
IN THE
SUPREME COURT OF THE UNITED STATES

Mario Contreras,

Petitioner,

v.

United States of America,

Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX

Mario Contreras

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 24-1113

Mario M. Contreras

Plaintiff - Appellant

v.

United States of America

Defendant - Appellee

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:17-cv-04075-LLP)

JUDGMENT

Before GRUENDER, SHEPHERD, and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

April 01, 2024

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MARIO M. CONTRERAS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

4:17-CV-04075-LLP


JUDGMENT

In accordance with the Memorandum Opinion and Order filed on this date with the Clerk,

IT IS ORDERED, ADJUDGED, and DECREED that the Motion to Vacate, Set Aside or
Correct Sentence pursuant to 28 U.S.C. § 2255 is denied.

Dated this ^{27th} day of September, 2023.

BY THE COURT:



Lawrence T. Piersol

United States District Judge

A001

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

MARIO M. CONTRERAS, Movant, vs. UNITED STATES OF AMERICA, Respondent.	4:17-CV-04075-LLP MEMORANDUM OPINION AND ORDER
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This matter is before the Court on Mario M. Contreras's Amended Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody under 28 U.S.C. § 2255. (Doc. 135.) Contreras seeks relief on the grounds that he is actually innocent of the murder and assault resulting in serious bodily injury of his two-year-old daughter, A.C. Contreras claims that A.C. died because of an unrelated heart condition, not because of head injuries inflicted by Contreras. The Government argues that Contreras cannot meet the burden of an actual innocence claim because he offers evidence-free allegations that the true cause of A.C.'s death was an unrelated heart condition. **[See: Echocardiogram "PFO cannot be completely ruled out." PFO medical definition is hole in heart birth defect.]**

The Amended Petition also asserts claims of ineffective assistance of trial counsel, including:

- failure to identify medical evidence that supported the alternative theory of causation relating to a heart defect;

[John Stelios Leventis]

- failure to interview and document testimony from physician John Levintis, who - according to Contreras - would have testified to a latent heart issue that required consultation of a cardiologist and affirmed that Dr. Levintis had made a referral for a consultation in November 2011; and

- failure to invoke Rule 16 and Brady to compel the Government to turn over the exculpatory medical evidence relating to Cook Contreras's medical condition.

A002

Doc. 135, p. 5. The Amended Petition also includes a claim that Contreras was denied effective assistance of trial counsel “in that counsel failed to question the coroner from the Ramsey County Coroner’s Office about events or problems that, according to Mr. Contreras, cast doubt on the impartiality and professional competence of the work performed in that office.” Doc. 135, p. 3. The Government disputes the allegations of ineffective assistance of counsel.

BACKGROUND¹

On December 28, 2011, two-year-old A.C. had a physical for a Head Start program. TT 73-76. The physical revealed that A.C. was a healthy child without injury about two weeks before her death. TT 73-76. On January 9, 2012, Mario Contreras, A.C.’s father, was responsible for taking care of a total of five children, A.C. and four other children, who were all under the age of eleven. TT 93, 307-310. Contreras was under pressure to arrive at work on time because he had been routinely late for work in 2011. TT 307-310. In addition to Contreras’s stress from caring for five children and his job, A.C. was known to be a challenging child in the mornings. TT 362.

On the morning of January 9, 2012, while A.C. was in the care of Contreras, she lost consciousness at some point. TT 460. On February 2, 2012, FBI Agent Rob Mertz interviewed Contreras about what occurred on January 9, 2012. TT 89-91. During the interview, Contreras stated twice that A.C.’s physical condition “was just fine” on the night of January 8, 2012.² TT 92. According to Contreras, when Contreras left the room on the morning of January 9, 2012, A.C. fell out of a chair in the kitchen. TT 94-5. When Contreras re-entered the kitchen, he saw A.C. lying on the kitchen floor groaning while her eyes rolled back into her head. TT 95. In addition, Contreras stated that A.C.’s toes started to stiffen and point inwards. TT 95. After A.C. lost consciousness, Contreras drove A.C. to his uncle’s house before driving her to the Coteau Hospital in Sisseton, South Dakota. TT 460. Neither Contreras nor his uncle called emergency services. TT 460. Contreras’s uncle declined to accompany Contreras on the drive to the hospital

¹ The Trial Transcript, Docket Number 158 in the underlying criminal prosecution, will be cited as “TT” followed by the relevant page number. Other entries in the clerk’s docket in the underlying criminal prosecution (1:12-cr-10047) will be cited as “CR Doc.” followed by the docket number and page number, if applicable. Citations to docket entries in this civil case (4:17-cv-4075) will be cited as “CIV Doc.” followed by the docket number and page number, if applicable.

² Contreras’s statement that A.C. “was just fine” on the night of January 8, 2012, corroborates A.C.’s mother’s testimony. A.C.’s mother testified that A.C. was fine when she spoke to A.C. over the telephone on the night of January 8, 2012. TT 237-38.

because he was experiencing back pain, and he believed A.C. "was already gone at the time." TT 460.

