Appendix A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 12, 2022
Lyle W. Cayce
Clerk

No. 22-40018

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SERVANDO PINEDA-VALDEZ,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC Nos. 4:19-CV-209, No. 4:17-CR-38

Before HAYNES, ENGELHARDT, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Servando Pineda-Valdez, federal prisoner # 26961-078, pleaded guilty to conspiracy to possess with intent to distribute five kilograms or more of cocaine and was sentenced to 168 months of imprisonment and five years of supervised release. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his sentence. He argues that his defense counsel rendered ineffective assistance on various grounds relating to the Guidelines, the motion to withdraw his guilty plea, and the loss of his adjustment for acceptance of responsibility after that motion to withdraw was denied.

To obtain a COA, Pineda-Valdez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When a district court has denied claims on the merits, a movant must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (internal quotation marks and citation omitted); *see also Slack*, 529 U.S. at 484.

Pineda-Valdez has failed to make the requisite showing. Accordingly, his motion for a COA is DENIED. In addition, his motion for leave to proceed in forma pauperis on appeal is DENIED. As Pineda-Valdez 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).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SERVANDO PINEDA-VALDEZ, #26961-078	§	
	§	
	§	CIVIL ACTION NO. 4:19cv209
VS.	§	CRIMINAL ACTION NO. 4:17cr38(1)
	§	
UNITED STATES OF AMERICA	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson, who issued a Report and Recommendation concluding that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed pursuant to 28 U.S.C. § 2255 should be denied and dismissed with prejudice. Movant filed objections

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a *de novo* review of the objections raised by Movant to the Report, the Court concludes that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court.

It is accordingly **ORDERED** that Movant's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**.

It is further **ORDERED** that all motions not previously ruled on are hereby **DENIED**.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SERVANDO PINEDA-VALDEZ, #26961-078	§	
	§	
	§	**CIVIL ACTION NO. 4:19cv209**
v.	§	**CRIMINAL ACTION NO. 4:17cr38(1)**
	§	
UNITED STATES OF AMERICA		

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Movant Servando Pineda-Valdez filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, asserting violations concerning his Eastern District of Texas, Sherman Division conviction. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 8, 2016, Drug Enforcement Agency ("DEA") agents met with a confidential source ("CS") who stated that Movant was known for distributing five to ten kilograms of cocaine at a time in the Dallas/Fort Worth, Texas area. Under the direction of the DEA, the CS contacted Movant by telephone and said he was interested in purchasing cocaine. The CS, under the direction and surveillance of the DEA, met with Movant, and Movant agreed to sell the CS five kilograms of cocaine.

On January 10, 2017, the CS and an undercover officer who purported to be the customer for the five kilograms of cocaine, met with Movant while DEA agents conducted surveillance.

Movant agreed to sell the undercover officer five kilograms of cocaine for $32,000 apiece. They discussed methods regarding the delivery of the cocaine.

On February 17, 2017, the CS contacted Movant, and Movant stated that he would have a courier, "Michelin," deliver five kilograms of cocaine to the CS. "Michelin" was later identified as co-defendant Miguel Arrellano. The CS, an undercover officer, and Arrellano subsequently met, and Arrellano provided a gift bag that contained five kilograms of cocaine to the undercover officer. Arrellano was arrested at the scene. Movant contacted the CS after some time had passed and stated he had not heard from Arrellano. The CS informed Movant the meeting had gone well and that the undercover officer had the money for the cocaine; however, the CS was having trouble locating Arrellano. Movant stated that he felt something was not right. After a few more calls between the CS and Movant, Movant agreed to meet the CS to receive the payment for the cocaine. The CS, at the direction of the DEA, told Movant to meet him at a Jack-in-the-Box restaurant in Plano. Upon his arrival, Movant was arrested.

