ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL ACTION NO. 15-544-02
v.	§	
	§	CIVIL ACTION NO. 22-cv-3186
DIMAS DELEON RIOS	§	

MEMORANDUM OPINION AND ORDER

Defendant Dimas Deleon Rios, proceeding *pro se*, filed a motion (Docket Entry No. 1123) and amended motion (Docket Entry No. 1125) to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The Government filed a motion for summary judgment (Docket Entry No. 1145), to which defendant filed a response. (Docket Entry No. 1151.) The Court deems the response timely filed.

Having considered defendant's section 2255 motions, the Government's motion for summary judgment, the response, the record, and the applicable law, the Court **GRANTS** summary judgment and **DENIES** the section 2255 motion, as explained below.

I. BACKGROUND AND CLAIMS

Defendant pleaded guilty to one count of conspiracy to possess with intent to distribute cocaine, and was sentenced to a 180-month term of incarceration on September 23, 2021. (Docket Entry No. 1066.) Defendant did not pursue an appeal.

In his timely-filed motion and amended motion for relief under section 2255, defendant claims that trial counsel was ineffective at sentencing in the following three particulars:

1. Trial counsel failed to investigate adequately statement made by Carlos Oyervides in his television interview.

2. Trial counsel failed to investigate adequately Mario Solis's prior statements.

3. Trial counsel failed to investigate adequately kidnapping allegations made against defendant.

The Government argues that the claims lack merit and should be dismissed.

II. LEGAL STANDARDS

A. Section 2255

Generally, there are four grounds upon which a defendant may move to vacate, set aside, or correct his sentence pursuant to section 2255: (1) the imposition of a sentence in violation of the Constitution or the laws of the United States; (2) a lack of jurisdiction of the district court that imposed the sentence; (3) the imposition of a sentence in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). Section 2255 is an extraordinary measure, and cannot be used for errors that are not constitutional or jurisdictional if those errors could have been raised on direct appeal. *United States v. Stumpf*, 900 F.2d 842, 845 (5th Cir. 1990). If the error is not of constitutional or jurisdictional magnitude, the movant must show 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). Moreover, a defendant who raises a constitutional or jurisdictional issue for the first time on collateral review must show both cause for his procedural default, and actual prejudice resulting from the error. *Placente*, 81 F.3d at 558.

B. Effective Assistance of Counsel

The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel, both at trial and on appeal. *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). To successfully state a claim of ineffective assistance of counsel, the prisoner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. A failure to establish either prong of the *Strickland* test requires a finding that counsel's performance was constitutionally effective. *Id.* at 696.

In determining whether counsel's performance is deficient, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance." *Id.* at 689. To establish prejudice, a defendant 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." *Id.* at 694. Reviewing courts must consider the totality of the evidence before the finder of fact in assessing whether the result would likely have been different absent counsel's alleged errors. *Id.* at 695–96.

To demonstrate prejudice in the context of sentencing, a defendant must demonstrate that the sentence was increased, or not lowered, due to the deficient performance of defense counsel. *Glover v. United States*, 531 U.S. 198, 200, 203–04 (2001); *U.S. v. Grammas*, 376 F.3d 433, 438 (5th Cir. 2004).

In this instance, the Court imposed a sentence that was twelve years below the low end of the Sentencing Guidelines and well below the statutory maximum of life imprisonment.

III. ANALYSIS

A. Statements of Carlos Oyervides

In his first ground for relief, defendant claims that trial counsel was ineffective in failing to present evidence that Carlos Oyervides admitted during a television interview that he himself was the leader of the drug trafficking organization. (Docket Entry No. 1126, pp. 14–20.) Defendant appears to contend that, had the Court heard the recorded interview, it would not have imposed the four-point addition under U.S.S.G. § 3B1.1 against defendant for being a leader.

Defendant's argument is refuted by the record and the applicable law. The Court was well aware of the recorded interview and Oyervides's statement that he was the leader of the organization. At sentencing, trial counsel and counsel for the Government stipulated to the fact that the videotaped interview showed Oyervides admitting he was a leader of the drug trafficking organization. (Docket Entry No. 1143, pp. 78–79.) Trial counsel informed this Court that "we have someone subpoenaed, and they're not here yet, [ ] Hector Guevarro."