Contreras left his uncle's house and drove A.C. to the Coteau Hospital in Sisseton, South Dakota. TT 457, 460-61. While A.C. was at the Coteau Hospital, the doctors were "having to probe very much to get information from [Contreras] about the sequence of what had happened just within the last few hours or hour." TT 267. According to at least one relative, it was unusual that Contreras appeared emotionless and evasive when doctors tried to find out what happened to A.C. TT 267-68. A.C. remained unconscious at the Coteau Hospital in Sisseton. TT 265.

The doctors at the Coteau Hospital suggested that A.C. be airlifted to the Sanford Hospital in Fargo, North Dakota, to receive further care. TT 241. A.C.'s mother consented to A.C. being airlifted to the Sanford Hospital in North Dakota. TT 241. While Contreras and his relatives were at the Sanford Hospital with A.C., she was placed on life support on January 10, 2012. TT 243-44. A.C. never regained consciousness, and the decision to end life support was made on January 11, 2012. *United States v. Contreras*, 816 F.3d 502, 506 (8th Cir. 2016). A.C.'s time of death was at about 5:00 pm on January 11, 2012. TT 244.

In August of 2012, a grand jury indicted Contreras for second-degree murder, voluntary manslaughter, assault resulting in serious bodily injury, and child abuse. CR Doc. 2. Contreras proceeded to trial in July of 2013. TT 1. At trial, the medical testimony revealed that A.C. had suffered from eighteen subgaleal hemorrhages on multiple planes of her head. TT 125-27, 137-38.

Dr. Arne Graff, a leading expert medical doctor on child injuries, cared for A.C. at the Sanford Hospital in Fargo, North Dakota. TT 240-44. "Dr. Graff testified to his physical examination of A.C. and all of the tests, scans, and records that he had reviewed." *United States v. Contreras*, 816 F.3d at 507. Dr. Graff "held the opinion that A.C.'s injuries '[were] not consistent with a simple fall off a chair,'" rather the injuries were "consistent with a physical assault." *Id.*; see TT 301. After Dr. Graff learned Contreras claimed A.C.'s head injuries were caused by a single fall, Dr. Graff told Contreras A.C.'s injuries were, in fact, inconsistent with a single fall. TT 240-44.

Dr. Victor Froloff, a St. Paul Coroner, performed A.C.'s autopsy. TT 188. According to Dr. Froloff, A.C.'s eighteen subgaleal hemorrhages, which were on multiple planes of her head, were inconsistent with a single fall. TT 150-51. Dr. Froloff testified that A.C.'s injuries occurred within about seventy-two hours of the time of her death, placing A.C. in Contreras's care at the

time she received the head injuries. TT 142. Further, Dr. Froloff stated that A.C.'s cause of death was traumatic brain injury due to physical assault "by a fist . . . [or] . . . by just punching." TT 139, 184.

In addition, Dr. Brad Randall, the defense expert witness hired by Contreras, predominantly agreed with the facts found in Dr. Froloff's autopsy report. TT 371. Dr. Randall testified, "I don't believe a single fall can explain everything, all the injuries that were found at the autopsy." *United States v. Contreras*, 816 F.3d at 507; see TT 378-79. Dr. Randall agreed, "if the child would have fallen from a chair of two feet in height, . . . that would not cause [eighteen] subgaleal hemorrhages." *Id.*; see TT 403. Further, Dr. Randall agreed that "three or four blows with the knuckles to the head or four or five blows could cause these [eighteen] subgaleal contusions." TT 413.

A clinical pathologist, Dr. Kenneth Snell, reviewed Dr. Froloff's autopsy report, photographs, the Death Certificate, medical records from both the Coteau Hospital and the Sanford Hospital, and Dr. Brad Randall's report. TT 323. "Dr. Snell explained that one fall equals one contusion on one side of the head and that A.C. has suffered injuries on both sides of her head and to the top of her head and forehead." *United States v. Contreras*, 816 F.3d at 507. After reviewing the various records, Dr. Snell concluded that "it was not possible to get [eighteen] hemorrhages on one's head from a single fall." *Id.*; see TT 331-34. Further, Dr. Snell testified that "the injury occurred approximately right about the time or right before . . . [A.C.] was admitted to the hospital." TT 326-27. Thus, Dr. Snell's testimony places A.C. in the care of Contreras when she sustained the injuries. *United States v. Contreras*, 816 F.3d at 509. Finally, Dr. Snell testified that he agrees with the cause of the death listed on the Death Certificate and that A.C.'s manner of death seemed to be consistent with homicide. TT 342-43. See CR Doc. 101, p. 15 (listing immediate cause of death as traumatic head injuries as a consequence of physical assault).

The jury found Contreras guilty of murder and assault resulting in serious bodily injury. *United States v. Contreras*, 816 F.3d at 507. "A month after the verdict, Contreras refused to cooperate with his attorney and claimed mental illness." *Id.* While Contreras received a competency evaluation, the Court delayed his sentencing. *Id.* After an assessment by a local psychiatrist and a two-month examination at a federal medical center, the report found Contreras was pretending to suffer from a mental illness. *Id.* The Court "found Contreras competent to be

sentenced.” *Id.* On November 25, 2014, the Court sentenced Contreras to the mandatory minimum of 360 months’ imprisonment for the committed crimes. *Id.*; see CR Doc. 180.