On March 8, 2017, the grand jury returned an Indictment charging Movant in Count One with conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846. Crim. ECF (Dkt. #28). On June 19, 2017, the Government filed a Notice of Plea Agreement, informing the Court that the Government and Movant had entered into a plea agreement relating to the charge. Crim. ECF (Dkt. #42). Movant consented to have a United States Magistrate Judge administer the guilty plea and Fed. R. Crim. P. 11 allocution, and on July 19, 2017, before the undersigned and alongside Counsel, Movant pled guilty to Count One of the Indictment pursuant to the written plea agreement. Crim. ECF (Dkts. ##46, 48-49). Through the plea agreement and factual basis, Movant stipulated to being responsible for at least five kilograms

but less than fifteen kilograms of cocaine, resulting in a base offense level of 30. Crim. ECF (Dkt. #49, ¶ 5(a); Dkt. #51, ¶ 5).

On that same day, the undersigned entered Findings of Fact and Recommendation on Guilty Plea, finding that Movant, after consultation with his attorney, knowingly and voluntarily consented to the administration of the guilty plea by a Magistrate Judge subject to final approval and imposition of sentence by the District Court; that Movant verified that he understood the terms of the plea agreement; that Movant was aware of the nature of the charges and the consequences of the plea; that the plea of guilty was made freely, knowingly, and voluntarily and did not result from force, threats, or promises (other than the promises set forth in the plea agreement); and that the plea of guilty was supported by an independent factual basis establishing each of the essential elements of the offense. Crim. ECF (Dkt. #52). On August 8, 2017, United States District Judge Amos L. Mazzant adopted the Magistrate Judge's recommendation, accepted Movant's plea, and adjudged him guilty on Count One of the Indictment. Crim. ECF (Dkt. #53).

The final Presentence Report ("PSR") determined that Movant's base offense level was 30 pursuant to U.S.S.G. § 2D1.1 because the offense involved five kilograms but less than fifteen kilograms of cocaine. Crim. ECF (Dkt. #87 ¶ 17). Specifically, the probation officer found that Movant was responsible for five kilograms of cocaine. *Id.* The base offense level was increased by two levels pursuant to U.S.S.G. § 2D1.1(b)(1) because a dangerous weapon (including a firearm) was possessed during the drug transaction. *Id.* at ¶ 18. The base offense level was increased another two levels pursuant to U.S.S.G. § 3B1.1(c) because Movant organized the drug transaction. *Id.* at ¶ 20. With a three-level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1, *id.* at ¶¶ 24-25, Movant's total offense level was 31, *id.* at ¶ 26. With an offense level of 31 and a criminal history category of I, *id.* at ¶ 30, the advisory guideline range was 108

to 135 months' imprisonment; nevertheless, because of the statutory minimum sentence of ten years, the range became 120 to 135 months' imprisonment. *Id.* at ¶ 44.

Movant, through Counsel, filed written objections to the base offense level of 30, arguing that the attributed five kilograms of cocaine was incorrect because a laboratory report reflected that the net weight of the cocaine seized was 4,949.1 grams after removal of the packaging. Crim. ECF (Dkt. #69). And, on February 12, 2018, Movant, through Counsel, filed a motion to withdraw his guilty plea based on the lab results which showed 4945.4 grams of cocaine. Crim. ECF (Dkt. #76). Movant argued that, although he wanted to accept responsibility for his crime, the lab results were not available when he agreed to plead guilty to at least five kilograms of cocaine. *Id.* He sought to withdraw his plea so that his offense level could be based on 4945.4 grams (less than five kilograms) of cocaine. *Id.*

The Government responded, stating that Movant's "plea agreement, his factual statement, his declarations under oath in front of the Magistrate Judge, his debrief with the Government, and his recorded statements with the confidential source all indicate that [he] was involved with well over five (5) kilograms of cocaine." Crim. ECF (Dkt. #84, p. 14). The Government argued that Movant's motion to withdraw his guilty plea based on his claim that he is now only responsible for less than five kilograms of cocaine was "a clear and obvious attempt to minimize his acceptance of responsibility." *Id.* at pp. 14-15. Additionally, the Government argued that if Movant persisted in claiming that he was only responsible for 4945.4 grams of cocaine, he should not be granted a reduction for acceptance of responsibility. *Id.* at p. 15.

