system can offset 'any weight' accorded to an officer's failure to advise a suspect of his right to resist a search." *United States v. Ponce*, 8 F.3d 989, 997 (5th Cir. 1993) (affirming trial court's finding that consent was voluntary when the trial court believed that defendant was familiar with his right to refuse consent based on defendant's three prior convictions and "consequent experience with law enforcement procedures"); *see also United*

[25] In his second consent to search later the same day, Pedro was clearly aware of his right to refuse consent, which he acknowledged by signing a written consent-to-search form.

[26] Here again, Pedro's statements are not reflected in record of his criminal proceeding and could not have been relied on by Movant's appellate counsel on appeal. *See supra* n.24.

States v. Gonzalez-Quesada, 618 F. App'x 237, 239 (5th Cir. 2015) (per curiam) (finding that defendant's previous experience in the criminal justice system offset any failure by police to advise defendant of his right to refuse consent) (citing *Ponce*, 8 F.3d at 998).

The factor addressing Pedro's awareness of his right to refuse consent is inconclusive. One the one hand, there is no evidence in the record that Agent Olivarez advised Pedro of this right; on the other hand, Pedro was likely aware of it as a result of his previous encounters with the criminal justice system. In any event, even if this factor tended to favor Movant's position, "it is not dispositive that a defendant was not aware of [his] right to withhold consent." *Martinez (Selina Martinez)*, 537 F. App'x at 346 (citing *United States v. Olivier–Becerril*, 861 F.2d 424, 426 (5th Cir.1988)). It is just "one factor in determining voluntariness." *United States v. Solis*, 299 F.3d 420, 438 (5th Cir. 2002).[27]

e. The Defendant's Education and Intelligence

Pedro characterizes himself as a "Spanish-speaking American[] with limited education."[28] (Docket No. 10, at 24) Contrary to Pedro's suggestion that he lacks English language skills, the

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[27] *See also United States v. Freeman*, 482 F.3d 829, 833 (5th Cir. 2007) (stating that "although [defendant] was not informed that he could deny consent, this fact is 'not to be given controlling significance'") (quoting *United States v. Watson*, 423 U.S. 411, 425 (1976)); *United Ponce*, 8 F.3d at 997 ("[P]roof that the suspect knew of his right to refuse consent, while relevant, is not required to show voluntariness.").

[28] At various points in Pedro's § 2255 motion and related filings, he claims both that he *did* graduate from high school and that he *did not* graduate from high school. (*Compare* Case No. 7:17-cv-104, Docket No. 10, Pedro's Decl., dated Nov. 6, 2017, at 2 ("I did finish high school, but English is not my first language.") *with* Docket No. 10, at 27 ("Pedro did not finish high school[.]").) The PSR states that "[Pedro] reported he is a 1990 graduate of West Ottawa High School in Holland, Michigan." (Cr. Docket No. 473, at 20, ¶ 87.) Similarly, prior to his bond hearing, Pedro reported to a pretrial services officer that he graduated from that high school. (Cr. Docket No. 6, at 1.) Given the statement in Pedro's declaration and his statements to both a probation officer and a pretrial services officer, it appears he did graduate from high school.

records shows that he is fluent in the English language. At the suppression hearing, Agent Hugas testified that he conversed with Pedro in English and that Pedro did not have any trouble understanding the English language. The PSR also notes that Pedro is literate in the English language. (Cr. Docket No. 473, at 20, ¶ 87.) The record of Pedro's criminal proceedings reflects that at each of his court appearances a Spanish-language interpreter was present in court, but Pedro repeatedly did not use the interpreter.[29] At Pedro's sentencing hearing (where again an interpreter was present but not used), Pedro engaged in a lengthy conversation with the District Court in English, and there is no indication that he had any difficulty understanding or expressing himself. (*See* Cr. Docket No. 541, Sentencing Tr., at 18–23; Cr. Docket Minute Entry for 6/5/2014 (noting that the interpreter was present but not used during the sentencing hearing).) In sum, the record refutes Movant's attempt to suggest that Pedro's alleged lack of English language skills rendered his consent involuntary.

Additionally, there is nothing in the record to indicate that Pedro is of low intelligence; to the contrary, Pedro is fluent in two languages (English and Spanish) and has graduated from high school. Taking all this into account, Pedro's education and intelligence weigh in favor of a finding that his consent was voluntary. *See Martinez (Selina Martinez)*, 537 F. App'x at 346 (finding that the intelligence/education factor established voluntary consent where the defendant "was 20 years

[29] For example, the criminal docket entries show that an interpreter was present in court but not used by Pedro at the following proceedings: initial appearance (07/05/2012), preliminary examination and bond hearing (04/10/2012), arraignment and material witness hearing (07/31/2012), continuation of material witness hearing (08/28-29/2012), arraignment on superseding indictments (12/21/2012, 01/20/2013, and 05/08/2013), pretrial conferences (08/31/2012, 02/01/2013, 03/01/2013, 05/31/2013, 10/04/2013, and 01/31/2014), suppression hearing (04/10/2013), trial (03/17-20/2014), and sentencing (06/05/20014). Out of all his many court appearances, Pedro elected to use the interpreter only a couple times. For example, he used the interpreter at a pretrial conference on 11/01/2013, but later the same month he chose not to use the interpreter at a pretrial conference on 11/26/2013.

old at the time of the search, had completed 10 years of schooling, and had been arrested several times"); *see also United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting that the person searched, "who was 22 years old and had an 11th-grade education, was plainly capable of a knowing consent").

f. The Defendant's Belief That No Incriminating Evidence Will Be Found

Pedro knew that incriminating evidence would be found in his house in the form of illegal aliens (which was the proffered reason for the search). In fact, Pedro directed the officers to the location where they were hiding (in his attic). This weighs against a finding of voluntariness on the theory that a suspect would not voluntarily consent to a search that would incriminate him. *See United States v. Arroyo*, No. EP-19-CR-1506-PRM, 2019 WL 4601853, at *8 (W.D. Tex. Sept. 23, 2019) ("Consent is more likely to be voluntary when the defendant did *not* know incriminating evidence would be found and, conversely, involuntary when the defendant knew incriminating evidence would be found.") (emphasis in original).

However, application of this factor under the circumstances here is not free from doubt. As the Fifth Circuit observed in a similar context (where the defendant knew that the search would reveal evidence of a crime): "[T]he question is not whether [the defendant] acted in her ultimate self-interest, but whether she acted voluntarily. [I]t is arguable that [defendant] may have thought that she was acting in her self-interest, by voluntarily cooperating with the officers in the hope of receiving more lenient treatment." *Martinez (Selina Martinez)*, 537 F. App'x at 346 (quoting *Mendenhall*, 446 U.S. at 559 & n.7) (citations and internal punctuation omitted). Here, despite knowing that illegal aliens would be found in his house, Pedro may have been willing to allow a search of his home for the aliens in the hopes that it would divert attention from his role in the shooting that had occurred the night before. Still, because Pedro knew that incriminating evidence

of alien harboring would be found in his home, this factor weighs slightly against a finding that his consent was voluntary.

g. Weighing the Factors – Totality of the Circumstances

As noted at the outset of this discussion, "[t]he voluntariness of consent depends upon the totality of the circumstances surrounding the search"; no single factor is controlling. *Mendez*, 431 F.3d at 429. In considering the six factors here, two factors arguably suggest that Pedro's consent to search his house was not voluntary while the remaining four support the District Court's finding that Pedro's consent was voluntary. Taken together, the six factors strongly support the Court's finding of voluntariness. This is particularly true since, had Movant's appellate counsel raised this issue on appeal, the evidence in the record would have been viewed "in the light most favorable to the prevailing party—in this case the Government." *Polk*, 118 F.3d at 296. Moreover, the appellate court would have "indulge[d] all inferences in favor of the district court's denial of the motion to suppress." *Id.* Because the Court based its finding of voluntary consent on the testimony presented at the suppression hearing, the Fifth Circuit would have "give[n] particular deference to the district court's credibility determinations." *Martinez (Selina Martinez),* 537 F. App'x at 345 (citing *United States v. Solis,* 299 F.3d 420, 436 (5th Cir. 2002)). Movant's appellate counsel had no hope of overcoming such deference since the Court's ruling is fully supported by the record.

In sum, Movant has not shown that a challenge to the District Court's voluntariness ruling would have been "meritorious." *Reinhart*, 357 F.3d at 525. To the contrary, applying the appropriate standard for appellate review, such a challenge would have clearly failed. Movant cannot demonstrate that his appellate attorney rendered deficient performance in failing to raise a meritless issue on appeal, and, for the same reason, he cannot show that he was prejudiced as a result. *See Smith v. Puckett*, 907 F.2d 581, 585 n.6 (5th Cir. 1990) ("Counsel is not deficient for,

and prejudice does not issue from, failure to raise a legally meritless claim."); *Williams v. Collins*, 16 F.3d 626, 635 (5th Cir. 1994) (holding that appellate attorney's failure to raise meritless issues on appeal did not prejudice movant); *United States v. Delagarza*, 987 F.2d 770, 1993 WL 67232, at *3 (5th Cir. Feb. 24, 1993) (per curiam) (holding that movant cannot show that appellate attorney's performance was deficient when claims movant posits attorney should have raised were meritless). This claim should therefore be dismissed.

2. Failure to Move for Recusal of the Trial Court Judge

In his second ground for relief, Movant contends that both his trial and appellate attorneys rendered ineffective assistance by failing to move for the recusal of Judge Crane. (*See* Docket No. 1, at 4; Docket No. 11, at 5-6, 11-13; Docket No. 12, at 3–4.) Movant appears to claim that Judge Crane was biased because "a police officer was involved and because we were Hispanic." (*See* Docket No. 12, Decl. of Pedro Alvarado, dated Nov. 6, 2017, at 6.). According to Movant, this bias is shown by Judge Crane's reference to "vigilantes" and a "culture of lawlessness." (Docket No. 11, at 13.)

Movant claims his attorneys should have argued for Judge Crane's recusal pursuant to 28 U.S.C. § 455.[30] In pertinent part, § 455 provides:

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[30] A party may also move for a judge's recusal pursuant to 28 U.S.C. § 144, which, like § 455, provides a procedure for addressing allegations that a judge has a personal bias or prejudice against a party. *See* 28 U.S.C. § 144; *United States v. Alexander*, 726 F. App'x 262, 262 (5th Cir. 2018) (per curiam) ("Section 144 requires a judge to reassign a case in the event of actual bias."). "Substantively, the two statutes are quite similar, if not identical." *Phillips v. Joint Legislative Comm. On Performance & Expenditure Review of State of Miss.*, 637 F.2d 1014, 1019, 1019 n.6 (5th Cir. 1981). As the Fifth Circuit further explained:

> To the extent there is a difference, section 455 imposes the stricter standard: a movant under section 144 must allege facts to convince a reasonable person that bias exists, while under the broader language of section 455, he must show only that a reasonable person would harbor doubts about the judge's impartiality.

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

28 U.S.C. § 455(a)-(b)(1).

The Fifth Circuit has explained that the "standard for disqualification is 'whether a reasonable person, with full knowledge of all the circumstances, would harbor doubts about the judge's impartiality.'" *United States v. Allen*, 587 F.3d 246, 252 (5th Cir. 2009) (quoting *Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999)). Applying the reasonable person standard, courts "must ask how [the] facts would appear to a 'well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.'" *Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004) (quoting *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995)).

In determining whether a judge should disqualify himself, the source of the alleged bias or impartiality is critical. In *Liteky v. United States*, the Supreme Court explained:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 1019 n.6 (internal quotation marks and citations omitted). Section 455 is broader than § 144, and thus if Movant's § 455 claim fails, any challenge alleging bias under § 144 would fail as well.