After trial, “Contreras renewed his motion for judgment of acquittal” that he had filed during the trial. *United States v. Contreras*, 816 F.3d at 508. This Court found that while there was conflicting evidence, the evidence still supported Contreras’s conviction beyond a reasonable doubt. CR Doc. 117. “In support of its ruling, the court noted that ‘[the] location of the injuries to the skull, the number of separate injuries to the skull, and the severity of the injuries to the victim all strongly supported the conclusion that . . . [Contreras] hit the head of the victim several times with his closed fist.’” *United States v. Contreras*, 816 F.3d at 508. This Court explained that “[t]he evidence established that this was not a shaken baby case, but rather a baby that got beaten as opposed to a single fall from a chair or even the table.” *Id.*

On direct appeal, Contreras made five separate arguments before the Eighth Circuit. *United States v. Contreras*, 816 F.3d at 507. Among other things, Contreras argued that “the district court erred in denying his motion for judgment of acquittal based on sufficiency of the evidence.” *Id.*

The Eighth Circuit considered that

[b]oth Dr. Froloff’s and Dr. Snell’s estimates of when A.C. sustained the fatal injuries place her in Contreras’s care. Furthermore, A.C. underwent a physical exam with no reported issues at the end of December 2011, and A.C.’s mother testified that A.C. sounded fine on the telephone while in Contreras’s care on the Sunday night prior to A.C. being taken to the hospital.

Id. The Eighth Circuit ruled that “based on the evidence in the record, . . . the jury could conclude beyond a reasonable doubt that A.C.’s injuries fell within the time period specified in the indictment and that sufficient evidence exists to support Contreras’s convictions.” *Id.* at 509. The Eighth Circuit issued a decision on March 7, 2016, affirming Contreras’s conviction in all respects. CIV Doc. 135, p. 2.

Contreras’s motion for rehearing was denied on July 14, 2016. CIV Doc. 135, p. 2. Then, on May 31, 2017, Contreras filed an initial Motion to Vacate, Set Aside, or Correct a Sentence by ~~Person in Federal Custody under 28 U.S.C. § 2255~~. CIV Doc. 1. Contreras filed four motions requesting court-appointed counsel. CIV Docs. 19, 44, 54, and 69. On November 8, 2018, the Court appointed counsel for Contreras. CIV Doc. 90. The lawyer, who had agreed to the appointment, was unresponsive for almost a year. CIV Doc. 97. Thus, the Court terminated the appointed counsel on October 29, 2019 (CIV Doc. 99) and appointed new counsel to represent

Contreras (CIV Doc. 106). Contreras's then-appointed counsel filed an Amended § 2255 petition on April 24, 2020. CIV Doc. 135, Amended Petition. Contreras's § 2255 petition alleged claims for ineffective assistance of counsel and actual innocence. CIV Doc. 135.

Concerning the ineffective assistance of counsel claims, the Court issued an order on May 29, 2020, that Contreras must sign and file an attorney-client privilege waiver form allowing his trial lawyer to address Contreras's ineffective assistance of counsel claims. CIV Doc. 138. Contreras did not sign the attorney-client privilege waiver form. CIV Doc. 140. On August 11, 2020, the Court issued another order regarding the attorney-client privilege waiver form. CIV Doc. 140. The Order directed Contreras's lawyer to provide the Court with the status of the attorney-client privilege waiver form, and to advise the Court "whether Mr. Contreras understands that his claims of ineffective assistance of counsel are subject to being stricken if the form is not signed and returned." CIV Doc. 140.

On August 22, 2020, Contreras's then-appointed counsel sent a letter to the Court detailing the attempts he had made to contact Contreras to discuss the attorney-client privilege form. CIV. Doc. 141. From June 1, 2020, until August 11, 2020, Contreras was unresponsive to his then-appointed counsel's attempts to contact him. CIV. Doc. 141. On August 14, 2020, Contreras's then-appointed counsel was able to speak with Contreras about the procedure relating to the attorney-client privilege waiver form and the Court's expectations. CIV. Doc. 141. Contreras told his then-appointed counsel that he would submit the signed waiver form. CIV. Doc. 141. On September 1, 2020, Contreras's lawyer filed a Motion to Withdraw as Counsel because of difficulties he encountered while working with Contreras. CIV. Doc. 142. On October 2, 2020, the Court issued an order allowing Contreras's then-appointed counsel to withdraw. CIV. Doc. 145.

On January 11, 2021, the Court issued an Order which explained the background of Contreras's § 2255 action and discussed Contreras's failure to comply with this Court's orders directing him to sign and file an attorney-client privilege waiver form. CIV Doc. 156. The Court warned Contreras that his case could be dismissed if he failed to comply with the Court's orders. *Id.* The Clerk of Court was directed to send the Order and another attorney-client privilege waiver form to Mr. Contreras. *Id.* Unfortunately, Contreras did not respond with a signed waiver form.