Id., p. 79. This Court invited trial counsel to make a proffer of the witness's testimony, to which trial counsel stated that "Mr. Guevarro would have authenticated a video. We have both the video and a transcript of that video in which . . . Mr. Oyervides admits to being a leader of the organization." *Id.* The Government agreed to stipulate that it was Carlos Oyervides speaking on the video, and that he says "he was a leader of the organization. We can stipulate to that, and there's no need to call the witness to authenticate the video." *Id.* The Court accepted the stipulations. *Id.*

Defendant's conclusory assertion that this Court would have imposed a lesser sentence had it viewed the actual videotaped interview is unsupported in the record and warrants no relief. As noted earlier, the Court imposed a sentence that was twelve years below the low end of the Sentencing Guidelines and well below the statutory maximum of life imprisonment.

Moreover, defendant is incorrect in assuming that U.S.S.G. § 3B1.1 may apply only to a single offender in a criminal conspiracy. "There can, of course, be more than one person who qualifies as a leader or organizer of a criminal associate or conspiracy." U.S.S.G. § 3B1.1, cmt. n.4. Defendant was not required to be the sole, or primary, leader for the enhancement to apply, and Oyervides's statement of being "a" or "the" leader of the drug trafficking organization did not preclude the Court's finding that defendant was a leader of the organization. *See United States v. Cabrera*, 288 F.3d 163, 175 n.13 (5th Cir. 2002).

Defendant's first claim for ineffective assistance of counsel has no merit, and the Government's motion for summary judgment is granted as to the claim.

B. Statements of Mario Solis

Defendant next argues that trial counsel was ineffective at sentencing in failing to investigate prior statements made by witness Mario Solis. According to defendant, Solis lied to government agents when he said that defendant intimidated him by hiring attorney Juan Guerra to represent Solis so he would stop cooperating with federal investigators. Defendant argues that trial counsel should have called attorney Guerra as a witness at sentencing to refute Solis's statements. (Docket Entry No. 1126, p. 20.)

The record shows that trial counsel did attempt to call Guerra as a witness at sentencing and informed the Court that Guerra had not yet arrived. (Docket Entry No. 1143, p. 81.) The Court asked, "What's he going to testify to that's helpful to this hearing?" *Id.*, p. 82. Trial counsel responded, "He would testify he was never retained by [defendant] to represent anyone but [defendant]. The Government is essentially accusing Mr. Guerra of unethical activity saying [he withdrew due to a conflict of interest] – and it's just false. I think he should have a chance to clear his name." *Id.*, pp. 82–83. The Court stated, "I would have given Mr. Guerra a hearing at any point on the issue of conflict. I don't know why he's just now wanting to clear his name. I would have – at any time – given him a hearing on that. So I don't see any point in waiting for that." *Id.*, p. 83. The Court denied trial counsel's request to allow Guerra additional time to appear for the hearing.

Thus, the record shows that trial counsel intended to present Guerra as a witness at sentencing, but the Court declined to allow Guerra additional time to appear. Consequently, defendant's allegations against trial counsel are refuted by the record. Defendant establishes neither deficient performance nor actual prejudice under *Strickland*. Specifically, defendant fails to show that, but for trial counsel's alleged deficient performance, the Court would have imposed a lesser sentence.

Defendant's second ground for habeas relief lacks merit, and the Government's motion to summarily dismiss the claim is granted.

C. Statements Regarding Kidnapping

In his third claim, defendant contends that trial counsel was ill-prepared and failed to argue that he was not responsible for the kidnapping of Oyervides. Specifically, he asserts that "[had] my lawyer investigated the evidence of my non-involvement in the kidnapping and been prepared to correct the misperceptions at sentencing caused by the testimony of Agent Perez and the arguments of the prosecutor, there is a reasonable probability that the court's view of the offense would have resulted in a lesser sentence." (Docket Entry No. 1126, p. 23.)

