Appendix A

United States Court of Appeals
For the First Circuit

No. 22-1414

CHRISTOPHER L. LAUREANO-PEREZ,

Petitioner - Appellant,

v.

UNITED STATES,

Respondent - Appellee.

Before

Barron, Chief Judge,
Lynch and Howard, Circuit Judges.

JUDGMENT

Entered: June 22, 2023

Petitioner-Appellant Christopher Laureano-Perez seeks a certificate of appealability ("COA") to appeal from the denial of his § 2255 petition in the district court. After careful review of all of petitioner's submissions and of the record below, we conclude that that the district court's disposition of the petition was neither debatable nor wrong, and that petitioner has therefore failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, Laureano-Perez's motion for a COA is denied.

The appeal is hereby terminated.

So ordered.

By the Court:

Maria R. Hamilton, Clerk

cc:
Christopher L. Laureano-Perez, Mariana E. Bauzá-Almonte

Appendix B

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CHRISTOPHER LAUREANO-PÉREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 18-1837 (ADC)
[Related to Crim. No. 12-426-2 (ADC)]

OPINION & ORDER

Pending before the Court is Christopher Laureano-Pérez's ("Petitioner") motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. **ECF No. 1.** The Government filed a response, and Petitioner replied. **ECF Nos. 7; 21.** For the reasons set forth below, the Court **DENIES** Petitioner's § 2255 motion.

I. Factual and Procedural Background

Petitioner, pro se, claims that both trial and appellate counsels rendered ineffective assistance in violation of his Sixth Amendment rights. **ECF No. 1-1.** Petitioner contends that his trial counsel failed to: (1) object to the superseding indictment as duplicitous or multiplicitous, *id.* at 6-8, (2) object to the sentence for not comporting with the rule of lenity, *id.* at 8-12, (3) request an instruction as to the proper weight the jury should give certain testimonies, *id.* at 12-14, (4) object to the use of a machinegun at sentencing, *id.* at 14-17, and (5) object to the drug quantity application at sentencing, *id.* at 17-19. He alleges appellate counsel similarly rendered ineffective assistance by not raising these issues on appeal. *See id.* at 19-21.

On November 28, 2012, a Grand Jury charged Petitioner in Counts 7 and 9 of a multi-defendant superseding indictment. **Crim. No. 12-426, ECF No. 58.** Count 7 charged him with conspiracy to possess with intent to distribute 1 kilogram or more of heroin, 280 grams or more of crack cocaine, 5 kilograms or more of cocaine, and measurable amounts of marijuana, Oxycodone, and Alprazolam, all within 1,000 feet of a protected location, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 860. *Id.* at 8-22. Count 9 charged him with conspiracy to possess firearms in furtherance of a drug trafficking crime, in violation 18 U.S.C. §§ 924(c)(1) and (o). *Id.* at 23-25.

On June 14, 2013, after an 8-day jury trial before U.S. District Judge Jose A. Fusté, a jury found Petitioner guilty of both charges. **Crim. No. 12-426, ECF Nos. 726, 728.** He was sentenced to life in prison on September 27, 2013. **Crim. No. 12-426, ECF Nos. 1027, 1029.** The Court imposed a single sentence as to the two counts. *See id.*

On October 3, 2013, Petitioner appealed. **Crim. No. 12-426, ECF No. 1036.** On July 30, 2015, The First Circuit affirmed his conviction, but remanded for resentencing so that the Court could impose separate sentences for Counts 7 and 9. *See United States v. Laureano-Pérez*, 797 F.3d 45, 83 (1st Cir. 2015).

On January 8, 2016, the Court resentenced Petitioner to 480 months imprisonment as to Count 7 and 240 months as to Count 9, to be served concurrently to each other. **Crim. No. 12-426, ECF Nos. 1484, 1487.**

II. Legal Standard

Pursuant to 28 U.S.C. § 2255, a federal prisoner may move to vacate, set aside, or correct his sentence if "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C § 2255; *Hill v. United States*, 368 U.S. 424, 426-427 (1962).

To review a claim of ineffective assistance of counsel, the Court must assess whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *See Strickland v. Washington*, 466 U.S. 668, 685-87 (1984). To succeed in a claim of ineffective assistance of counsel, a petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to petitioner. *See United States v. Carrigan*, 724 F.3d 39, 44 (1st Cir. 2013). That is to say, a petitioner must demonstrate both incompetence and prejudice. Furthermore, the *Strickland* test is bifurcated. *See Tevlin v. Spencer*, 621 F.3d 59, 66 (1st Cir. 2010). Failure to prove either prong proves fatal for the other. *See United States v. Caparotta*, 676 F.3d 213, 219 (1st Cir. 2012).