510 U.S. 540, 555 (1994) (emphasis in original). This is what has become known as the "extrajudicial source rule," which "more or less divides events occurring or opinions expressed in the course of judicial proceedings from those that take place outside of the litigation context and holds that the former rarely require recusal." *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003). Put simply, "[f]acts learned by a judge in his or her judicial capacity regarding the parties before the court, whether learned in the same or a related proceeding, cannot be the basis for disqualification." *Conkling v. Turner*, 138 F.3d 577, 592 (5th Cir. 1998) (quoting *Lac Du Flambeau Indians v. Stop Treaty Abuse-Wis.*, 991 F.2d 1249, 1255–56 (7th Cir. 1993)).

In addition, when considering the recusal of a judge, "review should entail a careful consideration of context, that is, the entire course of judicial proceedings, rather than isolated incidents." *Andrade*, 338 F.3d at 455. In order to be successful under § 455, a party must "(1) demonstrate that the alleged comment, action, or circumstance was of 'extrajudicial' origin, (2) place the offending event into the context of the entire trial, and (3) do so by an 'objective' observer's standard." *Id.* Here, to establish that his attorneys were deficient in failing to seek the Court's recusal, Movant must show that these requirements could have been met.

Movant's recusal claim is based on two comments by Judge Crane. First, Movant complains of the following statements made by the Court during Movant's sentencing hearing:

> THE COURT: All right, the Court adopts the factual finding contained within the presentence report. I find that it was correctly scored. This left Mr. [Arnoldo] Alvarado at a Level 23, which is a range—with no criminal history points, he's in a range of 46 to 57 months, plus 120 months. So, it's really a range of 166 to 177 months would be his range. And that's the range that he would be at if this incident stopped at the tree, at the initial intersection, and I think this case is much more aggravating than that.

> The really callous and unrelenting pursuit of this fleeing individual I think merits a variance upward from these guideline ranges.
>
> It is fortunate that Mr.—Agent Harrison was not killed. That was the attempt in this case. That was what Mr. [Arnoldo] Alvarado was attempting to do and I, therefore, feel that a greater punishment is merited under these circumstances.
>
> **The Alvarados both are—seem to be completely lawless and really no respect for any kind of law or human life. On this occasion I appreciate that Arnoldo Alvarado is young, but he seems to be already mature and already in this culture of lawlessness that unfortunately exists within certain people and pockets—small pockets of our community.**
>
> I believe that the 3553(a) factors merit an upward variance to promote respect for the law, to be a just deterrent to others and adequate punishment for this particular crime, given its very serious nature.

(Cr. Docket No. 533, Sentencing Tr., at 28–29) (emphasis added; portion Movant complains of in bolded text).

Movant's second example of alleged bias occurred during the discussion between Judge Crane and counsel regarding the jury charge. The following exchange took place between the Court and Movant's attorney when discussing whether to include a self-defense instruction in the jury charge:

> MR. GARCIA: The Court asking a question in regards to what occurred and the evidence of the firing coming from the west. From Agent Harrison's own testimony, he was being shot from both sides. Agent Harrison is between—he is—my client and his father and his brother are to the east of Agent Harrison. To the west, we come to learn that Renee Garcia and his crew are to the west. If he's taking shots from both sides, that puts my client downrange from potentially where Renee Garcia and his crew were firing from

	and there is evidence in the Record that they were armed. That's—
THE COURT:	That makes it even more unreasonable.
MR. GARCIA:	Right.
THE COURT:	And you—this car could have been just—
MR. GARCIA:	Well, whether—
THE COURT:	—somebody pulled over trying to sober up for the night.
MR. GARCIA:	—and that is—right. Correct.
THE COURT:	**You can't—we can't let in a civilized society—we're a country of laws, you cannot let these vigilantes go out, hunt somebody down, shoot them up and then claim self-defense because two months prior there was a—**
MR. GARCIA:	**I take exception to call [sic] my clients "vigilantes"—**
THE COURT:	**I didn't. I was giving a hypothetical.**
MR. GARCIA:	**—even a hypothetical.**
THE COURT:	**In this country we cannot allow that. I did not describe that as your client. I made a statement about our society and that we are a country of laws and cannot permit vigilantes to go out, hunt somebody down and shoot them.**

(Cr. Docket No. 539, Day Four Jury Trial Tr., at 44–45) (emphasis added; portion Movant complains of in bolded text.)

The comments Movant complains about where made in the course of Movant's criminal proceedings and based on facts presented in court. The opinions expressed by Judge Crane are fully supported by the evidence presented at the suppression hearing and at trial, which detailed

the egregious conduct of Pedro and his sons.[31] It is abundantly clear from the record that Judge Crane's comments and rulings were based on "facts introduced or events occurring in the course" of Movant's criminal proceedings. *Liteky*, 510 U.S. at 555.

To show a basis for recusal, Movant needed to "identify[] extrajudicial evidence that the . . . judge based [his] rulings on something other than what []he learned from [his] participation in the case." *Ryerson v. Berryhill*, 772 F. App'x 102, 104 (5th Cir. 2019) (per curiam) (citing *United States v. Clark*, 605 F.2d 939, 942 (5th Cir. 1979)). He has not done so. Movant's conclusory allegations fall far short of meeting the extrajudicial source requirement. *See Ryerson*, 772 F. App'x at 104 ("Conclusory statements do not constitute such evidence.").

Beyond that, no reasonable person, with full knowledge of all the circumstances, would harbor doubts about Judge Crane's impartiality in this case. To the contrary, based on the evidence before the Court, a "thoughtful and objective observer" would not conclude that the Court's comments arose from some out-of-court bias or prejudice.[32] It is also telling that the Fifth Circuit

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[31] For example, as the Fifth Circuit observed in its opinion on Movant's appeal:

> Agent Harrison did nothing aggressive but began his attempt to escape as soon as Pedro drove towards his vehicle. It was not contested that Pedro and his sons sought out Agent Harrison's vehicle, that Arnoldo and his brother fired upon Agent Harrison's vehicle as it attempted to leave the Alvarados' property, or that Pedro pursued Agent Harrison, at high speeds, for over three miles.

United States v. Alvarado, 630 F. App'x 271, 274 (5th Cir. 2015).

[32] Pedro suggests that Judge Crane was prejudiced against him because "we were Hispanic." (Docket No. 10, Decl., at 6.) Pedro and Movant apparently assume that Judge Crane is not Hispanic, perhaps based on his surname. In fact, Judge Crane, like Movant and Pedro, is Mexican American. As Judge Crane mentioned to the panel during jury selection, his "grandparents spoke no English." (Cr. Docket No. 535, Jury Selection Tr. at 79.) But regardless of his background, no objective observer would have a legitimate reason to believe that Judge Crane was prejudiced against Movant based on race or national origin. There is simply no evidence to support such a conclusion.

had occasion to review Judge Crane's comments in considering Movant's argument that the Court erred in refusing to give a self-defense instruction and Pedro's argument that his sentence was unreasonable. The Fifth Circuit rejected both of those claims. *Alvarado*, 630 F. App'x at 273-76.

Because Judge Crane's comments and ruling were not based on an extrajudicial source and because no informed reasonable person would harbor doubts about his impartiality, Movant's attorneys were not deficient for failing to assert a meritless—if not frivolous—request for Judge Crane's recusal. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument . . . cannot form the basis of a successful ineffective assistance of counsel claim[.]"); *Puckett*, 907 F.2d at 585 n.6. Having failed to show that his attorneys were deficient regarding the issue of recusal, Movant's ineffective assistance of counsel claim should be denied.

C. Motion to Amend

In his "Notice of New and Controlling Authority," Movant seeks permission to amend his § 2255 motion to include a claim based on the Supreme Court's recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). (*See* Docket No. 16.) The Government filed a response to Movant's Notice, arguing that the Notice should be denied because (1) it is time-barred and does not relate back to the date of Movant's original pleading; and (2) *Davis* does not affect Movant's sentence imposed under 18 U.S.C. § 924(c)(1)(A). (*See* Docket No. 18.) On August 7, 2019, Movant filed a motion for leave to brief *Davis*, along with the proposed brief. (*See* Docket Nos. 19, 19-1.) These filings will be liberally construed as a motion for leave to amend Movant's § 2255 motion.[33]

[33] Movant's "Notice of New and Controlling Authority" (Docket No. 16), "Motion for Leave to Brief Davis" (Docket No. 19), and "Brief on United States v. Davis Subject to Leave Being Granted by the Court" (Docket No. 19-1) will collectively be referred to as Movant's

1. Timeliness of Movant's Motion to Amend

A motion made under § 2255 is subject to a one-year limitations period, which, in most cases, begins to run when the judgment becomes final.[34] 28 U.S.C. § 2255(f)(1). A judgment becomes final when the applicable period for seeking review of a final conviction has expired. *Clay v. United States*, 537 U.S. 522, 532 (2003); *United States v. Gamble*, 208 F.3d 536, 536–37 (5th Cir. 2000) (per curiam).

"motion to amend." Movant's motion to amend is not a "second or successive" application within the meaning of 28 U.S.C. §§ 2244 and 2255 because it was filed during the pendency of Movant's original § 2255 action. *See Williams v. United States*, No. MO-06-CR-151(03), 2013 WL 12231888, at *2 (W.D. Tex. Aug. 14, 2013) ("[S]ubsequent § 2255 motions filed before the adjudication of a prior motion are considered as motions to amend the original petition and not as second or successive."); *Green v. Quarterman*, No. H-08-553, 2008 WL 2489840, at *1 (S.D. Tex. June 18, 2008) ("[I]t is clear that for a petition to be 'second or successive' within the meaning of the statute, it must at a minimum be filed *subsequent to the conclusion* of a proceeding that counts as the first") (emphasis in original) (quoting *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002)); *see also Clark v. United States*, 764 F.3d 653, 658 (6th Cir. 2014) ("A motion to amend is not a second or successive § 2255 motion when it is filed before the adjudication of the initial § 2255 motion is complete—i.e., before the petitioner has lost on the merits and exhausted her appellate remedies.").

[34] Section 2255 also provides certain alternative dates upon which the limitations period may begin. Specifically, it provides that the limitations period shall run from the latest of:

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Movant filed his motion to amend on July 15, 2019 (*see* Docket No. 16), which is more than three years after the date on which his conviction became final.[35] Movant's proposed new claim would thus be time barred under § 2255(f)(1). Because Movant's request to amend is premised on the Supreme Court's recent ruling in *Davis*, he presumably relies on the limitations accrual date found in § 2255(f)(3), which addresses claims based on rights that are newly recognized by the Supreme Court and made retroactive to cases on collateral review. In *United States v. Reece*, 938 F.3d 630, 635 (5th Cir. 2019), the Fifth Circuit held that *Davis* announced a new substantive rule of constitutional law applicable retroactively to cases on collateral review.

Movant's attempt to assert a new claim based on *Davis* was made within one year of "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). As explained below, however, Movant's proposed *Davis* claim is clearly meritless, and his motion to amend should be denied because it would be futile.

2. *Davis* Claim

Movant claims that his conviction under 18 U.S.C. § 924(c) is now unconstitutional after the Supreme Court's decision in *Davis*. (*See* Docket No. 15-1.) Although Movant's precise argument is not entirely clear, it appears that Movant is claiming that because he was convicted under the aiding and abetting statute (18 U.S.C. § 2), his conviction falls under § 924(c)'s residual clause—which the Supreme Court found to be unconstitutional in *Davis*.[36]

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[35] As already discussed, *see supra* n.12, it appears that Movant's original § 2255 motion was untimely, although that issue was not raised by the Government.

[36] Specifically, Movant makes the following argument:

> Because "aiding and abetting" makes the analysis not so simple . . . . Like conspiracy, aiding and abetting allows for conviction without the actual assault taking place by either Pedro's car or Arnoldo's conduct, but merely by "counseling" or "inducing" or "procuring"—none of which require any act of force. As such,

In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Supreme Court examined the constitutionality of the residual clause definition of "crime of violence" found in 18 U.S.C. § 924(c)(3)(B). Pursuant to § 924(c), "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to a term of imprisonment]." 18 U.S.C. § 924(c)(1)(A). For purposes of § 924(c), "crime of violence" is defined as:

> [A]n offense that is a felony and--
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that by its nature, *involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*

28 U.S.C. §924(c)(3) (emphasis supplied). The italicized portion of this definition in § 924(c)(3)(B) is referred to as the "residual clause," while the text of § 924(c)(3)(A) is referred to as the "elements clause."[37] *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018) (noting that "the elements clause [in § 924(c)] defines an offense as a crime of violence if it 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another,' whereas the residual clause defines an offense as a crime of violence if it, 'by its nature, involves a substantial risk that physical force against the person or property of another may

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> like conspiracy, aiding and abetting convictions can only be under the residual clause.

(Docket No. 19-1, at 4.)

[37] Other courts have referred to § 924(c)(3)(A) as the "force clause." *See, e.g., United States v. Hill*, 890 F.3d 51, 54 (2d Cir. 2018) ("We refer to §924(c)(3)(A) as the 'force clause[.]'"); *In re Smith*, 829 F.3d 1276, 1278 (11th Cir. 2016) ("Subsection (A) [of § 924(c)(3)] is often referred to as the force clause[.]").

be used in the course of committing the offense'") (quoting § 924(c)(3)), *affirmed in part and vacated in part* by 139 S. Ct. 2319 (2019). Following the precedent set in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court in *Davis* held that the residual clause definition of "crime of violence" found in § 924(c)(3)(B) is also unconstitutionally vague.[38] *Davis*, 139 S. Ct. at 2326–33, 2236.

Movant was convicted of knowingly and intentionally discharging, using and carrying a firearm, during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and 18 U.S.C. § 2. Movant's firearm conviction was based on his companion conviction for assaulting Agent Harrison under 18 U.S.C. § 111(b).[39] Contrary to Movant's assertion, a

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[38] Previously, in *Johnson*, the Supreme Court held that a similarly worded residual clause defining "violent felony" found in § 924(e) was void-for-vagueness. 135 S. Ct. 2551, 2563 (2015). Three years later in *Dimaya*, the Supreme Court held that the residual clause definition of "crime of violence" found in 18 U.S.C. § 16(b)—which is identical to § 924(c)'s definition of "crime of violence"—was also unconstitutionally vague. 138 S. Ct. 1204, 1213–16.

[39] There is no doubt that Movant was convicted under § 111(b), as opposed to merely § 111(a). "Because § 111 is a divisible statute, the modified categorial approach permits us to consult the *Shepard* documents to determine which of the alternative statutory phrases formed the basis for [defendant's] § 111 conviction." *United States v. Hernandez-Hernandez*, 817 F.3d 207, 213 (5th Cir. 2016). The relevant *Shepard* documents here include the superseding indictment, the judgment, and the jury charge. *See id.* (*Shepard* documents include the indictment, judgment, and plea agreement); *see also United States v. Espinoza-Bazaldua*, 711 F. App'x 737, 742 (5th Cir. 2017) (*Shepard* documents include the indictment and jury instructions); *United States v. Lobaton-Andrade*, 861 F.3d 538, 541 (5th Cir. 2017) (*Shepard* documents include indictment or information). Those documents show that Movant was convicted under § 111(b) for at least two reasons. First, "the citation to § 111(a)(1) *and (b)* in the indictment and judgment indicates that subpart (b) was the operative statutory provision." *Hernandez-Hernandez*, 817 F.3d at 214 (emphasis in original). The plain language of § 111(b) requires proof of both assaultive conduct and the use of a deadly or dangerous weapon (or bodily injury). Both assaultive conduct and the use of a dangerous weapon (a handgun and a rifle) are charged in Movant's superseding indictment, and the jury charge instructed that for the jury to find Movant guilty as to Count Two, the jury must find that "the defendant forcibly assaulted the person described in the indictment . . . and [t]hat in doing such acts, the defendant used a deadly or dangerous weapon." (*See* Cr. Docket Nos. 240, 407.) Second, Movant's "sentence reflected in the judgment accompanied by a citation to § 111(a)(1) *and (b)* further supports [the] conclusion that [defendant's] conviction was based on

conviction under 18 U.S.C. § 111(b) categorically constitutes a "crime of violence" under the elements clause of § 924(c)(3). *See United States v. Hernandez-Hernandez*, 817 F.3d 207, 210 (5th Cir. 2016) (holding that "§ 111(b) is categorically a crime of violence" when deciding whether § 111(b) conviction constitutes a crime of violence under U.S.S.G. § 2L1.2's use of force provision).[40]

Movant's argument that "aiding and abetting convictions can only be under [§ 924(c)(3)'s] residual clause" is incorrect. A person convicted of aiding and abetting a crime is treated the same as if he committed the offense.[41] *See Rosemond v. United States*, 572 U.S. 65, 73–74 (2014) ("[A]ll who shared in [the overall crime's] execution . . . have equal responsibility before the law, whatever may have been [their] different roles.") (quoting *United States v. Johnson*, 319 U.S. 503, 515 (1943)); *United States v. Bowens*, 907 F.3d 347, 351 (5th Cir. 2018) ("[W]ith the enactment of [§ 2], all participants in conduct violating a federal criminal statute are 'principals.' As such,

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§ 111(b)." *Hernandez-Hernandez*, 817 F.3d at 214 (emphasis in original). Taken together, there is no doubt that Movant was convicted under § 111(b).

[40] *See also United States v. Taylor*, 848 F.3d 476, 494 (1st Cir. 2017) (holding that § 111(b) conviction is a crime of violence under the force clause of § 924(c)(3)); *United States v. Rafidi*, 829 F.3d 437, 446 (6th Cir. 2016) (holding that defendant's conviction pursuant to §111(b) constitutes a "crime of violence" for purposes of § 924(c)(3)); *United States v. Juvenile Female*, 566 F.3d 943, 947–48 (9th Cir. 2009) (holding that conviction under § 111(b) is a crime of violence for purposes of 18 U.S.C. § 16's force clause); *United States v. Kendall*, 876 F.3d 1264, 1269–70 (10th Cir. 2017) (holding that defendant's felony § 111(b) conviction constitutes a crime of violence under U.S.S.G. § 4B1.1); *United States v. Green*, 543 F. App'x 266, 272–73 (3d Cir. 2013) (holding that 18 U.S.C. § 111(b) is a crime of violence under U.S.S.G. § 4B1.1).

[41] Movant cites *Rosemond v. United States*, 572 U.S. 65 (2014), as support for his argument. *Rosemond*, however, does not help Movant's argument. In *Rosemond*, the Supreme Court considered "what it takes to aid and abet a § 924(c) offense." 572 U.S. at 70. The Court ultimately held that "the Government makes its case [when aiding and abetting is charged along with a § 924(c) count] by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Id.* at 67.

they are punishable for their criminal conduct; the fate of other participants is irrelevant.") (quoting *Standefer v. United States*, 447 U.S. 10, 20 (1980)); *United States v. Williams*, 449 F.3d 635, 647 (5th Cir. 2006) ("Under the general aiding and abetting statute, a person who aids and abets the commission of an offense is treated the same as a principal actor[.]") (citing 18 U.S.C. § 2). Because a person convicted of aiding and abetting a crime of violence is treated the same as a principal, Movant's argument that his aiding and abetting conviction must fall under the residual clause is baseless.

Accordingly, Movant's proposed *Davis* claim is meritless, and his motion to amend should be denied as futile.[42] *See Sims v. Carrington Morg. Servs., L.L.C.*, 538 F. App'x 537, 549 (5th

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[42] Movant also appears to be attempting to add another new claim asserting that his § 924(c) conviction is unconstitutional because the jury charge allegedly did not contain the "the specific requirements out of Rosemond." (*See* Docket No. 15-1, at 11, 17.) A new claim based on *Rosemond* would fail for three reasons. First, it is barred from review in this § 2255 action. Where a defendant fails to raise an issue in his criminal proceedings, that issue is procedurally barred from consideration in §2255 proceedings. *See United States v. Lopez*, 248 F.3d 427, 433 (5th Cir. 2001); *United States v. Kallestad*, 236 F.3d 225, 227 (5th Cir. 2000) A district court may consider a defaulted claim only if the petitioner can demonstrate either: (1) cause for his default and actual prejudice; or (2) that he is actually innocent of the crime charged. *Bousley v. United States*, 523 U.S. 614, 622 (1998); *United States v. Jones*, 172 F.3d 381, 384 (5th Cir. 1999). Movant does not even attempt to make this showing. Second, a new claim based on the 2014 *Rosemond* ruling would be time barred under § 2255(f)(1). Third, even if it was not procedurally barred and time barred, this new claim would clearly lack merit. In the wake of *Rosemond*, in order to be convicted of aiding and abetting a § 924(c) offense, a defendant must have "advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond*, 572 U.S. at 67. Here, the jury charge in Movant's criminal case included an instruction based on the newly announced (at the time) requirement in *Rosemond*:

> For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> *First*: That the offense of using or carrying a firearm during and in relation to a crime of violence was committed by some person;
>
> *Second*: That the defendant associated with the criminal venture;
>
> *Third*: That the defendant purposefully participated in the criminal venture;

Cir. 2013) ("A district court . . . may properly deny a motion to amend when the amendment would be futile.") (quoting *Avatar Expl., Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 321 (5th Cir. 1991)).

III. CONCLUSION

For the foregoing reasons, the undersigned respectfully recommends that Respondent's Motion for Summary Judgment (Docket No. 7) be GRANTED, that Movant's § 2255 motion (Docket No. 1) be DENIED, that Movant's Motion for Release Pending § 2255 (Docket No. 17) be DENIED, that Movant's Motion for Leave to Brief Davis (Docket No. 19) be DENIED, and that this action be DISMISSED. For the reasons discussed below, it is further recommended that Movant be denied a certificate of appealability.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability[.]" 28 U.S.C. § 2253(c)(1). Although Movant has not yet filed a notice of appeal, the § 2255 Rules instruct that the District Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11, RULES GOVERNING SECTION 2255 PROCEEDINGS. Because the undersigned recommends the dismissal of Movant's § 2255 action, it is necessary to address whether Movant is entitled to a certificate of appealability (COA).

Fourth: That the defendant sought by action to make that venture successful; and

Fifth: **That the defendant had advance knowledge that a firearm would be used or carried during the venture.**

(Cr. Docket No. 407, at 15; emphasis added.) The bolded text above comports with the ruling in *Rosemond*. Movant testified that Pedro woke him up in the middle of the night and told him to grab his gun; based on this testimony, the jury clearly could have concluded Movant had advance knowledge that a firearm would be used or carried during the commission of the offense.

A COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To warrant a COA as to claims denied on their merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (applying *Slack* standard to a COA determination in the context of § 2255 proceedings). An applicant may also satisfy this standard by showing that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *see also Jones*, 287 F.3d at 329. As to claims that a district court rejects solely on procedural grounds, the prisoner must show both that "jurists of reason would find it debatable whether the petition states a valid claim of 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." *Slack*, 529 U.S. at 484.

Here, Movant's § 2255 claims should be dismissed on their merits. For the reasons explained in this report, the undersigned believes that reasonable jurists would not find debatable or wrong the conclusion that Movant's claims lack merit, nor are the claims adequate to deserve encouragement to proceed further. Accordingly, Movant is not entitled to a COA.

NOTICE TO THE PARTIES

The Clerk shall send copies of this Report and Recommendation to Movant and counsel for Respondent, who have fourteen (14) days after receipt thereof to file written objections pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file timely written objections shall bar an aggrieved party from receiving a de novo

review by the District Court on an issue covered in this Report and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

DONE at McAllen, Texas on February 28, 2020.

Peter E. Ormsby
United States Magistrate Judge

APPENDIX EXHIBIT 4

APPENDIX EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

PEDRO ALVARADO	§	
	§	CIV. NO. 7:17-14-W104
V.	§	
	§	CRIM. NO. 7:12-CR-00136-1
UNITED STATES OF AMERICA	§	

OBJECTIONS TO REPORT AND RECOMMENDATION

COMES NOW, Pedro Alvarado and files these Objections to Report and Recommendation ("R&R") and for just cause would show as follows:

PRELIMINARY STATEMENT

Pedro Alvarado and Arnoldo Alvarado raised their petitions for relief under 28 U.S.C. §2255 various issues. Both asked for extensions to file objections to R&R due to two (2) factors: (1) The delivery of the brief to the Alvarados on or about the due date, and (2) the BOP's operation on modified schedule due to the coronavirus which has adversely affected the inmates' periods of access to the law library to obtain access to copiers, typewriter ribbons (commissary closed for inventory), and sufficient time to research and file their objections. The Court granted in part the extension (the Alvarados had requsted until April 30, 2020, and the Court granted until March 30, 2020--effectively the two (2) weeks that the delivery of the R&R had been delayed) in Pedro Alvarado's case. Pedro and Arnolodo's §2255 petitions (Arnoldo's requested extension to April 30, 2020, was granted) were assigned to different judges.

Ex 5

Pedro had endeavored to comply with the Court's brief extension to March 30, 2020, under the Coronavirus-caused restrictions, and to the extent that the Brief and Objections are untimely, moves for leave to file out of time. The commissary now does not have typing ribbons to type, causing additional delay.

OBJECTIONS

The Alvarados (Pedro and Arnoldo have substantively the same objections with minor self-explanatory differences) object to the Magistrates' R&R and file these objections for two (2) purposes. First, the Alvarados seek to protect the record; and second, the Alvarados seek to point out the errors and/or biases of the Magistrate's R&R. The Magistrate authored a fifty-two (52) page R&R addressing four (4) issues of the Alvarados to include (1) the law enforcements' unconstitutional use of a ruse to obtain permission to search the Alvarado home and the subsequent use of constitutional statements and subsequent searches in furtherance of the prosecution of the Alvarados; (2) Failure of counsel to move for recusal of the trial judge after the Court made statements that would tend to lead a reasonable person who knows the circumstances to believe the Court was biased (that the bias was extra-judicial); (3) trial counsel "misspoke" when advising Pedro Alvarado of his right to remain silent; and (4) the Supreme Court's declaration that §924(c)(3)(B) was unconstitutional in United States v. Davis, 139 S.Ct. 2319 (2019).

The Magistrate, in a valiant effort to preserve the conviction, under what Senior Judge David Hinter calls "the paternal interest" of Government, overlooks the Government's response and assumes the position of the advocate for the Government. The Magistrate's R&R is a much more thoughtful and certainly better advocacy for the Government's position than the Government, but it is nevertheless in error.

The Alvarado would initially object to the Magistrate's R&R to the extent that it raises issues and arguments not advanced by the Government.

The Alvarados would request a ruling on each of the objections herein without enumerating a specific request for a ruling after each objection.

PRIOR OBJECTIONS AND WAIVERS NOT ADDRESSED BY THE MAGISTRATE

1) The Government did not dispute any of the Alvarados' factual allegations and they are therefore undisputed for purposes of Summary Judgment. The facts, under Summary Judgment filed by the Government, are viewed from the perspective of the Alvarados, which is in direct conflict with the basic §2255 Government response in which the facts are viewed with the perspective of the Government. In a Response to a §2255 and a Motion for Summary Judgment, the opposite burden shift is unreconcilable and the Alvarados object.

2) Because the facts alleged by Alvarado are undisputed, and the Magistrate nevertheless attempts to adopt the Government's version of facts, Alvarado objects.

3) In Alvarado's Reply, Alvarado filed numerous objections and requested rulings, and made numerous requests for discovery.

In the alternative, Alvarado provided notice of numerous waivers by the Government, none corrected and they are all uncontested. The Magistrate neither ruled upon those Alvarado objections nor made recommendations as to those objections, waivers, undisputed facts asserted by the Alvarados, nor addressed all the particulars asserted by the Alvarados. (In fact, the Magistrate selectively addressed the facts asserted by the Alvarados). The Alvarados reassert those waivers and objections, incorporate them in their entirety herein. These include "Pedro Alvarado and Arnoldo Alvarado's (Petitioners') Reply to United States' Response to Motion for Relief under 28 U.S.C. §2255" and "Pedro Alvarado and Arnoldo Alvarado (Petitioners) Response to United States of America's Motion for Summary Judgment" and the following:

* Different legal standards for M4SJ and §2255 as to burden of proof on which party, as such Alvarado objects;

* All F.R.C.P. Rule 56 objections noted at ¶3 in their Response to United States of America's Motion for Summary Judgment, found at ¶3(A), (B), (C), (D), (E);

* All waiver claims against the Government for its waiver by failing to address items noted thereon. See Pedro Alvarado and Arnoldo Alvarado's (Petitioners') Response to United States of America's Motion for Summary Judgment.

The Alvarados requested a ru ling therein and requests a ruling herein on these objections and waivers properly asserted previously, but not ruled upon by the Magistrate.

Additionally, throughout the R&R, the Magistrate, in a difficult opinion to write, note several inopposite standards. For example, the Government bears the burden to show under the six (6) part text that consent was ["voluntary"] granted to search. That governmental burden never shifts to the Alvarados as the Magistrate alleges. Rather, the test and analysis as noted by the Magistrate (FN 17, p.20 of R&R) notes that "the viability of the Fourth Amendment claim is inextricably intertwined with [Movant]'s cliam that his [appellate] counsel rendered ineffective assistance." This is correct, however the Magistrate thereafter imposed the duty on Alvarado in his §2255 to meet the "voluntary" six (6) part test. That is not correct. Rather, the question for the Magistrate was the manner in which the trial court determined that the Government met its burden at the suppression hearing--not a burden shift to the Alvarados. The difference is slight but with major implications on Due Process.

OBJECTIONS TO THE MAGISTRATE'S R&R

4) Generally, the Alvarados object to the Magistrate's application of the Strickland standard. While Strickland is certainly the prennial case on ineffective assistance of counsel, the Magistrate applied mechanical rules, as noted infra, and did not analyze the issues of Strickland under a "fundamental fairness" standard.

For example, the Court starts with the language of the statute. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 L.Ed. 2d 290, 109 S.Ct. 1026 (1989). The Court construes words of a statute with their "ordinary, contemporary, common meaning," unless Congress has indicated them to be defined differently. See Walters v. Metropolitan Ed. Enterprises, Inc., 519 U.S. 202, 207, 136 L.Ed. 2d 694, 117 S.Ct. 660 (1997), c.f. Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Part., 507 U.S. 380, 123 L.Ed. 2d 74, 113 S.Ct. 1489 (1993). See also Bailey v. United States, 516 U.S. 137, 141, 133 L.Ed. 2d 472, 116 S.Ct. 501 (1995).

Title 28 U.S.C. §2255 provides in part: "A prisoner in custody ... claiming a right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence." Id.

Strickland teaches that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. 656, 690, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984) (emphasis added). The Court concluded in part that "most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."

Although these principles should guide the process of decision, the ultimate focus of inquiry must be of the

fundamental fairness [not whether the errors of counsel would have resulted in an acquittal] of the proceeding whose result is being challenged. In every case, the Court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of breakdown in the adversarial process that our system counts on to produce just results." Id. 466 U.S. at 696. (emphasis added).

Here, the Magistrate, as is unfortunately typical in the United States now, devolved into a mechanical application of pull quotes from Strickland without actually applying the tenants of Strickland. Strickland is, first and foremost, about "fundamental fairness." Id.

The Magistrate disregarded the lack of fundamental fairness. See Weaver v. Massey, 582 U.S. _____, 137 S.Ct. _____, 198 L.Ed. 2d 420 (2017) (prejudice inquiry not to be applied in "mechanical fashion" and "ultimate inquiry must concentrate on the fundamental fairness of the proceeding" citing Strickland, at 696. c.f. Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed. 2d 379, 395 (2012) (J. Scalia dissenting) ("ultimate focus on our ineffective assistance cases on the fundamental fairness of the proceeding) (citing Strickland at 696); Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1326, 182 L.Ed. 2d 398, 417 (2012); Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed. 2d 807, 827 (2012) (fundamental fairness remains the central concern of habeas corpus) (citing Pretke v. Haley, 541 U.S. 346, 393, 124 S.Ct. 1847, 158 L.Ed. 2d 569 (2004) (quoting Strickland, 466 U.S. at 697).

As the Supreme Court teaches that some of the elements to be considered by the Court is constitutional error (whether counsel is functioning as envisioned by the Sixth Amendment) and if there is prejudice to the defendant. But those are merely "mechanical rules" and not the conclusion to be determined itself. Rather, Strickland teaches that the Court is to apply the elements enumerated in Strickland to determine whether, "viewed as of the time of counsel's conduct," 466 U.S. at 690, the proceeding itself was fundamentally unfair.

Here, that analysis did not take place (fundamental fairness analysis).

Under these circumstances, the Magistrate had to determine whether the trial was fundamentally fair and not to apply a mechanical procedure.

For example:

* "The Sixth Amendment refers simply to 'counsel' ... [i]t relies instead on the legal professions maintenance of standards ..." Strickland, 466 U.S. at 688.

* "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. 466 U.S. at 688 (emphasis added).

* "A fair assessment of attorney performance ... eliminat[ing] the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the

time." Id. 466 U.S. at 689 [not the court's perspective or the defendant's perspective post-trial].

* "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. 466 U.S. at 691.

* "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have do not establish mechanical rules. Although these principles should guide the process of decision, the ultimate focus of inquiry must be on fundamental fairness of the proceeding ... being challenged." Id. 466 U.S. at 496. (emphasis added).

Here, as has become the practice in the federal courts, the Magistrate applied "mechanical rules."

In evaluating Strickland and its progeny, the Magistrate (and in fairness to the Magistrate, usiling pull quotes instead of the fundamental fairness analysis is common in the federal courts now) used pull quotes from Strickland without applying Strickland's teachings in their totality.

5) The Magistrate did not address all the discovery and related issues raised by the Alvarados in their Response.

As such, the Alvarados object and request a ruling on their objection.

6) The Magistrate ignores and argues exceptions to circumvent Wong-Sun v. United States, 371 U.S. 471 (1963), enunciation of the "fruit of the poisonous tree" exclusionary rule. The Alvarados would object. (Not raised by the Government--see attenuation rule discussed infra.)

7) The Magistrate's R&R reads much more akin to an advocacy brief for the Government (while pointing out notable exceptions in the case law--precluding a denial of COA under Slack and Barefoot) and as such Alvarado would object.

For example:

Much of the Magistrate's R&R read the way the Government's Response Brief should have read, allowing for a proper back and forth under the adversarial system before a "neutral Magistrate." It does not. Rather, in an attempt to save the conviction as opposed to "neutrally" adjudicating between two parties, the Magistrate chooses a side (the Government's) and advocates for them despite the Government's failure to raise much of the issues raised by the Magistrate.

It is enough that the Alvarados have a difficult burden under the current paradigm (§2255, etc.) in dealing with an often unfair Government, they should not have to contend with a Magistrate pre-determined to save a conviction (because it involved a shooting of a federal law enforcement officer). That just further exacerbates the denial of "fundamental fairness" that Strickland teaches is at the core of ineffective assistance of counsel analysis.

Next, the Magistrate takes on himself the role of speculator-in-chief. No question, as noted below, had the Government offered affidavits from the two (2) Alvarado trial counsels and appellate counsels, making the Magistrate's arguments (from the R&R) that the Alvarados' burden would be significant (or if there was an evidentiary hearing with testimony). But here, the trial counsel and appellate counsel are silent, and the Magistrate takes on the role of puppeteer mouthing the speculated utterances as though they were the statements of the assigned counsel.

Again, that is fundamentally unfair. Counsel certainly could have spoken for themselves. The Government could have requested statements from counsel. The Magistrate could have ordered affidavits from counsel. The Magistrate could have ordered an evidentiary hearing, appointed counsel to cross-examine counsel; but none of that happened. Speculation by the Magistrate should and cannot be the standard in a fair system.

[**NOTE:** Due to FCI-Low-Beaumont's modified operations due to the Coronavirus national emergency, law library typewriters have been inaccessible. The rest of the Objections to the Magistrate's Report and Recommendation shall be typed on a different style typewriter (accounting for the extreme font difference) in an effort to comply with Alvarado's due date of March 30, 2020.]

8) The Alvarados note with particularity the points raised by the Magistrate that are speculative and not positions of either trial or appellate counsel.

* First, the Magistrate applies the wrong standard. On page 18 of his R&R, the Magistrate argues that "Movant must first show that the consent-to-search issue ... should have been raised on appeal."

* Second, the Magistrate places the burden on the Alvarados to prove the Goverment's obligation (six factor text under United States v. Mendez, 431 F.3d 420, 429 (5th Cir. 2005)).

CASE LAW ON CONSENT TO SEARCH

9) In United States v. Mendez, 431 F.3d 420 (5th Cir. 2005), the Fifth Circuit stated that "[t]he standard for measuring the scope of ... consent under the Fourth Amendment is that of 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04, 114 L.Ed. 2d 297 (1991). And while objective reasonableness is a question of law, "factual circumstances [like the location of the incident, in remote South Texas near the border (See United States v. Escamilla, 852 F.3d 474, 481 (5th Cir. 2017) (Brignoni-Ponce factors) which can contribute to reasonable suspicion [although agents confessed they had none for this ruse] to look for illegal aliens in a vehicle stop (1) the area's proximity to the border; (2) the area's characteristics; [ ] [here rural nature] ... (4) the agents' previous experience with criminal activity, etc.]] are highly

relevant when determining what the reasonable person would have believed to be the outer bounds of the consent that was given." 431 F.3d at 426 (internal citation omitted).

10) In United States v. Montes-Reyes, 547 F.Supp. 2d 281 (S.D.N.Y 2008), the Court considered the fabrication of exigent circumstances with a ruse at Montes' hotel room where the DEA agents lied saying they were looking for a little girl. What Montes-Reyes did not know of at that time, however, was that Agent Luna was a DEA agent and not a police officer, and that he was not looking for a little girl; rather, he wished to search Montes-Reyes's room for evidence of drug dealing, and had determined to use this ruse to obtain Montes-Reyes's consent to search the room. Id. at 284. Using a totality of the circumstances, the Court found that the verbal consent given by Montes-Reyes was not voluntarily given because a "false claim of a missing child is precisely the kind of 'extreme' misrepresentation of investigatory purpose by which a person is 'deprive[d] ... of the ability to make a fair assessment of the need to surrender his privacy.'" Id. at 291. (emphasis added)

In United States v. Hernandez-Juarez, 2009 U.S. Dist. LEXIS 22031 *10 (West. Dist. Tex. 2009), the Court concluded that "[v]iewing the totality of all the circumstances, the ICE agents entered the most private of spaces, a home, without a warrant and with only a hunch [agents herein testified to no probable cause and no reasonable suspicion--or any reason to be at the Alvarado home] that the person they were looking for would be

inside." "The questioning of a female American citizen with a nursing infant indicates that the agents used their fraudulent entry for the purposes of a general round up once they realized that Junior was not in the premsies."

In the case at bar, the Magistrate, in his analysis did not consider the bulk of the facts to include:

* Alvarados' property location near the border in rural Texas, a notorious illegal alien trafficking area;

* The size and shape of the Alvarado property--a home and out buildings in a gated and fenced property set approximately 150 feet from the highway. After using the ruse to enter the property, the Alvarados [the agents testified at the hearing] were never free to leave, were separated from each other, and restrained in their movements.

* The officers never left the property, but rather restrained the movements of Pedro, Arnoldo, and Marquez (under arrest).

These are material under "reasonable person" analysis of Mendez, supra, and Jimeno, supra, and they were completely dicounted. Further, the Magistrate selected thematic facts (facts that supported his narrative) rather than applying the totality of the situation and facts.

11) In Lewis v. United States, 385 U.S. 200, 208-09, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966), the Supreme Court held that "[I]t has long been acknowledged ... [that] the Government is entitled to use decoys and to conceal the identity of its agents." (citations and footnote omitted); id. at 210. But the right

to deceive, however, is not unbounded. "The various protections of the Bill of Rights ... provide checks upon such official deception for the protection of the individual." Id. at 209. One such limitation is where the government agents' deceptive tactics prevent an individual from making "an essentially free and unconstrained choice" to forego the constitutional protection of a warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 255 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973).

12) The dynamic in the Alvarado case is substantially different when "police officers identify themselves as such but misrepresent their purpose. Because citizens will respond to law enforcement (especially in remote and rural Texas) with a sense of obligation and presumption of trustworthiness, multiple courts have held that facially consensual searches to be invalid where the "consent" was elicited through officers' lies about the nature and scope of their investigations. See e.g. United States v. Bosse, 898 F.3d 113, 115 (9th Cir. 1990) (per curiam) ("A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent.") id. at 115 (stating that "entry ... acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation" violates the Fourth Amendment (quoting United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984)); S.E.C. v. ESM Gov't Sec., Inc., 645 F.2d 310, 316-18 (5th Cir. Unit B May 1981) ("When a government agent presents

himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations."); United States v. Twell, 550 F.2d 297, 300 (5th Cir. 1977) (finding consent vitiated by misrepresentation was civil, not criminal); People v. Daughtery, 161 ILL. App. 3d 394, 374 N.E. 228, 233, 112 ILL. Dec. 762 (ILL. App. Ct. 1987) (Cohene, as here, the law enforcement officer without a warrant uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises when, in fact, his real reason is to search inside for evidence of a crime, we find that this deception under the circumstances is so unfair as to be coercive and renders the consent invalid") c.f. United States v. Watzman, 486 F.3d 1004, 1007 (7th Cir. 2007); United States v. Turpin, 707 F.2d 332, 334 (8th Cir. 1983) (upholding lawfulness of consent search, but stating that "[m]isrepresentations about the nature of an investigation may be evidence of coercion"). This is exactly what the agents did here, used a ruse, "We are looking for illegal aliens, can you help us?"

13) Courts are further troubled by the public policy implications. "Courts troubled by agents' lies about the searches they seek to conduct have worried that condoning such falsehoods 'would obliterate citizens' widely shared social expectations that they may place some modicum of trust in the words of government officials acting as such,' with that lack of trust

providing 'catastrophic consequences'." Parson, 599 F.Supp. 2d at 606. The Fifth Circuit observed that private individuals have "the right to expect that the government, when acting in its own name, will behave honorably." ESM Gov't Serv., Inc., 645 F.2d at 316. (We think it clearly improper for a government agent to gain access ... which would otherwise be unavailable to him by involving the private individual's trust in his government, only to betray that trust.) Id.

See also Parson, 599 F.Supp. 2d at 606 ("Society expects that law enforcement officers who present themselves and show badges will be honest and forthright with the community that they serve.")

The Eleventh Circuit in United States v. Spivey, 861 F.3d 1207, 1214 (11th Cir. 2017) (Acknowledged that "fraud, deceit, or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable.") (quoting United States v. Prudden, 424 F.2d 1021, 1032 (5th Cir. 1970).

14) In short, the analysis on both sides of the issue is not so one-sided as the Magistrate presents and especially in view that the Alvarados' allegations were not controverted in any way--not even by a sintilla of the evidence--by the government. As such, counsel was ineffective for failing to pursue this issue on appeal.

15) The standards used by the Magistrate are not correct. Alvarado does not need to establish that he would prevail, rather that counsel was not functioning properly by no raising this

issue on appeal. The prejudice factor is more subtle than the Magistrate postulates. The standard is whether the result of the proceeding would be different--not whether it would result in an acquittal.

The jury was hung on one (1) charge, and had the evidence been excluded, as no other exception was even argued by the Government (i.e., inevitable discovery, etc.), the high probability was that the case would have been resolved differently on at least one (1) other count.

16) In discussing the Court's general consensus on the types of deception used by lying police, the Spivey Court noted that "when an officer lies about the existence of exigent circumstances [presence of illegal aliens in a residence],[1] he also suggests that the occupant has no right to resist and may

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1. In the Rio Grande Valley (totality of circumstances) Border Patrol vehicles are ubiquitous. One of the major points of entry of illegal aliens is across the Texas-Mexico border. The United States is building a wall/fence to stim the tide of illegal immigrant crossings. ICE agents, Border Patrol agents, along with DEA agents, Customs officials, and local police are constantly pursuing illegals across farms, ranches, back yards, and into houses. While the presence of illegal aliens north of the Hwy 77 and Hwy 281 check points might reasonably be argued to be not exigent circumstances, below those two (2) check points, the search for illegal aliens and the drugs or human trafficking involved therewith is exigent circumstances (the U.S. has deployed tens of thousands of troops along the border to stop the "invasion" of aliens).

face immediate danger if he tries. Spivey, 861 F.3d at 1213 (citing United States v. Harrison, 639 F.3d 1273 (10th Cir. 2011) (agents falsely claimed a bomb was planted in an apartment); Montes-Reyes, supra, (false statement to search for missing girl); Krause v. Commonwealth, 206 S.W. 3d 922, 926 (Ky. 2006) (false report of rape occurring on the premises); People v. Jefferson, 43 A.D. 2d 112, 350 N.Y.S. 2d 3, 4 (N.Y. App. Div. 1973) (per curiam) (possible gas leak); c.f. United States v. Hardin, 539 F.3d 404, 424-25 (6th Cir. 2008) (non-existent water leak).

17) The pantheon of lies told, apparently, by police is infinite and all too often blessed by the courts (falsities perpetuated by the Government undermine the Republic, and Courts, apparently the only honest branch left in our government, should not countenance such repugnant conduct. Police should do the right thing and Courts should not condone their conduct when they do not.

The Supreme Court weighed in on dishonorable police conduct. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that, in the end, life and liberty can be as much endangered from illegal methods used to convict [in this case, to gather evidence] those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-21 (1959).

18) More recently, Courts have noted this under the public policy paradigm. Montes-Reyes, 547 F.Supp. 2d at 288 n.10 ("the

potential public policy hazard created when police officers 'make false claims of exigent circumstances"); United States v. Girardo, 743 F.Supp. 152, 154 (E.D. N.Y. 1990) (Emergency warnings cannot be trusted (whether they be law abiding or law breaking)); see also Krauze, 206 S.W. 3d at 926 (if the court sanctioned ruse of false report [here, of illegal aliens] of a young girl's rape, "citizens would be discouraged from 'aiding to the utmost of their ability in the apprehension of criminals' since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them" (quoting Schneckloth, 412 U.S. at 243)).

18) Academia has recognized this pernicious practice.[2] Laurent Sacharoft, Trespass and Deception, 2015 B.Y.U.L. Rev.

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2. The courts in the Rio Grande Valley, primarily State courts, but some Federal courts as well, have far too long tolerated the most abusive of police actions. From threatening first generation Mexican-Americans that C.P.S. will come take their children if they do not consent to a search (a favorite of the City of Pharr police department) to the situation here at bar of advising that "we have a report of illegal aliens being inside" and the full gambit in between.

Further, it is not as though any other (currently) area of the country has as many prosecutions for police corruption as the Rio Grande Valley. Sheriffs, District Attorneys, Attorneys, Pharr police officers, Border Patrol agents, etc., fill the news as being prosecuted. And while the lure of drugs and/or human trafficking and corruption is perversive--this "culture of lawlessness" as asserted by the Honorable Judge Crane does not begin with the citizenry at large, but with the blind eye that the Courts have heretofore turned to corrupt policy practices--excusing them at every turn.

How can the Courts have even created multiple categories of lies told by uniformed police to determine which lies are countenanced as permissible lies and others as not permissible? (Rhetorically) This dystopia of police lying is at the heart of our country's political demise and must stop. Our highest institutions of military training, the U.S. Military accademies have an honor code: "I will not lie, cheat, or steal, nor tolerate anyone who does." Until the Courts impose honorable conduct on the police as well as the citizens before it (no question this Court has sentenced defendants to enhancements under the U.S.S.G. for either perjury or obstruction of justice,

359, 381-82 (discussing the "line of cases" in which "police lie in such a way that the resident feels no choice but to allow the search"); see also 4 Wayne R. LaFave, Search and Seizure: A Tretise on the Fourth Amendment, §8.2(n) (5th ed. 2017) (noting that "[t]he critical fact in Jefferson [the gas leak ruse] ... was that the police in effect deprived the defendant of a free choice in deciding whether to surrender his privacy, for they made it falsely appear that a failure to permit entry might result in injury to persons or property").

20) While the "fact specific" nature of the analysis from the totality of the circumstances test is still the law within this murky area of analysis concerning consents [to search] obtained by deception as to purpose, it is certainly much less clear than the Magistrate intimated and appellate counsel should have pursued it. 4 Search and Seizure, §8.2(n). Courts have uniformly recognized that the Fourth Amendment is violated when consent is obtained through police lies conveying or implying exigent circumstances to necessitate the search. See Bumper,

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but never varied downward for the Government's false statements or obstruction of justice) the "culture of lawlessness" that begins with the police and permeates out into the population will continue.

In the context of Strickland, it is fundamentally unfair for Courts to tolerate perjury, lies, obstruction of justice on either side, and when it occurs on the police side to impose draconian elemental analysis (six factor test) on a non-legally trained, English as a Second Language, first-generation Mexican American fighting for his freedom, is not only fundamentally unfair, it is unAmerican!

391 U.S. at 548-49 (stating that the Government's burden of proving that consent was "freely and voluntarily given" "cannot be discharged by showing no more than acquiescence to a claim of lawful authority"); See also 4 Search and Seizure, §8.2(n) (noting that "[o]ne factor very likely to produce a finding of no consent under Schneckloth voluntariness test is an express or implied false claim by the police that they can immediately proceed to make the search in any event" (footnotes omitted, emphasis added) [exactly what happened here]; 2 Wayne R. LaFave et al., Criminal Procedure §3.10(c) (4th ed. 2017) (consent obtained by means of "extreme" misrepresentations that allow no meaningful option to refuse "should not be considered valid").

21) In short, the totality of the circumstances noted herein belies the black and white rendition of the Magistrate's (R&R) and appellate counsel should have raised the law enforcement ruse on direct appeal and was ineffective for failing to do so. The Magistrate's six (6) part analysis, argued herein arguendo without adopting same and while noting the Magistrate left out significant factual analysis as well, should have been the government's position--allowing for rebuttal by Alvardo and not that of a neutral Magistrate (unless postulating the position of one of the parties). It was not, and Alvarado objects.

22) The Magistrate's tactic, in trying to save the conviction instead of being a "neutral Magistrate" undermines the "fundamentals of fairness" countenanced by an impartial

arbiter. Rather than Alvarado arguing against the Government's position before a neutral Magistrate, Alvarado is objecting to a R&R which raises entirely new arguments sua sponte by the Magistrate. Were it issues of law, that would be a separate matter. But here, where it is a mixed question of law and fact, supported by none of the Government's postulations, the Magistrate has gone far afield in his search for a saving argument (in Arguendo, not adopting same).

28 U.S.C. §455

23) With all due deference to the Magistrate regarding the appearance of bias, the Magistrate errs in his analysis. The Court made a series of comments pre-trial (suppression hearing) in response to plea discussions, during the sentencing hearing and trial ("Jurors confused on the attempted-murder" charge). All taken together indicate that the Court was seeking, from pre-trial forwards, a specific outcome. During sentencing when Alvarado's counsel objected, the Court clarified that "these vigilantes" did not result from the case at hand, but a hypothetical. (Doc. 539, Day Four Jury Trial at 44-45).

24) Had the Court substituted the term "blacks, Asians, Hispanics, whites, transsexuals, gays, lesbians, Muslims, Catholics, goat-ropers, or other slang (white supremecist), or derrogative term to identity the defendants as a member of an undesirable class, creed, religion, group, etc., especially when the case was not about that group's specific conduct, but solely these two (2) individuals, that appearance under 28 U.S.C. §455 would

not even be questioned.

In the United States, defendants are not impugned because of their standings, classifications, or associations, and the Court's comments (not his beliefs) is the crux of the 28 U.S.C. §455 analysis. A white judge can have an express bias against "white supremecists" that disgust is not limited only to other races. A Hispanic judge can hold a disgust for particular "types" of other Hispanics. Hispanics are not a monolythic group who all hold the same beliefs (religion, political, or otherwise).

The §455 analysis is not what was done, but what was the appearance. Counsel noted it and took exception. The Court clarified, "I did not describe your client." The only other interpretation was the Court's acknowledgment of a long-held belief regarding a class of individuals, to whom the Court ascribes the defendant's membership. The implication is plain, and the appearance of bias attaches.

MISSPOKE DEFENSE -

24) It is clear that counsel's mis-advice on the record is fatal to the case. The idea that a factual error that is on the record needs to be buttressed by other evidence is nonsensical (Alvarado laments having to argue against the Magistrate as opposed to opposing counsel, and purposes no disrespect).

Imagine what the Magistrate's argument countenances. "Judge, I misspoke when I pleaded guilty. We talked about it in private off the record, so withdraw my guilty plea." (Court to counsel)

"What say you, counsel?" (Counsel is silent.) "Well, I guess I have no other choice, guilty plea is withdrawn." In what world does that exist?

The Fifth Circuit, in its bench book, has a dileneated colloquy:

"How do you plead?"

"And you are pleading guilty because you are in fact guilty?"

"Has anyone coerced you, threatened you, etc. ..."

to ensure that a plea is, in fact, guilty.

But here, speculation reigns. "Defense counsel must have meant this." Do we speculate when other pronouncements are made in court? We do not. Both the trial court and the prosecutor had a duty to correct trial counsel--they did not. The Court is well aware of the large number of defendants who try and recant their pleas or allege they misspoke. The Court does not grant quarter. There is no, from the time of the Assize of Claradon in 1166, through Blackstone, to the modern day, an affirmative defense of "mis-spoke" in open court. This is, in part, the reason for the solemnity, pomp, the public oaths, etc. (everyone knows to tell the truth in court), to denote the importance of the proceedings at hand.

The misadvising of a defendant of his right to testify, not corrected by the trial court or the prosecutor is subject to the prejudicial analysis.

However, that analysis cannot be made blindly without trial counsel's controverting affidavit. Alvarado's assertions stand uncontroverted. As the Court is aware, there are thousands

of federal cases both granting and denying Summary Judgments solely on the strength of an uncontroverted affidavit. There is no evidence to rebut Alvarado's Affidavit , noting his desire to testify. His two (2) sons testified. No allegation that Alvarado was anything but truthful with the Government. Based on the trial record, and absent any controverting affidavit, Alvarado's Affidavit regarding his desire to testify at trial substantiates his prejudice.

DAVIS

25) In United States v. Davis, 139 S.Ct. 2319 (2019), the Supreme Court held that 18 U.S.C. §924(c)(3)(B) was unconstitutional.

18 U.S.C. §924(c), "residual clause underlined below," provides:

> An offense that is a felony and--
>
> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

26) The Magistrate discusses the predicate convictions, 18 U.S.C. §§111(a)(1) and (b) and 18 U.S.C. §2. Next, omitted from the discussion is the enhancement convictions of §924(c)(1)(A) §924(c)(1)(A)(iii), and 18 U.S.C. §2.

27) The crux of the Magistrate's argument is:

* Pedro was convicted under 18 U.S.C. §111(b) not §111(a), which is enhanced by §111(b);

* Aiding and Abetting offense is treated the same as the principal offense;

* Under Rosemond v. United States, "the government makes its case [when aiding and abetting is charged along with a §924(c) count] by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission."

(R&R, pp. 46-48, fn.43-45).

Respectfully, the Magistrate's underlying presumptions are incorrect. The Magistrate's predicate principals:

* Pedro was convicted of 18 U.S.C. §111(b) and 18 U.S.C. §2

* Pedro was convicted of 18 U.S.C. §924(c) and 18 U.S.C. §2

does not equally stand up to his conclusion that "Pedro was therefore convicted under the element clause rather than the residual clause of 924(c)(3)(B)."

28) The agent-principal analysis is flawed (as argued under aiding and abetting). The Government charged both Pedro and Arnoldo as both principal and agent (18 U.S.C. §§111(a), 111(b) (principal), and 18 U.S.C. §2 (agent) (co-conspirator plus an affirmative act)). The Government charged Pedro and Arnoldo both principal and agent (18 U.S.C. §924(c) (principal) and 18 U.S.C. §2 (agent)).

29) There are, therefore, multiple pairings under these charges which could lead to conviction:

* Arnoldo could be the principal in 18 U.S.C. §111(a) and §111(b), and Pedro could be the agent in 18 U.S.C. §2. There is no merger doctrine here; aiding and abetting is a distinct charge.
* Pedro could be the principal in 18 U.S.C. §111(a) and §111(b), and Arnoldo could be the agent in 18 U.S.C. §2.
* Arnoldo could be the principal in §924(c), and Pedro could be the agent in 18 U.S.C. §2.
* Pedro could be the principal in §924(c), and Arnoldo could be the agent in 18 U.S.C. §2.

30) The jury was never asked to decide which pairing it relied upon to convict Arnoldo and Pedro.

31) The Magistrate concludes that under the modified categorical approach, it is conclusive that Pedro was convicted of 18 U.S.C. §111(b) (independent of §111(a)), and because aiding and abetting (18 U.S.C. §2) are punished the same as the principals, he is therefore guilty under §924(c). But the Magistrate's logic is "a bridge too far."

The Magistrate succintly makes his argument (R&R, pp. 48-49):

> "All who have shared in [the overall crime's] execution ... have equal responsibility before the law, whatever may have been [their] different roles. [ ] With the enactment of [§2], all participants in

> conduct violating a federal criminal statute are 'principals.' As such they are punishable for their criminal conduct; the fate of the other participants is irrelevant. Under general aiding and abetting statute, a person who aids and abets the commission of an offense is treated the same as a principal actor. Because a person convicted of aiding and abetting a crime of violence is treated the same as a principal, [Pedro]'s argument that his aiding and abetting conviction must fall under the residual clause is baseless." (internal citations omitted)

This conclusion ignores the central point. A charge of Aiding and Abetting cannot stand alone. Both Pedro and Arnoldo were charged with subsentively being the principal, and both subsentively being the aider and abetter. The Government's catch-all methodology (i.e. kill them all, let God sort them out) is what is at the root of the dispute. The proverbial "cake and eat it too" mentality, that they can overcharge defendants as principal, aider and abetter, etc. ... and something is bound to stick, falls flat under the "void for vagueness" doctrine that is at the heart of Johnson, Dimaya, and Davis.

32) Section 924(c) correctly reads now: [the definition of a qualifying felony]:

> An offense that is a felony and--
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another ...

The crime of Aiding and Abetting does not have those elements. And while there is disagreement with the Magistrate on his 18 U.S.C. §111(a) and §111(b) dichotomy, that analysis is irrelevant. The Alvarados were charged as aiders and abetters, and while his analysis is correct for purposes of the primary offense (assuming that Marquez was the principal (the 18 U.S.C. §111(a) and (b)) (in arguendo) and that Marquez was charged in this case--he was not), it is not correct for the §924(c) definition. The point of Rosemond, decided in 2014, when the residual clause of §924(c) was constitutional, or better, was yet to be declared unconstitutional (pre-Johnson, pre-Dimaya, all of which have sounded the alarm and this continual drum beat of void for vagueness in statutes) is that Aiding and Abetting charges do not cure the Government's ailing charging practices. Aiding and Abetting attached to everything (as has been the policy of the D.O.J. for decades) is not a panacea that cures all errors of charging instruments to get around void for vagueness statute prohibitions.

33) The simple fact remains, despite the heroic efforts of the Magistrate to save the conviction(s), that Aiding and Abetting, which was how the Alvarados were charged, does not meet the definition of a crime of violence under §924(c)'s elements clause, and does not survive Davis. The §924(c) charge cannot stand by the plain terms of the definition of the elements clause that remains, and the §924(c) charge (independent of the other arguments herein) must be dismissed.

As Justice Scalia teaches, "The words of a governing text [here §924(c)'s definition of crime of violence] are of paramount

concern, and what they convey, in their context, is what the text means." Scalia, Antonin & Garner, Bryan, Reading Law, p.56 (2012).

In Justice Scalia's treatise, he posits that the "Supremacy-of-Text Principal" of interpreting law thusly:

> "... the purpose [of the legislation] must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decision maker." The methodology of the Magistrate. "Assume a text that requires the losing litigant to pay the winner's attorney's fees; and assume further that the interpretive question is whether expert-witness fees are included." In the case at bar, whether aiding and abetting is included under §924(c)'s elements clause. "It is clear enough that in normal usage, expert-witness fees are not included." Id. at 56-57.

No question that before Davis, the residual clause would have incorporated all of the Magistrate's arguments. Aiding and Abetting "by its nature, involves a substantial risk that physical forces against the person or property of another may be used in the course of committing the offense."

That is what is wrong with the residual clause. Vagueries. The "Rule of Lenity" demands it. "Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." Id. at 296.

34) When reading statutes in conjunction (18 U.S.C. §2) and (18 U.S.C. §924(c)'s "crime of violence definition"), secondary and tertiary statutes (whether 18 U.S.C. §111(a) and (b) or 18 U.S.C. §1343) cannot be transmorphed into crimes of violence any more than conspiracy can. They are separate offenses. While Aiding and Abetting offenses are punished the same as a principal (just like conspiracy), they are not the principal, and after Johnson, Dimaya, and Davis, cannot support a conviction under §924(c).

C.O.A.

35) As noted throughout, multiple jurists disagree with the Magistrate's interpretation and application of the law and facts, and under Slack and Barefoot, C.O.A. should issue.

CONCLUSION

For these reasons, and those objections and waivers incorporated herein filed previously by the Alvarados in their underlying filings, the Alvarados object to the Magistrate's Report and Recommendation.

PRAYER

Alvarado would request that the Objections to the Magistrate's Report and Recommendation be sustained and that §2255 writ shall issue for all the reasons set forth herein, as well as in the underlying petitions and replies and supplemental briefing on

Davis. Alvarado would request such other and additional relief to which Alvarado may be entitled whether in equity or in law.

Respectfully submitted,

Pedro Alvarado
Reg. No. 16458-379
FCI-Beaumont-Low
P.O. Box 26020
Beaumont, TX 77720

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy was placed in the BOP legal mail system, properly addressed with postage to the Court and opposing counsel noted below on _____, 2020. I make this declaration pursuant to 28 U.S.C. §1746 and under penalties of perjury.

James L. Turner
AUSA
1000 Louisiana St.
Suite 2300
Houston, TX 77002

_____ _____

Date Pedro Alvarado

VERIFICATION

I hereby assert that the material factual allegations herein are true and correct to the best of my knowledge and belief. I make this verification pursuant to 28 U.S.C. §1746 and under penalties of perjury.

_____ _____

Date Pedro Alvarado

APPENDIX EXHIBIT 6

UNITED STATES OF AMERICA, Plaintiff - Appellee v. PEDRO ALVARADO, Defendant - Appellant;UNITED STATES OF AMERICA, Plaintiff - Appellee v. ARNOLDO ALVARADO, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
630 Fed. Appx. 271; 2015 U.S. App. LEXIS 19808
No. 14-40635 cons/w 14-40641
November 12, 2015, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Alvarado v. United States, 2016 U.S. LEXIS 2120 (U.S., Mar. 21, 2016)

Editorial Information: Prior History

{2015 U.S. App. LEXIS 1}Appeals from the United States District Court for the Southern District of Texas. USDC 7:12-CR-1136.

Counsel For UNITED STATES OF AMERICA (14-40635, 14-40641), Plaintiff - Appellee: Paul Eunkuk Kim, Assistant U.S. Attorney, Renata Ann Gowie, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.
For PEDRO ALVARADO, Defendant - Appellant (14-40635): James Scott Sullivan, Esq., Law Offices of J. Scott Sullivan, San Antonio, TX.
For ARNOLDO ALVARADO, Defendant - Appellant (14-40641): Carlos Andres Garcia, Sr., Esq., Mission, TX.

Judges: Before KING, DENNIS, and OWEN, Circuit Judges.

CASE SUMMARY Defendants were not entitled to a self-defense jury instruction with respect to a charge under 18 U.S.C.S. § 111 of aggravated assault of a federal agent with a deadly weapon; there was insufficient evidence to show that defendants reasonably acted in self-defense when they pursued and fired upon the agent's vehicle after it left their property.

OVERVIEW: HOLDINGS: [1]-Defendants were not entitled to a self-defense jury instruction with respect to a charge under 18 U.S.C.S. § 111 of aggravated assault of a federal agent with a deadly weapon. There was insufficient evidence to show that defendants reasonably acted in self-defense when they pursued and fired upon the agent's vehicle after the vehicle left defendants' property; [2]-One defendant's sentence was not rendered unreasonable by the district court's consideration of his attempt to murder the agent, as the jury's inability to reach a verdict on an attempted murder charge did not preclude a finding that the underlying conduct was proven by a preponderance of the evidence; [3]-Restriction of cross-examination of the agent did not violate the Confrontation Clause, as the restriction excluded only cumulative evidence.

OUTCOME: Judgment affirmed.

Ex 6

71944279

Opinion

{630 Fed. Appx. 272} PER CURIAM:*

This direct criminal appeal arises from the conviction following jury trial of Appellants Pedro Alvarado (Pedro) and **Arnoldo Alvarado** (Arnoldo) for aggravated assault of a federal agent with a deadly weapon, 18 U.S.C. §§ 111(a)(1) and (b) and 18 U.S.C. § 2, and unlawful use of a firearm during and in relation to a crime of violence, 18 U.S.C. §§ 924(c)(1) and (c)(1)(A)(iii) and 18 U.S.C. § 2. For the following reasons, we affirm the judgment of the district court.

I.

Around 3:00 am on July 3, 2012, Rene Garcia-who was{2015 U.S. App. LEXIS 2} allegedly casing the area in preparation for a drug heist-contacted Pedro and informed him that a suspicious vehicle was parked under a tree on the Alvarado family's property.1 Pedro told Arnoldo, then 18 years old, and his other son Marques, then 16 years old, to join him to investigate. Arnoldo and Marques each retrieved a gun and the three got into Pedro's pickup truck and drove down the road towards the suspicious vehicle. The suspicious vehicle was actually the unmarked Jeep of Special Agent Kelton Harrison, who was parked with his engine on and his lights off conducting an undercover stakeout as part of an ongoing Homeland Security investigation. Agent Harrison testified that, upon seeing Pedro's pickup truck slowly approaching, he attempted to leave the property, but he soon heard shots ring out and felt the impact of bullets on both sides of his vehicle. As he accelerated in an attempt to escape, another truck, later discovered to be driven by Garcia and his coconspirators, blocked his Jeep from leaving. Agent Harrison was able to get around Garcia's truck and drive off the property and onto Route 493, but the Alvarados and Garcia continued to pursue Agent Harrison for about{2015 U.S. App. LEXIS 3} three miles. It is undisputed that Arnoldo and Marques continued to shoot their firearms, but there is conflicting testimony about whether the Alvarados fired at Harrison's Jeep {630 Fed. Appx. 273} once they left their family's property: Arnoldo testified that after Harrison pulled onto Route 493 he only shot into the air in an attempt to scare the driver away. Ultimately, Agent Harrison's truck was struck by approximately 12 bullets, one of which struck the agent in the back. Agent Harrison continued north on 493 until he came to a T-intersection, where his vehicle hit a fence and crashed into a field. Agent Harrison ran from his vehicle and hid in a brush of trees for a short period, then crawled back to his vehicle and called for help. Agent Harrison survived and testified at trial to these events.

Pedro and Arnoldo were charged by superseding indictment{2015 U.S. App. LEXIS 4} with attempted murder of a federal officer (Count One); assault of a federal officer by means of a deadly and dangerous weapon (Count Two); and use of a firearm during and in relation to a crime of violence (Count Three). The central facts were uncontested at trial. At the close of the evidence, Arnoldo and Pedro urged the district court to instruct the jury regarding self-defense. The district court denied the request, reasoning that a rational jury could not conclude that either Pedro or Arnoldo was in fear for his life or was reasonable in his use of force during the three-mile pursuit of Agent Harrison.

The jury convicted Pedro and Arnoldo of Counts Two and Three, but could not reach a verdict on Count One, the attempted murder charge. Pedro was sentenced to a non-Guideline sentence of 120 months' imprisonment on Count Two and 120 months' imprisonment on Count Three, to be served consecutively for a total of 240 months. Arnoldo was sentenced to 72 months' imprisonment on Count Two and 120 months' imprisonment on Count Three, to run consecutively. Pedro and Arnoldo

separately appealed, and this court *sua sponte* consolidated their cases.

II.

Pedro and Arnoldo both contend that the district {2015 U.S. App. LEXIS 5} court erred by declining to charge the jury with a self-defense instruction. "We review *de novo* a district court's refusal to offer an instruction for a criminal defense that, if credited, would preclude a guilty verdict." *United States v. Theagene*, 565 F.3d 911, 917 (5th Cir. 2009); *see also United States v. Bradfield*, 113 F.3d 515, 521 (5th Cir. 1997); *United States v. Gentry*, 839 F.2d 1065, 1071 (5th Cir. 1988). The requested charge is such an instruction.

As the Supreme Court held in *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1998), "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Evidence is "sufficient" where it "raise[s] a factual question for a reasonable jury." *United States v. Branch*, 91 F.3d 699, 712 (5th Cir. 1996). Although "[a] district court cannot refuse to give an instruction for which there is sufficient evidence in the record for a reasonable juror to harbor a reasonable doubt that the defendant did not act in self defense, . . . the district court is not required 'to put the case to the jury on a basis that essentially indulges and even encourages speculations.'" *Id.* (quoting *United States v. Collins*, 690 F.2d 431 (5th Cir. 1982)). Rather, all evidence must be considered in the context of the entire record. *See id.*

In *United States v. Feola*, 420 U.S. 671, 684, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975), the Supreme Court held that a conviction for assault of a federal officer under 18 U.S.C. § 111 requires "an intent to assault, not an intent to assault a federal officer." However, the Court made {2015 U.S. App. LEXIS 6} clear that there could be some situations in {630 Fed. Appx. 274} which ignorance of the officer's status would negate criminal intent:

> For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent. *Id.* In order to warrant an acquittal under a theory of self-defense, a defendant charged under § 111 must produce evidence demonstrating that he was unaware of the federal officer's identity and reasonably believed that the officer intended to damage his home or injure his family. *United States v. Ochoa*, 526 F.2d 1278, 1281 (5th Cir. 1976). In other words, the ultimate question is "whether [the defendant] believed that he needed to defend himself against an assault by a private citizen." *United States v. Kleinebreil*, 966 F.2d 945, 951 (5th Cir. 1992).

Appellants liken their case to *United States v. Young*, 464 F.2d 160, 163 (5th Cir. 1972), where this court held the jury should have been instructed that it could not find the defendant guilty under § 111 if it believed that he acted out of a reasonable belief that the federal agents were strangers who intended to inflict harm on him. {2015 U.S. App. LEXIS 7} But *Young* both applies an outdated legal standard and is factually distinguishable from the case at hand. The *Young* court determined that there was "any foundation in the evidence" to support a finding that Young believed that the federal officers "intended to inflict harm upon [him]." *Id.* at 163-164. A rule that entitled a defendant to a jury instruction if it was supported by "any evidence" was expressly rejected by this court in *Branch*. 91 F.3d at 713 ("[I]t is not enough that an item of evidence viewed alone and unweighed against all the evidence supports an inference that a defendant acted in self defense."). Furthermore, unlike in *Young*, where evidence showed that the agents' car "abruptly pulled in front of Young's" and Young "thought he was being harassed by local rowdies," 464 F.2d at 161, 163, no evidence was presented to suggest that, when Agent Harrison was shot, the Appellants reasonably believed that he intended

to inflict harm upon them.

The only evidence that even suggested that Arnoldo and Pedro acted out of fear for their safety-Arnoldo's testimony that he and his father thought that Agent Harrison was a stranger intruding on their property, that his family was recently the victim of an armed intruder, and that he heard shots{2015 U.S. App. LEXIS 8} fired before he or his brother fired their weapons-was insufficient to show that they reasonably acted in self defense when they pursued and fired upon Agent Harrison's fleeing vehicle. *See Branch*, 91 F.3d at 712. Agent Harrison did nothing aggressive but began his attempt to escape as soon as Pedro drove towards his vehicle. It was not contested that Pedro and his sons sought out Agent Harrison's vehicle, that Arnoldo and his brother fired upon Agent Harrison's vehicle as it attempted to leave the Alvarados' property, or that Pedro pursued Agent Harrison, at high speeds, for over three miles. Arnoldo and his brother did not testify that they saw muzzle flashes coming from Agent Harrison's vehicle or that that they definitely believed that the gunshots they heard came from the Jeep. Nor was evidence presented to contradict Agent Harrison's testimony that he felt the impact of a bullet on his back when he was already over a mile away from the Alvarados' property. Considering the record as a whole, the evidence was insufficient for a reasonable jury to find in Appellants' favor. The {630 Fed. Appx. 275} district court therefore did not err when it denied the self-defense jury instruction.

III.

Pedro contends that the non-Guideline{2015 U.S. App. LEXIS 9} sentence of 120 months imposed by the district court for Count Two was substantively unreasonable and that the upward variance was impermissibly based on conduct for which he was acquitted, namely the attempted murder of Agent Harrison. This court reviews a sentence for reasonableness using a two-step process: first, the court must ensure that the district court did not commit any significant procedural error; then, the court must consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard, taking into account the totality of the circumstances. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). When reviewing a non-Guideline sentence-that is, a sentence either higher or lower than the relevant Guideline range-this court may not apply a presumption of unreasonableness. *Id.* The reviewing court "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* The sentencing court's factual findings are reviewed for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (quoting *United States v. Juarez Duarte*, 513 F.3d 204, 2008 WL 54791, at *3 (5th Cir. 2008)).

A district court may impose a non-Guideline sentence if it first calculates the Guideline range and considers it advisory, using the appropriate Guideline{2015 U.S. App. LEXIS 10} range as a "frame of reference." *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). The district court must "more thoroughly articulate its reasons when it imposes a non-Guideline sentence than when it imposes a sentence under authority of the Sentencing Guidelines" and ensure that its reasons are consistent with the factors enumerated in 18 U.S.C. § 3553(a). *Id.* These factors include the nature and circumstances of the offense and the history and characteristics of the defendant and the need for the sentence imposed to reflect the seriousness of the offense. In *United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), the Supreme Court held a sentencing court may consider conduct underlying a charge for which the defendant was acquitted "so long as that conduct has been proved by a preponderance of the evidence." *See also United States v. Vaughn*, 430 F.3d 518, 526-27 (5th Cir. 2005) (stating that *Watts* remained valid after *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)); *United States v. Partida*, 385 F.3d 546, 565 (5th Cir. 2004) (explaining that because the standard of proof at sentencing is lower than the proof necessary to convict at trial, the scope of a sentencing court's fact finding is not limited to

considering only the conduct of which the defendant was formally charged or convicted); *United States v. Cathey*, 259 F.3d 365, 368 (5th Cir. 2001) (citing *Watts* and rejecting defendant's argument that district court was precluded from sentencing him on conduct for which the jury was unable to reach a verdict).

Pedro does{2015 U.S. App. LEXIS 11} not contend that his sentence was procedurally unreasonable, and there is no evidence of procedural error. Pedro argues that his sentence was substantively unreasonable because it was based on the attempted murder charge, the one charge on which the jury could not agree. He asserts that the fact that the jury could not reach a verdict precludes a finding that the underlying conduct was proven by a preponderance of the evidence. However, as the Supreme Court {630 Fed. Appx. 276} noted in *Watts*, "an acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt." 519 U.S. 148, 155, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir.1996) (Wallace, J., dissenting)). As this court has repeatedly stated, "a finding of fact is clearly erroneous only if a review of all the evidence leaves [the reviewing court] with the definite and firm conviction that a mistake has been committed." *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011) (quoting *United States v. Castillo*, 430 F.3d 230, 238 (5th Cir.2005)) (internal quotation marks omitted). The trial testimony indicated that Pedro involved his children, one of whom was a minor, in a high-speed chase that left the Agent Harrison's vehicle riddled with bullets and the agent himself in the ICU. The PSR set forth that Arnoldo{2015 U.S. App. LEXIS 12} told officials that he fired over 15 rounds of ammunition and his brother fired at least six rounds as Pedro pursued Agent Harrison for several miles. In light of the record, the district court's finding that Pedro's conduct was egregious, consisting of the "relentless pursuit of [a] fleeing human being in an attempt to murder the person, in an attempt to kill the person," was not clearly erroneous. As a result, the district court's reliance on that finding in deviating from the guidelines-consistent with the factors enumerated in § 3553(a)-did not render Pedro's sentence substantively unreasonable.

IV.

Arnoldo contends that the district court violated his Sixth Amendment right of confrontation when it refused to allow cross-examination of Agent Harrison on the issue of the federal agents' "bungled operation." Whether the Confrontation Clause issue was properly raised at trial determines the appropriate standard of review: This court reviews any Confrontation Clause issues that were not contemporaneously raised at trial for plain error only, while Confrontation Clause issues that were properly raised at trial are reviewed *de novo*, subject to harmless error analysis. *United States v. Octave*, 575 F. App'x 533, 537 (5th Cir. 2014) (citing *United States v. Acosta*, 475 F.3d 677, 680 (5th Cir.2007)). Where there has been no constitutional violation, this court reviews a district court's limitations{2015 U.S. App. LEXIS 13} on cross-examination for an abuse of discretion, "which requires a showing that the limitations were clearly prejudicial." *United States v. Skelton*, 514 F.3d 433, 438 (5th Cir. 2008) (citing *United States v. Jimenez*, 464 F.3d 555, 558-59).

A defendant's constitutional right to cross-examine witnesses against him is secured by the Confrontation Clause of the Sixth Amendment. *United States v. Mayer*, 556 F.2d 245, 248 (5th Cir.1977). Cross-examination "is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 559. "The Confrontation Clause is satisfied where defense counsel has been allowed to expose the jury to facts from which the jury could appropriately draw inferences relating to the reliability of the witness." *Heard*, 709 F.3d at 432. This court has recognized that a district court has "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive

or only marginally relevant." *United States v. Heard*, 709 F.3d 413, 432 (5th Cir. 2013) (internal quotation marks and citation omitted). However, "a judge's discretionary authority to limit the scope of cross-examination comes **{630 Fed. Appx. 277}** into play only after the defendant has been permitted, as a matter of right, sufficient cross-examination to satisfy the Sixth Amendment." *United States v. Davis*, 393 F.3d 540, 548 (5th Cir. 2004).

Arnoldo objected to the restrictions on cross-examination,**{2015 U.S. App. LEXIS 14}** but not on Confrontation Clause grounds. We need not determine whether his objection properly raised the issue, however, because his constitutional claim lacks merit. Decisions of the Supreme Court and of this court recognize that restrictions on the scope of cross-examination can violate the Confrontation Clause. *E.g. Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *United States v. Morris*, 485 F.2d 1385, 1387 (5th Cir. 1973). However, these cases make clear that the concern with such restrictions is that they might undermine the purpose of cross-examination by denying defense counsel the opportunity "to delve into the witness' story to test the witness' perceptions and memory, [and also] . . . to impeach, *i.e.*, discredit, the witness." *Davis*, 415 U.S. at 316. Therefore, to establish a violation of the right to confrontation, a defendant must establish that "a reasonable jury might have received a significantly different impression of the witness's credibility had defense counsel been permitted to pursue his proposed line of cross-examination." *Skelton*, 514 F.3d at 439-40 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (internal alterations omitted). Here, Arnoldo does not allege that his inability to cross-examine Agent Harrison about the nature of the operation prevented him from exposing the witness's biases or motives. Instead, he contends that the restriction denied him the opportunity to elicit testimony**{2015 U.S. App. LEXIS 15}** that was "at the very core of the Appellant's self-defense claim," testimony that might establish that Agent Reneau knew that there might be counter-surveillance the night that Agent Harrison was shot and that his injury might have been prevented if Reneau had informed him and his team of that fact. Not only did the restriction on cross-examination not change the jury's perception of Agent Harrison's credibility, but defense counsel did in fact elicit testimony from Agents Jean-Paul Reneau and Harrison about the poor planning of the Homeland Security operation: before the Government objected, Agent Harrison conceded that he was concerned about the lack of a formal plan, and Agent Reneau admitted that he deviated from normal operating procedure by obtaining only verbal approval for the surveillance conducted on the night of the shooting.

The restriction on cross-examination did not change the jury's perception of Agent Harrison's credibility; it excluded only cumulative evidence testimony regarding Agent Harrison's frustration with Agent Reneau's handling of the surveillance operation. Such a restriction neither violates the dictates of the Sixth Amendment nor is so prejudicial as to constitute an**{2015 U.S. App. LEXIS 16}** abuse of discretion. *See, e.g., United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993) (no constitutional violation and no abuse of discretion where, despite a restriction on cross-examination, the jury could have inferred that the witness was biased); *United States v. Vasilios*, 598 F.2d 387, 390 (5th Cir. 1979) (defendant was not prejudiced by the restrictions placed on his counsel's cross-examination of key government witness where "[t]he jury was sufficiently apprised of other bases on which [the defendant's] credibility was vulnerable to attack").

V.

Arnoldo argues that the district court erred when it overruled his objection **{630 Fed. Appx. 278}** to the instruction in the jury charge that he need not have known he was assaulting a federal agent. Supreme Court case law is clear that to be convicted of assault on a federal officer, the defendant need not have the specific intent to assault a *federal officer*-rather, the intent to assault is sufficient. *See Feola*, 420 U.S. at 684. The defendant's ignorance of the victim's official status may negate

criminal intent where the circumstances otherwise justify the use of force, *see id*; however, the defendant's knowledge of his victim's identity is not an element of the offense. The district court therefore properly denied Arnoldo's objection to the jury instruction on this ground.

VI.

For the foregoing{2015 U.S. App. LEXIS 17} reasons, the judgment of the district court is AFFIRMED.

Footnotes

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Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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More specifically, Pedro was informed that a suspicious vehicle was parked under a tree near Arnoldo and Marques's aunt's house, at the intersection of 11th Street (Cemetary Road) and Route 493 in Hargill, TX, which is approximately a quarter mile from the Alvarados' home. Marques testified that the aunt had moved away and left the house in his family's care.