A sentencing hearing was held on February 28, 2018. Crim. ECF (Dkt. #89). At the beginning of the hearing, the Court informed Movant that if he continued with his motion to withdraw his plea and it was not successful, the Court would take away the reduction for

acceptance of responsibility. Crim. ECF (Dkt. #152, pp. 3-4). Counsel informed the Court that he already had spoken to Movant about this eventuality but conferred again with Movant before proceeding. *Id.* at p. 3. After Movant and Counsel conferred, the following colloquy ensued between the Court and Counsel:

> MR. FERNANDEZ: Judge, I have spoken to him about it. I would like to put on the record that he understands that, if it pleases the Court. But I have spoken with him as far as wanting to continue, and knowing that if we do lose, that you will take away the acceptance of responsibility points.
>
> THE COURT: Okay. But he still wants to proceed?
>
> MR. FERNANDEZ: Yes, Your Honor.

Id. at p. 4.

Movant then testified that he understood that if he proceeded with the motion to withdraw his guilty plea, and he was unsuccessful, he could lose the reduction for acceptance of responsibility. *Id.* at p. 5. Movant confirmed that, with this understanding, he wanted to continue with the motion to withdraw. *Id.* After arguments from both parties, the Court denied the motion to withdraw, found that Movant had not accepted responsibility, and removed the three-point reduction from his offense level. *Id.* at pp. 43-44. This resulted in a final offense level of 34 and a guideline sentencing range of 151 to 188 months' imprisonment. *Id.* at p. 44.

On March 14, 2018, the Court sentenced Movant to 168 months' imprisonment. Crim. ECF (Dkt. #92). The Court also stated that, "absent the guidelines," or even if its application of the guidelines was erroneous, it would impose the same sentence. Crim. ECF (Dkt. #152, pp. 48-49). Movant did not file a direct appeal, but he timely filed the instant § 2255 motion. (Dkt. #1). Movant asserts that he is entitled to relief based on ineffective assistance of counsel. His chief argument is that Counsel's decision to file, and continue with, the motion to withdraw the guilty plea caused Movant to lose the reduction for acceptance of responsibility, which resulted in a

longer sentence. The Government filed a response (Dkt. #14), asserting Movant's claims are without merit, to which Movant filed a reply (Dkt. #16).

II. STANDARD FOR FEDERAL HABEAS CORPUS PROCEEDINGS

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a § 2255 proceeding may not bring a broad-based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A "distinction must be drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-1301 (5th Cir. 1992) (citations omitted). A collateral attack is limited to alleging errors of "constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). Conclusory allegations, which are unsupported and unsupportable by anything else contained in the record, do not raise a constitutional issue in a habeas proceeding. *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

III. MOVANT'S GUILTY PLEA AND WAIVER

Movant pled guilty pursuant to a plea agreement. In his plea agreement, Movant waived his rights to plead not guilty, to be tried by a jury, to have his guilt proven beyond a reasonable doubt, to confront and cross-examine witnesses, to call witnesses in his defense, and to not be compelled to testify against himself. He stated that he understood the charge and the elements of the offense, as well as the possible sentences he faced. Movant stipulated that his guilty plea was freely and voluntary given, and not the result of force, threats, or promises, other than those contained in the plea agreement. Also included in his plea agreement was the following waiver provision:

> Except as otherwise provided in this paragraph, the defendant waives the right to appeal the conviction, sentence, fine, order of restitution, or order of forfeiture in this case on all grounds. The defendant further agrees not to contest the conviction, sentence, fine, order of restitution, or order of forfeiture in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. § 2255. The defendant, however, reserves the right to appeal any punishment imposed in excess of the statutory maximum. The defendant also reserves the right to appeal or seek collateral review of a claim of ineffective assistance of counsel.