III. Discussion

a. Duplicity and Multiplicity

Petitioner argues that his trial counsel provided ineffective legal assistance because he did not object to duplicitous or multiplicitous charges levied against him in the superseding indictment. **Civil No. 18-1837, ECF No. 1-1 at 6-8.**[1] The Government responds that the two charges against Petitioner are neither duplicitous nor multiplicitous because they are distinct offenses with different elements covered by separate statutes. **Civil No. 18-1837, ECF No. 7 at 5-6.**

As previously stated, Petitioner was charged with conspiracy to possess with intent to distribute various controlled substances within 1,000 feet of a protected location (Count 7) and conspiracy to possess firearms in furtherance of a drug trafficking crime (Count 9). **Crim. No. 12-426, ECF No. 58 at 8-22; 23-25.**

"Duplicity is the joining in a single count of two or more distinct and separate offenses." *United States v. D'Amico*, 496 F.3d 95, 98 (1st Cir. 2007), *cert. granted, judgment vacated on other grounds*, 552 U.S. 1173 (2008). It follows that an indictment is improper when it joins, in a single count, two or more distinct offenses. *See United States v. Prieto*, 812 F.3d 6, 11 (1st Cir. 2016) (*citing* Fed. R. Crim. P. 8(a)). Here, the Court finds that the superseding indictment is not duplicitous

[1] It is not clear whether Petitioner's pro se § 2255 motion is claiming that the superseding indictment is duplicitous or multiplicitous. The Court construes pro se motions "more favorably than [it] would those drafted by an attorney." *Miranda v. United States*, 2011 WL 13150194, at *2 (D.P.R. July 21, 2011) (*citing Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). As such, the Court will address both arguments.

because Counts 7 and 9 are two distinct offenses that were not joined into a single count. *See United States v. Dunbar*, 367 F. Supp. 2d 59, 61 (D. Mass. 2005) ("Even if Counts 1 and 2 were based entirely on the same conduct, they would not be duplicitous because Counts 1 and 2 allege two separate crimes (conspiracy to distribute drugs and conspiracy to import drugs)").

"An indictment is multiplicitous and in violation of the Fifth Amendment's Double Jeopardy Clause if it charges a single offense in more than one count." *United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994). The rule against multiplicitous prosecution "protects against multiple punishments for the same offense." *United States v. Pires*, 642 F.3d 1, 15 (1st Cir. 2011). Determining whether an indictment is multiplicitous requires the Court to examine whether a particular course of illegal conduct constitutes one or multiple offenses. *See United States v. Chiaradio*, 684 F.3d 265, 272 (1st Cir. 2012). In the present case, the Court finds that the superseding indictment is not multiplicitous because Counts 7 and 9 are different offenses. *See Guerrero-Clavijo v. United States*, 242 F. Supp. 3d 57, 62 (D. Mass. 2017). Indeed, Petitioner was charged with 21 U.S.C. § 846 in Count 7 and 18 U.S.C. § 924 in Count 9. Each of these statutes require "proof of a fact the other did not." *See id.* Consequently, Petitioner's counsel did not provide ineffective legal representation for failing to object to the superseding indictment as duplicitous or multiplicitous.

Counsel cannot be ineffective by failing to raise an erroneous argument. *See Acha v. United States*, 910 F.2d 28, 32 (1st Cir. 1990).[2]

b. **Lenity**

Petitioner claims that trial counsel was ineffective for not pushing the Court to apply the rule of lenity to the sentence it imposed for Petitioner's Count 7 conviction. **Civil No. 18-1837, ECF No. 1-1 at 8-12.** The Government opposes, contending that the rule of lenity does not apply because the statute under which Petitioner was sentenced is unambiguous. **Civil No. 18-1837, ECF No. 7 at 8-9.**

The rule of lenity requires that ambiguity in a criminal statute be resolved in favor of the accused. *See United States v. Jiménez*, 507 F.3d 13, 20 (1st Cir. 2007). Genuine ambiguity requires more than just a possible alternative construction. *See id.* at 21. The rule only applies if there is "grievous ambiguity" in the statute, or where no common definition of a term exists and there is "insurmountable doubt" as to Congress's intent. *See id.* at 21, 22.

