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App. 1

United States Court of Appeals
for the Fifth Circuit

No. 22-40676

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

HECTOR MENDEZ,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC Nos. 7:19-CV-227, 7:15-CR-938-2

UNPUBLISHED ORDER

(Filed Feb. 24, 2023)

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Hector Mendez, federal prisoner # 92187-379, was convicted by a jury of conspiracy to possess with intent to distribute five kilograms or more of cocaine and possession with intent to distribute five kilograms or

more of cocaine and received concurrent terms of 300 months of imprisonment. He now seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion challenging these convictions.

The district court found that the following claims were procedurally barred because Mendez had failed to raise them on direct appeal: (i) the Government withheld his "exculpatory call detail records" in violation of (a) his rights under *Brady v. Maryland*, 373 U.S. 83 (1963); (b) his Sixth Amendment rights to confront and cross-examine adverse witnesses; and (c) his Sixth Amendment rights to compulsory process and to present a defense; (ii) the Government withheld an exculpatory letter dated August 24, 2015, in violation of *Brady*; (iii) the Government violated his due process rights and Sixth Amendment right to compulsory process and to present a defense by suppressing the favorable testimony of Charles Lopez; and (iv) his due process rights and Sixth Amendment right to compulsory process, to cross-examine witnesses, and to present a defense were violated when a witness asserted the Fifth Amendment at a hearing on Mendez's motion for a new trial. The district court further found that Mendez had failed to demonstrate cause and prejudice or his actual innocence that would enable him to overcome the default and proceed with the claims under § 2255. Mendez fails to meaningfully challenge the district court's procedural dismissal of these claims in his COA motion, and the issues are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999);

see also United States v. Gonzalez, 592 F.3d 675, 680 n.3 (5th Cir. 2009).

As to Mendez's remaining claim that he received ineffective assistance when his counsel failed to utilize the August 24, 2015 letter at trial to undermine one of the Government's arguments, Mendez has failed to demonstrate "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), or "that reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, Mendez's COA motion is DENIED. As Mendez fails to make the required showing for a COA, we do not reach his contention that the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

HECTOR MENDEZ	§	CIVIL ACTION NO. M-19-227
VS.	§	
UNITED STATES OF AMERICA	§	CRIMINAL ACTION NO. M-15-938-2

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GRANTING DISMISSAL

(Filed Sep. 28, 2022)

The Court has reviewed the magistrate judge's Report and Recommendation regarding Movant Hector Mendez's action pursuant to 28 U.S.C. § 2255, and Movant's objections thereto. After having reviewed the said Report and Recommendation, and after appropriate review of Movant's objections thereto, 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 Nadia S. Medrano's Report and Recommendation entered as Docket Entry No. 10 are hereby adopted by this Court.

FURTHER, the Court, having adopted the magistrate judge's conclusions, is of the opinion that Respondent's Motion to Dismiss should be **GRANTED**, the Motion to Vacate Sentence under 28 U.S.C. § 2255

should be **DISMISSED**, and that a certificate of appealability should be **DENIED**.

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

SO ORDERED September 28, 2022, at McAllen, Texas.

/s/ Randy Crane
Randy Crane
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

HECTOR MENDEZ	§	CIVIL ACTION NO.
VS.	§	7:19-CV-227
	§	
UNITED STATES	§	CRIM. ACTION NO.
OF AMERICA	§	7:15-CR-938-2

REPORT AND RECOMMENDATION

(Filed Aug. 24, 2022)

Movant Hector Mendez, a federal prisoner proceeding with retained counsel, 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 (who was an officer with the Mission Police Department) was sentenced to 300 months imprisonment after a jury found him guilty—beyond a reasonable doubt—of conspiracy to possess with intent to distribute and possession with intent to distribute approximately 14.9 kilograms of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(A), and 18 U.S.C. § 2. Movant had no criminal history; however, his sentence factored in numerous enhancements. Notably, Movant received enhancements because he was in possession of a firearm during the course of the illegal conduct, he was the organizer/leader of the criminal activity, and

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

because he abused his position of trust as a law enforcement officer.

In his § 2255 motion to vacate, Movant asserts seven separate claims, most of which allege that during the course of the underlying criminal proceedings the Government violated his constitutional rights. (Docket No. 1, ¶ 12 (Grounds One through Three, and Five through Seven).) Movant's claims are largely based on his assertion that the Government improperly withheld exculpatory evidence, including "call detail records," a letter from the Mission Police Department Chief of Police, and by blocking the testimony of two favorable witnesses. Movant also alleges that his attorney rendered ineffective assistance of counsel "by failing to present exculpatory evidence undermining the Government's timeline." (*Id.* (Ground Four).) Respondent United States has moved to dismiss based on the present record. (Docket No. 6.)

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, all of Movant's claims—with the exception of his ineffective assistance of counsel allegation—are procedurally barred from consideration in this § 2255 action. In any event, Movant's claims prove meritless for various reasons. In addition, Movant's sole ineffective assistance claim is largely conclusory, but more importantly, he fails to establish his burden under the *Strickland* standard. Accordingly, for the reasons explained further below, it is recommended that the

District Court grant Respondent's motion to dismiss, deny Movant's § 2255 motion, and dismiss this action.

I. BACKGROUND

A. The Underlying Criminal Charge[2]

On July 17, 2015, Movant was arrested for his involvement in the underlying offenses. His arrest was the culmination of an investigation which was conducted jointly by the Federal Bureau of Investigation (FBI), Department of Homeland Security-Office of Inspector General, and the Drug Enforcement Administration (DEA). The investigation targeted several Mission, Texas, Police Department Officers (including Movant) and was based on interviews and debriefings of cooperating defendants, Salvador Gonzalez as well as Reynol Chapa.

> According to the investigative material, Reynol Chapa was a confidential source for approximately 11 years under the supervision of Hector Mendez, who was a Mission, Texas,

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[2] The facts in the next two sections are drawn principally from Movant's Presentence Investigation Report (PSR). (Cr. Docket No. 107.) The PSR contains a detailed description of the facts relevant to the underlying criminal charges. In addition, in its motion to dismiss, Respondent United States included a detailed summary of the criminal proceedings. (Docket No. 6, at 3-38.) "On 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)). As such, the facts of Movant's case will be summarized in the light most favorable to the jury's guilty verdict.

Police Department Officer as well as a DEA Task Force Officer (TFO). Although Reynol Chapa and Hector Mendez worked together on many cases, the investigation began as a result of a cocaine seizure in Mission, Texas, which according to Hector Mendez, occurred on July 29, 2012. On this date, while under the supervision of Hector Mendez, Reynol Chapa arranged the delivery of a load vehicle containing 15 bundles of cocaine, with a gross weight of 18.9 kilograms, to the parking lot of Ace's Barbeque in Mission, Texas. Salvador Gonzalez, who was determined to have delivered the load vehicle to the parking lot, was arrested and charged with possession with intent to distribute more than 18.9 kilograms of cocaine in related case styled Criminal Docket Number M-121736-01. However, after the investigation continued and after several post-arrest interviews with Salvador Gonzalez, many discrepancies arose to include: misrepresented cocaine amounts, erroneous dates and different packaging.

After several interviews, Reynol Chapa recanted his statements wherein he stated that the load vehicle was delivered to the parking lot of Ace's Barbeque by Salvador Gonzalez. Instead, Reynol Chapa admitted that Salvador Gonzalez had delivered the bundles of cocaine to his residence. Reynol Chapa further admitted that DEA TFO Hector Mendez subsequently picked up the bundles from his residence, in order to "cut" the cocaine. As to the seizure which occurred on July 29, 2012, Reynol Chapa stated that it was staged by

> Hector Mendez. The investigation of this seizure led to the arrest of Reynol Chapa, Hector Mendez, and Charles Lopez, a Mission, Texas, Police Department Canine Officer.

(Cr. Docket No. 107, ¶¶ 14-15.) In fact, "[a]fter an independent investigation, a review of the investigative material[,] and an interview" with the case agent, Hector Mendez's [Movant] role was determined to be the following:

> Hector Mendez was a law enforcement officer employed by the Mission, Texas, Police Department who also served as a DEA Task Force Officer. Hector Mendez abused his position of trust in a manner that significantly facilitated the commission of the offense in that he exercised management responsibility and authority over a confidential source, Reynol Chapa. Hector Mendez directed Reynol Chapa to negotiate the transport of the cocaine bundles with Salvador Gonzalez. In addition, Hector Mendez instructed Reynol Chapa to receive the bundles at his residence. On the date of the instant offense, Hector Mendez picked up the cocaine bundles from Reynol Chapa's residence. For the next several days, Hector Mendez maintained communication with Reynol Chapa who was dealing with Salvador Gonzalez. In turn, Salvador Gonzalez was dealing with Carlos Garza, an unindicted coconspirator, as well as the source of supply. During this time, Hector Mendez directed Reynol Chapa to advise Salvador Gonzalez as

to the progress of the transportation of the cocaine.

