APPENDIX C

Report and Recommendation of

the United States Magistrate Judge,

(Mar. 2, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TOMAS JARAMILLO,	§	
Petitioner,	§	**A-21-CV-902-LY-ML**
V.	§	**(A-19-CR-318-LY-8)**
	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court are Tomas Jaramillo's Motion to Vacate Under 28 U.S.C. § 2255 and Memorandum of Law and Facts in Support (Dkt. #427), the Government's Response (Dkt. #433), and Jaramillo's Reply (Dkt. #434).[1]

I. BACKGROUND

A. Indictment and Guilty Plea

On December 3, 2019, Movant Tomas Jaramillo was indicted on one count of conspiracy to distribute 500 grams or more of methamphetamine, 40 grams or more of fentanyl and cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). Dkt. #159 (Indictment). On August 13, 2020, Jaramillo pled guilty to the indictment in a plea hearing before the undersigned. *See* Dkt. #290 (Findings of Fact and Recommendation); Dkt. #432 (Transcript from Plea Hearing). Jaramillo pled guilty without a plea agreement. *Id*.

Jaramillo testified at the plea hearing that he had consulted with his attorney about the charges he faced, had reviewed the indictment with his attorney, that he was "satisfied with the representation" his attorney had provided him and that he had no complaints regarding the performance of his attorney. Dkt. #432 at 6:12-18. Jaramillo further confirmed at the plea hearing

[1] The undersigned submits this Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas.

that he understood the significance of the statutory range of punishment that he faced and understood the important role that the sentencing guidelines play in his sentencing. *Id*. at 9:1-13; 13:5-15. Importantly, Jaramillo also testified that he understood that any estimate of a sentencing range given to him by his attorney was a guess and that such a guess is not binding upon a district judge, who was free to reach his own conclusion about Jaramillo's sentence. *Id*. at 14:1-15. The court further established that Jaramillo was competent to enter the guilty plea and that he made the plea freely and voluntarily. *See* Dkt. #290. On September 16, 2020, the district court accepted Jaramillo's guilty plea. Dkt. #335.

B. Sentencing

In the final presentence report ("PSR"), the Probation Office calculated that Jaramillo was responsible for distributing more than 5 kilograms of "ICE" methamphetamine, resulting in a Total Offense Level of 41, and determined Jaramillo's Criminal History Category as I, for a Guidelines range of 324 to 405 months. Dkt. #409 (Final PSR), at ¶¶ 23, 29, 38, 42, 57.

On January 27, 2021, Jaramillo was sentenced by the district court to a below guidelines sentence of 240 months. Dkt. #410 (Final Judgment and Commitment); Dkt. #431 (Transcript from Sentencing Hearing).

Neither the District Court docket nor the Fifth Circuit docket reflect the filing of a direct appeal. A notice of appeal must be filed within 14 days from the entry of judgment. FED. R. APP. P. 4(b)(1)(A), 26(a)(2). Therefore, Jaramillo's deadline for filing a notice of appeal passed on February 10, 2021.

C. Instant Petition

On October 7, 2021, Jaramillo filed the instant 2255 petition. Dkt. #427. In his 2255 motion, Jaramillo makes several complaints about his attorney's representation including

allegations that his attorney was ineffective by failing to file a notice of appeal, failing to raise and litigate the actual methamphetamine determination during the Rule 11 plea hearing, failing to object to the presentence investigation report (PSR), and failing to challenge the drug amounts in the PSR. *See* Dkt. #427. The motion further alleges violations of Jaramillo's Fifth and Sixth Amendment rights due to an erroneously calculated base level offense. *Id*.

In light of Jaramillo's allegation that his attorney failed to file a notice of appeal as he requested, the court ordered the parties to appear for an evidentiary hearing as to the conversations between Jaramillo and his attorney. Dkt. #437. The court also appointed attorney Phil Lynch to represent Jaramillo during these limited proceedings. Dkt. #435.

The court held the evidentiary hearing on February 10, 2022. Dkt. #438. At the hearing, the court heard the testimony of Jaramillo, his wife, and his former retained counsel, Kevin Boyd, as well as the arguments of counsel for all parties. Having considered Jaramillo's motion, all relevant briefing, as well as the testimony and arguments presented at the evidentiary hearing, the undersigned issues the following report and recommendation.

II. LEGAL STANDARD

Under § 2255, four general grounds exist upon which a defendant may move to vacate, set aside, or correct his sentence: 1) the sentence was imposed in violation of the Constitution or laws of the United States; 2) the district court was without jurisdiction to impose the sentence; 3) the sentence imposed was in excess of the maximum authorized by law; and 4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. The nature of a collateral challenge under § 2255 is extremely limited: "A defendant can challenge his conviction after is it presumed final only on issues of constitutional or jurisdictional magnitude . . . and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual

prejudice' resulting from the error." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). If the error is not of constitutional or jurisdictional magnitude, the movant must show that the error could not have been raised on direct appeal and would, if condoned, "result in a complete miscarriage of justice." *United States v. Smith*, 32 F.3d 194, 196 (5th Cir. 1994). A defendant's claim of ineffective assistance of counsel gives rise to a constitutional issue and is cognizable pursuant to § 2255. *United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1996).

III. ANALYSIS

A. Ineffective Assistance of Counsel

The court reviews claims of ineffective assistance of counsel under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). To warrant post-conviction relief, a movant must show his attorney's performance fell below an objective standard of reasonableness, and that he was prejudiced by that substandard performance. *Id.* at 687-692. To establish deficient performance, the movant must show that his counsel committed an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. A movant must offer more than "conclusory allegations" of his counsel's ineffective assistance. *See Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998) ("Mere conclusory allegations in support of a claim of ineffective assistance are insufficient to raise a constitutional issue").

To demonstrate prejudice, 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. Thus, "the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have

been established if counsel acted differently." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different," which "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* at 111-12 (quoting *Strickland*, 466 U.S. at 693, 696, 697). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112.

i. Failure to File Appeal as Instructed

Jaramillo's Section 2255 motion alleges that defense counsel rendered ineffective assistance by failing to follow his directions to file a notice of appeal. Dkt. #427 at 7, 22-23. "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). "[T]he failure to file a requested [notice of appeal] is per se ineffective assistance of counsel." *United States v. Tapp*, 491 F.3d 263, 265 (5th Cir. 2007). If a defendant "is able to demonstrate by a preponderance of the evidence that he requested an appeal, prejudice will be presumed and [he] will be entitled to an out-of-time appeal, regardless of whether he is able to identify any arguable meritorious grounds for appeal . . . ." *Id*. at 266.

The court assesses the credibility of Jaramillo and his former defense attorney, Kevin Boyd, regarding the issue of whether Jaramillo requested his attorney file a notice of appeal and his attorney refused. *See Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980) (discussing the deference given to a judge who conducted an evidentiary hearing based on a habeas corpus claim and that judge's authority and discretion to make credibility findings based upon hearing and observing witness testimony). *See also Portillo-Guerrero v. United States*, 1:19-CV-82, 2020 WL

6922649, at *7-8 (S.D. Tex. Oct. 29, 2020), *report and recommendation adopted*, 2020 WL 6887780 (S.D. Tex. Nov. 24, 2020), *report and recommendation adopted*, 2020 WL 7024857 (S.D. Tex. Nov. 30, 2020), *order amended and superseded*, 2021 WL 183440 (S.D. Tex. Jan. 19, 2021), *report and recommendation adopted*, 2021 WL 183440 (S.D. Tex. Jan. 19, 2021) (finding attorney's testimony that he was never asked to file an appeal credible and that Petitioner's testimony was not credible, thereby failing to carry Petitioner's burden by a preponderance of the evidence).

Both Jaramillo and Boyd testified under oath at the evidentiary hearing. Jaramillo testified that immediately following his sentencing hearing—which was conducted via video conference—Jaramillo spoke on the phone with Boyd and with Boyd's paralegal who served as an interpreter for Jaramillo and his wife. Jaramillo claims that during this phone call, Jaramillo asked Boyd to file an appeal. According to Boyd's testimony, Jaramillo made no such request. Boyd testified that in the past, he has had clients ask him to file a notice of appeal, even after pleading guilty, and that he has always acted according to their wishes. Boyd stated under oath that if Jaramillo had asked him or his paralegal to file a notice of appeal, he would have done so. Boyd attested that if requested to do so, he has a legal and ethical duty to follow his client's wishes and file a notice of appeal. The court finds that Boyd's testimony on this issue is credible, while Jaramillo's is not, for various reasons.

First, there is no evidence, other than his word, that Jaramillo affirmatively instructed Boyd to file a notice of appeal. Jaramillo has presented no evidence that either he or his family members reached out to Boyd after the sentencing hearing and asked him to file a notice of appeal or to follow up on an appeal. Notably, Jaramillo's actions and statements to the district court at

sentencing do not reflect any uncertainty with his decision to plead guilty, wish to appeal his sentence, or issues with his attorney's performance. *See* Dkt. #431; Dkt. #432.

Further, Jaramillo's testimony in general is not credible. Jaramillo made several representations to the court, under oath, which belie his claims and testimony here. At the evidentiary hearing, Jaramillo attempted to deny his guilt to the crimes to which he pled guilty, including the fact that Jaramillo was a leader within the drug trafficking group and that Jaramillo had a gun in connection with his drug dealing. However, he testified before the undersigned at the time of his guilty plea that the factual basis of his plea was correct (*see* Dkt. #432 at 18:11-25), and the factual basis stated that the guns and drugs found in his apartment belonged to him (Dkt. #287 at 3-4). Similarly, at the evidentiary hearing Jaramillo attempted to deny knowledge of whether the drugs he distributed were ICE methamphetamine. The record reflects, however, that Jaramillo was recorded by police stating that the drugs constituted ICE methamphetamine, and that Jaramillo admitted knowing the drugs were high quality ICE to Boyd. Dkt. #433-1 at ¶ 2. Additionally, while Jaramillo initially indicated to the court at the evidentiary hearing that he only spoke Spanish and did understand any English, Jaramillo subsequently acknowledged on the witness stand that he does understand English and simply prefers to have an interpreter. In sum, Jaramillo and his claim that he requested Boyd to file a notice of appeal are simply not credible, while the court finds Boyd's testimony is credible.

ii. Failure to Consult

Jaramillo also alleges that counsel rendered ineffective assistance by failing to properly consult with him on his right to appeal. *See* Dkt. #434 at 1. When a defendant does not specifically instruct counsel to appeal, the court considers "whether counsel in fact consulted with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 478.

Although the United States Supreme Court recognized "that the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal," it rejected a bright-line rule that "in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient." *Id*. at 479. Ultimately, the Supreme Court concluded:

> counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Id. at 480.

To establish *Strickland* prejudice in a case where the defendant has not specifically requested his attorney to file an appeal, the petitioner must demonstrate "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id*. at 484. The petitioner need not show that an appeal would be successful or even state the grounds on which he would have appealed. *Id*. at 486.

At the evidentiary hearing, Jaramillo and his wife testified that immediately following sentencing they both expressed dissatisfaction with Jaramillo's sentence and asked Boyd and his paralegal about options to "reduce the number of years." According to Boyd's testimony, it was his belief following sentencing that although Jaramillo and his wife expressed some confusion as to the length of the sentence, that ultimately Jaramillo was happy with the fact that he received a below-Guidelines sentence and that Jaramillo did not indicate any interest in an appeal.

Based on the testimony heard at the evidentiary hearing, the undersigned concludes that Jaramillo reasonably demonstrated an interest in appealing such that Boyd had a duty to consult with Jaramillo regarding his options to appeal. *See Pham*, 722 F.3d at 325 (collecting cases);

Atehortua-Castro v. United States, 2012 WL 3072569, at *4 (N.D. Tex. June 1, 2012), r*eport and recommendation adopted,* 2012 WL 3079056 (N.D. Tex. July 27, 2012), *aff'd sub nom. United States v. Bejarano*, 751 F.3d 280 (5th Cir. 2014). The court turns next to whether Boyd's post-sentencing consultation with Jaramillo was sufficient to discharge his duty.

According to Boyd's testimony, following the sentencing hearing Boyd spoke to Jaramillo on the phone with his paralegal and discussed Jaramillo's right to appeal, including reading to Jaramillo a letter referenced by the district judge during his sentencing which outlined the fourteen-day period to file notice of appeal. Boyd conceded that, although it is his usual practice to conduct a "post-mortem" conference with clients sometime in the weeks following a sentencing, in this case Boyd only had the meeting with Jaramillo's wife, and he did not have any further communications with Jaramillo after his sentencing. Jaramillo's testimony confirmed that he discussed the fourteen-day admonition letter with Boyd during the post-sentencing phone call and that after the phone call Jaramillo did not have any further contact with Boyd or his paralegal.

Based on the testimony given at the evidentiary hearing, the undersigned finds that Boyd provided Jaramillo sufficient information from which he could have intelligently and knowingly asserted his right to an appeal if he had wanted to. Thus the court concludes that Boyd discharged his duty to consult with Jaramillo about appealing. *See Atehortua-Castro*, 2012 WL 3072569, at *4; *United States v. Johnson*, 2018 WL 5014185, at *2 (S.D. Tex. Oct. 16, 2018), *aff'd*, 792 F. App'x 339 (5th Cir. 2020); *United States v. Purviance*, 400 Fed. App'x. 201, 202 (9th Cir. 2010) (unpublished memorandum) (rejecting claim that counsel failed properly to consult with petitioner regarding appeal because petitioner and defense counsel discussed the possibility of an appeal and the petitioner did not instruct counsel to appeal).

Lastly, even assuming deficient performance, the court concludes that Jaramillo cannot show prejudice. In light of the totality of the circumstances of this case, and the evidentiary hearing testimony, Jaramillo cannot demonstrate a reasonable probability that, but for counsel's presumed failure to adequately consult with him about an appeal, he would have timely appealed. The testimony at the evidentiary hearing reflected that in the months following sentencing, Jaramillo did not attempt to contact Boyd with any questions or interest regarding an appeal. Jaramillo's only evidence of prejudice is his own testimony that, if counsel had properly advised him that he could have appealed that he would have insisted on appealing. Nothing in the record supports Jaramillo's supposition, however, and as indicated previously, the court finds Jaramillo's self-serving testimony implausible in light of the other evidence. The court finds that Jaramillo's claim of ineffective assistance for his counsel's failure to consult with Jaramillo as to his right to appeal should likewise be denied.

iii. Failure to Challenge the ICE/Actual Methamphetamine Determination

Next, Jaramillo argues Boyd was ineffective because he did not challenge the ICE/actual methamphetamine determination during the Rule 11 factual basis hearing. Dkt. #427 at 4, 17. This argument is without merit. Jaramillo has not presented any evidence that the drugs that he conspired to distribute were not in fact ICE, as defined by the Sentencing Guidelines. The court, via the PSR, found that "this drug trafficking organization dealt exclusively with high quality methamphetamine" and as a result considered all methamphetamine seized or mentioned to be 'ICE' methamphetamine." Dkt. #409 at ¶ 5. Jaramillo's 2255 motion presents no evidence to even suggest that conclusion was erroneous. On the contrary, the record reflects that Jaramillo in fact knew this conclusion was correct because Jaramillo discussed and admitted to his attorney "that the drugs were high quality ICE." Dkt. #433-1 at ¶ 2. Accordingly, Jaramillo cannot show

that Boyd's decision not to challenge the ICE/actual methamphetamine determination at the Rule 11 hearing constituted deficient performance, and his claim should be denied.

iv. Failure to Object to the PSR and Challenge the Drug Amounts

Jaramillo also asserts that Boyd was ineffective for failing to object to or challenge the drug amounts in the PSR. Dkt. #427 at 4, 17. As an initial matter, "a district court may adopt the facts contained in a [PSR] without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable." *United States v. Mendez-Becerra*, 745 F. App'x 240, 241 (5th Cir. 2018). "In other words, defendant has the burden of presenting evidence to show the facts in the PSR are inaccurate or materially untrue." *Id*. Here, Jaramillo has provided no evidence to contradict the facts set out in the PSR regarding the amount of drugs for which he was accountable.

Moreover, Jaramillo cannot demonstrate that Boyd's performance was deficient or that Jaramillo was prejudiced by Boyd's failure to object to the drug amounts in the PSR. According to the sworn affidavit submitted by Boyd, Jaramillo agreed that an objection to the PSR was "untenable," and the defense made a strategic decision not to file objections to the PSR but instead to argue for a sentence below the guideline range. Dkt. #433-1 at ¶ 1 (Boyd Affidavit); *see also* Dkt. #407 (Sentencing Memorandum). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002). In this case, the decision to not object to the PSR or drug amounts was a strategic decision. Additionally, Jaramillo has failed to show prejudice, as he received a below-

Guidelines sentence, and presented no other evidence that he would have proceeded to trial. For these reasons, Jaramillo's claims of ineffective assistance of counsel necessarily fail.

B. Violation of Fifth and Sixth Amendment Rights

Lastly, Jaramillo's 2255 motion includes claims that his Fifth and Sixth Amendment due process rights were violated due to an erroneously calculated base offense level. Dkt. #427 at 5. However, as the Government correctly notes, "[a]n improper calculation or application of the sentencing guidelines is an error that could be raised on direct appeal; thus, "claims that the guidelines were improperly applied are not cognizable under § 2255." *United States v. Payne*, 99 F.3d 1273, 1281 (5th Cir. 1996); *see also United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992) ("A district court's technical application of the Guidelines does not give rise to a constitutional issue."). As stated above, there was no direct appeal in this case. Accordingly, Jaramillo's claim that the court erroneously calculated his base offense level is not cognizable under Section 2255.

IV. RECOMMENDATIONS

The undersigned **RECOMMENDS** that the District Court **DENY** Petitioner Tomas Jaramillo's Motion to Vacate Under 28 U.S.C. § 2255 (Dkt. #427).

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the

Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED March 2, 2022

MARK LANE
UNITED STATES MAGISTRATE JUDGE