Crim. ECF (Dkt. #49, ¶ 11).

The Court first examines whether Movant knowingly and voluntarily pled guilty, as informed and voluntary waivers of post-conviction relief are upheld by the Fifth Circuit. *See United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). In Movant's plea agreement, Movant states:

> The defendant has thoroughly reviewed all legal and factual aspects of this case with defense counsel and is fully satisfied with defense counsel's legal representation. The defendant has received satisfactory explanations from defense counsel concerning each paragraph of this plea agreement, each of the defendant's rights affected thereby, and the alternatives to entering a guilty plea. After conferring with counsel, the defendant concedes guilt and has concluded that it is in the defendant's best interest to enter this agreement rather than proceeding to trial.

Crim. ECF (Dkt. #49, ¶ 15). Movant's plea agreement also states, "This plea of guilty is freely and voluntarily made and is not the result of force, threats, or promises other than those set forth in this agreement." *Id.* at ¶ 10. Further, Movant states, "I have read or had read to me this plea agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it." *Id.* at p. 8. Movant's signed plea agreement shows that his guilty plea was knowingly and voluntarily made.

At Movant's change of plea hearing, Movant said he understood the charge, the elements of the offense, and the rights he was waiving by pleading guilty. Crim. ECF (Dkt. #88). He had reviewed and understood the plea agreement before signing it. Movant understood he could be

sentenced to not less than ten years and not more than life imprisonment. Movant confirmed that he understood the maximum range of penalties and consequences, that the District Judge would sentence him after the PSR is prepared, and that the federal sentencing guidelines are simply discretionary. Movant stated that everything contained in the factual basis was true and correct. The Court admonished Movant as to his waiver of rights and the rights he was reserving. Movant understood the waiver and understood that he would likely be deported as a result of his guilty plea. Movant agreed that he was involved in a conspiracy to distribute at least five kilograms but less than fifteen kilograms of cocaine. Movant stated that he was satisfied with Counsel's advice and representation in his case. Finally, Movant confirmed that his plea was made freely and voluntarily and that nobody forced or threatened him or made any promises to him other than what was in the plea agreement. Accordingly, the plea hearing also shows that Movant's guilty plea was knowing and voluntary.

The factual basis states that Movant's role was "to supply co-conspirators with kilogram quantities of cocaine from various sources which would then be distributed to other co-conspirators and co-defendants . . . in the Eastern and Northern Districts of Texas." Crim. ECF (Dkt. #51). It also states that Movant "knew that the amount involved during the term of the conspiracy [was] at least 5 kilograms but less than 15 kilograms" of cocaine. *Id.* In the Findings of Fact, the United States Magistrate Judge concluded that Movant was fully competent and capable of entering an informed plea, and that his guilty plea was knowing and voluntary. Crim. ECF (Dkt. #52). These documents also show that Movant's guilty plea was knowing and voluntary.

In cases where the record establishes that the defendant understood the nature of the charges against him and the direct consequences of his actions, the rudimentary demands of a fair proceeding and a knowing, voluntary plea are satisfied. *Wright v. United States*, 624 F.2d 557,

561 (5th Cir. 1980). Movant fails to show that he did not understand the nature of a constitutional protection that he was waiving or that he had "such an incomplete understanding of the charges against him that this plea cannot stand as an admission of guilt." *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). The Fifth Circuit has held that a defendant's testimony at the plea colloquy that no one attempted in any way to force him to plead guilty carries a strong presumption of verity. *United States v. Abreo*, 30 F.3d 29, 31 (5th Cir. 1994). If a defendant understands the nature of the charges against him and the consequences of his plea, yet voluntarily chooses to plead guilty, the plea must be upheld on federal review. *Wilkes,* 20 F.3d at 653; *Diaz v. Martin*, 718 F.2d 1372, 1376-77 (5th Cir. 1983). Accordingly, any issues raised in Movant's § 2255 motion that were not reserved for review are waived by Movant's knowing and voluntary plea agreement.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Reserved for review are Movant's claims of ineffective assistance of counsel. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires the defendant to show the performance was deficient and the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. A movant who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence. *James*, 56 F.3d at 667. The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Strickland*, 466 U.S. at 690. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981).