While Hector Mendez had the cocaine in his possession, he "cut" the cocaine by taking a portion of the cocaine and creating "sham" bundles with the diluted cocaine. On July 28, 2012, Hector Mendez staged the seizure of the "sham" bundles and instructed Mission, Texas, Police Department Canine Officer Charles Lopez to locate the load vehicle. In addition, Hector Mendez instructed Reynol Chapa to advise Salvador Gonzalez that the 15 cocaine bundles had been seized by law enforcement. As such, Hector Mendez will be held accountable to the total amount of cocaine seized which is 14,790.3 grams or 14.8 kilograms net weight.

In addition, Hector Mendez instructed Reynol Chapa to build a hidden compartment in the master closet of his home in Mission, Texas. This hidden compartment was used by Hector Mendez to store marijuana. According to Reynol Chapa, Hector Mendez stored approximately 8,000 pounds of marijuana in his residence from 2011 to 2012 (20 separate occasions). As such, Hector Mendez will be held accountable to approximately 8,000 pounds of marijuana (conservative estimate) which he stored at Reynol Chapa's residence. It should be noted that Hector Mendez will also be held accountable for the firearm he possessed while on official duty and for the firearm he returned to Reynol Chapa, as well as for maintaining a premise with Reynol Chapa for

> the purpose of manufacturing or distributing a controlled substance.[3]

(Cr. Docket No. 107, ¶¶ 63-65.)

B. Criminal Proceedings

On June 8, 2016, a two-count second superseding indictment was filed in the Southern District of Texas, McAllen Division, charging Movant with: 1) conspiracy to possess with intent to distribute more than 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A); and 2) possession with intent to distribute approximately 15 kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A) and 18 U.S.C. § 2. Movant pleaded not guilty

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[3] On direct appeal, the Court of Appeals for the Fifth Circuit briefly summarized the facts of the underlying conviction as follows:

> A jury convicted Hector Mendez of cocaine trafficking offenses. The government's allegations that the jury accepted showed the following about Mendez, who was a police officer in Mission, Texas. Mendez abused his law enforcement position by working with a confidential informant to steal and sell cocaine that was being delivered to the informant. Mendez took the entire load of cocaine, removed some to sell for his own benefit, and then combined the remaining cocaine with pancake mix to try and restore the original weight of the load. Mendez then put the diluted cocaine in a car parked in front of a barbecue restaurant and staged a seizure of the load.

United States v. Mendez, No. 17-40027, 717 F. App'x 502 (5th Cir. 2018).

and proceeded to trial, where he was represented by his retained attorney, Carlos A. Garcia.

The Government framed this case as being "about cocaine, corruption and cover up." (Cr. Docket No. 190, Jury Trial (Day One) Tr. 10.) The Government highlighted to the jury that the evidence would show deception and "intentional, willful, calculated" lies. (*Id.* at 12.) On the other hand, Mr. Garcia's theory of the case was that Movant was "duped" and "set up" by his codefendants. (*Id.* at 14.) In addition, Mr. Garcia explained that as a result of the "FBI Task Force" attempting to "clean up the corruption in the Valley," Movant was essentially arrested as a fall guy and "the weakest one in the group." (*Id.* at 15.) The jury apparently did not believe Movant's version of events and returned a guilty verdict as to both counts of the second superseding indictment. After accepting the jury verdict, Movant was remanded into custody and the District Court ordered the Probation Office to prepare a Presentence Investigation Report (PSR).

The PSR calculated Movant's base offense level at 32, based on the net weight of the cocaine (14.8 kilograms) seized as well as "the 8,000 pounds (3,628.73 kilograms) of marijuana he stored in Reynol Chapa's residence."[4] (Cr. Docket No. 107, ¶ 75-79.) In addition, Movant was assessed the following enhancements:

- A 2-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) because Movant possessed a

[4] The 2015 U.S. Sentencing Guidelines were utilized in Movant's case.

dangerous weapon (firearm) during the course of the illegal conduct[5];

- A 2-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(12) because Movant maintained a premises for the purpose of drug trafficking;
- A 4-level enhancement pursuant to U.S.S.G. § 3B1.1(a) because Movant was an organizer or leader of the criminal activity; and
- A 2-level enhancement pursuant to U.S.S.G. § 3B1.3 because Movant abused his position of public trust as a law enforcement officer.

This brought his offense level to 42.[6] The PSR calculated his criminal history at level 1,[7] which resulted in a Guidelines imprisonment range of 360 to life imprisonment.[8]

Prior to sentencing, Movant retained a different attorney, Lilly A. Gutierrez. Ms. Gutierrez filed written objections to the PSR arguing that Movant's base offense level should not include 8,000 pounds of

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[5] In fact, because Movant possessed a firearm in connection with the offense, he was ineligible for the 2-level reduction pursuant to U.S.S.G. § 2D1.1(b)(17) and safety valve relief pursuant to U.S.S.G. § 5C1.2. (Cr. Docket No. 107, ¶¶ 82.)

[6] Movant was also ineligible for any reduction for acceptance of responsibility because he "put the Government to its burden of proof at trial" and continues to maintain his innocence. (Cr. Docket No. 107, ¶ 88.)

[7] Movant had no criminal history.

[8] Movant's conviction also carried a statutory mandatory minimum term of imprisonment of 10 years and a statutory maximum term of life. (Cr. Docket No. 107, ¶ 112.)

marijuana, and that he should not receive enhancements for maintaining a premises for drug trafficking or for being a leader/organizer of the criminal activity. (Cr. Docket No. 102.) She also filed several motions for a new trial. (*See* Cr. Docket Nos. 77, 86, 115, 122.)

At the hearing on Movant's motion for a new trial, Ms. Gutierrez attempted to highlight discrepancies in co-defendant Chapa's statements and trial testimony. (*See*, *e.g.*, Cr. Docket No. 197, Motion Hr'g Tr. 26.) The Court responded that "[m]uch of the very . . . damaging evidence that came in the case was the coverup of all of this, [Movant's] role in the coverup," and the sort of mistakes he kept making along the way in the coverup, the sloppiness of how the initial staging of this takedown occurred." (*Id.* at 33.) The Court concluded that "I haven't seen any – you haven't presented anything that either exculpates [Movant] or [reflects] something dramatically different than the ***mountain of evidence*** that came in." (*Id.* (emphasis added).) Ms. Gutierrez seemed to place the blame on Mr. Garcia's trial strategy, stating that he "left out of the picture [information] that had it gone to the ears of the jury, the jury may have had doubts." (*Id.* at 36-37.) Ultimately, the Court "denie[d] the motion for new trial," finding that there was no "manifest injustice," that the "verdict was supported by substantial evidence," and Mr. Garcia's trial strategy was within his "sound discretion." (*Id.* at 60-61.)

At the sentencing hearing, the Court confirmed that Movant had reviewed the PSR with his attorney and that he did not have any questions about it. (Cr.

Docket No. 197, Sentencing Tr. 61.) Movant's attorney then re-urged her written objections. Counsel urged the Court not to include the 8,000 pounds of marijuana in Movant's base offense level (*id.* at 62-65) and argued that Movant should not be given a role adjustment (*id.* at 66-70). The Court overruled those objections. (*Id.* at 64-65, 69-70.) As to counsel's objection regarding maintaining a premises for drug trafficking, the Court agreed and sustained counsel's objection to the 2-level enhancement (and noted that the Government was not opposed). (*Id.* at 65-66.) This lowered Movant's offense level to 40 which reduced the applicable Guidelines sentencing range to 292 to 365 months imprisonment. (*Id.* at 74.)

Movant was given an opportunity to speak at sentencing, and he stated the following:

> All right. Well, I don't – something I don't have to apologize because I didn't do anything wrong. I'm innocent. I mean, I'm not going to talk about the case or anything like that, but there's something that was – something innocent turned into they made it look guilty or suspicious and the jury bought it, so – but I'm innocent. I've never done this before, 20-plus years and never got tempted to do this. I have a clean record.

(*Id.* at 73.) The Government highlighted to the Court that Movant had not displayed "even a speck of remorse[,] . . . just a total denial that it ever happened, even in the face of all the evidence." (*Id.*) Movant's

attorney concluded with a request that Movant be sentenced "on the low end of the guideline." (*Id.* at 74.)

