IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 18-cr-00363-RM
(Civil Action No. 19-cv-001518-RM)

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MIGUEL ANTONIO GARCIA,

Defendant-Movant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Denying Motion to Vacate, Set Aside, or Correct Sentence (Doc. 212) by Judge Raymond P. Moore entered on March 31, 2020, it is

ORDERED that Defendant's Motions to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, including any supplements to the motions, are denied. It is

FURTHER ORDERED that there is no basis on which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c). It is

FURTHER ORDERED that it is certified pursuant to 28 U.S.C. § 1951(a)(3) that any appeal from the Order is not taken in good faith, and therefore, *in forma pauperis* status will be denied for purpose of appeal.

Dated at Denver, Colorado this 31st day of March, 2020.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ C. Pearson
Deputy Clerk

[Appendix A]

FILED
United States Court of Appeals
Tenth Circuit

August 31, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIGUEL ANTONIO GARCIA,

Defendant - Appellant.

No. 20-1160
(D.C. Nos. 1:19-CV-001518-RM and 1:18-CR-00363-RM-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

Miguel Garcia, a prisoner proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal the district court's order denying his 28 U.S.C. § 2255 motion.[2] For the reasons explained below, we deny his request and dismiss this matter.

A jury found Garcia guilty of possession of a firearm and ammunition by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); possession of a firearm in furtherance of a drug-trafficking crime in violation of § 924(c)(1)(A)(i); and

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

[1] We liberally construe Garcia's pro se filings. But we will not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

[2] Garcia supplemented his original COA application with a second brief within the original filing deadline. We now consider both briefs as Garcia's application.

possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii). After trial, the district court granted two successive counsel's motions to withdraw and allowed Garcia to represent himself. Garcia then filed post-trial motions claiming, among other things, that he received ineffective assistance of counsel (IAC), that the government secured his indictment and conviction using fabricated evidence and perjured testimony, among other government misconduct; that the jury was erroneously instructed; and that his rights under the Confrontation Clause were violated. The district court denied all motions and entered judgment sentencing Garcia to 280 months in prison.

Garcia did not file a direct appeal. Instead, before the time to appeal expired, he filed a § 2255 motion, largely reasserting the same claims as the post-trial motions. He later supplemented his motion, adding two new claims: one based on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and another based on *United States v. Davis*, 139 S. Ct. 2319 (2019). After concluding that all of Garcia's claims were both procedurally barred and lacked merit, the district court dismissed Garcia's § 2255 motion and denied him a COA.

Garcia seeks to appeal, but he must first obtain a COA. 18 U.S.C. § 2253(c). Because the district court dismissed his habeas claims on procedural grounds, Garcia can obtain a COA by showing that reasonable jurists could debate both the district court's procedural ruling and the validity of his constitutional claims. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We may rule on whichever basis "is more apparent from the record and arguments." *Id.* at 485.

In his application for a COA, Garcia now asserts the same categories of claims that he raised in his § 2255 motion. First, his IAC claims are based largely on his assertion that his counsel failed to prevent the government from infecting his trial with errors. Specifically, Garcia claims his counsel allowed the government to use allegedly fabricated evidence presented to the grand jury and at trial; failed to object to certain jury instructions; and failed to properly investigate and present mitigating evidence. Next, Garcia claims he was denied due process because the government violated *Rehaif*. He then asks to appeal the errors underlying his IAC claims themselves, including that the government violated due process by using fabricated evidence and improperly instructing the jury. Further, he claims that the government violated his constitutional rights by using perjured testimony, committing *Brady* violations, and failing to produce a 911 caller.

We begin by assessing Garcia's IAC claims. Garcia did not assert these claims in a direct appeal, and a § 2255 motion generally "is not an appropriate vehicle to raise issues that should have been raised on direct appeal." *United States v. Bolden*, 472 F.3d 750, 751 (10th Cir. 2006). We typically excuse IAC claims from that general direct-appeal requirement. *United States v. Erickson*, 561 F.3d 1150, 1170 (10th Cir. 2009). But the district court concluded this exception did not apply to Garcia's IAC claims because they were fully briefed and decided in post-trial motions. We do not need to decide if the district court was correct in its procedural decision because we can consider whichever component of the COA threshold inquiry is "more apparent from the record and arguments." *Slack*, 529 U.S. at 485. We therefore consider whether reasonable jurists could debate the district court's dismissal of the IAC claims on the merits. *See id.*

To state an IAC claim, Garcia must show that counsel's performance both "fell below an objective standard of reasonableness," and prejudiced him, creating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1982). Our review is "highly deferential" to counsel. *Id.* at 689. And, because we are engaging in a COA inquiry, not a complete merits analysis, we do so "without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

First, Garcia claims that his counsel was ineffective for failing to challenge the use of allegedly fabricated evidence as the basis for his indictment and at trial. Specifically, Garcia points to two categories of fabricated evidence: (1) evidence found in Garcia's pocket that matched evidence found in a backpack containing firearms and methamphetamine and (2) a lab report analyzing those drugs. The district court addressed these claims and found them without merit. But Garcia ignores the district court's findings in his COA application, reasserting his arguments from his habeas motion instead of challenging the district court's conclusions. By not addressing the district court's order, Garcia has waived this challenge to it. *See Grant v. Trammell*, 727 F.3d 1006, 1025 (10th Cir. 2013).

Even if Garcia had not waived these claims, they fail on the merits. *See id.* Garcia cites no evidence in support of his belief that the evidence was falsified. And Garcia has

not shown that the lab report was presented to the grand jury or the trial jury.[3] Further, his counsel attempted to suppress all the contents of the backpack and then cross-examined detectives about the evidence found in the backpack. Garcia has not demonstrated that these efforts were objectively unreasonable. Next, Garcia argues that his counsel should have objected to instructing the jury on actual possession of the backpack and instead should have sought a constructive-possession instruction. But as the district court pointed out, the government's theory of the case was that Garcia was in actual possession of the backpack. And we agree with the district court that it is not objectively unreasonable to decline to request an instruction that is unrelated to the government's theory. Finally, Garcia argues that his counsel did not investigate his case, contact alibi witnesses, or present any mitigating evidence.[4] Again, we agree with the district court that these conclusory allegations do not suffice to state a constitutional claim. *See United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994). Accordingly, reasonable jurists could not debate that Garcia has failed to state an IAC claim.

Next, we turn to the merits of Garcia's *Rehaif* claim. Like his IAC claims, Garcia fails to challenge the district court's reasons for rejecting his *Rehaif* argument. Again, by not addressing that ruling, Garcia has waived his challenge to it. *See Grant*, 727 F.3d at

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[3] At trial, Garcia and the government stipulated to the weight and purity of the methamphetamine seized from the backpack. He does not address this stipulation in his application for a COA.

[4] To the extent that Garcia's argument is based on the fact that counsel did not call as a witness or compel the government to call as a witness the 911 caller who later identified Garcia out of court, we also agree with the district court that reasonable counsel would avoid calling a witness who could make an in-court identification of a criminal defendant. *Hawkins v. Hannigan*, 185 F.3d 1146, 1155 (10th Cir. 1999).

court found that Garcia would not suffer prejudice from barring his § 2255 motion because Garcia raised and argued these issues and the court rejected them prior to sentencing. Nor could he show that a reasonable jury would reach a different verdict but for his alleged errors. For example, although he argued that the government fabricated evidence connecting Garcia to the backpack, the government presented other evidence sufficient to convict Garcia without the allegedly fabricated evidence: video footage, a 911 call, and a cellphone in the backpack that matched a cellphone backplate in his pocket.

In his application for a COA, Garcia does not challenge or acknowledge any of these findings by the district court. That is, he fails to point to any "objective factor external to [his] defense" that "impeded" his ability to raise his claims on direct appeal. *Daniels v. United States*, 254 F.3d 1180, 1190 (10th Cir. 2001) (quoting *McCleskey v. Zant*, 499 U.S 467, 493 (1991), *abrogated by statute on other grounds*). Nor does he acknowledge the other evidence used to convict him. He thus has not shown that notwithstanding the constitutional errors he asserts, the jury would be reasonably likely to change its guilty verdict. Accordingly, Garcia has not shown actual innocence or that a fundamental miscarriage of justice would result from procedurally barring these claims.

Because reasonable jurists could neither debate whether Garcia stated a constitutional claim regarding IAC or *Rehaif*, nor "whether the district court was correct" in determining his remaining claims are procedurally defaulted, we deny Garcia's request for a COA and dismiss this matter. *Slack*, 529 U.S. at 484. As a final matter, we grant

Garcia's motion to proceed in forma pauperis.

Entered for the Court

Nancy L. Moritz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Criminal Case No. 18-cr-00363-RM

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. MIGUEL ANTONIO GARCIA,

Defendant.

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL

THIS MATTER is before the Court on defendant's Motion for Judgment of Acquittal filed pursuant to Rule 29, Fed.R.Crim.P., (the "Motion"). (ECF No. 86.) The Court has reviewed the Motion and is familiar with the trial as it was before the undersigned. Having considered the matter, the Court determines as follows:

1. The jury could readily have concluded that defendant was the individual on video seen carrying a black backpack just minutes before, and around the corner from the place of, defendant's arrest. The jury could also have readily concluded that the backpack being carried and the backpack found minutes later, yards from defendant, were one and the same given (i) their appearance (straps, color, white lettering/label) matched and (ii) contents of the backpack (cell phone without back plate and key envelope) connected with items recovered from defendant's person (cell phone without back plate and key bearing the imprint of the same numbers appearing on the envelope). As for knowledge of the contents, the brief period of time

between video and discovery, as well as defendant's escape attempt, provide adequate support.

2. Although much is made of what the 911 caller saw, said and/or did, he was not central to the government's case. He simply provided explanation for who law enforcement was looking for and why. And no inference can be drawn from the government's decision not to call the 911 caller as he was not central to the government's case and was available to be subpoenaed by defendant.[1]

3. For these and other reasons, the Court finds the evidence sufficient to sustain the convictions on each count of the superseding indictment.

ACCORDINGLY, it is Ordered:

That the Motion (ECF No. 86) is DENIED.

Dated this 19th day of February, 2019.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

[1]The Court also notes that having defendant call the 911 caller would have been sheer folly as he had identified the defendant at the scene of arrest, and the Court had ruled that identification admissible.

U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

The following transaction was entered on 7/26/2023 at 11:56 AM MDT and filed on 7/26/2023

Case Name: USA v. Garcia

Case Number: 1:18-cr-00363-RM

Filer:

Document Number: 234(No document attached)

Docket Text:

ORDER: This matter is before the Court on Defendant's *pro se* "Emergency Ex-Parte" Motion [233]. The Motion is DISMISSED. In the alternative, it is DENIED on the merits. The matters raised in this Motion have been repeatedly raised and addressed by this and other courts. These matters have been previously addressed in this Court prior to sentencing (*see* ECF No. 158), post-sentencing in the context of a 2255 Motion (*see* ECF No. 212) by the Tenth Circuit Court of Appeals (*see* ECF No. 224), and in a prior "Emergency Ex Parte Motion pursuant to Rule 60" (*see* ECF No. 228). Yet, as many times as these bases for relief are denied, Defendant repackages them as if something new has occurred. By this Court's count, these same issues have been raised in seven (7) different cases in this District (including the 2255) and seven (7) different cases in the United States District Court for the District of Columbia. In the various filings the defendants have included current President Biden, former President Trump, this Judge, the Governor of Colorado, the Denver Police Department and a variety of prosecutors. These pleadings have repeatedly been denied and/or dismissed. Interpreted liberally, this is a second and subsequent Section 2255 motion which can only be filed with permission of the Circuit. The Defendant has no such permission; therefore, his Motion is DISMISSED. Alternatively, this matter is DENIED on the various bases on which it has previously been denied, including, but not limited to, the fact that Defendant is seeking relief in a criminal case pursuant to a Rule of Civil Procedure which has no applicability whatsoever. Defendant is advised that further motions seeking relief under the Federal Rules of Civil Procedure, including Rule 60(b), will be STRICKEN without further analysis. A similar result will accrue with respect to motions seeking Section 2255 relief without permission of the Circuit. SO ORDERED by Judge Raymond P. Moore on 7/26/2023. (Text Only Entry) (rmsec)

1:18-cr-00363-RM-1 Notice has been electronically mailed to:

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Additional material from this filing is available in the Clerk's Office.