Appendix A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 6, 2021
Lyle W. Cayce
Clerk

No. 20-50199

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MANUEL GERARDO VELASQUEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
No. 3:18-CV-365

O R D E R:

The district court denied habeas corpus relief and a certificate of appealability ("COA"). Petitioner seeks a COA from this court.

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). This entails "demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Petitioner fails to make the required showing. Accordingly, his motion for a COA is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MANUEL GERARDO VELASQUEZ,	§	
Reg. No. 23599-380,	§	
Movant,	§	**SEALED**
	§	**EP-18-CV-365-KC**
v.	§	**EP-13-CR-1726-KC-1**
	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Manuel Gerardo Velasquez challenges his life sentence through a pro se motion under 28 U.S.C. § 2255 (ECF No. 1216).[1] After reviewing the record and for the reasons discussed below, the Court concludes Velasquez is not entitled to § 2255 relief and it will deny his motion. The Court will additionally deny Velasquez a certificate of appealability.

BACKGROUND AND PROCEDURAL HISTORY

A large-scale drug transportation business—organized and led by Velasquez—operated from El Paso, Texas, and Ciudad Juarez, Chihuahua, Mexico, from January 1997 through August 2013. Initial Presentence Investigation Report, ¶ 20, ECF No. 722 (sealed). It purchased Mexican marijuana in the United States from other drug-trafficking organizations. It distributed the marijuana to cities in Texas, Oklahoma, Kansas, Missouri, Illinois, Ohio, Tennessee, and North Carolina. It repatriated the proceeds of the sales to the sources of the marijuana in Mexico.

Various law enforcement agencies investigated Velasquez's organization. They relied on confidential sources, cooperating defendants, Title III intercepted telephone calls, consensual

[1] "ECF No." refers to the Electronic Case Filing number for documents docketed in EP-13-CR-1726-KC-1. Where a discrepancy exists between page numbers on filed documents and page numbers assigned by the ECF system, the Court will use the latter page numbers.

recorded telephone calls, pen registers, and surveillance to develop a case against Velasquez and multiple co-defendants. Their investigation led to the seizure of 4,776 kilograms of marijuana and revealed Velasquez's organization trafficked an additional 20,103 kilograms of marijuana. In addition, the investigation led to the seizure of $13,117 in drug proceeds and the identification of an additional $22,639,000 of drug proceeds repatriated to Mexico.

On August 7, 2013, a grand jury in the Western District of Texas returned a thirteen-count indictment charging nineteen subjects with various drug-trafficking and money-laundering offenses. Indictment, ECF No. 60. The indictment charged Velasquez with engaging in a continuing criminal enterprise (Count One); conspiring to possess with the intent to distribute 1,000 kilograms or more of marijuana (Count Two); conspiring to launder monetary instruments (Count Three); possessing with the intent to distribute 1,000 kilograms or more of marijuana and aiding and abetting (Counts Four and Five); conspiring to possess with the intent to distribute 100 kilograms or more of marijuana and aiding and abetting (Counts Six, Seven, Ten, and Eleven); maintaining a manufacturing site for the purpose of distributing marijuana (Counts Eight and Nine); and conspiring to possess with the intent to possess a quantity of marijuana and aiding and abetting (Counts Twelve and Thirteen). *Id.*

On August 15, 2013, Velasquez was apprehended by Mexican police at his home in a gated community in Ciudad Juarez. His picture was transmitted by cell phone to Drug Enforcement Administration (DEA) special agents in the United States. He was then delivered by the Mexican police to DEA special agents in the United States. He was extensively photographed while at the port of entry. He told the DEA special agents he voluntarily returned to El Paso to face the charges pending against him. Gov't's Sentencing Memo 1, ECF No. 847 (sealed).

On November 17, 2013, a news article in "Proceso" suggested Velasquez was kidnapped and tortured by the Mexican authorities. *Id.* at 2. On December 20, 2013, Velasquez confirmed to DEA special agents he had talked to a news reporter and a lawyer in Mexico. He admitted the "Proceso" article contained erroneous assertions and facts which were not within his personal knowledge. Velasquez insisted, however, he was assaulted—even tortured—by Mexican police officers. He also claimed he did not voluntarily return to the United States.

On September 10, 2013, Velasquez and his original attorney, Christopher Antcliff, signed a proffer agreement. Velasquez debriefed with agents. He provided detailed information about his drug-trafficking activities. He implicated all his co-defendants charged in the indictment.