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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Movant must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove the prejudice component, a court need not address the question of counsel's performance. *Id.* at 697. When a movant pleads guilty, as in this case, he must also show that, but for trial counsel's alleged deficient performance, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985). Furthermore, in non-capital cases, to establish prejudice, the movant must show there is a reasonable probability that absent counsel's errors, the movant's sentence would have been different. *Glover v. United States*, 531 U.S. 198, 199 (2001); *see also United States v. Gammas*, 376 F.3d 433, 436 (5th Cir. 2004).

A. Failure to Explain Guidelines Application

Movant alleges that Counsel was ineffective because he failed to explain the application of the sentencing guidelines to Movant's case, including that Movant could lose credit for acceptance of responsibility if he persisted in his motion to withdraw his guilty plea and the motion proved unsuccessful. The record does not support Movant's claim.

In paragraph 4 of the plea agreement, Movant acknowledged that he understood his sentence would be imposed by the District Court after consideration of the guidelines, which were not binding on the District Court but advisory only. Crim. ECF (Dkt. #49, ¶ 4). Movant also acknowledged that he had "reviewed the guidelines with defense counsel," but understood "that no one [could] predict with certainty the outcome of the Court's consideration of the guidelines in this case." *Id.* Additionally, Movant acknowledged that he would not be allowed to withdraw his plea if the sentence was higher than expected, so long as it was within the statutory maximum, and

that the actual sentence to be imposed was solely in the discretion of the District Court. *Id.* At the change of plea hearing, the Court reviewed paragraph 4 of the plea agreement with Movant, and Movant confirmed he understood it. Crim. ECF (Dkt. #88, p. 7). Furthermore, at sentencing, Movant testified that he understood that he could lose credit for acceptance of responsibility if he persisted in his motion to withdraw his guilty plea. Crim. ECF (Dkt. #152, p. 5).

In sum, Movant fails to show that Counsel did not explain how the guidelines applied to Movant's case—more specifically, that Movant could lose credit for acceptance of responsibility if he continued with his motion to withdraw his guilty plea and was unsuccessful in the attempt. Movant does not identify any other specific guideline provision that Counsel allegedly failed to explain. Nonetheless, Movant cannot demonstrate that, but for Counsel's alleged failure to explain the application of the guidelines to his case, he would not he would not have pled guilty and would have insisted on going to trial. *See Hill*, 474 U.S. at 57-59.

Furthermore, the District Court made clear that it would have imposed the same sentence regardless of the applicable guidelines range. Thus, even assuming that Movant would not have filed, or continued with, the motion to withdraw, and would have been granted a reduction for acceptance of responsibility, the District Court still would have imposed the same sentence of 168 months' imprisonment. Thus, Movant cannot demonstrate that, but for Counsel's alleged failure to explain the application of the guidelines, Movant's sentence would have been different. *See Glover*, 531 U.S. at 199; *Gammas*, 376 F.3d at 436; *cf. United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012) (error in the guidelines calculation was harmless where the district court stated that even if its calculation under the guidelines was incorrect, it would still impose the same sentence); *United States v. Gutierrez-Mendez*, 752 F.3d 418, 430 (5th Cir. 2014) (same). This ineffective assistance of counsel claim is without merit and should be denied.

B. Counsel's Assurances Regarding the Motion to Withdraw

Next, Movant argues that Counsel was ineffective because he "assured" Movant the motion to withdraw would succeed. (Dkt. #1-1, p. 9).

