APPENDIX

APPENDIX

INDEX TO APPENDIX

APPENDIX

A

NOT FOR PUBLICATION

FILED

SEP 7 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GALVIN GIBSON, Defendant-Appellant.	No. 19-56249 D.C. Nos. 2:16-cv-07435-TJH 2:09-cr-00783-TJH-3 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Submitted September 2, 2021**
Pasadena, California

Before: IKUTA, BENNETT, and R. NELSON, Circuit Judges.

Defendant Galvin Gibson appeals the district court's denial of his 28 U.S.C. § 2255 motion. He contends that the district court erred in denying his claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), as well as his ineffective assistance of counsel (IAC) claims as they relate to a six-

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

level sentence enhancement. We have jurisdiction under 28 U.S.C. §§ 2253(a), 1291, and review the denial of a § 2255 motion de novo. *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158 (9th Cir. 2000). We also review Gibson's *Brady*, *Napue*, and IAC claims de novo. *See Dow v. Virga*, 729 F.3d 1041, 1049 (9th Cir. 2013) (*Napue*); *United States v. Williams*, 547 F.3d 1187, 1202 n.12 (9th Cir. 2008) (*Brady*); *United States v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996) (IAC). We affirm.

1. Gibson contends that the district court erred in denying his *Brady* and *Napue* claims, arguing that those claims pertained to the first trial, which ended in a hung jury, and not the second trial, which resulted in a conviction. The government contends that these claims are identical to claims raised and rejected on direct appeal[1] and are thus barred in this habeas proceeding. The district court rejected the claims because we had rejected those claims on direct appeal. If the claims were raised in the direct appeal, then, as the district court found, they are barred. *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985). But if the claims were never raised on direct appeal, they are procedurally defaulted, and Gibson would need to show both cause and prejudice to overcome that procedural default. *See United States v. Frady*, 456 U.S. 152, 167–68 (1982). Gibson has shown neither.[2]

---

[1] *See United States v. Gibson*, 598 F. App'x 487, 489–90 (9th Cir. 2015).
[2] It also appears that the "first trial" claims were forfeited, as they were not explicitly presented to the district court. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th

2. Gibson contends that his sentencing and appellate counsel were both ineffective, arguing that the former failed to properly object to his six-level ransom enhancement, and the latter failed to raise the enhancement claim on direct appeal. Gibson also argues that the district court erred in holding that his sentencing counsel IAC claim was procedurally defaulted.

We agree with Gibson that the district court erred in holding that his sentencing counsel IAC claim was procedurally defaulted. *See Massaro v. United States*, 538 U.S. 500, 504 (2003) (IAC claims need not be raised on direct appeal for them to be raised in a 28 U.S.C. § 2255 habeas proceeding). But we "may affirm on any basis supported by the record even if the district court did not rely on that basis." *United States v. Pope*, 686 F.3d 1078, 1080 (9th Cir. 2012).

Gibson argues that sentencing counsel should have objected when the trial court applied a preponderance standard to the ransom enhancement instead of a clear and convincing evidence standard. But Gibson cannot show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), as the evidence supporting the ransom enhancement was at least clear and convincing. Indeed, on direct appeal, we held that "uncontroverted evidence" supported the finding that Gibson was involved with the ransom demands. *Gibson*, 598 F. App'x at 489. The trial

---

Cir. 2018) ("[A]rguments raised for the first time on appeal . . . are deemed forfeited."). But the government does not argue forfeiture, so we need not consider that alternative ground for rejecting the claims.

testimony shows that Gibson made some ransom calls and was present for others, and demanded financial information (e.g., pin numbers and bank details) from the victim, beating the victim when he was unresponsive or provided incorrect information. A ransom "script" was also found in Gibson's car. No matter the standard, the sentencing court properly enhanced the sentence under U.S.S.G. § 2A4.1.

For the same reason—lack of prejudice—we also reject Gibson's ineffectiveness claim against appellate counsel.

AFFIRMED.

APPENDIX

B

United States District Court
Central District of California
Western Division

GALVIN GIBSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CV 16-07435 TJH
CR 09-00783-TJH

Order
[14,28]

The Court has considered Petitioner Galvin Gibson's motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255, together with the moving and opposing papers.

On July 30, 2009, Gibson and two co-defendants ambushed and assaulted Sandro Karmryan in a parking garage. Gibson and his co-defendants held Karmryan for five days in four different locations. On August 3, 2009, SWAT officers rescued Kamryan from Gibson's house and Gibson was arrested. Officers, also, found marijuana growing on the second floor of Gibson's house.

On October 1, 2009, the Government filed a First Superseding Indictment against Gibson, charging him with one count of: (1) Conspiracy to kidnap, in violation of 18

U.S.C. § 1201(c); (2) Aiding and abetting a kidnapping, in violation of 18 U.S.C. §§ 12019(a)(1), (2); (3) Manufacturing marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C); and (4) Being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1).

On January 19, 2010, Judge Jacqueline Nguyen presided over the first jury trial in this action. Judge Nguyen granted the Government's motion to preclude Gibson's necessity, duress, and justification defenses. On February 18, 2010, the jury was unable to reach a verdict and Judge Nguyen declared a mistrial.

On April 27, 2010, Judge Nguyen presided over Gibson's second jury trial in this action. Gibson objected to the introduction of any evidence referencing a ransom demand, which had been introduced in the first trial. Judge Nguyen cautioned that if the Government sought to introduce or elicit evidence of a ransom demand, then it might open the door to a necessity or justification defense. Accordingly, the Government did not introduce evidence about the ransom demands. On May 10, 2010, the jury found Gibson guilty of conspiracy to kidnap, aiding and abetting a kidnapping, and manufacturing marijuana, and not guilty of being a felon in possession of ammunition.

After the trial, the Government learned, and acquired documentation, about the FBI's investigation into Karmryan in an unrelated financial fraud investigation ["Karmryan FBI Investigation"]. The Government obtained two reports, prepared in August, 2009, related to the Karmryan FBI Investigation ["the Reports"]. Gibson moved for a new trial arguing, *inter alia*, that the Government's failure to disclose the Karmryan FBI investigation and the Reports violated *Brady v. Maryland*, 373 U.S. 83 (1963). Judge Nguyen denied Gibson's motion, holding that, although the Karmryan FBI investigation and the Reports should have been disclosed and produced prior to trial, the evidence was not material given the overwhelming evidence that Gibson had committed the offenses.

On June 28, 2010, the United States Probation Office prepared Gibson's

Presentence Report ["PSR"]. The PSR calculated Gibson's total offense level to be 44, after adding a 6 level enhancement because a ransom demand was made during the kidnapping. The PSR recommended life imprisonment. On February 13, 2012, Judge Nguyen sentenced Gibson to 324 months. Gibson appealed his conviction and sentence.

Gibson raised four issues on direct appeal: (1) Whether Judge Nguyen erred in excluding his necessity or justification defense; (2) Whether the jury instructions misstated the elements of kidnapping by leaving out the "ransom, reward, or benefit" language; (3) Whether Judge Nguyen erred in precluding cross-examination of Karmryan related to Gibson's necessity or justification defense; and (4) Whether the Government committed a violation pursuant to *Brady* or *Napue v. Illinois*, 360 U.S. 264 (1959), by failing to disclose the Karmryan FBI Investigation and the Reports.

The Ninth Circuit held that: (1) Judge Nguyen did not err in excluding the justification or necessity defense; (2) Judge Nguyen committed a harmless error by failing to include the "for ransom, reward, or benefit" language because of the substantial evidence of Gibson's guilt; (3) Judge Nguyen did not err by precluding testimony for defenses that were excluded from the trial; and (4) The Government did not commit a *Brady* or *Napue* violation because of the "overwhelming evidence" of Gibson's guilt and that Gibson failed to show that any testimony was "actually false." *See United States v. Gibson*, 598 F. App'x. 487, 488-490 (9th Cir. 2015). Accordingly, the Ninth Circuit affirmed Gibson's conviction and sentence. *Gibson*, 598 F. App'x. at 490.

Gibson, now, moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Gibson raised three ineffective assistance of counsel claims and one claim based on *Brady* and *Napue*.

With regard to his three ineffective assistance of counsel claims, Gibson raised two claims against his trial counsel and one against his appellate counsel. Gibson argued that his trial counsel was ineffective because he failed to: (1) Investigate,

discover, or use evidence of the Karmryan FBI Investigation or the Reports; and (2) Object to the 6 level ransom enhancement. Gibson argued that his appellate counsel was ineffective because he failed to appeal the 6 level ransom enhancement. To establish an ineffective assistance of counsel claim, Gibson must prove that his counsel's performance was deficient, and that the deficient performance resulted in prejudice against him. *See Strickland v. Wash.*, 466 U.S. 688, 687 (1984).

Ineffective Assistance of Counsel Claim Against Gibson's Trial Attorney

Because nothing barred Gibson from raising his ineffective assistance of counsel claims against his trial attorney on direct appeal, those claims are procedurally defaulted. *See United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). To overcome this procedural default, Gibson must prove either: (1) Actual innocence, *see McQuiggin v. Perkins*, 569 U.S. 383, 386 2013); or (2) Cause and actual prejudice. *See United States v. Frady*, 456 U.S. 152, 167 (1982).

Here, Gibson argued that his procedural default on his ineffective assistance of counsel claims should be excused because he is actually innocent of conspiracy to kidnap because 18 U.S.C. § 1201(c) is unconstitutionally vague in light of *United States v. Johnson*, 135 S. Ct. 2551 (2015), *United States v. Davis*, 139 S. Ct. 2319 (2019), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Gibson's argument is meritless.

Johnson, *Davis*, and *Dimaya* are inapposite, here, because they contemplate whether the identically worded "crime of violence" definitions in 18 U.S.C. § 924(c) and 18 U.S.C. § 16(a) are unconstitutionally vague. The language in § 1201(c) is nowhere comparable to the language in § 924(c) and § 16(a).

Further, § 1201(c) is not unconstitutionally vague as applied to Gibson because "an ordinary citizen would consider the conduct alleged in the [First Superseding Indictment] to fall within the statutory definition" in § 1201(c). *See United States v. Carman*, 341 F. App'x. 345, *2 (9th Cir. 2009). Indeed, the Ninth Circuit noted multiple times that there was overwhelming evidence of Gibson's guilt with regard to the § 1201(c) conviction. Accordingly, Gibson failed to set forth a cognizable basis to

establish his actual innocence. *See Gibson*, 598 F. App'x. at 489. Thus, relief from his procedurally default claims and his actual innocence claim is not warranted.

With regard to Gibson's claim that his trial counsel was ineffective because he failed to investigate, discover, or use evidence of the Karmryan FBI Investigation or the Reports, Gibson, also, argued that his default should be excused because of cause and actual prejudice. However, Gibson cannot prove actual prejudice because the Ninth Circuit already held that the probative value of further evidence attacking the credibility of the victim was outweighed by potential confusion of the issues for the jury, especially given the "overwhelming evidence of [Gibson's] guilt." *See Gibson*, 598 F. App'x. at 489.

With regard to Gibson's claim that his trial counsel was ineffective because he did not object to the 6 level ransom enhancement, Gibson failed to prove that some external impediment prevented him from raising this claim on direct appeal and, therefore, cannot prove cause. *See Player v. Bunnell*, 992 F.2d 1220, *1 (9th Cir. 1993). Nevertheless, Gibson's claim, also, fails on the merits. Without the 6 point ransom enhancement, Gibson's sentencing range would have been 292 to 365 months. Because Gibson's 324 month sentence fell within the sentencing range without the 6 point enhancement , Gibson cannot show that he was prejudiced by his counsel's failure to object to the 6 point enhancement. *See Strickland*, 466 U.S. at 687.

Ineffective Assistance of Counsel Claim Against His Appellate Counsel

Gibson's ineffective assistance of counsel claim against his appellate counsel is not procedurally barred. *See Player*, 992 F.2d at *1. However, it does fail on the merits because Gibson cannot prove that his appellate counsel's failure to raise this issue on direct appeal prejudiced him because his current sentence falls within the sentencing range without the 6 point enhancement. *See Strickland*, 466 U.S. at 687.

***Brady* and *Napue* Claims**

Gibson's *Brady* and *Napue* claims were already litigated during his direct appeal

and the Ninth Circuit already held that those claims were meritless. *See Gibson*, 598 F. App'x. at 489-490. Gibson failed to set forth any basis for this Court to hold otherwise.

Accordingly,

It is Ordered that Gibson's motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255 be, and hereby is, **Denied.**

Date: September 26, 2019

Terry J. Hatter, Jr.
Senior United States District Judge

APPENDIX

C

United States District Court
Central District of California
Western Division

GALVIN GIBSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CV 16-07435 TJH
CR 09-00783 TJH-3

Order

The Court has considered Petitioner Galvin Gibson's request for a certificate of appealability.

This Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a showing requires the petitioner to "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alterations in original, emphasis omitted). Petitioner has made such a showing.

Accordingly,

It is Ordered that a certificate of appealability be, and hereby is, **Granted** as to all issues Petitioner raised in his 28 U.S.C. § 2255 motion.

It is Further Ordered that the Clerk of Court shall convey a copy of this order to the Ninth Circuit Court of Appeals.

Date: January 22, 2020

Terry J. Hatter, Jr.
Senior United States District Judge

CC: 9TH COA