On June 17, 2014, the Government delivered a draft plea agreement to Antcliff. Plea Agreement, ECF No. 540 (sealed). The Government proposed if Velasquez pleaded guilty to Counts One, Four, Eight, Nine, and Eleven of the indictment, it would move to dismiss the remaining counts. *Id.* at 1–2. It explained in the plea agreement that the range of imprisonment for Count One was not less than twenty years or more than life, Count Four was not less than ten years or more than life, Counts Eight and Nine were not more than twenty years; and Count Eleven was not less than five or more than forty years. *Id.* at 2. But it offered Velasquez a binding sentencing recommendation under Federal Rule of Criminal Procedure 11(c)(1)(C) for a total offense level of 39. *Id.* at 5. Consequently—based upon a total offense level of 39 and a criminal history category of I—Velasquez's guideline imprisonment range under the agreement was 262 to 327 months in prison.

Velasquez signed the plea agreement. *Id.* at 10. Velasquez then moved to substitute counsel and Gary Hill became his attorney of record. Entry of Appearance and Substitution of

Counsel, ECF No. 552.

The Government discussed the plea agreement—and made the same offer to Velasquez on the record—at a status conference held on August 20, 2014:

> The government has made an offer both to Mr. Antcliff and Mr. Hill and it is the exact same offer. It was to plead him to a level 39. If he were to go to trial . . . and be found convicted, that would be an automatic level 42, I believe. And the offer has never been anything below that level 39. Certainly, nothing that would be around the 10-year mark.

Tr., p. 3, ECF No. 789.

The Court also discussed the plea agreement with Velasquez:

> THE COURT: All right. And so the offer is -- and I saw the plea agreement. The offer was that the total offense level would be 39. And obviously, the probation department would still prepare the -- the presentence investigation report.
>
> But as I recall -- and let me just make sure – it was an 11(c)(1)(C) plea agreement; is that correct?
>
> MR. HILL: Yes.
>
> MR. ACOSTA: Yes, Your Honor.
>
> THE COURT: Binding?
>
> MR. ACOSTA: Yes, Your Honor.
>
> THE COURT: All right. And so I do want you to understand -- and the Court, Mr. Velasquez, obviously, I -- this is your case. I want you to be sure what you want to do.
>
> You're absolutely entitled to a trial, and if you want a trial, this Court will give you a trial. That's not a problem.
>
> You're also absolutely entitled, if you decide you want to plea, to accept the government's offer, you can do that. I want you to be sure of what you want to do. And I want -- and my understanding is that Mr. Hill is -- needs some time talk to you about it.
>
> I do want to make clear to you that an 11(c)(1)(C) plea essentially means that should the Court not follow the recommendation, then you will be allowed to

withdraw your plea.

Do you understand that?

DEFENDANT VELASQUEZ: Yes.

Id. at 4–5. At the conclusion of the status conference, the Court granted Hill's request for additional time for Velasquez to decide whether he wanted to plead guilty or go to trial. *Id.* at 7–8.

The draft amended plea agreement delivered to Hill contained the same Rule 11(c)(1)(C) binding sentencing agreement for a total offense level of 39—without any further increase or decrease in the offense level. Am. Plea Agreement 5, ECF No. 637 (sealed). It also warned Velasquez he could not rely on any estimate of his sentence by his counsel:

> The Defendant understands and agrees that any estimate of the probable sentencing range that may be received from defense counsel . . . is not a promise, did not induce the guilty plea or this waiver, and does not bind the Government, the United States Probation Office, or the Court.

Id. at 6.

Velasquez signed the amended plea agreement. *Id.* at 10.

During the plea hearing on September 9, 2014, the Court asked Velasquez if he had reviewed and understood the amended plea agreement with the binding sentencing recommendation for a total offense level of 39:

> THE COURT: Mr. Velasquez, it's my understanding that you are here today to enter a plea to Counts One, Four, Eight, Nine and Eleven of the -- of a 13-count indictment; is that correct?
>
> DEFENDANT VELASQUEZ: Yes.
>
> THE COURT: And that is, you have a plea agreement with the government; is that correct?
>
> VELASQUEZ: Yes.

> THE COURT: And did you have a chance to go over that agreement and discuss it with your attorney before you signed it?
>
> VELASQUEZ: Yes.
>
> THE COURT: Does that agreement contain -- document contain all of the agreements that you have with the United States [G]overnment?
>
> DEFENDANT VELASQUEZ: Yes.
>
> THE COURT: Has anybody made any other or different promise to you to get you to plead guilty here today.
>
> DEFENDANT VELASQUEZ: No.