On March 15, 2021, the Court gave Contreras one more opportunity to sign the attorney-client privilege waiver form. CIV Doc. 174. Contreras was advised, "if he does not sign and file

the attorney-client waiver form by April 15, 2021, the Court will dismiss his ineffective assistance of counsel claims alleged in the Amended Petition.” CIV Doc. 174, p. 3. Despite the attempts made by the Court, Contreras “neither filed the waiver form nor sought an extension of the time within which to do so.” CIV Doc. 184, p. 1. On May 6, 2021, the Court dismissed the ineffective assistance of counsel claims alleged in the Amended Petition. CIV Doc. 184. The Government was directed to file an answer to the actual innocence claim asserted in the Amended Petition. *Id.* On June 7, 2021, the United States filed a response requesting dismissal of Contreras’s claim that he is actually innocent of the crimes of conviction. CIV Doc. 187.

On July 6, 2021, a new lawyer filed a Notice of Appearance for Contreras. CIV Doc. 188. On July 15, 2021, Contreras’s new lawyer filed a motion for reconsideration, asking the Court to reconsider its dismissal of the ineffective assistance of counsel claims. CIV Doc. 191. Contreras wrote his new lawyer about why he did not sign the waiver form. His lawyer reported that, among other things, Contreras said he did not sign the form because “he feared his trial attorney being persecuted because he was from Iran,” he “was fearful of testifying against Iranians,” and “other non-relevant issues.” *Id.* The new lawyer thought Contreras might be willing to waive his attorney-client privilege if she had a chance to meet with him and explain the reason it is needed. *Id.* No legal basis was articulated in support of the motion to reconsider, and the government resisted the motion. CIV Doc. 192.

The motion for reconsideration was denied without prejudice to Contreras’s right to file a subsequent motion if it was accompanied by a signed waiver of Contreras’s attorney-client privilege, and if a legal basis for the Rule 60(b) motion was articulated. CIV Doc. 194. On August 16, 2021, Contreras filed the motion for relief under Rule 60(b). CIV Doc. 196. The motion included a copy of the attorney-client privilege waiver signed by Contreras. CIV Doc. 196-1. The government opposed the Rule 60(b) motion. CIV Doc. 199. Noting the difficulties encountered by Contreras during the COVID-19 pandemic, the strong policy in favor of addressing the merits of claims, and Contreras’s lengthy 30-year sentence, the Court granted the Rule 60(b) motion and reinstated Contreras’s ineffective assistance of counsel claims set forth in his Amended Petition. CIV Doc. 201. The Government was directed to respond to those claims. *Id.*

The Affidavit of Trial Counsel responding to Contreras’s ineffective assistance of counsel claims was filed by the Government on November 22, 2021. CIV Doc. 206. The Government’s brief addressing the ineffective assistance of counsel claims was filed on December 22, 2021. CIV

Doc. 207. On January 10, 2022, Contreras filed a "Response to the Government" which included six exhibits. CIV Doc. 208. The Government filed a Reply asserting that Contreras's Response raised three new claims that were untimely and that did not relate back to his Amended § 2255 Petition. CIV Doc. 210. Contreras responded by explaining why he believed the three claims relate back to his Amended Petition that was filed on April 24, 2020. CIV Doc. 211. The Court determined that the claim regarding the Ramsey County Medical Examiner's Office related back to the Amended Petition, but two additional claims raised in Contreras's Response to the Government did not relate back. CIV Doc. 212. The Government was directed to file a supplemental brief addressing the Ramsey County Medical Examiner's Office claim. (*Id.*) The Government's responsive filing included a second Affidavit of trial counsel. CIV Doc. 215.

Trial counsel explained that it is his general practice to search for information to impeach the credibility of any expert witnesses, and he followed that practice in this case. *Id.* Contreras told counsel that "he was aware of evidence Dr. Froloff or someone from his office lied in a previous case or had ethical issues," but Contreras did not provide any documents or more specific information to his lawyer. *Id.* Counsel's own search "did not reveal any material that would be useful to impeach Dr. Froloff." *Id.* Had he found any impeachment material he would have used it. *Id.*

On March 7, 2022, Contreras filed a Motion for the Court to Order Service of Subpoenas. CIV Doc. 213. Contreras included two proposed subpoenas. One was for records relating to "heart surgery" for A.C. allegedly performed at Sanford Hospital in Fargo, North Dakota, and the other was for records regarding a supposed "heart examination" of A.C. at Indian Health Services ("IHS") in South Dakota. CIV Doc. 214. The Court directed the United States Marshal Service to serve the completed subpoenas. CIV Doc. 219. One subpoena was served on Sanford Heart Hospital on April 28, 2022, and the other subpoena was served on IHS on May 4, 2022. CIV Doc. 222.