After considering the factors under 18 U.S.C. § 3553(a), the Court sentenced Movant to 300 months (25 years), which was within the Guidelines sentencing range. (*Id.* at 75.) The Court explained that Movant's lengthy sentence was "intended to reflect the seriousness of this crime." (*Id.*) The Court concluded:

> Mr. Mendez, anytime law enforcement is corrupted it, unfortunately, brings a lack of confidence to law enforcement in the community. And this is – we live in a great area of the country and I'm very proud of our community, and it's upsetting when this area gets the black eye of having corrupt law enforcement officer.
>
> Since you were working on the DEA Task Force, I find this particularly offensive because of that special trust that you were given to work with the very best members of law enforcement in our area. And then to take advantage of that trust by trying to profit through stealing drugs is particularly reprehensible.
>
> I hope this 25-year sentence will serve as a deterrent to others not to be tempted by what appears to be the lure of the easy money and the lure of not getting caught because you're stealing from criminals, and that we will see fewer and fewer, if not no other law enforcement officer is being corrupted in this manner.

> I hope that when you get out of custody that you will return to a law-abiding lifestyle and perhaps make efforts to amend for the damage that you've done, again, in destroying the confidence of our community and our law enforcement officers.
>
> All right. Those are all – that's all I have to say to you. And you do have the right to appeal this, and you'll have two weeks to file your Notice of Appeal, if you desire to do that.

(*Id.* at 75-76.)[9]

Movant appealed his sentence to the Fifth Circuit Court of Appeals. *United States v. Mendez*, No. 17-40027, 717 F. App'x 502 (5th Cir. 2018). Movant raised 13 grounds for relief/review in his direct appeal; most of which alleged that the District Court committed reversible error during the trial through various rulings and statements to the jury. (*See United States v. Mendez*, No. 17-40027, "Appellant's Initial Brief," at 18-21 (filed Sept. 19, 2017).) Movant also challenged the District Court's finding that Movant qualified for the four-level enhancement based on his leadership role in the criminal activity. (*Id.* at 20.) However, after "[h]aving heard oral argument and reviewed the briefing, record, and applicable law, [the Fifth Circuit found] no reversible error." As such, the Fifth Circuit affirmed Movant's

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[9] Several days after sentencing, Movant's attorney filed a "Motion to Reconsider Sentence" in which she again argued that the "four level increase [based on Movant's leadership role was] improper." (Cr. Docket No. 142.)

conviction and dismissed his direct appeal.[10] *Mendez*, No. 17-40027, 717 F. App'x at 502.

Movant subsequently timely filed the instant § 2255 action.

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

As noted, in his § 2255 motion to vacate, Movant asserts seven separate claims, most of which allege that during the course of the underlying criminal proceedings the Government violated his constitutional rights in various ways. (Docket No. 1, ¶ 12 (Grounds One through Three, and Five through Seven).) Movant's claims are largely based on his assertion that the Government improperly withheld exculpatory evidence, which can be grouped into the three following categories:

1) "Call detail records" of Movant Mendez (Grounds One through Three);

2) A letter from the Mission Police Department Chief of Police (Ground Five); and

3) By intentionally blocking the testimony of two favorable witnesses (Grounds Six and Seven).

(*Id.* at ¶ 12.) Movant also alleges a single claim that his attorney, Mr. Garcia, rendered ineffective

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[10] The Fifth Circuit also denied "Appellant's Motion for Rehearing and Motion for Rehearing En Banc." (*See United States v. Mendez*, No. 17-40027, "Non Dispositive Court Order," (filed May 16, 2018).)

assistance of counsel "by failing to present exculpatory evidence undermining the Government's timeline"; specifically, the letter from the Mission Police Department Chief of Police. (*Id.* (Ground Four).)

Respondent United States has moved to dismiss based on the present record.[11] (Docket No. 6.) Specifically, Respondent argues that in his first three claims Movant has failed to establish a *Brady* violation or a violation of his constitutional rights because (primarily) the call detail records were "marked, offered, and introduced as Government Exhibit 114 during Mendez's trial." (*Id.* at 39-40, 42-57.) As to the letter from the Mission Chief of Police, Respondent argues that Movant has failed to show that his attorney's performance was deficient under the standard set forth in *Strickland v. Washington*, or that there was a *Brady* violation regarding the letter. (*Id.* at 40-41, 58-65.) Finally, Respondent argues that Movant has failed to show that his due process rights were violated or that the Government acted improperly by excluding two "favorable" witnesses from testifying. (*Id.* at 41, 65-76.)

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

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[11] In its motion to dismiss, Respondent argues that in support of his claims Movant "[c]it[es] no case law and no testimony from the record." (Docket No. 6, at 53, 55, 58, 63, 65, 72; *see also* Docket No. 1, ¶12.) Respondent is correct and the undersigned notes that Respondent's summary of the record (Docket No. 6, at 1-41) and controlling legal authority (Docket No. 6, at 42-76) was both thorough and helpful to the Court.

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 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, 23132 (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 another way, 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.[12] 28 U.S.C. § 2255(a); *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

B. Exculpatory Call Detail Records

The first three claims in Movant's § 2255 motion to vacate assert that the Government violated his constitutional rights by withholding exculpatory material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[13] (Docket No. 1, ¶ 12 (Grounds One through Three).)

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[12] Movant "has a burden of sustaining his contentions on a § 2255 motion by a preponderance of the evidence." *United States v. Bondurant*, 689 F.2d 1246, 1251 (5th Cir. 1982) (citing *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980)).

[13] In addition to alleging that the withholding of Movant's cell phone records violated his rights under *Brady v. Maryland*, he also argues that this violated his Sixth Amendment rights to confront and cross-examine witnesses, compulsory process, and to present a defense. (Docket No. 1, ¶ 12 (Grounds Two and Three). These claims are likewise based entirely on his assertion that his personal cell phone records were improperly withheld from him. As is shown above, the premise of this claim fails for multiple reasons. *See infra* Part II.B. As such, Movant's claim alleging a violation of his Sixth Amendment rights fails for the same reasons. In any event, Movant now asserts that had he had the cell phone records, he likely would have called Movant's wife to testify as an alibi witness. (*See* Docket No. 1, at 23.) However, this assertion is self-serving to say the least. Movant's attorney, Mr. Garcia, previously determined that putting Movant's wife on the stand at trial would not be beneficial to Movant because she could potentially perjure herself, she would be unpersuasive, and the jury would likely see her as nothing more than a desperate wife. (*See* Docket No. 1, at 23; Cr. Docket No. 196, Motion Hr'g Tr. 167-68.) Movant's cell phone records apparently did not factor into Mr. Garcia's trial strategy analysis. (Cr. Docket No. 196, Motion Hr'g Tr. 167-68.)

Specifically, Movant argues that the FBI improperly withheld until after sentencing the "cell phone records" or "call detail records" of Movant's personal cellular phone. (*Id.*) Movant alleges that had the Government released the call detail records earlier they would have exculpated Movant, or at the very least, bolstered his defense.

Respondent argues that Movant's claim is procedurally defaulted, that he has failed to meet his burden under *Brady v. Maryland*, and that the cell phone records at issue are not only his own, but that they were offered and admitted (without objection) as an exhibit at trial.[14] (Docket No. 6, at 42-57.) Movant's first three claims in his § 2255 motion to vacate fail for multiple reasons.

Brady v. Maryland established the rule that the suppression, by the prosecution, of evidence favorable to a criminal defendant violates due process where the evidence is material to the defendant's guilt. *Brady*, 373 U.S. at 87. Under *Brady*, the prosecution has a duty to disclose evidence that could be used to impeach a Government witness. *See Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) (citing *United States v.*

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[14] Respondent also points out that Movant's "motion under § 2255 is not sworn and it is not signed" by him; therefore, "Mt cannot and does not create a fact issue." (Docket No. 6, at 47.) Respondent appears to be correct; although the undersigned notes that Movant's claim fail for many reasons. *United States v. Gonzalez*, 493 F. App'x 541, 544 (5th Cir. 2012) ("affirming that a defendant's unsworn allegations do not bear sufficient indicia of reliability to be considered by the court") (citing *United States v. Lghodaro*, 967 F.2d 1028, 1030 (5th Cir. 1992)).

Bagley, 473 U.S. 667, 676 (1985)). Additionally, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). To prevail on a prosecutorial misconduct claim under *Brady*, a movant must establish: (1) the evidence was suppressed by the State; (2) the evidence was materially favorable to the accused; and (3) Movant suffered prejudice as a result. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). A reasonable probability means that the likelihood of a different result is great enough to undermine the confidence in the outcome of the trial. *Kyles*, 514 U.S. at 434.