Plea Tr. 2–3, ECF No. 790. The Court also explained the effect and limitations of any advice Velasquez might have received during the plea process on his sentence:

> [I]t's important you understand, before you enter your plea, that nobody can promise you or guarantee you a particular sentence, in your case. The best your attorneys can do is explain to you how those sentencing guidelines work, some of the factors that I might look at for purposes of sentencing. . . . But in the end, each of your sentences is up to me as the judge in your case.

Id. at 22.

The Government summarized the evidence against Velasquez and claimed he voluntarily returned to the United States after the Mexican police detained him:

> On August 15th, 2013, the Juarez Municipal Police apprehended Velasquez at his home in Juarez and advised him of the pending charges in El Paso. Velasquez was transported to the Zaragosa International Bridge where he was taken into custody by DEA agents.
>
> Velasquez was advised of his Miranda rights, which he understood and voluntarily waived. Velasquez then told agents that he voluntarily chose to return to El Paso, Texas, to face the charges and agreed to be transported to the Zaragosa Bridge to be taken into custody by DEA agents.
>
> The defendant then admitted that he had been coordinating the transportation of marijuana during the last 10 years, and directed other members of the organization to engage in various activities to facilitate the drug trafficking affairs.

Id. at 35.

After the Government summarized the evidence, Hill claimed Velasquez believed a DEA special agent was present at the time of his apprehension and subsequent beating in Mexico:

> MR. HILL: . . . Mr. Velasquez and I have gone over the factual basis in this case extensively. Mr. Velasquez did not voluntarily agree to return to the United States. When the municipal police came to his home in Juarez, they had a DEA Agent Javier Barraza with them. He was beaten. He was -- had a sack put over his head, handcuffed. He was brought across the bridge and turned over to DEA there.
>
> He did make statements, and that was a result of his having been told that his parents were in custody, and they would be released if he would cooperate and make statements. He did so, and they were not released. They are in prison now.
>
> Mr. Velasquez -- at the time that all of this occurred, he believes that the -- the DEA agent that was involved, Mr. Barraza, was in violation of the new extradition treaty that we have with Mexico where kidnapping is specifically prohibited.
>
> And he just -- he realizes that he was involved in the drug business and all of this -- all these allegations by these people and the places and things were correct. But the way he came into custody of the agents, that's not correct.

Id. at 37–38.

The Court intervened and asked Velasquez to clarify if he was only disputing the circumstances of his return to the United States after his arrest in Mexico:

> THE COURT: . . . I certainly understand your position about how you got here to the United States. I'm not here to decide that issue, you know. And I -- but I want to make sure that as far as the allegations that support the conduct of this drug trafficking and the -- the counts of One, Four, Eight, Nine and Eleven that you are pleading guilty to, you are not disputing that conduct? Am I correct in understanding that? You're disputing how you came back into the United States?
>
> DEFENDANT VELASQUEZ: Yes.

Id. at 38–39.

The Government offered "there was absolutely no DEA agent involved in Mexico with

Four, and Five; three hundred and sixty months as to each of Counts Seven, Ten and Eleven; two hundred and forty months as to each of Counts Three, Eight and Nine; and sixty months as to each of Counts Twelve and Thirteen. 2d Am. J. Crim. Case, ECF No. 1201.

In his § 2255 motion, Velasquez asserts his trial counsel provided constitutionally ineffective assistance. Pet'r's Pet. 4, ECF No. 1216. Specifically, he claims his counsel was ineffective for advising him to withdraw from the plea agreement and pursue a meritless and faulty defense at trial:

> The Government offered Velasquez a favorable plea agreement, which he accepted, that included a sentence "as low as 21 [years] . . . plus the opportunity to reduce that with a 5K." (Doc. 1159, p. 25). As part of the agreement, the Government agreed to drop several counts in exchange for Velasquez' guilty plea. *Id.* . . . . The Court, after questioning Velasquez over the agreement, accepted Velasquez' guilty plea. (Doc. 788, p. 46). All was proceeding as planned. However, six months after the Court accepted his guilty plea, counsel advised Velasquez to withdraw his plea since he had a strong defense over [his] kidnapping [in Mexico by Mexican authorities] and should go proceed to trial. (Exhibit A). Following his lawyer's advice, Velasquez agreed to withdraw his plea. (Exhibit A). The Court granted the motion to withdraw and set a trial date. (Doc. 893). In the motion to withdraw the plea, counsel told the Court he "mistakenly communicated a legal opinion to the defendant in exchange for his change of plea to guilty, [that] the defendant would not receive a sentence of more than twenty years of incarceration." (Doc. 883, p. 1-2). However, that was not what counsel told Velasquez. (Exhibit A). Counsel actually told Velasquez he should withdraw his plea because counsel strongly believed he had a valid legal defense and could prevail at trial. (Exhibit A). Counsel told Velasquez that because Mexican police had "kidnapped" him and turned him over the United States law enforcement agents, his arrest was illegal. (Exhibit A). That was the defense counsel used to convince Velasquez that he would win at trial. (Exhibit A). Counsel did not tell Velasquez to withdraw his plea because of erroneous sentencing advice, as he alleged in the motion to withdraw. (Exhibit A). In fact, the Court had already advised Velasquez at the plea hearing of the maximum sentences he faced for each count, and he acknowledged to the Court that he understood. (Doc. 788, p. 17-18). Instead, the sole reason Velasquez followed counsel's advice and withdrew his plea was that of the kidnapping-by-Mexican-police defense counsel told him would win at trial. (Exhibit A). Velasquez was not even aware that counsel was basing the motion to withdraw on the purported erroneous sentencing advice. (Exhibit A). Otherwise, he never would have agreed to withdraw his plea. (Exhibit A).

Mem. in Supp. 13–14, ECF No. 1217. Velasquez asks the Court to vacate the judgment and impose the sentence in accordance with the plea agreement. Pet'r's Pet. 13.

APPLICABLE LAW

A § 2255 motion "'provides the primary means of collateral attack on a federal sentence.'" *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (quoting *Cox v. Warden*, 911 F.2d 1111, 1113 (5th Cir. 1990)). Relief under § 2255 is warranted for errors that occurred at trial or at sentencing. *Solsona v. Warden, F.C.I.*, 821 F.2d 1129, 1131 (5th Cir. 1987). Before a court will grant relief, however, the movant must establish that (1) his "sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack." *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995) (citations omitted). Ultimately, the movant bears the burden of establishing his claims of error by a preponderance of the evidence. *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) (citing *United States v. Kastenbaum*, 613 F.2d 86, 89 (5th Cir. 1980)). "If it plainly appears from the motion . . . and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion . . ." 28 U.S.C. foll. § 2255 Rule 4(b); *see also* 28 U.S.C. § 2255(b) (2012); *United States v. Drummond*, 910 F.2d 284, 285 (5th Cir. 1990) ("Faced squarely with the question, we now confirm that § 2255 requires only conclusive evidence—and not necessarily direct evidence—that a defendant is entitled to no relief under § 2255 before the district court can deny the motion without a hearing.").

A movant may collaterally attack a sentence by alleging ineffective assistance of counsel pursuant to the Sixth Amendment in a § 2255 motion. *Lee v. United States*, 137 S. Ct. 1958, 1963–64 (2017). A court analyzes an ineffective-assistance-of-counsel claim pursuant to the

two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). To prevail, a movant must show (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689–94. This means a movant must show that counsel's performance was outside the broad range of what is considered reasonable assistance and that this deficient performance led to an unfair and unreliable conviction and sentence. *United States v. Dovalina*, 262 F.3d 472, 474–75 (5th Cir. 2001). "[C]ounsel's assistance is deficient if it falls 'below an objective standard of reasonableness.'" *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003) (quoting *Strickland*, 466 U.S. at 688). "[T]o prove prejudice, 'the defendant must show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *United States v. Bass*, 310 F.3d 321, 325 (5th Cir. 2002). If the movant fails to prove one prong, it is not necessary to analyze the other. *See Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997) ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim."); *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").

ANALYSIS

Velasquez asserts his trial counsel provided constitutionally ineffective assistance. Pet'r's Pet. 4, ECF No. 1216. Specifically, he claims his counsel erred when he advised him to withdraw from a plea agreement to pursue a meritless and faulty defense at trial. Mem. in Supp. 13–14, ECF No. 1217.

A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process.

Missouri v. Frye, 566 U.S. 134, 140 (2012). Consequently, the *Strickland* test applies when a defendant alleges the denial of effective assistance of counsel in the context of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 57–58 (1985).

A defendant may show deficient performance when his counsel advises him to reject a plea offer based on a meritless and faulty defense at trial. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). A defendant may show prejudice when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the procedure would have been different." *Strickland*, 466 U.S. at 694.