The Court did not hear from Contreras after the subpoenas for heart-related medical records were served. Four months later, on September 12, 2022, the Court directed counsel for Contreras to file a brief advising the Court what, if any, documents were received in response to the subpoenas for the records from IHS and Sanford Heart Hospital related to A.C.'s alleged heart surgery and heart examination. CIV Doc. 225. The Order provided that the brief should include

argument and legal authority as to how the documents from IHS and Sanford Heart Hospital affect Contreras's claims in this case. *Id.*

In response to the Order, counsel for Contreras sent a letter to the Court indicating that she could not write a brief because she did not obtain any new documents or evidence that a heart examination or heart surgery took place. CIV Doc. 226. Counsel offered to present an affidavit of Mario Contreras "as to what he wants to tell the Court" regarding A.C.'s alleged heart surgery. *Id.* On October 24, 2022, an Affidavit of Mario Contreras was filed. CIV Doc. 229. Contreras asked the Court to issue an Order signed by this Court directing IHS and Sanford Heart Hospital to produce the records he is seeking. *Id.*

On October 28, 2022, the Court ordered counsel for Contreras to serve and file a brief raising the issues regarding A.C.'s heart defect/heart surgery that Contreras wants to raise. CIV Doc. 230. So that she could provide the information to the Court without compromising her ethical obligations as an officer of the court, counsel was advised that she did not need to include any legal authority or argument. *Id.* The brief was filed on November 21, 2022. CIV Doc. 232. Six exhibits were attached to the brief. Several of the exhibits are copies of medical records that Contreras had filed many times before. In a nutshell, the brief explained Contreras's belief that the hospital is refusing to produce the heart surgery records because they committed medical malpractice when treating A.C. *Id.* He also believes that IHS would turn over medical records of a heart examination of A.C. if this Court ordered IHS to do so. *Id.*

Counsel also filed a letter which included a document prepared by Contreras that appears to be a proposed Order to be signed by this Court compelling Sanford Hospital to produce documents related to a "heart defect corrective operation" performed on January 11, 2012. CIV Doc. 233. Counsel has explained to Contreras that the subpoenas for records issued to IHS and Sanford Hospital were correctly issued and signed by the Clerk of Court. *Id.*

Contreras's Amended § 2255 Motion is now ready for a ruling. Contreras attempts to overcome his convictions for second degree murder and assault resulting in serious bodily injury by claiming there is evidence that A.C. died as a result of a preexisting heart condition, which Contreras alleges proves he is actually innocent. CIV Doc. 135, Amended Petition, pp. 6-7. According to Contreras, "no juror could conclude that . . . [A.C.] died of head trauma if the evidence relating to an underlying heart condition had been properly uncovered and presented." *Id.* In addition, Contreras contends that his trial lawyer was ineffective for failing to take steps in

order to discover A.C.'s heart condition, and for failing to discredit Dr. Froloff's testimony about A.C.'s cause of death. However, there is no evidence that A.C. had a preexisting heart condition.

In many of Contreras's filings, he asked this Court to contact witnesses and make other attempts to locate medical records regarding A.C.'s alleged heart condition. *See, e.g.*, CIV Docs. 1-2, p. 2; 14, p. 4; 10, p. 13; 61, p. 1; 92, p. 1; 139, p. 1; 233. The Court's proper function is not "to assume the role of an advocate for a pro se litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *see also Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). However, the Court allowed for service of subpoenas to attempt to locate the alleged medical records sought by Contreras. The Court also has ensured that Contreras has had the assistance of counsel in pursuing his claims. It is true that the lawyer hired by Contreras in 2017 was inactive for over a year, but the Court terminated that lawyer and appointed other counsel. Contreras's second appointed counsel did good work, but he withdrew from the case because of the difficulties of working with Contreras. Contreras's third lawyer has advocated on his behalf since her appearance on July 6, 2021. None of Contreras's lawyers were able to locate records indicating that A.C. had a preexisting heart condition.

A mere suspicion that A.C. had a heart condition that preexisted the date of A.C.'s hospitalization for her head trauma on January 9, 2012, is insufficient to satisfy the burden required for Contreras's § 2255 claims of actual innocence and ineffective assistance of counsel. Even if a heart condition could be proven, the record evidence clearly shows that A.C. died from her head injuries, not from a heart condition. Accordingly, Contreras's § 2255 petition is denied.

DISCUSSION

A prisoner in custody pursuant to a federal conviction and sentence may move the court that imposed the sentence to vacate, set aside or correct the sentence:

[U]pon the ground that 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(a).

A. Actual Innocence

Contreras seeks relief under § 2255 on the grounds of actual innocence. Contreras asserts that, at the time of her death, A.C. suffered from a preexisting heart condition. According to

Contreras, the cause of A.C.'s death was not head trauma but her an unrelated preexisting heart condition. Further, Contreras claims that the medical record of A.C.'s heart condition have been lost. Therefore, based on the speculation of A.C.'s preexisting heart condition, Contreras asks the Court to find him actually innocent of the crimes he was convicted.