"A petitioner's *Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." *United States v. Bernard*, 762 F.3d 467, 480 (5th Cir. 2014) (citing *Reed v. Stephens*, 739 F.3d 753, 781 (5th Cir. 2014)). Under *Brady* "[e]vidence is not 'suppressed' if the defendant 'knows or should have known of the essential facts that would enable him to take advantage of it.'" *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir. 2002) (citation omitted). Stated another way, when the information at question "is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence,

the defendant has no *Brady* claim". *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980.)

The defendant "has the burden to establish a reasonable probability that the evidence would have changed the result." *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000) (citing *Strickler*, 527 U.S. at 291). Upon a finding that the defendant did not establish a reasonable probability that the evidence in question would have produced a different result, the other *Brady* components need not be considered. *Hughes*, 230 F.3d at 819. In fact, "the part[y] alleging a *Brady* violation[ ] ha[s] the burden of establishing *all three prongs* of the *Brady* test." *Banks v. Thaler*, 583 F.3d 295, 312 (5th Cir. 2009) (quoting *United States v. Edwards*, 442 F.3d 258, 267 n.9 (5th Cir. 2006)) (emphasis added).

To begin with, 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). Here, Movant filed a direct appeal, but he failed to raise any issues alleging that the Government withheld "exculpatory call detail records" in violation of *Brady v. Maryland.* (*See United States v. Mendez*, No.

17-40027, "Appellant's Initial Brief," at 18-21 (filed Sept. 19, 2017).) Furthermore, Movant has not made an adequate showing of cause for his default to raise these issues, or that he is actually innocent of the crime charged (as explained in this Report and Recommendation). As such, Movant's first three claims are procedurally barred from consideration in this § 2255 action.

Next, Movant alleges that the "exculpatory call detail records [were] withheld by the FBI" and "were not released until after the motion for new trial (MNT) was denied and [Movant] was sentenced." (*See*, *e.g.*, Docket No. 1, ¶ 12 (Ground Two).) As an initial matter, the record reflects that the Government included Movant's cell phone records in its exhibit lists prior to trial. (*See* Cr. Docket Nos. 65-67 (Government's Exhibits 114, 117).) Based on this, Movant's attorney should have been aware that the Government had in its possession Movant's cell phone records. In addition, on the fifth day of the jury trial, the Government introduced Exhibit 114 into evidence—without objection—which included the cell phone records in question. (Cr. Docket No. 194, Jury Trial (Day 5) Tr. 87-88, 95-96.) As such, the record conclusively refutes Movant's claims that the Government violated his constitutional rights under the *Brady v. Maryland* standard.

Not surprisingly, in his affidavit Movant's trial attorney, Mr. Garcia, stops short of alleging the "exculpatory call detail records" were improperly withheld from him by the Government. Rather, he passively asserts that "[a]fter [Movant] was found guilty, I found out

about some of [his] cell phone records the Government had gotten." (Docket No. 1, at 22.) He further states that he has now "reviewed those records" and "[h]ad [he] known that there was strong evidence—actually gathered by the Government—corroborating [Movant's] assertions . . . , [he] would have presented that evidence to the jury." (*Id.*)

Notwithstanding Mr. Garcia's assertion that he "found out about" some of Movant's cell phone records after trial, he could have obtained those records at any time. Again, at issue here are the cell phone records of what Movant alleges is one of his own personal phones.[15] Movant could have obtained—by way of subpoena or otherwise—his own cell phone records prior to trial. *United States v. Ricks*, 774 F. App'x 841, 848-49 (5th Cir. 2019) (Defendant cannot show prejudice because he "could have easily subpoenaed . . . his own prison phone calls . . . himself."); *United States v. Ellender*, 947 F.2d 748, 756-57 (5th Cir. 1991) (defendant cannot establish a *Brady* violation where the prosecutor failed to produce the defendant's own prison records). Without explanation, Movant failed to do so. "*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable

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[15] According to the Government's Trial Exhibit list, Movant possessed multiple cell phones. (*See* Cr. Docket Nos. 65-67.) In addition, at trial co-defendant Chapa testified that Movant believed that his cell phone that was issued by the DEA was being recorded and/or monitored. (Cr. Docket No. 193, Jury Trial (Day Four) Tr. 6-8.) As a result, Mendez frequently used a "radio" or push-to-talk Boost phone to communicate. (*Id.* at 7-8.)

diligence." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002) (citing *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997)). Stated another way, "[w]hen evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation." *Kutzner*, 303 F.3d at 336.

Furthermore, as Respondent points out, [e]vidence is not 'suppressed' if the defendant knows or should know of the essential facts that would enable him to take advantage of it." (Docket No. 6, at 50 (citing *Runyan*, 290 F.3d at 246).) Here, Movant knew—or should have known—of the content and substance of his own phone records. "[T]he State bears no responsibility to direct the defense toward *potentially* exculpatory evidence that is either *known to the defendant* or that could be discovered through the exercise of reasonable diligence." *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004) (emphasis added). Movant argues that the cell phone records were both exculpatory and could have been used to contradict co-defendant Chapa's testimony. (Docket No. 1, 112 (Grounds One through Three).) However, Movant, "better than anyone else, knew his whereabouts" during the relevant periods in question. *Rector v. Johnson*, 120 F.3d 551, 560 (5th Cir. 1997) ("The Magistrate judge concluded that Rector, *better than anyone else, knew his whereabouts* on the night of Davis's murder, and therefore his failure to discover the information possessed by Stillwell was the result of a lack of diligence on his part. We agree.") (emphasis added).

As such, for multiple reasons Movant has wholly failed to prove the first prong of the *Brady* analysis; specifically, that the Government suppressed evidence. *Strickler*, 527 U.S. at 281-82. "[T]he part[y] alleging a *Brady* violation[ha[s] the burden of establishing *all three prongs* of the *Brady* test." *Banks*, 583 F.3d at 312 (quoting *Edwards*, 442 F.3d at 267 n.9) (emphasis added). Failure to prove one prong of the *Brady* analysis is fatal to a *Brady* claim.[16] *See Hughes*, 230 F.3d at 819; *see also Banks*, 583 F.3d at 312. Accordingly, Movant's first three claims in his § 2255 motion to vacate—which are predicated on the so-called "withheld" exculpatory cell phone records—conclusively fail.

C. Ineffective Assistance of Counsel Claim

Movant claims that his attorney rendered ineffective assistance of counsel. An ineffective assistance of counsel claim is properly made for the first time in a § 2255 motion because it raises an issue of

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[16] Respondent also argues that Movant has failed to meet the second and third elements of his *Brady* claims; namely, that the cell phone records were neither "favorable to the defense" nor "material." (Docket No. 6, at 51-52.) Given the fact that Movant had multiple portable modes of communication at his disposal, the location of one of Movant's cell phones does not definitely prove the location of Movant at any given time. In addition, Movant has failed to show that he was prejudiced by the Government's failure to produce his cell phone records because as noted, they were available at trial and otherwise discoverable by Movant using reasonable due diligence. In any event, Movant's first three claims alleging a violation of *Brady v. Maryland* fail because he has at the very least, failed to meet his burden to establish the first element of the *Brady* analysis. *See supra* Part II.B.

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).

1. General Standard

An ineffective assistance of counsel allegation presented in a § 2255 motion is properly analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). To prevail on a claim of ineffective assistance of counsel, a movant must demonstrate that his or her counsel's performance was both deficient and prejudicial. *Id.* This means that 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).

In reviewing ineffectiveness claims, "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. An ineffective assistance claim focuses on "counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct[,]" because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." *Id.* at 689-90.

With regard to the prejudice requirement, a movant 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. 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."). "Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim." *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997).

2. Letter from Mission Chief of Police

Movant alleges a single claim that his attorney rendered ineffective assistance of counsel. (Docket No. 1, ¶ 12 (Ground Four).) Specifically, that Mr. Garcia was constitutionally deficient "by failing to present exculpatory evidence"—the letter from the Mission Police Department Chief of Police—which would have "undermin[ed] the Government's timeline." (*Id.*) Respondent argues that the record does not support Movant's claim and that he has failed to meet his burden to establish a violation under the *Strickland v. Washington* standard. (Docket No. 6, at 58-63.)