In the case-at-hand, Petitioner was sentenced for a violation of 21 U.S.C. § 846, a drug conspiracy statute. The Supreme Court has previously held that the rule of lenity cannot be

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[2] Petitioner also claims that his conspiracy convictions cannot stand because the superseding indictment does not allege a "single act" that links him to the conspiracy. **Civil No. 18-1837, ECF No. 1-1 at 6-8.** The Government counters that neither of the conspiracies require an overt act. **Civil No. 18-1837, ECF No. 7 at 5-6.** The Court agrees with the Government. *See United States v. Shabani*, 513 U.S. 10, 11 (1994) (holding that drug conspiracy statute does not require the Government to prove conspirator committed an overt act in furtherance of the conspiracy); *United States v. Pena-González*, 62 F. Supp. 2d 366, 370-72 (D.P.R. 1999) (holding that drug conspiracy and firearm conspiracy statutes do not require proof of an overt act in furtherance of a conspiracy).

applied to 21 U.S.C. § 846 convictions because the statute is not grievously ambiguous. *See United States v. Shabani*, 513 U.S. 10, 17 (1994). The Court is bound by that precedent here.

Thus, Petitioner's rule of lenity argument cannot succeed. *See Acha*, 910 F.2d at 32.

c. **Weight of Testimony**

Petitioner posits that his counsel was ineffective for failing to request a jury instruction as to the weight the jury should give to the testimonies of Officer Luis Vázquez-Torres ("Officer Vázquez"), Marco Díaz-Narváez ("Díaz"), and Carlos Rivas-Serrano ("Rivas"). **Civil No. 18-1837, ECF No. 1-1 at 12-14.** The Government responds that the Court did instruct the jury as to the proper weight it should give to the testimonies. **Civil No. 18-1837, ECF No. 7 at 7-8.**

After reviewing the transcript for the last day of the jury trial, the Court finds that it did indeed instruct the jury as to the proper weight it should give to Officer Vázquez's, Díaz's, and Rivas' testimonies. **Crim. No. 12-426, ECF No. 1186 at 97-101.** Regarding Officer Vázquez, the Court instructed the jury that the "fact that some agents testified, whether they were Puerto Rico Police agents, FBI agents, task force agents that are agents of the Puerto Rico Police, or other agents of the Puerto Rico government, given Federal permission to work as a Federal agent, that label alone doesn't make the person more credible." *Id.* at 99. As to the two cooperating witnesses, Díaz and Rivas, the Court asserted that the jury "should consider the testimony of these individuals with particular caution" because "[t]hey may have had reason to make up stories or exaggerate what others did because they wanted to help themselves." *Id.* at 100. Hence, Petitioner's argument fails. *See Acha*, 910 F.2d at 32.

d. **Machinegun**

Petitioner contends that his counsel provided ineffective legal aid because he failed to object to the imposition of a sentence for possession of a machinegun under Count 9. **Civil No. 18-1837, ECF No. 1-1 at 14-17.** The Government disputes this argument by claiming that it is unsupported by the record because he was instead charged with conspiracy to possess firearms "of unknown brands, models, calibers, and serial numbers" in furtherance of a drug trafficking crime. **Civil No. 18-1837, ECF No. 1-1 at 9.**

The Court agrees with the Government. The superseding indictment never charged Petitioner with possessing a machinegun and he was not sentenced for conspiring to possess a machinegun. **Crim. No. 12-426, ECF Nos. 58 at 23-25; 1487 at 1.** Petitioner's argument is accordingly belied by the record and is therefore doomed. *See Acha*, 910 F.2d at 32.

e. **Foreseeable Drug Quantities**[3]

Petitioner maintains that his counsel's performance was ineffective because he did not object to the drug quantity application at sentencing. **Civil No. 18-1837, ECF No. 1-1 at 17-19.** The Government retorts Petitioner could reasonably foresee the quantity of drugs applied. **Civil No. 18-1837, ECF No. 7 at 9-11.**

In cases involving a drug conspiracy, the sentencing court must "make an individualized finding as to drug amounts attributable to, or foreseeable by, the defendant." *United States v.*

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[3] The jury rendered a special verdict determining that the conspiracy involved "more than 5 kilograms of cocaine," "more than 1 kilogram of heroin," "more than 280 grams of cocaine base ('crack')," and "a detectable amount of marihuana." **Crim. No. 12-426, ECF No. 728 at 2-3.**

Millán-Machuca, 991 F.3d 7, 30 (1st Cir. 2021) (cleaned up). When making a drug quantity finding, the sentencing court's responsibility is "to make reasonable estimates of drug quantities, provided they are supported by a preponderance of the evidence." *United States v. Maldonado-Peña*, 4 F.4th 1, 57 (1st Cir. 2021). A drug conspiracy defendant will be held responsible "not only for the drugs he actually handled but also for the full amount of drugs that he could reasonably have anticipated would be within the ambit of the conspiracy." *Id.* at 58.