As an initial mater, Movant does not point to any evidence, other than his own affidavit, to show that Counsel promised him the motion to withdraw his plea would be successful. Rather, the record establishes that Counsel informed Movant about the possibility of being denied a reduction for acceptance of responsibility if the motion to withdraw the guilty plea proved unsuccessful. The District Court also cautioned Movant about this eventuality at the beginning of the sentencing hearing. The record weighs against Movant's allegation that Counsel promised a victory on the motion to withdraw.

With respect to Counsel's decision to file, and continue with, the motion to withdraw, "conscious and informed decisions on trial tactics and strategy cannot merit habeas relief unless they were so ill-chosen that they permeate the entire trial with obvious unfairness." *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983). Furthermore, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. A review of the sentencing transcript demonstrates that Counsel thoroughly researched the issue, carefully considered and discussed the ramifications of the motion with Movant as well as other attorneys who practiced criminal law in federal court, and believed that the motion had merit and was in Movant's best interests. Although the defensive strategy was arguably "risky," Movant has failed to overcome the presumption that the strategy was inside the wide range of reasonable professional assistance. *See Livingston v. Johnson*, 107 F.3d 297, 306-07 (5th Cir. 1997). The record does not show that Counsel's advice with respect to the motion to withdraw represented anything other than a

legitimate exercise of professional judgment. That the motion to withdraw was unsuccessful is insufficient to establish deficient performance. *See Strickland*, 466 U.S. at 687; *United States v. Cantu-Cantu*, 157 F.3d 903 (5th Cir. 1998).

Moreover, Movant cannot demonstrate that, but for Counsel's advice regarding the merits of the motion to withdraw, his sentence would have been different. *See Glover*, 531 U.S. at 199; *Gammas*, 376 F.3d at 436; *cf. Richardson*, 676 F.3d at 511; *Gutierrez-Mendez*, 752 F.3d at 430. Indeed, the District Court made clear that it would have imposed the same sentence, regardless of the guidelines range. Thus, this ineffective assistance of counsel claim is without merit and should be denied.

C. Counsel's Assurance Regarding Reduction for Acceptance of Responsibility

Movant also argues that Counsel was ineffective because he assured him that the District Court would not take away the acceptance of responsibility credit if he filed a motion to withdraw his guilty plea.

Again, Movant does not point to any evidence, other than his own affidavit, to show that Counsel promised him that the Court would not take away the acceptance of responsibility credit if he filed a motion to withdraw his guilty plea. To the contrary, the record shows that Counsel informed Movant about the possibility of being denied a reduction for acceptance of responsibility if the motion to withdraw the guilty plea proved unsuccessful. The District Court also cautioned Movant about this eventuality at the beginning of the sentencing hearing. Furthermore, Movant acknowledged in the plea agreement that he understood that "no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case" and that "the actual sentence to be imposed is solely in the discretion of the Court." Crim. ECF (Dkt. #49, ¶ 4). Thus, even if Counsel made some type of predication regarding the District Court's treatment of the reduction

for acceptance of responsibility, Movant was aware that Counsel could not predict with certainty what the Court would do with respect to the acceptance of responsibility reduction. Movant decided to proceed with his motion to withdraw despite this uncertainty.

Moreover, Movant cannot demonstrate that, but for Counsel's advice regarding the Court's treatment of the acceptance of responsibility deduction, his sentence would have been different. *See Glover*, 531 U.S. at 199; *Gammas*, 376 F.3d at 436; *cf. Richardson*, 676 F.3d at 511; *Gutierrez-Mendez*, 752 F.3d at 430. Indeed, the District Court made clear that it would have imposed the same sentence, regardless of the guidelines range. This claim of ineffective assistance is without merit and should be denied.

D. Failure to Ask Permission to File Motion to Withdraw

Movant claims that Counsel was ineffective because he filed the motion to withdraw the guilty plea without Movant's permission. This claim is belied by the record. In his affidavit attached to his § 2255 motion, Movant states that had he known Counsel "was incorrect in his reasoning, [he] would have never *agreed* to file the motion to vacate the guilty plea." (Dkt. #1-2, ¶ 11) (emphasis added). This statement demonstrates that Movant acquiesced to the motion being filed. At sentencing, the Court cautioned Movant as to the consequences of proceeding with the motion and the motion proved unsuccessful, and Movant unequivocally stated that he understood the consequences and wished to continue with the motion. This claim is without merit and should be denied.