On August 24, 2015, approximately eleven (11) months before the jury trial began, Robert Dominguez, the Chief of Police of the Mission Police Department, wrote a letter to FBI Special Agent Ryan Porter. (Docket No. 2, at 52-53.) In his letter—which is

unsworn, not an affidavit, and not signed under the penalty of perjury—Chief Dominguez addresses the timing of the requested license plate check of the seized vehicle and the issuance of the Mission PD case number. (*Id.* at 52.) In his letter he states that the first license plate check was requested at "the time that Officer Charles Lopez checked out [] the vehicle in question at the ACE BBQ parking lot." (*Id.*) Chief Dominguez also asserts that in his opinion "[t]here was no tampering with the case number." (*Id.*)

First, as Respondent points out, "there is no mention of [Chief Dominguez's] letter in attorney Carlos Garcia's affidavit." (Docket No. 6, at 61; *see also* Docket No. 1, at 21-24.) Not surprisingly, Movant does not assert that Mr. Garcia ever saw Chief Dominguez's letter. (Docket No. 1, ¶ 12 (Ground Four).) Rather, Movant states that "[t]rial counsel is unsure of whether the Government turned over the August 24, 2015, letter from the Mission Police Department Chief of Police." (*See* Docket No. 1, ¶ 12 (Ground Five).) Respondent agrees, arguing that "there is no showing that attorney Garcia did, or did not, have a copy of the August 24 letter from Chief Dominguez in advance of trial."[17] (Docket No. 6, at 61.)

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[17] In fact, according to the record, Chief Dominguez's letter was discovered by attorney Jaime Pena, who represented Mission PD Canine Officer Charles Lopez, after Officer Lopez was charged "with lying to the federal law enforcement agents during the Hector Mendez investigation, in violation of 18 U.S.C. § 1001." (Docket No. 2, at 6.) Mr. Pena asserts that he found the letter "in pre-trial discovery from the Government." (*Id.*)

In a § 2255 motion to vacate, "conclusory allegations on a critical issue are insufficient to raise a constitutional issue." *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993). Furthermore, "[a] movant's claim of ineffective assistance of counsel must be stated with specificity." *United States v. Whitehead*, No. 09-10617, 2010 WL 3377637, at *1 (5th Cir. Aug. 27, 2010) (citing *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990)). Movant's claim that Mr. Garcia rendered constitutionally deficient performance based on Chief Dominguez's letter is conclusory and thus fails on that basis alone.

Next, Respondent asserts that even if Mr. Garcia had obtained the letter from Chief Dominguez, "the contents would have been hearsay" and presumably inadmissible. (Docket No. 6, at 62.) Here, the letter avers that the license plate check was performed in a procedurally correct manner, and that the case number was not "tampered" with. (*See* Docket No. 2, at 52.) According to Movant, the purpose of the letter was to bolster the defense's arguments. (*See* Docket No. 1, ¶ 12 (Ground Four).) Since Chief Dominguez's letter was "to be admitted to assert [its] truth, [it would have] failed to pass the hearsay test and [would have been] properly excluded. *See United States v. Tansley*, 986 F.2d 880, 887 (5th Cir. 1993) (citing *United States v. Mastropieri*, 685 F.2d 776, 793 (2d Cir. 1982)).

In addition, courts should not overlook "the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (quoting *Strickland*, 466 U.S. at 689). In fact,

courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might have been considered sound trial strategy." *Nelson v. Davis*, 952 F.3d 651, 659 (5th Cir. 2020) (quoting *Strickland*, 466 U.S. at 688).

Here, Mr. Garcia explains that the "Government had some purported circumstantial evidence, but nothing besides Chapa's testimony linked [Movant] to the alleged conspiracy." (Docket No. 1, at 21.) As such, Mr. Garcia's trial strategy was to "discredit Chapa's narrative in every way possible" and to "make Chapa appear entirely untrustworthy in front of the jury." (*Id.*) In his mind, "[i]f the jury did not believe Chapa, they could not have found [Movant] guilty." (*Id.*) Under the circumstances, Mr. Garcia's strategy was reasonable. Stated another way, "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 U.S. 86, 107 (2011) (string cite omitted). "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy," as it does here. *Richter*, 562 U.S. at 111. Mr. Garcia represented Movant "with vigor and conducted [among other things] skillful cross-examination." *Id.*; (*see also* Cr. Docket No. 193, Trial (Day Four) Tr. 24-93) (Mr. Garcia's cross-examination of Mr. Chapa); Cr. Docket

No. 194, Trial (Day Five) Tr. 19-49, 62-69 (Mr. Garcia's cross-examination of Mr. Champion).)

In light of this record, Movant's claim that counsel rendered ineffective assistance of counsel based on Chief Dominguez's letter falls flat. Movant has wholly failed to meet his burden under the *Strickland* standard to show that Mr. Garcia's representation was unreasonable under the circumstances, deficient in any way, or that he was incapable in his defense of Movant. Movant's sole claim of ineffective assistance of counsel should be rejected.[18]

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[18] If the movant fails to prove one prong, it is not necessary to analyze the other. *Armstead*, 37 F.3d at 210 ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one."). "Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim." *Carter*, 131 F.3d at 463. However, even if Movant had shown that counsel rendered deficient performance in relation to Chief Dominguez's letter (which has not been shown), Movant has failed to "affirmatively prove" that he was prejudiced. *Strickland*, 466 U.S. at 693. Movant baldly asserts that the letter was "exculpatory" and "ran contrary to the Government's theory." (Docket No. 1, ¶ 12 (Ground Four).) However, the Government did not rely solely on the issues that Chief Dominguez discussed in his letter; namely, the license plate check and case number sequence. In addition to co-defendant Chapa's testimony, the Government also presented other evidence—albeit mostly circumstantial—that supported the jury's guilty verdict. This evidence included testimony regarding other irregularities in the investigation, cell phone records, and other unusual behavior of Movant. (Cr. Docket No. 191, Jury Trial (Day Two) Tr. 34-38 (irregularities in timesheets); Cr. Docket No. 193, Jury Trial (Day Four) Tr. 130-54 (irregularities in standard law enforcement procedures); Cr. Docket No. 194, Jury Trial (Day Five) Tr. 126, 129, 131, 134, 161 (testimony that Movant had burned evidence).) Put

D. Due Process—Chief Dominguez's Letter

Next, Movant argues that "[i]n the alternative to Ground 4, the Government violated Movant's due process rights, as delineated in *Brady v. Maryland*, by withholding" the letter from the Mission Chief of Police. (Docket No. 1, ¶ 12 (Ground Five).) Here again, Respondent argues that Movant's claim is procedurally defaulted and otherwise meritless. (Docket No. 6, at 63-65.) Respondent is correct.

In fact, this claim fails for many of the same reasons that Movant's other *Brady* claims failed. *See supra* Part II.B. First, this claim is procedurally defaulted. Where a defendant fails to raise an issue in his criminal proceedings, that issue is procedurally barred from consideration in § 2255 proceedings. *See Lopez*, 248 F.3d at 433; *Kallestad*, 236 F.3d at 227. As noted, Movant filed a direct appeal but he failed to allege a violation of *Brady v. Maryland* violation based on Chief Dominguez's letter. (*See United States v. Mendez*, No. 17-40027, "Appellant's Initial Brief," at 18-21 (filed Sept. 19, 2017).) In addition, Movant has not made an adequate showing of cause for his default to raise this issue, or that he is actually innocent of the crime charged (as explained in this Report). *Bousley*, 523 U.S. at 622; *Jones*, 172 F.3d at 384. As such, Movant's fifth claim alleging a *Brady* violation is

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another way, Movant has also failed to prove prejudice under the *Strickland* standard because "the letter even if allowed was not [] exculpatory." *Tansley*, 986 F.2d at 887.

procedurally barred from consideration in this § 2255 action.

Next, Movant acknowledges that Mr. Garcia "is unsure of whether the Government turned over the August 24, 2015, letter from the Mission Police Department Chief of Police." (Docket No. 1, ¶ 12 (Ground Five).) Therefore, "[a]ssuming the Government did not turn over that letter, withholding that evidence was a violation of *Brady v. Maryland*." (*Id.*) Stated another way, this claim is entirely speculative and unsupported. "[S]peculative and unsupported accusations of government wrongdoing do not entitle a defendant to an evidentiary hearing." *United States v. Reed*, 719 F.3d 369, 374 (5th Cir. 2013) (citing *United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980) ("Auten does not point to any evidence, nor do we find any in the record, to support his allegation that the government knowingly used perjured testimony. . . . Auten's conclusory assertions do not support the request for an evidentiary hearing."); *United States v. Edwards*, 442 F.3d 258, 265 (5th Cir. 2006) ("Our review of the record reveals no factual support for this improbable scenario [involving alleged government *Brady* violations]; instead, the record affirmatively contradicts Appellants' arguments.")).