At sentencing, Petitioner was held accountable for 1,076,241.2 kilograms of converted drug weight, which is the full quantity of drugs attributed to the conspiracy. **Crim. No. 12-426, ECF Nos. 914 at 21-23; 1564 at 16.** According to the evidence presented at trial, the probation officer calculated that the drug organization sold 78,097.77 kilograms of crack cocaine, 9,700.6 kilograms of cocaine, 1,889 kilograms of heroin, and detectable amounts of marijuana, Oxycodone, and Alprazolam per year for 12 years over the course of the conspiracy. **Crim. No. 12-426, ECF No. 914 at 21-23.** This quantity adds up to 1,076,241.2 kilograms of converted drug weight. *See id.*

At trial, cooperating witnesses Díaz and Rivas, who were sellers in the drug organization, identified Petitioner as a leader of the drug organization. **Crim. No. 12-426, ECF Nos. 1176 at 96; 1177 at 34-35; 1179 at 30.** They testified that Petitioner supplied the lookouts with radios, split the cost of paying them, and ordered the gates to the housing project be chained in order to prevent the police from entering. **Crim. No. 12-426, ECF Nos. 1176 at 113, 115; 1182 at 35.**

Furthermore, Díaz testified that Petitioner was in charge and that no one could sell drugs at the housing project without his permission. **Crim. No. 12-426, ECF Nos. 1179 at 33.** Accordingly, the trial Court found that Petitioner was a leader in the drug organization because he was an active participant in and supervisor of a large-scale drug trafficking organization. Under these circumstances, it was reasonable to attribute the full amount of converted drug weight to Petitioner. *See Millán-Machuca,* 991 F.3d at 30-31 (holding that "[s]uch a finding follows inexorably from the conclusion that he was a high-level leader of the conspiracy"). Consequently, Petitioner's counsel did not render defective legal assistance because Petitioner could reasonably foresee that the full amount of drugs would be within the scope of the conspiracy as a leader of the drug organization. As a result, Petitioner's argument fails. *See Acha,* 910 F.2d at 32.

f. **Appellate Counsel**

Petitioner argues that his appellate counsel provided ineffective legal representation because he failed to raise the foregoing issues of ineffective assistance of counsel on appeal. **Civil No. 18-1837, ECF No. 1-1 at 19-21.** The Government argues that appellate counsel cannot be ineffective for failing to raise meritless claims. **Civil No. 18-1837, ECF No. 7 at 11-12.** The Court agrees. Petitioner's appellate counsel did not provide ineffective legal assistance because he acted reasonably in focusing on the most promising arguments. *See Cofske v. United States,* 290 F.3d 437, 444 (1st Cir. 2002) (indicating that the Court has "regularly said that appellate counsel is often well advised to choose the most promising arguments and is not obliged to crowd a

brief with less promising ones which may detract"). Moreover, counsel cannot be ineffective by failing to raise erroneous arguments. *See Acha*, 910 F.2d at 32. Furthermore, Petitioner was not prejudiced by appellate counsel's decision not to include unmeritorious arguments on appeal. *See Colón-Díaz v. United States*, 899 F. Supp. 2d 119, 138 (D.P.R. 2012).[4]

IV. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings, a "district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant." Rules Governing § 2255 Proceedings, Rule 11, 28 U.S.C.A. foll. § 2255. To merit a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The applicant 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). Petitioner made no such showing here. Therefore, the Court **DENIES** Petitioner's COA.

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[4] Even if Petitioner had successfully established that trial and appellate counsels were ineffective, his petition would nonetheless fail because he has failed to satisfy the prejudice prong of the *Strickland* test. Petitioner argues that the Court must presume he was prejudiced by his counsel's ineffective legal assistance. **Civil No. 18-1837, ECF No. 1-1 at 12.** Prejudice is presumed when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *See United States v. Theodore*, 468 F.3d 52, 56 (1st Cir. 2006). The Court finds that counsel's conduct was not tantamount to non-representation because he cross-examined the Government's witnesses, **Crim. No. 12-426, ECF Nos. 679; 716; 717**, advanced defense theories, **Crim. No. 12-426, ECF Nos. 1174 at 11-13; 1186 at 55-67**, and filed motions in limine, **Crim. No. 12-426, ECF Nos. 511; 624.**

V. **Conclusion**

For the reasons explained above, the Court **DENIES** Petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. **Civil No. 18-1837, ECF No. 1.**

SO ORDERED.

At San Juan, Puerto Rico, on this 31st day of March, 2022.

S/AIDA M. DELGADO-COLÓN

United States District Judge