E. Failure to Consider Implications of Motion to Withdraw

Movant further contends that Counsel was ineffective because he failed to consider the implications of filing the motion to withdraw Movant's guilty plea. This claim is not supported by the record. At sentencing, Counsel thoroughly explained the research he conducted into the

motion to withdraw the plea and why he decided to file the motion. Movant fails to show that this strategy, sound or not, was the product of a lack of investigation and informed evaluation of Movant's options. *See Bower v. Quarterman*, 497 F.3d 459, 467 (5th Cir. 2007). In addition, at sentencing, the Court informed Movant of the implications of continuing with his motion to withdraw. There is no merit to Movant's argument that Counsel failed to consider the consequences of filing, or continuing with, the motion to withdraw. Moreover, Movant fails to demonstrate prejudice from Counsel's decision regarding the motion to withdraw, because the District Court made clear that it would have imposed the same sentence, regardless of the guidelines range. Thus, this claim is without merit and should be denied.

F. Cumulative Error

Last, Movant argues that the cumulative effect of the impact of Counsel's errors require his sentence to be vacated. Federal relief is available only for cumulative errors that are of constitutional dimension. *Livingston*, 107 F.3d at 309; *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993). Because none of Movant's ineffective assistance of counsel claims establishes ineffective assistance, he has not identified errors of constitutional dimension. *See Miller v. Johnson*, 200 F.3d 274, 286 n.6 (5th Cir. 2000); *Livingston*, 107 F.3d at 309. The claim lacks merit and should be denied.

V. HEARING

Movant also requests an evidentiary hearing. Evidentiary hearings, however, are not required in federal habeas corpus proceedings. *See Rule 8, Rules Governing § 2255 Cases in the United States District Courts*; *see also McCoy v. Lynaugh*, 874 F.2d 954, 966-67 (5th Cir. 1989). Quite the contrary, "to receive a federal evidentiary hearing, a petitioner must allege facts that, if proved, would entitle him to relief." *Wilson v. Butler*, 825 F.2d 879, 880 (5th Cir. 1987), *cert.*

denied, 484 U.S. 1079 (1988). "This requirement avoids wasting federal judicial resources on the trial of frivolous habeas corpus claims." *Id.* In this case, Movant fails to show that he is entitled to an evidentiary hearing. *See United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980) (noting that mere conclusory allegations are not sufficient to support a request for an evidentiary hearing). As was determined above, Movant's guilty plea was knowing and voluntary, and he fails to meet his burden in showing that his plea was due to ineffective assistance of counsel, that Counsel rendered deficient performance with respect to the motion to withdraw Movant's guilty plea, or that absent Counsel's errors, Movant's sentence would have been different. Accordingly, he is not entitled to a hearing. *See id.*

VI. CONCLUSION

The Court concludes that Movant's guilty plea was knowing and voluntary. Movant fails to show that Counsel rendered deficient performance or that there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Finally, Movant fails to show he is entitled to a hearing. For these reasons, the § 2255 motion should be denied.

VII. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, the Court will address whether Movant would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a [movant] relief is in the best position to determine whether the [movant] has made a substantial showing of a denial of a constitutional right on the issues

before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the movant must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the movant shows, at least, that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

In this case, it is respectfully recommended reasonable jurists could not debate the denial of Movant's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is recommended the court find Movant is not entitled to a certificate of appealability.

VIII. RECOMMENDATION

It is recommended the above-styled motion for relief under 28 U.S.C. § 2255 be denied and this case be dismissed with prejudice. It is further recommended a certificate of appealability be denied.

Within fourteen days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).