Defendant's claim is speculative, conclusory, and unsupported, and he presents no probative summary judgment evidence sufficient to preclude the Government's motion for summary judgment. *See United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993) (noting that "mere conclusory allegations on a critical issue are insufficient to raise a constitutional

issue"); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) ("Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertion on a critical issue in his *pro se* petition . . . to be of probative evidentiary value."). Nothing in the record indicates that trial counsel failed to investigate the kidnapping allegations, nor does defendant direct the Court to any specific evidence that was available to counsel that would have corrected any misconceptions caused by agent Perez or the Government's arguments.

The record shows that Oyervides was kidnapped because he was an active participant in the drug trafficking organization for which defendant was a leader. Oyervides's kidnapping was precisely the type of "uncharged conduct" that U.S.S.G. § 5K2.21 contemplates. *See United States v. Newsom*, 508 F.3d 731, 735 (5th Cir. 2007). ("Thus, we join those other circuits . . . in interpreting § 5K2.21 as requiring some degree of connection between uncharged and charged offenses, although even a remote connection will suffice."). It was not necessary that the Government show that defendant himself actually kidnapped Oyervides or was personally involved in the kidnapping. Defendant establishes neither deficient performance nor actual prejudice under *Strickland*.

Defendant's third ground for habeas relief is without merit, and the Government's motion for summary judgment is granted as to the third ground.

ATTACHMENT B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 16, 2024
Lyle W. Cayce
Clerk

No. 23-20434

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DIMAS DELEON RIOS,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-3186

ORDER:

Dimas DeLeon Rios, federal prisoner # 08752-479, moves this court for a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his 180-month below-guideline sentence for conspiracy to possess with intent to distribute more than five kilograms of cocaine. He contends that defense counsel rendered ineffective assistance at the sentencing hearing.

To obtain a COA, DeLeon Rios must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a district court has rejected a

claim on the merits, a movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

DeLeon Rios has not made the requisite showing. *See id.* Accordingly, his request for a COA is DENIED.

Edith Brown Clement

EDITH BROWN CLEMENT
United States Circuit Judge

ATTACHMENT C

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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July 02, 2024

#08752-479
Mr. Dimas Deleon Rios
FCI Victorville Medium II
P.O. Box 3850
Adelanto, CA 92301-0000

No. 23-20434 USA v. Deleon Rios
USDC No. 4:22-CV-3186

Dear Mr. Deleon Rios,

We will take no action on your petition for rehearing. The time for filing a petition for rehearing under Fed. R. App. P. 40 has expired.

Sincerely,

LYLE W. CAYCE, Clerk

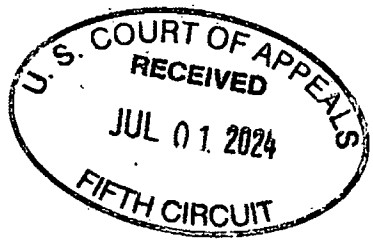
Rebecca L. Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc: Ms. Carmen Castillo Mitchell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,	)	Case No. 23-20434
	)	
Respondent-Appellee,	)	
	)	
-vs-	)	
	)	
DIMAS DELEON RIOS,	)	
	)	
Petitioner-Appellant.	)	



PETITION FOR REHEARING

I, Dimas DeLeon Rios, Defendant-Appellant herein, herewith move this Court for rehearing or reconsideration of the order of this Court, issued May 16, 2024, denying me a certificate of appealability ("COA").

1. In my *Application for a Certificate of Appealability* ("COA Application") I argued that a COA should be granted to review the denial of my *Amended Motion to Vacate, Set Aside or Correct Sentence by a Person in Custody Pursuant to 28 U.S.C. § 2255*, ECF 1123 and 1125, in Case No. 3:15-cr-00544-02, before the United States District Court for the Southern District of Texas (hereinafter referred to "*§ 2255 Motion*"). The District Court denied the *§ 2255 Motion* by an *Order* (ECF 1162), entered August 21, 2023.

2. ***Relief Sought:*** I pled guilty to one count of conspiracy to possess with intent to distribute cocaine. I was sentenced to 180 months in prison on

ATTACHMENT D

28 U.S. Code § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United

States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by § 3006A of Title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Pub. L. 104–132, title I, § 105, Apr. 24, 1996, 110 Stat. 1220; Pub. L. 110–177, title V, § 511, Jan. 7, 2008, 121 Stat. 2545.