Because a reasonable juror could find Contreras guilty beyond a reasonable doubt even if Contreras presented evidence that A.C. had a preexisting heart condition, he does not meet the burden to prove he is actually innocent. A claim of actual innocence may be "freestanding" or serve as a "gateway." *House v. Bell*, 547 U.S. 518, 554–55 (2006). An actual innocence claim acts as a "gateway" when it serves as a means for the petitioner to argue other constitutional claims that may otherwise be procedurally barred. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). On the other hand, a freestanding actual innocence claim is the petitioner's attempt to prove his or her innocence independent of another claim. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Thus, whether a separate constitutional issue exists is irrelevant when a petitioner raises a freestanding actual innocence claim. *Id.*

It is an open question as to whether the Supreme Court will honor a freestanding actual innocence claim. *House*, 547 U.S. at 555; *Dansby v. Hobbs*, 766 F.3d 809, 816 (8th Cir. 2014); *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (recognizing the Supreme Court had "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"). While the Supreme Court has never explicitly recognized the standard for satisfying a freestanding actual innocence claim, the Supreme Court has noted that the standard would be "extraordinarily high." *Dansby*, 766 F.3d at 816. *See Rouse v. United States*, No. CIV 06-4008, 2020 WL 1287986, at *14, 16 (D.S.D Mar. 18, 2020) (finding that even with the petitioner's new evidence of recantations and expert testimony that conflicts with the trial testimony, "a reasonable juror could find the trial testimony was credible" and convict the petitioner); *see also Rhodes v. Smith*, 950 F.3d 1032, 1036–37 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 365, 208 L. Ed. 2d 92 (Oct. 5, 2020) (finding that a reasonable juror still could convict the petitioner even in light of new scientific evidence including "two-peer reviewed [medical] articles. . . as well as the opinions of seven different pathologists" which petitioner argued indicated he was innocent of murder).

The Supreme Court has implied that the standard for a freestanding claim is a more difficult burden to meet than the burden of the gateway claim. *House*, 547 U.S. at 555. First, the Court noted in *Herrera* that if the Court were to recognize a freestanding actual innocence claim, the

burden would be high. Then in *Schlup*, the Court went on to define a standard for a gateway claim. *House*, 547 U.S. at 555; see *Schlup*, 513 U.S. at 327 (finding the standard for an actual innocence claim serving as a gateway is that the petitioner must show that if a jury hears the new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt"). Thus, if the freestanding claim is recognized, it would require "more convincing proof" than the gateway standard. *House*, 547 U.S. at 555.

Because Contreras does not have a constitutional claim that is procedurally barred, his actual innocence claim is not acting as a "gateway" to allow the Court to hear otherwise barred claims. Instead, Contreras's actual innocence claim is "freestanding," or that he is actually innocent of the crimes he was convicted. The Court will assume that a freestanding claim of actual innocence is recognized. Therefore, Contreras needs to show "more convincing proof" than what is required for a gateway claim of actual innocence.

Contreras's situation is unlike that in *House*, where the petitioner satisfied the gateway standard. In *House*, the petitioner's evidence was indicative of another suspect and, thus, called into question the strength of the evidence connecting the petitioner to the crime. *House*, 547 U.S. at 553-54. The evidence consisted of DNA and bloodstain evidence. *Id.* The Court found that the evidence was sufficient to meet the standard required for a gateway actual innocence claim. *Id.*

Unlike *House*, Contreras is unable to present any evidence that A.C.'s heart condition preexisted the date of A.C.'s hospitalization for head trauma on January 9, 2012. Instead, Contreras claims the medical professionals have lost the necessary documentation. Because Contreras bases his claim on speculation, he does not have sufficient evidence to support even a "gateway" actual innocence claim. Because a freestanding claim has a heavier burden than a gateway claim, by implication, Contreras would not meet the "more convincing proof" burden for a freestanding actual innocence claim. Thus, before proceeding to the merits of the case, Contreras cannot support his freestanding claim of actual innocence.

Even if the Court were to allow Contreras to go ahead with his freestanding claim of actual innocence, Contreras would not prevail. Unlike the tangible DNA and bloodstain evidence in *House*, Contreras repeatedly claims that the possibility of showing A.C.'s heart condition preexisted the head trauma would result in a reasonable juror finding him innocent as to A.C.'s death. However, both Dr. Froloff and Dr. Snell testified that A.C. died due to the eighteen subgaleal hemorrhages. In effect, the medical testimony of Dr. Froloff and Dr. Snell negates Contreras's

claim that a preexisting heart condition was the cause of A.C.'s death rather than A.C.'s head injuries.

Contreras's claim of actual innocence has even less support than that in *Dansby*. In *Dansby*, the new evidence offered by the petitioner included documents that were withheld by the State and recantations of trial testimony stating Dansby's guilt. *Dansby*, 766 F.3d at 815–16. The Eighth Circuit reasoned that, even when considering the new evidence, the “substantial evidence apart from . . . [the recantations] . . . permitted a jury to infer . . . Dansby's . . . [guilt].” *Id.* at 817. Therefore, the court held that the “proffered evidence does not meet the extraordinarily high threshold that might support relief based on a showing of actual innocence.” *Id.*

Considering that Contreras's claim that A.C. died of an unrelated heart condition is both without evidence and contrary to the medical testimony, Contreras would need evidence strong enough to disprove the medical testimony presented at trial. Contreras's suspicion that there is evidence proving A.C.'s heart condition preexisted A.C.'s head trauma inflicted on January 9, 2012, is even more speculative than the recantation in *Dansby*, the recantations and new expert testimony in *Rouse*, and the new peer-reviewed medical articles and expert opinions in *Rhodes*. Like *Dansby*, even when considering new evidence, if some was presented, there is substantial medical evidence supporting that A.C.'s cause of death was head trauma inflicted by Contreras. Contreras only has a suspicion that lost medical documents would be able to show A.C. had a heart condition that was both preexisting and caused her death. Contreras has not met this high standard because his mere suspicion that a heart condition caused A.C.'s death is too nebulous.