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164.

Hill unfortunately died on March 26, 2016. Gov't's Resp. 2, ECF No. 1220. Consequently, he cannot provide testimony and the Court must rely on the record to evaluate the merits of Velasquez's claim.

The record shows the Government delivered a proposed plea agreement to Velasquez's first attorney, Antcliff. Plea Agreement, ECF No. 540 (sealed). It explained the range of imprisonment Velasquez faced for Count One was not less than twenty years or more than life, Count Four was not less than ten years or more than life, Counts Eight and Nine were not more than twenty years; and Count Eleven was not less than five or more than forty years. *Id.* at 2. However, it offered Velasquez a binding sentencing recommendation under Rule 11(c)(1)(C) for a

total offense level of 39. *Id.* at 5. That meant that under the terms of the plea agreement—based upon a total offense level of 39 and Velasquez's criminal history category of I—Velasquez would face a sentencing range of 262 to 327 months in prison.

Velasquez and his counsel, Antcliff, signed the first plea agreement. *Id.* at 10. Velasquez then obtained new counsel, Hill.

The Government delivered a proposed amended plea agreement to Velasquez's new attorney, Hill. Am. Plea Agreement, ECF No. 637 (sealed). It contained the same Rule 11(c)(1)(C) binding sentencing agreement for a total offense level of 39—without any further increase or decrease in the offense level. *Id.* at 5.

Velasquez and Hill signed the amended plea agreement. *Id.* at 10.

During the plea hearing on September 9, 2014, Velasquez was asked by the Court if he had reviewed and understood the amended plea agreement with the binding sentencing recommendation for a total offense level of 39. Plea Tr. 2, ECF No. 790. Velasquez said he had. *Id.*

After the Government summarized the evidence against Velasquez, Hill claimed Velasquez believed a DEA agent was present at the time of his detention and alleged beating by Mexican police. *Id.* at 37–38.

As a result, the Court asked Velasquez to clarify whether he was disputing the circumstances of his apprehension and return to the United States—or suggesting he was entitled to immunity from prosecution because police misconduct precipitated his return to the United States and appearance in court. *Id.* at 38–39; *see United States v. Crews*, 445 U.S. 463, 474 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent

prosecution, nor as a defense to a valid conviction.").

Velasquez explained he was disputing the circumstances of his return to the United States and not challenging the allegations against him in the indictment. *Id.* at 39.

At the end of the plea colloquy, Velasquez pled guilty to Counts One, Four, Eight, Nine, and Eleven of the indictment. *Id.* at 40–44.

Velasquez's telephone calls were monitored while he was in pretrial detention. During a call recorded on December 7, 2014, Velasquez discussed a visit from his attorneys with his sister, Delia Margarita Velasquez. Resp't's Resp., Ex. 1, ECF No. 1220-1. He told her they would "fight" because the Government knew "the process that they did on [him] was wrong." *Id.* at 2. He acknowledged the Government had some pictures showing his "face was not beaten up," but—despite this photographic evidence—he still claimed he was pistol whipped by the Mexican police. *Id.*, Ex. 2, p. 2, ECF No. 1220-2. He added he told his lawyers to do their best at getting him sent back to Mexico because he was not properly extradited, or, in the alternative, getting the Court to "knock off some of the time . . . the most possible." *Id.* at 3.

On February 11, 2015, the Government recommended a 327-month sentence. Gov't's Sentencing Memo, ECF No. 847 (sealed).

Hill—with Velasquez present—asked to withdraw the guilty plea at a sentencing hearing on March 26, 2015. Minute Entry, ECF No. 879; Audio File, ECF No. 880. Hill followed up with a written motion to withdraw Velasquez's guilty plea on March 30, 2015. Mot. to Withdraw Plea, ECF No. 883. Hill explained he erroneously "communicated a legal opinion to Defendant that in exchange for his change of plea to guilty, the Defendant would not receive a sentence of more than twenty years of incarceration. The Defendant would not have entered a guilty plea, but

for erroneous advice." *Id.* at 2.

Meanwhile, on March 29, 2015, Velasquez called his sister to discuss Hill's oral motion to withdraw his plea. Resp't's Resp., Ex. 8, ECF No. 1220-8. He told her the sentencing hearing was postponed because he was not going to accept the plea. He explained "we had signed for twenty . . . and we're going to begin from, from scratch again." *Id.* at 2. He added, "what can they do? Because they have to give me that opportunity because supposedly I had pleaded guilty to get a bargain." *Id.* at 3.