As such, Movant has wholly failed to prove the first prong of the *Brady* analysis; specifically, that the Government suppressed evidence. *Strickler*, 527 U.S. at 281–82. "[T]he part[y] alleging a *Brady* violation[] ha[s] the burden of establishing *all three prongs* of the *Brady* test." *Banks*, 583 F.3d at 312 (quoting *Edwards*,

442 F.3d at 267 n.9) (emphasis added). Failure to prove one prong of the *Brady* analysis is fatal to a *Brady* claim. *See Hughes*, 230 F.3d at 819; *see also Banks*, 583 F.3d at 312. Accordingly, Movant's fifth claim alleging a *Brady* violation regarding Chief Dominguez's letter fails.

E. Government's Indictment of Officer Lopez

Movant's next claim is that the Government violated his constitutional rights by indicting Officer Charles Lopez, which essentially, "kept him from testifying at [Movant's] trial on [Movant's] behalf." (Docket No. 1, ¶ 12 (Ground Six).) Stated another way, Movant argues that the "Government used the power to indict to eliminate a material witness." (*Id.*) Respondent argues—primarily—that Movant has failed to show that the Government acted improperly in its decision to indict Officer Lopez. (Docket No. 6, at 65-72.)

"The Due Process Clause 'guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice.'" *United States v. Piper*, 912 F.3d 847, 854 (5th Cir. 2019) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982)); U.S. CONST. AMEND. V. "Due process includes the right to present witnesses to establish a defense." *Piper*, 912 F.3d at 854 (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

"The Compulsory Process Clause of the Sixth Amendment ensures that 'criminal defendants have the right to the government's assistance in compelling

the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.'" *Piper*, 912 F.3d at 854 (quoting *Taylor v. Illinois*, 484 U.S. 400, 408 (1988)); U.S. CONST. AMEND. VI. "To demonstrate a constitutional violation under either due process or compulsory process based on the deprivation of witness testimony, a defendant 'must make some plausible showing of how the[] testimony would have been both material and favorable to his defense.'" *Piper*, 912 F.3d at 854 (quoting *United States v. Villanueva*, 408 F.3d 193, 200 (5th Cir. 2005)). "In exercising the right to present witnesses, a defendant 'must comply with established rules of . . . evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Piper*, 912 F.3d at 854 (quoting *United States v. John*, 597 F.3d 263, 276-77 (5th Cir. 2010)).

"The government may violate both the Fifth and Sixth Amendment when it prevents a defense witness from offering testimony." *United States v. Vasquez-Hernandez*, 314 F. Supp. 3d 744, 756 (W.D. Tex. 2018), aff'd, 924 F.3d 164 (5th Cir. 2019); (citing *Valenzuela–Bernal*, 458 U.S. at 873). "This is so because the Due Process Clause of the Fifth Amendment guarantees an opportunity to put on an effective defense, and the Compulsory Process Clause of the Sixth Amendment guarantees a right to compel witness testimony." *Vasquez-Hernandez*, 314 F. Supp. 3d at 756; U.S. Const. amend. VI; *see also California v. Trombetta*, 67 U.S. 479, 486 (1984); *Valenzuela–Bernal*, 458 U.S. at 873. As

the Supreme Court explained in *Washington v. Texas*, 388 U.S. 14 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 23.

"There are several contexts where the government's treatment of a defense witness may constitute a due process violation." *Vasquez-Hernandez*, 314 F. Supp. 3d at 756. "For example, the government violates a defendant's right to due process when it threatens or intimidates a witness into refusing to testify." *Vasquez-Hernandez*, 314 F. Supp. 3d at 756 (citing *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979), and *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977)). "The government likewise commits a due process violation when it hides witnesses or conceals their whereabouts." *Vasquez-Hernandez*, 314 F. Supp. 3d at 756 (citing *Hernandez v. Estelle*, 674 F.2d 313, 315 (5th Cir. 1981), and *Lockett v. Blackburn*, 571 F.2d 309, 314 (5th Cir. 1978)).

The sixth amendment right to compulsory process is not unlimited. For example, "the defendants' sixth amendment rights do not override the fifth amendment rights of others." *United States v. Whittington*, 783 F.2d 1210, 1218-19 (5th Cir. 1986). "Nonetheless, substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant." *Whittington*, 783 F.2d at 1219.

Movant alleges that Officer Lopez was a "favorable" witness who "contradicted the Government's case." (Docket No. 1, ¶ 12 (Ground Six).) Along with the motion to vacate, Movant submitted the "Affidavit of Charles Lopez." (Docket No. 2, at 3-4.) Officer Lopez recalls that "the Government alleged that [he] was part of covering up an illegal conspiracy" involving Movant and co-defendant Chapa. (*Id.* at 3.) As such, he "was interviewed by federal agents and assistant U.S. attorneys multiple times during 2015 and 2016 regarding their investigation of [Movant]." (*Id.*) According to him, "[a]t those interviews, [he] was threatened with prison and criminal charges if [he] did not 'tell the truth.'" (*Id.*) In Officer Lopez's mind, this "obviously meant changing [his] story to one that they wanted [him] to tell." (*Id.*) Ultimately, the Government did not believe that Officer Lopez was truthful, "so a couple of months before [Movant's] trial" he was arrested and later indicted for a violation of 18 U.S.C. § 1001. (*Id.*)

Officer Lopez maintains the following:

- The report he "made about the events of July 28, 2012 regarding [Movant] and the investigation . . . is true and correct."
- During his interviews he "told the truth as best as [he] could and cooperated as best as [he] could."
- "I did not lie to them, I told them the truth as I knew it and as I still know it."

(*Id.*) In Officer Lopez's opinion, "[b]y arresting and indicting" him for allegedly lying, the Government "prevented [him] from testifying in [Movant's] behalf at his trial." (*Id.*) Officer Lopez does not recall anything "suspicious," "unusual," or "out of the ordinary" about the way he and Movant "conducted the investigation and seizure of the car with the cocaine." (*Id.*) He concludes that he was later acquitted of lying to federal authorities in violation of 18 U.S.C. § 1001.[19] (*Id.*)

Just like his other claims (other than his claim alleging ineffective assistance of counsel), this claim also fails because it is procedurally defaulted. Where a defendant fails to raise an issue in his criminal proceedings, that issue is procedurally barred from

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[19] However, the undersigned notes that "[a] jury can render inconsistent verdicts, even where the inconsistency is the result of mistake or compromise." *United States v. Scurlock*, 52 F.3d 531, 537–38 (5th Cir. 1995). "And, contrary to the conclusions of the defendant, an acquittal . . . does not necessarily equate with a finding that the defendant was innocent." *Id.* at 537. "The jury's verdict may have been motivated by other considerations." *Id.*

consideration in § 2255 proceedings. *See Lopez*, 248 F.3d at 433; *Kallestad*, 236 F.3d at 227. As noted, Movant filed a direct appeal but he failed to allege that the Government violated his due process rights or right to compulsory process by way of indicting Officer Lopez. (*See United States v. Mendez*, No. 1740027, "Appellant's Initial Brief," at 18-21 (filed Sept. 19, 2017).) In addition, Movant has not made an adequate showing of cause for his default to raise this issue, or that he is actually innocent of the crime charged (as explained herein). *Bousley*, 523 U.S. at 622; *Jones*, 172 F.3d at 384. As such, Movant's sixth claim regarding the Government's decision to indict Officer Lopez is procedurally barred from consideration in this § 2255 action.

The Fifth Circuit has described what would constitute improper government conduct as it related to preventing a witness from testifying in the following context:

> In some instances, we have held that government conduct so intimidated a potential defense witness as to deprive the defendant of his due process rights. Thus, in *United States v. Hammond*, we found such a violation when an FBI agent told a defense witness during a trial recess that the witness would have "nothing but trouble" if he persisted in his testimony and then subpoenaed the witness to appear before a grand jury, with the result that the witness subsequently asserted the fifth amendment. *Hammond*, 598 F.2d 1008 (5th Cir. 1979). Similarly, the Third Circuit

> held in *United States v. Morrison* that the government had improperly intimidated a defense witness by issuing a subpoena to her and conducting a personal interview with her in which the United States attorney warned that she might be prosecuted on drug charges and for perjury if she testified at the defendant's trial. *Morrison*, 535 F.2d 223 (3d Cir. 1976). The court further held that, if this witness invoked the fifth amendment at the retrial, the court was to direct the government to grant her use immunity. *Morrison*, 535 F.2d at 229.
>
> A prosecutor may, however, engage in proper investigatory actions if his conduct is not designed to intimidate a witness. The prosecutor's hands are not tied so tightly as to prevent good faith efforts to avert perjury or to investigate past offenses. Thus, we refused to find reversible error in the government's conduct in *United States v. Fricke*, when the prosecution informed prospective defense witnesses that they were already targets of a grand jury investigation. *Fricke*, 684 F.2d 1126 (5th Cir. 1982). We held that, so long as the investigation of witnesses is not prompted by the possibility of the witnesses testifying, and so long as the government does not harass or threaten them, the defendant's rights are not violated. *Fricke*, 684 F.2d at 1130.

Whittington, 783 F.2d at 1219.

In *Whittington*, the prospective defense witness "Lynn had been under investigation for obstruction of

justice before the trial." *Id.* The Court "had quashed an earlier grand jury subpoena issued to him because we concluded that the United States attorney was using the grand jury as a discovery tool." *Id.* "The issuance of another subpoena to Lynn in court just prior to his testimony was unseemly, but we do not think it has been shown to constitute a deprivation of the defendants' due process rights." *Id.* The Court found that "[t]he government's investigation of Lynn was not prompted by Lynn's prospective testimony as a defense witness." *Id.* "Nor did the prosecution attempt to intimidate Lynn by warning him of the consequences of testifying in the manner that was found so offensive in Hammond and Morrison." *Id.* "The government simply told Lynn that it believed he had already given false statements to government agents and that, if he repeated those statements under oath at trial, they would support an indictment for perjury." *Id.* As such, the Court concluded that "this was [not] governmental interference in violation of the defendants' due process rights." *Id.*

Similarly, in *United States v. Fricke* the Fifth Circuit determined that "Fricke has not shown that the government's investigation of [potential witnesses] was unjustified, nor that it was prompted by the possibility that they might testify for the defense." *United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982). "A defendant's sixth amendment rights do not override the fifth amendment rights of others." *Id.* at 1130 (citing *United States v. Lacouture*, 495 F.2d 1237 (5th Cir. 1974)). "Neither can a defendant compel the

government to grant use immunity to witnesses he desires to call." *Fricke*, 684 F.2d at 1130 (citing *United States v. Chagra*, 669 F.2d 241, 25861 (5th Cir. 1982)). "Given this, we do not feel that a defendant's rights are violated when the government merely informs witnesses that they are targets of an investigation, as long as the investigation was not prompted by the possibility of the witnesses testifying, *cf. Hammond*, 598 F.2d at 1012-14, and the government does not harass or threaten the witnesses, *see Morrison*, 535 F.2d at 223." *Fricke*, 684 F.2d at 1130.

In Officer Lopez's opinion, "[b]y arresting and indicting" him for lying in violation of 18 U.S.C. § 1001, the Government improperly "prevented [him] from testifying in [Movant's] behalf at his trial." (Docket No. 2, at 3.) Officer Lopez—and more importantly Movant—does not explain how this is so. *Pineda*, 988 F.2d at 23 (In a § 2255 motion to vacate, "conclusory allegations on a critical issue are insufficient to raise a constitutional issue."). Notwithstanding his indictment, Officer Lopez was free to testify at Movant's trial. In fact, nobody prevented him from doing so. Again, Officer Lopez is steadfast in his assertion that he "did not lie" to the Government and "told them the truth as [he] knew it and as [he] still knows it." (Docket No. 2, at 3.) Officer Lopez also stresses that he was later acquitted. (*Id.*) However, he—and Movant—fail to explain why the Government indicting Officer Lopez prevented him from testifying and "tell[ing] the truth." (*Id.*) Officer Lopez's conclusory and self-serving assertions fail to establish that the Government acted improperly. *See*

United States v. Crook, 479 F. App'x 568, 578 (5th Cir. 2012) ("Here, the Government did not make [the witness] unavailable, and therefore the Government's conduct did not rise to the level of a constitutional violation." (citing *United States v. Colin*, 928 F.2d 676, 679 (5th Cir. 1991) and *United States v. Henao*, 652 F.2d 591, 593–94 (5th Cir. 1981))). In fact, there is no indication that the government attempted to hide or conceal Officer Lopez. *See Vasquez-Hernandez*, 314 F. Supp. 3d at 756 ("The government likewise commits a due process violation when it hides witnesses or conceals their whereabouts.").

In addition, Movant does not allege that the Government intimidated, threatened, or harassed Officer Lopez in order to prevent him from testifying on Movant's behalf. (*See* Docket No. 1, ¶ 12 (Ground Six).) In his affidavit Officer Lopez baldly asserts that he "was threatened with prison and criminal charges if [h]e did not '***tell the truth***.'" (Docket No. 2, at 3 (emphasis added).) In Officer Lopez's mind this "obviously meant changing [his] story to one that [the Government] wanted [him] to tell" that would help convict Movant. (*Id.*) However, Officer Lopez's assertion that he was "threatened" is speculative at best. *Reed*, 719 F.3d at 374 ("[S]peculative and unsupported accusations of government wrongdoing do not entitle a defendant to an evidentiary hearing.")

Movant has wholly failed to show by a preponderance of the evidence that the Government improperly prevented Officer Lopez from testifying by threats, intimidation, or harassment. Furthermore, this case

appears to be analogous to the circumstances in *Whittington* and *Fricke*. Here, the government "believed that [Officer Lopez] had already given false statements" during their investigation of Movant. *See Whittington*, 783 F.2d at 1219. As such, the government informed Officer Lopez that "if he repeated those statements . . . they would support an indictment." *See id.* Similarly, the Government's informing Officer Lopez that his false statements would result in him becoming a "target of an investigation" was driven by its belief that he was lying, not because he was a potential witness for Movant. *Fricke*, 684 F.2d at 1130. Stated another way, "this was [not] governmental interference in violation of the defendant's due process rights." *Whittington*, 783 F.2d at 1219.

Accordingly, Movant's claim that the government violated his constitutional rights by indicting Officer Lopez fails and his sixth claim in this § 2255 motion to vacate should be rejected.[20]

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[20] "To demonstrate a constitutional violation under either due process or compulsory process based on the deprivation of witness testimony, a defendant 'must make some plausible showing of how the[] testimony would have been both material and favorable to his defense.'" *Piper*, 912 F.3d at 854. Although it is far from clear, Movant seems to argue that Officer Lopez's testimony would have both material and favorable to him by "contradict[ing] the Government's case" because Officer Lopez "told them [Movant] was in the Ace's parking lot with him." (*See* Docket No. 1, 12 (Ground Six).) However, everyone seems to be in agreement that Movant was in fact present at the Ace's parking lot. (*See* Docket No. 1, at 23 (Movant's wife Erika confirmed that she went to the parking lot with Movant); Docket No. 1, at 23 (Chapa said "they went to Ace's BBQ," although later on he did not see Movant

F. Chapa Asserts the Fifth Amendment

Finally, similar to his previous claim Movant argues that the Government violated his constitutional rights by "effectively blocking" co-defendant Chapa from testifying at the motion for a new trial by "standing by idly and watching their star witness make a blanket plea of the Fifth Amendment." (Docket No. 1, ¶ 12 (Ground Seven).) Movant alleges that "Chapa's assertion of the Fifth was not made in good faith but only because it was the Government's desire for him to do so." (*Id.*) Respondent argues that Movant's final claim is meritless, if not, wholly frivolous. (Docket No. 6, at 72-76.)

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there); Docket No. 2, at 3 (Officer Lopez stated that he and Movant "conducted the investigation and seizure of the car."); Docket No. 2, at 55 (Chapa stated that he and Movant "drove over to a parking lot adjacent to Ace's BBQ parking lot."); Cr. Docket No. 192, Jury Trial (Day Three) Tr. 200, 202 (Chapa testified that "Mr. Mendez initially showed [him] the vehicle parked in Ace's parking lot."); Cr. Docket No. 193, Jury Trial (Day Four) Tr. 148 (Chapa testifying that "Mr. Mendez located the vehicle and—that contained the cocaine in front of Ace's BBQ."). In addition, Officer Lopez and Movant's wife apparently disagree about Movant's involvement in the search and seizure of the car. On the one hand Officer Lopez alleges that Movant was with him during "the investigation and seizure of the car," but Movant's wife alleges that Movant was with her the whole time while at Ace's except for when he went inside to "get some drinks." (*Compare* Docket No. 2, at 1, *with* Docket No. 2, at 56; *see also* Cr. Docket No. 196, Motion Hr'g Tr. 29-32.) Put another way, Movant's bald assertions regarding Officer Lopez's testimony fail to show that it would have been "both material and favorable to his defense" or exculpatory.

As noted, "[t]he Due Process Clause 'guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice.'" *Piper*, 912 F.3d at 854. "Due process includes the right to present witnesses to establish a defense." *Id.* Similarly, "[t]he Compulsory Process Clause of the Sixth Amendment ensures that 'criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.'" *Id.*

"The government may violate both the Fifth and Sixth Amendment when it prevents a defense witness from offering testimony." *Vasquez-Hernandez*, 314 F. Supp. 3d at 756. "This is so because the Due Process Clause of the Fifth Amendment guarantees an opportunity to put on an effective defense, and the Compulsory Process Clause of the Sixth Amendment guarantees a right to compel witness testimony." *Id.*

However, the Sixth Amendment right to compulsory process is not unlimited and "does not always assure a defendant of the testimony sought." *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir. 1980). For example, "the defendants' sixth amendment rights do not override the fifth amendment rights of others." *Whittington*, 783 F.2d at 1218-19. "A valid assertion of the witness' Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights." *Goodwin*, 625 F.2d at 700 (citing *United States v. Lacouture*, 495 F.2d 1237 (5th Cir. 1974) and *United States v. Gloria*, 494 F.2d 477 (5th Cir. 1974)).

"Nonetheless, substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant." *Whittington*, 783 F.2d at 1219.

"Fifth Amendment claims must be judged by the standards in *Hoffman v. United States*, 341 U.S. 479, 486 (1951)." *Goodwin*, 625 F.2d at 700. The *Hoffman* court stated that the Fifth Amendment privilege is applicable where the defendant has 'reasonable cause to apprehend danger from a direct answer.' *Goodwin*, 625 F.2d at 700 (quoting *Hoffman*, 341 U.S. at 486). "And this is a question for the court to decide, the witness may not establish the privilege by his bald assertion of the privilege." *Goodwin*, 625 F.2d at 700. "Of course, the witness need not prove the danger, otherwise the privilege would be meaningless." *Goodwin*, 625 F.2d at 700.

Here again, this claim fails because it is procedurally defaulted. *See Lopez*, 248 F.3d at 433; *Kallestad*, 236 F.3d at 227. Movant failed to raise this claim in his direct appeal, and he has not made an adequate showing of cause for his default to raise this issue, or that he is actually innocent of the crime charged. *Bousley*, 523 U.S. at 622; *Jones*, 172 F.3d at 384. As such, Movant's final claim regarding co-defendant Chapa invoking his Fifth Amendment rights at the motion for new trial is procedurally barred from consideration in this § 2255 action.

At the hearing on his motion for new trial, Movant's newly retained attorney, Ms. Gutierrez, called

numerous witness; notably, Erica Barreiro (Movant's wife) and Carlos A. Garcia (Movant's trial attorney). (*See* Cr. Docket No. 196, Motion Hr'g Tr. 19, 160.) She also made clear her intention to call co-defendant Chapa to testify at the hearing. (*Id.* at 4-8.) The Court informed Ms. Gutierrez that Mr. Chapa, after consulting with his attorney, indicated that he "would invoke his right to remain silent" at the hearing. (*Id.* at 5.) Mr. Chapa's attorney confirmed this. (*Id.*)

Ms. Gutierrez argued that Mr. Chapa should not be allowed to avoid testifying because "this hearing is an extension of the trial," he already "testified [at trial] to the issues that are material," so he has "waived his Fifth Amendment right." (*Id.* at 6.) Ms. Gutierrez stressed that she would only be asking Mr. Chapa questions regarding "solely the issues that were raised during direct." (*Id.* at 8.) The Court disagreed and determined that Mr. Chapa still "maintains his Fifth Amendment rights" because this was "a separate hearing," "he could [still] request permission to withdraw his plea of guilty," and "there are things that could be said or could occur today that might adversely affect his sentencing" later. (*Id.* at 7.) Mr. Chapa was later called to testify at the hearing, and he informed the Court that "[p]er [his] attorney's recommendation," he was not going to testify. (*Id.* at 58-59.)

To begin with, Movant's constitutional rights were not violated here because Mr. Chapa did in fact testify at Movant's trial. (Cr. Docket No. 192, Jury Trial (Day Three) Tr. 144-206; Cr. Docket No. 193, Jury Trial (Day Four) Tr. 4-99.) More importantly, Movant's attorney,

Mr. Garcia, had the opportunity to cross-examine Mr. Chapa and to challenge his testimony and version of events. (Cr. Docket No. 193, Jury Trial (Day Four) Tr. 24-93.) At the outset, Mr. Garcia challenged Mr. Chapa, highlighting for the jury that he had changed his story "several times over the years," and that he has been caught lying "on several occasions to many different people depending on who [he was] talking to." (*Id.* at 24-25.) Stated another way, Movant's due process rights were not violated because he did have the opportunity to "present witnesses to establish [his] defense." *Piper*, 912 F.3d at 854. Furthermore, Movant's right to compulsory process was not violated here because Mr. Chapa did not need to be compelled to testify at Movant's trial.[21] *Id.*

Next, Movant alleges that the Government "effectively blocked" Mr. Chapa's testimony at the hearing by "standing by idly and watching [him] make a blanket plea of the Fifth Amendment." (Docket No. 1, ¶ 12 (Ground Seven).) The record does not support this bald assertion. *Reed*, 719 F.3d at 374 ("[S]peculative and unsupported accusations of government wrongdoing do not entitle a defendant to an evidentiary hearing.") *Pineda*, 988 F.2d at 23 (In a § 2255 motion to vacate,

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[21] In addition, as Respondent points out, Ms. Gutierrez stated that she planned to question Mr. Chapa regarding "solely the issues that were raised during direct." (*See* Cr. Docket No. 196, Motion Hr'g Tr. 8.) Her "intention is simply to ask him questions that he testified about" during the trial. (*Id.*) "As such, her questions would have been repetitive, and the Court would have been within its discretion to limit or eliminate them altogether." (*See* Docket No. 6, at 76.)

"conclusory allegations on a critical issue are insufficient to raise a constitutional issue."). Here, the Government did not "interfere" with Mr. Chapa's decision nor "prevent" him from testifying. *See Whittington*, 783 F.2d at 1219 ("Nonetheless, substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant."); *Vasquez-Hernandez*, 314 F. Supp. 3d at 756 ("The government may violate both the Fifth and Sixth Amendment when it prevents a defense witness from offering testimony."); (*see also* Cr. Docket No. 196, Motion Hr'g Tr. 5-9.) As the record makes clear, Mr. Chapa's decision was made by himself upon the advice of counsel.

Finally, Movant asserts that Mr. Chapa's "assertion of the Fifth was not made in good faith." (Docket No. 1, ¶ 12 (Ground Seven).) Here, Movant's "sixth amendment rights do not override [Mr. Chapa's] fifth amendment rights." *Whittington*, 783 F.2d at 1218-19. As noted, both Mr. Chapa, and his attorney, confirmed that they discussed Mr. Chapa potentially testifying at the hearing on Movant's motion for a new trial. (Cr. Docket No. 196, Motion Hr'g Tr. 5, 59.) Mr. Chapa decided to invoke his Fifth Amendment rights based on his "attorney's recommendation." (*Id.* at 59.)

The District Court determined that Mr. Chapa "maintains his Fifth Amendment rights" because he could still "withdraw his plea of guilty" and "since he's not been sentenced, there are things that could be said or could occur today that might adversely affect his sentencing." (*Id.* at 7.); *see Goodwin*, 625 F.2d at 700 (Whether a witness may assert the privilege "is a

question for the court to decide."). Stated another way, Mr. Chapa had "reasonable cause to apprehend danger from a direct answer" at the hearing. *Goodwin*, 625 F.2d at 700 (quoting *Hoffman*, 341 U.S. at 486). As such, Movant has failed to show that the Court's finding that Mr. Chapa's assertion of his Fifth Amendment rights was valid, was somehow improper. *Goodwin*, 625 F.2d at 700 ("A valid assertion of the witness' Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights.").

For these reasons, Movant's final claim fails.

III. CONCLUSION

For the foregoing reasons, the undersigned respectfully recommends that Respondent's Motion to Dismiss (Docket No. 6) be GRANTED, that Movant's § 2255 Motion to Vacate (Docket No. 1) 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)(A). Although Movant has not yet filed a notice of appeal, the recently-amended § 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).

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 both on procedural grounds and 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—other than his sole claim of ineffective assistance of counsel—lack merit and are procedurally barred. Likewise, the undersigned believes that reasonable jurists would not find debatable or wrong the conclusion that all of 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 the parties, 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 August 24, 2022.

/s/ Nadia S. Medrano
Nadia S. Medrano
UNITED STATES MAGISTRATE JUDGE