Thus, even though Contreras claims A.C. had a heart condition that may have preexisted her head trauma, Contreras's claim has no bearing on his innocence. Moreover, Contreras has not satisfied the standard set forth in *Schlup* that no reasonable juror would have found Contreras guilty beyond a reasonable doubt. Therefore, it follows that Contreras's suspicion does not amount to the “more convincing proof” required for a freestanding innocence claim.

E. Ineffective Assistance of Counsel

A defendant who claims to have been deprived of effective assistance of counsel must show: (1) that his lawyer's representation fell below an objective standard of reasonableness; and (2) that the lawyer's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). For the first requirement of the *Strickland* test, “the court must apply an objective standard and determine whether, in light of all the circumstances, the identified

acts or omissions were outside the wide range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions." *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (internal citation and quotation marks omitted). "There is a presumption that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *Hall v. Luebbbers*, 296 F.3d 685, 692 (8th Cir. 2002) (quotation omitted). It is the petitioner's burden to overcome this presumption, and a "petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." *Id.*

To demonstrate prejudice necessary to satisfy the second prong of *Strickland*, Contreras 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. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

"Unless a defendant makes both showings [required under *Strickland*], "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

1. Ineffective Assistance Related to Medical Evidence of Heart Defect

Contreras asserts trial counsel was constitutionally ineffective because he failed to identify medical evidence that supported the alternative theory that a heart defect caused A.C.'s death. According to Contreras, this includes evidence from Dr. John Levintis who "would have testified to a latent heart issue that required consultation of a cardiologist and affirmed that Dr. Levintis had made a referral for a consultation in November 2011." CIV Doc. 135, p. 3. It also includes his lawyer's failure to "compel the Government to turn over the exculpatory medical evidence relating to [A.C.'s] medical condition." *Id.* **[Echocardiogram: PFO cannot be completely ruled out.]**

Contreras's bald assertions that there is some evidence that A.C. had a heart defect or underwent heart surgery before she died are not enough to state a valid claim under *Strickland*. Contreras was given considerable time to find evidence to support this claim. Contreras and his habeas lawyers tried to find such evidence and failed. This Court granted Contreras's request to subpoena records from Sanford Hospital and IHS in order to obtain the alleged records from the sources identified by Contreras, but no records were found.

Trial counsel states in his affidavit that he inquired into potential alternative causes of A.C.'s death. CIV Doc. 206. He asked Contreras if A.C. had any medical conditions that could have caused her to fall from her chair (which is what Contreras testified had happened to A.C.). Counsel said: "I have no recollection of his mentioning a heart condition. If he had I would have followed up and obtained additional medical records." CIV Doc. 206, ¶ 5. Furthermore, trial counsel avers:

When I received discovery I carefully reviewed it multiple times, both alone and with Mr. Contreras. Dr. Randall, our medical expert, reviewed the child's medical records and autopsy photographs, and identified no underlying heart condition that would have led the child to sustain such an injury to her head. In fact, shortly before the child's death she had a routine check-up, and was found to be in good health. I recall this fact being one of the primary difficulties in formulating an alternative cause theory based on her health. If I could find any evidence to undermine it I would have thoroughly investigated it.

CIV Doc. 206, ¶ 6.

There is no indication that the records Contreras alleges counsel failed to find even exist, and counsel's failure to discover evidence of a prior heart condition was not unreasonable.

In addition, Contreras has failed to show prejudice. As stated earlier, the medical testimony at trial established that A.C. died from head injuries due to an assault. Thus, Contreras has failed to demonstrate prejudice resulting from trial counsel's failure to discover the alleged heart condition evidence.

2. Ineffective Assistance Related to Ramsey County Medical Examiner's Office

In his Amended Petition, Contreras alleges that he was denied effective assistance of counsel "in that counsel failed to question the coroner from the Ramsey County Coroner's Office about events or problems that, according to Mr. Contreras, cast doubt on the impartiality and professional competence of the work performed in that office." CIV Doc. 135, p. 3. In a later pleading, Contreras's habeas lawyer attached copies of two articles she found on-line regarding challenges to the credibility of testimony provided by Dr. Michael McGee, the Chief Medical Examiner in Ramsey County and Dr. Froloff's supervisor.³ CIV Docs. 208-4, 208-5. Contreras argues that:

³ Contreras describes the articles as being "posted online as early as 2011." CIV Doc. 208, p. 6. One article shows the date of September 6, 2011, CIV Doc. 208-5, and the other is undated. CIV Doc. 208-4.

[h]is trial attorney failed to investigate the Ramsey County Medical Examiner's office for allegations of dishonesty and autopsies deemed incorrect by other doctors. A random and simple internet search of articles published could have led the defense to numerous new articles about the chief medical examiner [Dr. Michael McGee], giving false and incorrect testify [sic] at a Minnesota murder trial. Contreras argues he was prejudiced by this mistake and that but for the error, there is a reasonable probability that the result would have been different.

CIV Doc. 208, p.2.

Trial counsel's affidavit indicates that, in Contreras's case, he followed his usual practice of searching for information "that may affect the credibility of any expert witness." CIV Doc. 215-1, p. 1. He did not find any information that would have been useful to impeach Dr. Froloff's credibility. If he had found such information he would have used it. *Id.*

Dr. Froloff is the Ramsey County medical examiner who performed A.C.'s autopsy. Dr. McGee did not perform A.C.s' autopsy. Dr. Froloff testified at the trial, not Dr. McGee. The trial transcript reveals that trial counsel conducted a thorough cross-examination of Dr. Froloff after consulting with Contreras's own medical expert. Neither of the articles submitted by Contreras mention Dr. Froloff. The credibility of Dr. McGee and the credibility of Dr. Froloff are entirely different matters. There is no showing that Dr. Froloff has a reputation for dishonesty, or that any other reason exists to question Dr. Froloff's professional integrity that went undiscovered by trial counsel. Furthermore, Contreras makes no argument and presents no legal authority for the proposition that the on-line articles about Dr. McGee, or any of the information in the articles, would be admissible at trial for the purpose of impeaching the credibility of Dr. Froloff. The Court is aware of no such authority. Requiring the jury to delve into Dr. McGee's credibility or reputation during Contreras's trial would not have been appropriate under the Federal Rules of Evidence. Thus, counsel's failure to impeach Dr. Froloff's credibility with evidence of accusations against Dr. McGee was not unreasonable.

In addition, Contreras cannot show prejudice. Dr. Snell, a clinical pathologist and the coroner for Minnehaha County, testified at trial that he reviewed all of the records from the Ramsey County medical Examiner's Office. TT pp. 329-330. Dr. Snell testified at length about why A.C.'s head injuries were not consistent with a fall from a table or a chair. He agreed with the cause of A.C.'s death that Dr. Froloff listed on the Death Certificate: traumatic head injury as a consequence of physical assault. TT p. 342.

The Court cannot find ineffective assistance of counsel for failing to investigate and present evidence of professional misconduct by Dr. Froloff when there is no showing that such information exists. Counsel searched for information that would have been useful to impeach Dr. Froloff's credibility, but he found nothing.

EVIDENTIARY HEARING and CERTIFICATE OF APPEALABILITY

A district court must grant an evidentiary hearing in a § 2255 proceeding “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). The court may deny an evidentiary hearing if “(1) the petitioner’s allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.” *United States v. Sellner*, 773 F.3d 927, 930 (8th Cir. 2014) (quoting *Thomas v. United States*, 737 F.3d 1202, 1206–07 (8th Cir. 2013)). There is no need for an evidentiary hearing in this case because it is clear from the record that Contreras’s claims do not warrant relief under 28 U.S.C. § 2255. *Walker v. United States*, 810 F.3d 568, 580 (8th Cir. 2016) (affirming denial of evidentiary hearing where no further factual development needed).

When a district court has denied a motion under 28 U.S.C. § 2255, the petitioner may not appeal without a certificate of appealability. Such a certificate may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A “substantial showing” under this section is a showing 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). A “substantial showing” is made if “a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Contreras has not made a substantial showing of the denial of a constitutional right and the certificate of appealability will not issue.

CONCLUSION

This Court concludes that Contreras has failed to demonstrate that he is actually innocent. When considering the medical testimony about A.C.’s cause of death, a reasonable juror could still convict Contreras of the murder and assault resulting in serious bodily injury to A.C. even if the case was tried with some new evidence of a heart condition. Thus, Contreras failed to satisfy the “more convincing proof” standard required for a freestanding innocence claim.

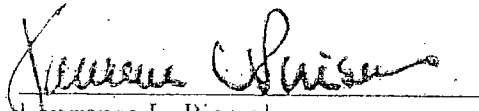
Furthermore, trial counsel provided professionally competent assistance to Contreras and did not make any objectively unreasonable choices regarding the appropriate actions to take or refrain from taking that prejudiced Contreras's defense. Thus, Contreras's ineffective assistance of counsel claims are without merit. Accordingly,

IT IS ORDERED:

1. That the Amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, doc. 135, is denied.
2. That a Certificate of Appealability shall not issue on the claims raised in the § 2255 motion.
3. That Contreras's pro se Motion to Expedite, doc. 185, and Motion for New Judge, doc. 198, are denied.

Dated this 27th day of September, 2023.

BY THE COURT:


Lawrence L. Piersol
United States District Judge

Mario M. Contreras, Appellant v. United States of America, Appellee
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2024 U.S. App. LEXIS 10868
No: 24-1113
May 3, 2024, Decided

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1} Appeal from U.S. District Court for the District of South Dakota - Southern.
(4:17-cv-04075-LLP). Contreras v. United States, 2021 U.S. Dist. LEXIS 86982 (D.S.D., May 6, 2021)

Counsel

Mario M. Contreras, Plaintiff - Appellant, Pro se, Sandstone, MN.
For United States of America, Defendant - Appellee: Kevin
Koliner, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Sioux Falls, SD.

Opinion

ORDER

The petition for rehearing by the panel is denied.

A08CASES

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A019

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