In a conversation with Manuel Barraza on April 3, 2015, Velasquez explained he thought it was better to go to trial instead of pleading guilty "because there's a lot of evidence, of everything they did wrong . . ." *Id.*, Ex. 5, p. 2, ECF No. 1220-5. Barraza responded, "the good thing is that . . . when you go to trial, that f***** has to go confront you, face to face and with all his bulls***, you know what I mean?" *Id.* On May 20, 2015, Barraza reminded Velasquez he pleaded "guilty with the understanding that the maximum was twenty . . ." *Id.*, Ex. 7, p. 6, ECF No. 1220-7. Barraza added "[s]o, if not, then too bad. Have them retract everything that's what I'm telling you." *Id.*

It is all too easy for a defendant to look back with hindsight and realize he should have chosen a different path. The record in this case shows Velasquez was advised he faced life sentences if convicted on several of the counts pending against him. Plea Agreement 2, ECF No. 540 (sealed). He debriefed with DEA special agents and knew there was substantial evidence against him. He entered into two plea agreements—presumably on the advice of two counsel. *Id.*; Am. Plea Agreement, ECF No. 637 (sealed). He pled guilty to Counts One, Four, Eight, Nine, and Eleven of the indictment—again presumably on the advice of his counsel.

"A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Martin v. Dretke*, 404 F.3d 878, 885 (5th Cir. 2005) (quoting *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002)). "Given the almost infinite variety of possible trial techniques and tactics available to counsel," a court should "not second guess legitimate strategic choices." *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). Hence, when assessing the objective reasonableness of an attorney's performance the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. A movant must rebut this presumption by proving that his attorney made errors so serious that resulted in his counsel not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. Finally, "a court cannot consider a habeas petitioner's bald assertions . . . unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

The record does not support Velasquez's bald assertion—unsupported by the record—that Hill advised him to withdraw his guilty plea and pursue a meritless and faulty defense at trial. *Id.* at 1011. Instead, it shows Hill advocated for Velasquez's cause, consulted him on important decisions, and kept him informed of important developments in the case. *Strickland*, 466 U.S. at 687. It shows Hill and Velasquez made conscious and informed decisions on trial tactics and strategy. *Martin*, 404 F.3d at 885. It does not show Hill made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. Consequently, Velasquez has not met his burden of overcoming the strong presumption Hill's

conduct fell within the wide range of reasonable professional assistance.

Because Velasquez failed to prove the first prong of the *Strickland* analysis, the Court need not analyze the other prong. *Carter*, 131 F.3d at 463; *Armstead*, 37 F.3d at 210. The Court finds Velasquez is not entitled to § 2255 relief on his ineffective-assistance-of-counsel claim.

EVIDENTIARTY HEARING

"Section 2255 requires a hearing unless the motion, files, and record of the case conclusively show that no relief is appropriate." *United States v. Santora*, 711 F.2d 41, 42 (5th Cir. 1983). Here, the Court has examined Velasquez's ineffective-assistance-of-counsel claim and determined from the motion, files, and records that Velasquez's claim does not have merit. Accordingly, the Court will not hold an evidentiary hearing. *See id.* (explaining when a motion is "devoid of factual or legal merit . . . no hearing is necessary.").

CERTIFICATE OF APPEALABILITY

A movant may not appeal a final order in a habeas corpus proceeding "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). In cases where a district court rejects a movant's constitutional claims on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *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* to a certificate of appealability determination in the context of § 2255 proceedings).

Here, Velasquez's § 2255 motion fails because he has not identified a transgression of his constitutional rights or alleged an injury that would, if condoned, result in a complete miscarriage of justice. Additionally, reasonable jurists could not debate the Court's reasoning for the denial of his § 2255 claim on substantive grounds—or find that his issue deserves encouragement to proceed. *Miller El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Thus, the Court will not issue a certificate of appealability.

CONCLUSION AND ORDERS

The Court concludes Velasquez's claim is without merit. Consequently, the Court enters the following orders:

IT IS ORDERED that Velasquez's "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" (ECF No. 1216) is **DENIED**, and his civil cause is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that all pending motions in this cause, if any, are **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Velasquez is **DENIED** a **CERTIFICATE OF APPEALABILITY**.

IT IS FINALLY ORDERED that the Clerk shall **CLOSE** this case.

SIGNED this 28th day of January, 2020.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE