

App. 1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-51457
USDC No. 3:14-CV-370
USDC No. 3:09-CR-1565-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SONG U. CHON, also known as The Korean,
Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

ORDER:

A jury convicted Song U. Chon of conspiracy to smuggle, transport, and harbor illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I); money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), (B)(i); and three counts of willfully aiding and assisting in the filing of a false tax return, in violation of 26 U.S.C. § 7206(2). He now moves for a certificate of appealability (COA) to appeal the district court's denial of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

App. 2

Represented by retained counsel, he argues that (1) his trial counsel failed to demonstrate that Chon lacked the requisite intent for the conspiracy charge; (2) the district court disregarded Supreme Court precedent by determining that Chon had the obligation to determine whether his customers were illegal aliens; (3) the district court disregarded the plain meaning of § 1324 by holding that someone who rents a hotel room to an illegal alien “automatically” violates the statute; (4) trial counsel failed to prove that hotel employees exceeded the scope of their employment by renting rooms to illegal aliens; (5) trial counsel failed to present evidence of the hotel’s prior owner’s policy of extending credit to alien smugglers; (6) trial counsel failed to argue and demonstrate that Chon never possessed proceeds of a specified unlawful activity; (7) trial counsel failed to object to the prosecutor’s closing arguments; and (8) Chon received ineffective assistance of counsel on appeal because this court failed to properly address the sufficiency of the evidence on the conspiracy charge.

To obtain a COA, Chon must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). He has not made the requisite showing as to any of his claims.

Accordingly, Chon’s motion for a COA is DENIED.

/s/ James L. Denis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

SONG U. CHON,	§	
Fed. Reg. No. 47129-280,	§	
Movant,	§	EP-14-CV-370-FM
v.	§	EP-09-CR-1565-FM-2
UNITED STATES	§	
OF AMERICA,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Movant Song U. Chon, through his counsel, challenges his convictions for conspiring to harbor illegal aliens, laundering money, and filing false tax returns in a motion under 28 U.S.C. § 2255 (ECF No. 1313).¹ Upon reviewing the record and for the reasons discussed below, the Court concludes that Chon has failed to establish an entitlement to § 2255 relief. The Court will accordingly deny his motion and dismiss his civil cause with prejudice. The Court will additionally deny him a certificate of appealability.

¹ “ECF No.” in this context refers to the Electronic Case Filing number for documents docketed in EP-09-CR-1565-FM-2. Where a discrepancy exists between page numbers on filed documents and page numbers assigned by the ECF system, the Court will use the latter page numbers.

BACKGROUND AND PROCEDURAL HISTORY

Chon purchased the Gateway Hotel, located near the international border in El Paso, Texas, in February of 2004. As the owner, he cooperated with alien smugglers and facilitated the use of his hotel to harbor aliens who had illegally crossed the border from Mexico. He allowed the alien smugglers to pay for rooms used by illegal aliens. He permitted his employees to provide food and laundry services to the illegal aliens so they could stay in their rooms and avoid contact with others. He was often present when Immigration and Customs Enforcement (“ICE”) special agents conducted raids at the hotel, which resulted in the discovery of hundreds of illegal aliens. He created two sets of books for the hotel: one accurately portrayed the gross receipts while the other understated them by \$300 to \$400 each day. He also prepared and signed corporate tax returns in 2005, 2006, and 2007, which understated the gross receipts from the hotel.

In 2010, a grand jury returned a second superseding indictment charging Chon and others with conspiring to smuggle, transport, and harbor illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) (“count one”).² The grand jury also charged Chon with money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (B)(i) (“count two”), and willfully aiding and assisting in the filing of false and fraudulent tax returns, in violation of 26 U.S.C. § 7206(2) (“counts three, four, and

² Second Superseding Indictment, June 16, 2010, ECF No. 848.

five”). Chon pleaded not guilty and proceeded to trial. A jury found him guilty on all charges. The Court sentenced Chon to 120 months’ imprisonment on count one, 180 months’ imprisonment on count two, which was an upward departure from the Sentencing Guidelines range of 108 to 135 months, and 36 months’ imprisonment on Counts three, four, and five, all to be served concurrently. The Court also ordered him to pay restitution in the amount of \$481,812.32. Chon timely filed a notice of appeal.

In his direct appeal, Chon asserted the evidence was insufficient to sustain his convictions, and he challenged the reasonableness of his sentences. The Fifth Circuit Court of Appeals rejected his arguments and affirmed the convictions and sentences.³ The Supreme Court denied his petition for writ of certiorari.⁴ This § 2255 motion followed.

In nineteen grounds for relief, Chon asserts his counsel provided constitutionally ineffective assistance. In a twentieth ground for relief, Chon argues the Court should vacate his conviction for money laundering.

APPLICABLE LAW

After a defendant has been convicted and exhausted or waived any right to appeal, a court is normally “entitled to presume that the defendant stands

³ *United States v. Chon*, 713 F.3d 812, 824 (5th Cir. 2013).

⁴ *Chon v. United States*, 134 S. Ct. 255 (2013).

App. 6

fairly and finally convicted.”⁵ Accordingly, ‘Melia under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.’”⁶ Typically, before a court will grant relief pursuant to § 2255, a movant must establish that “(1) his sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack.”⁷

Generally, an ineffective-assistance-of-counsel claim presented in a § 2255 motion is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).⁸ To prevail, a movant must show (1) that his counsel’s performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defense.⁹ This means that a movant must show that counsel’s performance was outside the broad

⁵ *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001) (citing *United States v. Frady*, 456 U.S. 152, 164 (1982)).

⁶ *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (quoting *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994)).

⁷ *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995) (citations omitted).

⁸ *Willis*, 273 F.3d at 598.

⁹ *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984).

App. 7

range of what is considered reasonable assistance and that this deficient performance led to an unfair and unreliable conviction and sentence.¹⁰ If the movant fails to prove one prong, it is not necessary to analyze the other.¹¹

Ultimately, the movant bears the burden of establishing his claims of error by a preponderance of the evidence.¹² A court may deny a § 2255 motion, however, if “the files and records of the case conclusively show that the prisoner is entitled to no relief.”¹³ When a court finds that the movant is entitled to relief, it “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.”¹⁴

¹⁰ *United States v. Dovalina*, 262 F.3d 472, 474-75 (5th Cir. 2001).

¹¹ *See Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir.1994) (“A court need not address both components of the inquiry if the defendant makes an insufficient showing on one”); *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir.1997) (“Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim.”).

¹² *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980) (citing *United States v. Kastenbaum*, 613 F.2d 86, 89 (5th Cir. 1980)).

¹³ 28 U.S.C. § 2255(b); *see also United States v. Drummond*, 910 F.2d 284, 285 (5th Cir. 1990) (“Faced squarely with the question, we now confirm that § 2255 requires only conclusive evidence-and not necessarily direct evidence-that a defendant is entitled to no relief under § 2255 before the district court can deny the motion without a hearing.”).

¹⁴ 28 U.S.C. § 2255(b).

Thus, the Court has ‘broad and flexible power . . . to fashion an appropriate remedy.’”¹⁵

With these principles in mind, the Court will address Chon’s claims.

ANALYSIS

A. “Alien Smuggler”

Chon first asserts his trial counsel rendered ineffective assistance by failing to object to the prosecutor’s characterization of individuals who rented rooms for aliens at the Gateway Hotel as “alien smugglers,” when they had not been convicted of an alien smuggling offense.¹⁶ He maintains this characterization prejudiced his defense on the conspiracy-to-harbor-alien charge.

The record does not support Chon’s claim. A review of the docket establishes that the main “alien

¹⁵ *United States v. Stitt*, 552 F.3d 345, 355 (4th Cir. 2008) (quoting *United States v. Hillary*, 106 F.3d 1170, 1171 (4th Cir. 1997)); see also *Andrews v. United States*, 373 U.S. 334, 339 (1963) (“[T]he provisions of the statute make clear that in appropriate cases a § 2255 proceeding can also be utilized to provide a . . . flexible remedy.”); *United States v. Torres-Otero*, 232 F.3d 24, 30 (1st Cir. 2000) (“As an initial matter, we note the broad leeway traditionally afforded district courts in the exercise of their § 2255 authority. . . . This is so because a district court’s power under § 2255 ‘is derived from the equitable nature of habeas corpus relief.’”) (quoting *United States v. Handa*, 122 F.3d 690, 691 (9th Cir. 1997)).

¹⁶ Mot. to Vacate 5, Oct. 6, 2014, ECF No. 1313.

smugglers” discussed during trial, Guillermo Lopez-Nunez and Maria Isidra Luna-Avila, pleaded guilty to conspiring smuggle aliens into the United States for private financial gain on January 14, 2010, and March 15, 2010, respectively.¹⁷ Chon’s trial did not begin until January 18, 2011. Thus, it was not improper for the prosecutor to characterize these individuals who rented rooms for aliens at the Gateway Hotel as “alien smugglers.”

Furthermore, counsel’s failure to object does not constitute deficient representation unless a sound basis for objection exists.¹⁸ Here, no sound basis for an objection exists. Chon cannot show that his “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”¹⁹ He is not entitled to relief on this claim.

B. Lack of Knowledge

Chon next claims his trial counsel rendered ineffective assistance by failing to demonstrate to the jury that he could not have possessed the intent to conspire

¹⁷ J. (Guillermo Lopez-Nunez), June 21, 2010, ECF No. 869; J. (Maria Isidra Luna-Avila), May 26, 2010, ECF No. 839).

¹⁸ See *Emery v. Johnson*, 1329 F.3d 191, 198 (5th Cir. 1997) (a futile or meritless objection cannot be grounds for finding deficient performance); *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) (failure to make a frivolous objection does not cause counsel’s performance to fall below an objective level of reasonableness).

¹⁹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

App. 10

to conceal or harbor aliens because, as a hotel owner, he did not possess the knowledge, training, or authority to enforce the immigration laws.²⁰ Chon further asserts he could not, as the owner of a public hotel, discriminate against a prospective hotel guest who wanted to rent a hotel room based on the guest's national origin.

The grand jury charged Chon with conspiracy to smuggle, transport, and harbor illegal aliens. In order to prove a conspiracy, the Government must show that an agreement existed to violate the law, and that each conspirator knew of, intended to join, and voluntarily participated in the conspiracy.²¹ The Government need not show the agreement was “explicit or formal” as a tacit agreement is sufficient.²² The Government may establish the agreement solely by circumstantial evidence.²³ Moreover, voluntary participation in a conspiracy “may be inferred from a collocation of circumstances,” and knowledge of a conspiracy “may be inferred from [the] surrounding circumstances.”²⁴ While a conspirator must knowingly participate in some way in the larger objectives of the conspiracy, he does not need to know all details of the

²⁰ Mot. to Vacate 7, Oct. 6, 2014, ECF No. 1313.

²¹ *United States v. Davis*, 226 F.3d 346, 354 (5th Cir. 2000).

²² *United States v. Freeman*, 434 F.3d 369, 376 & n.5 (5th Cir. 2005).

²³ *United States v. Bieganowski*, 313 F.3d 264, 277 (5th Cir. 2002).

²⁴ *Id.* (citation and internal quotation marks omitted).

App. 11

unlawful enterprise or have a major role in it.²⁵ In order to obtain a conviction for bringing in and harboring illegal aliens under 8 U.S.C. § 1324(a)(1)(A)(v)(I), the Government must establish that the defendant:

[A]greed with one or more persons to transport or move illegal aliens within the United States in furtherance of their unlawful presence, or to conceal, harbor, or shield from detection such aliens, knowingly or in reckless disregard of the fact that such aliens had come to, entered, or remained in the United States in violation of law.²⁶

Chon suggests he did not have the specific intent to violate the immigration laws and, in any event, he could not discriminate against prospective hotel guests based on their national origin. However, “specific intent is not an element of the offense of alien harboring.”²⁷ By enacting 8 U.S.C. § 1324, Congress “intended to broadly proscribe any knowing or willful conduct fairly within any of these terms that tends to substantially facilitate an alien’s remaining in the United States illegally.”²⁸ The Ninth Circuit Court of Appeals explained the proscribed conduct involved knowing the

²⁵ *Davis*, 226 F.3d at 354.

²⁶ *United States v. Ahmed Khan*, 258 F. App’x 714, 717 (5th Cir. 2007).

²⁷ *United States v. De Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005) (citing *United States v. Valerio-Santibanez*, 81 F. App’x 836 (5th Cir. 2003) (unpublished), *cert. denied*, 542 U.S. 915 (2004)).

²⁸ *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 n.5 (5th Cir.1982).

App. 12

status of the alien and willfully concealing, harboring or shielding him from detection:

While these provisions require knowledge or willfulness, they do not by their terms require knowledge that the actions engaged in violate the statute. On the contrary, the first requirement of knowledge is that of the status of the alien, and the second requirement of willfulness or knowledge goes to the fact of concealing, harboring or shielding from detection.²⁹

Testimony presented at trial clearly showed Chon knew hundreds of illegal aliens stayed, and he profited from their presence, at the Gateway Hotel.³⁰ Moreover, Chon's trial counsel argued that 8 U.S.C. § 1324(a)(1)(A)(v)(I) did not prohibit a hotel from renting rooms to illegal aliens:

The hotel clerks can rent hotel rooms to illegal aliens. That's not a violation. They can do that. Why would they – why would Mr. Chon need these clerks to somehow get involved with the alien smugglers for that purpose, to pay them to – these alien smugglers pay them to bring them to the hotel, no reason for that. And certainly no evidence that Mr. Chon ever received any tip from anybody and certainly nothing

²⁹ *United States v. Fierros*, 692 F.2d 1291, 1294 (9th Cir. 1982).

³⁰ *See, e.g.*, Trial Tr. Excerpt (Testimony of Armando Arzate), June 7, 2011, ECF No. 1066.

App. 13

from Western Union and certainly nothing from MoneyGram, none of those items.³¹

Despite this argument, the jury found sufficient evidence of Chon's participation in a conspiracy to conceal or harbor aliens to find him guilty as charged.

Furthermore, Chon raised a sufficiency-of-the-evidence claim in his direct appeal. The Fifth Circuit Court of Appeals rejected his argument, explaining the concerted action among Chon and his co-defendants supported an inference of an agreement to violate the law, and Chon was aware of the scope and objectives of the conspiracy:

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could infer that Chon agreed with Arzate, among others, to encourage alien smugglers to rent rooms for illegal aliens by providing a location where illegal aliens could obtain food, shelter, and laundry services without the need to leave their rooms at the Gateway Hotel. Chon's contention that he simply did not prevent illegal aliens from renting a room at the Gateway Hotel is belied by his facilitation of their presence and his willingness to allow alien smugglers to rent rooms on behalf of groups of illegal aliens. Although there was no direct evidence of an express agreement between Chon and the alien smugglers, the concerted action among Chon, his employees, and the alien smugglers supports an inference of

³¹ Trial Tr., vol. 10, p.41, June 20, 2011, ECF No. 1383.

such agreement. Moreover, Chon's participation in the conspiracy was supported by direct evidence, including testimony regarding his willingness to offer credit to alien smugglers and his subsequent complaints about alien smugglers who owed him money. There is also strong circumstantial evidence that Chon was aware of the scope and objectives of the conspiracy, such as his admitted presence at the Gateway Hotel when over 100 illegal aliens were removed in a single raid and his daily "skim" of \$300 to \$400 in cash receipts.³²

"It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions."³³ Under these circumstances, Chon cannot show that his counsel's performance was outside the broad range of what is considered reasonable assistance, or that this deficient performance led to an unfair and unreliable conviction and sentence.³⁴ He is not entitled to relief on this claim.

C. Challenge the Harboring Statute as Unconstitutional

Chon contends his trial counsel rendered ineffective assistance by not challenging the conspiracy to

³² *United States v. Chon*, 713 F.3d 812, 819 (5th Cir. 2013).

³³ *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) (citing *United States v. Jones*, 614 F.2d 80, 82 (5th Cir.1980)).

³⁴ *United States v. Dovalina*, 262 F.3d 472, 474-75 (5th Cir. 2001).

harbor illegal aliens statute as unconstitutional, as applied under the facts of his case, based on the way in which this statute conflicts with Section 201(a) of Title II of the Civil Rights Act of 1964.³⁵ Chon asserts the evidence adduced at his trial established he merely collected hotel room rent from illegal aliens and those who rented rooms for such aliens. He maintains the law enforcement agents who testified at his trial never claimed they observed him associate with alien smugglers or illegal aliens.

Under 8 U.S.C. § 1324, “[i]t is a federal felony for any person, ‘knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of federal law,’ to ‘conceal [], harbor[], or shield[] from detection . . . such alien in any place, including any building.’”³⁶ By enacting this provision, Congress “intended to broadly proscribe any knowing or willful conduct . . . that tends to substantially facilitate an alien’s remaining in the United States illegally.”³⁷ The Fifth Circuit has interpreted the statutory phrase “harbor, shield, or conceal” to imply that “‘something is being hidden from detection.’”³⁸ Although “§ 1324 . . . creates a safe harbor from

³⁵ Mot. to Vacate 9, Oct. 6, 2014, ECF No. 1313.

³⁶ *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 529 (5th Cir. 2013) (en banc) (quoting 8 U.S.C. § 1324(a)(1)(A)(iii)).

³⁷ *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 n.5 (5th Cir.1982).

³⁸ *Villas at Parkside*, 726 F.3d at 529 (quoting *United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981)).

App. 16

prosecution persons and bona fide religious organizations who ‘encourage, invite, call, allow, or enable an alien who is present in the United States’ to ‘perform the vocation of minister or missionary,’” it does not provide a defense for the owner of a commercial hotel who profits from knowingly renting rooms to illegal aliens.³⁹

Under section 201(a) of Title II of the Civil Rights Act of 1964, an individual has an entitlement to public accommodations without discrimination:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.⁴⁰

The gravamen of a section 201(a) claim is that the defendant denied the plaintiff the full and equal enjoyment of the services offered by the defendant’s public establishment.⁴¹ “When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also

³⁹ *Cruz v. Abbott*, 177 F. Supp. 3d 992, 1011 (W.D. Tex. 2016) (quoting 8 U.S.C. § 1324(a)(1)(C)).

⁴⁰ 42 U.S.C. § 2000a (2012).

⁴¹ See *United States v. DeRosier*, 473 F.2d 749, 752 (5th Cir.1973) (“[Title II] proscribes any and all efforts to deny one ‘the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation’ of that place because of discrimination based on race, color, religion or national origin.”).

as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”⁴² Section 201(a) does not provide a defense to a criminal charge.

Further, the Supreme Court has long held that “statutes should be construed whenever possible so as to uphold their constitutionality.”⁴³ Moreover, “immigration statutes are accorded special deference, and the Court will not nullify an immigration statute unless no rational basis for the statute exists.”⁴⁴ There are at least two reasons for upholding the constitutionality of an immigration statute. First, ‘Wile power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country . . . is settled . . . ’”⁴⁵ Second, the Constitution explicitly grants Congress the power to “regulate Commerce with foreign Nations and among the several States.”⁴⁶

Based on the foregoing analysis, the Court finds that 8 U.S.C. § 1324, as applied under the facts of Chon’s case, is not unconstitutional. Any challenge by

⁴² See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam) (“When a plaintiff brings an action under [Title III], he cannot recover damages.”).

⁴³ *United States v. Vuitch*, 402 U.S. 62, 70 (1971).

⁴⁴ *United States v. Hernandez-Guerrero*, 963 F. Supp. 933, 935 (S.D. Cal. 1997), aff’d, 147 F.3d 1075 (9th Cir. 1998).

⁴⁵ *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S. Ct. 2576, 2583, 33 L. Ed. 2d 683 (1972) (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)).

⁴⁶ U.S. Const. art. I, § 8, cl. 3.

Chon’s defense counsel based on the purported unconstitutionality of § 1324 would have been frivolous and unavailing. “Because failure to make a frivolous objection does not cause counsel’s performance to fall below an objective level of reasonableness,” Chon cannot establish deficient performance.⁴⁷ In addition, Chon alleges no facts to show a reasonable probability that, but for counsel’s failure to object, the outcome of his trial would have been different. Chon’s claim fails both prongs of *Strickland*, and he is not entitled to relief.

D. Credit policy

Chon contends his trial counsel rendered ineffective assistance by failing to prove that the Gateway Hotel had a policy of extending credit to alien smugglers which existed long before he became the hotel’s owner.⁴⁸ According to Chon, if the jury had been presented this evidence, it would have likely concluded that he did not enter any agreement with alien smugglers to rent hotel rooms, but that he had only continued credit policies implemented by Gateway Hotel employees years before he became the owner of the hotel.

“Deliberate ignorance is the legal equivalent of knowledge.”⁴⁹ “[D]eliberate ignorance . . . denotes a conscious effort to avoid positive knowledge of a fact

⁴⁷ *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998).

⁴⁸ Mot. to Vacate 11, Oct. 6, 2014, ECF No. 1313.

⁴⁹ *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 240 (5th Cir. 2010).

which is an element of an offense charged.”⁵⁰ It exists if (1) “the defendant was subjectively aware of a high probability of the existence of the illegal conduct” but (2) “purposely contrived to avoid learning of the illegal conduct.”⁵¹ Neither awareness of *some* probability of illegal conduct nor a showing the defendant *should* have known is enough.⁵² It requires *conscious* action in light of *known* facts amounting to a “charade of ignorance.”⁵³ In short, “deliberate ignorance is reflected in a . . . defendant’s actions which suggest, in effect, ‘Don’t tell me, I don’t want to know.’”⁵⁴

During trial, the prosecution called Armando Arzate, a former manager who testified that he was employed at the Gateway Hotel for almost twenty years.⁵⁵ Arzate claimed that he discussed the alien smugglers and Border Patrol raids with Chon on multiple occasions:

Q. Between 2004 and May 31, 2007, did you ever discuss with Mr. Chon the alien smugglers?

A. Yes, we discussed it.

⁵⁰ *United States v. Restrepo-Granda*, 575 F.2d 524, 528 (5th Cir. 1978).

⁵¹ *United States v. Faulkner*, 17 F.3d 745, 766 (5th Cir.1994).

⁵² *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir.1990).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Trial Tr. Excerpt (Armando Arzate) 5, June 7, 2011, ECF No. 1066.

. . . .

Q. . . . What did you tell Mr. Chon about the individuals that were the alien smugglers?

A. I pointed out that that type of persons brought a lot of people to the business.

Q. And by "people," did you mean illegal aliens?

A. Correct.

Q. And when there were a lot of people at the hotel, what did that mean to Mr. Chon?

A. Well, it meant that it was good business for the hotel.

Q. And when it was good business for the hotel, what would that mean financially?

A. Well, that there was money.

Q. How would the alien smugglers pay for the rooms?

A. They always paid cash, in cash.

. . . .

Q. Now, after Border Patrol had found the undocumented aliens and removed them, would you then report that to anyone?

A. Yes.

Q. Who would you tell?

A. Mr. Chon.

Q. What would you tell him?

....

A. I would tell him that the Border Patrol had come to take people out of the hotel.

Q. And when you would tell him that, what was his response?

....

A. That we had no authority to request documents within the hotel.

Q. Do you recall a day in 2006 – specifically, February 24 of 2006 – when law enforcement came to the Gateway Hotel?

A. Yes, I recall.

Q. And do you recall them removing about 100 – or over 100 undocumented aliens from the hotel on that day?

A. Yes, I recall.

Q. And was Mr. Chon present on that day?

A. Yes.

Q. After Border Patrol had removed all those undocumented aliens, did you discuss this event with Mr. Chon?

A. Yes, we discussed it.

Q. What did you discuss?

A. That we should change the path of the business.

....

App. 22

Q. And what was Mr. Chon's response to your suggestion?

A. The same. The same thing: We have no authority to request papers.

Q. Now, I want to take you up to May 31 of 2007. Do you recall that day?

A. Yes, I recall.

Q. Do you recall who came to the hotel from immigration on that day?

A. Yes, I recall.

Q. And who was that?

A. Mr. Cardoza.

....

Q. Did you provide something to Mr. Cardoza?

A. Oh, yes. Yes, I gave him room numbers where there were undocumented aliens.

Q. Was Mr. Chon present on that date?

A. Yes.

Q. Do you know whether or not they found undocumented aliens at the hotel on May 31, 2007?

....

A. Yes.⁵⁶

⁵⁶ *Id.* at 25-28, 45-48.

On cross-examination, Arzate agreed that at least some of the financial arrangements for illegal aliens existed before Chon purchased the hotel:

A. From the moment I arrived at that hotel, I would always receive tips, whether that be legal or illegal.

Q. And you had been doing that for a number of years; is that correct?

A. About ten years.

Q. Actually, you did that before Mr. Chon was even a part of that Gateway Hotel; isn't that right?

A. I was not in administration yet.

Q. When you were there at the Gateway Hotel, you were in maintenance, correct? Before Mr. Chon got there?

A. Correct.

Q. And you were receiving tips then; isn't that right, sir?

A. Correct.

Q. And these tips were from these alien smugglers, correct?

A. Correct.⁵⁷

Accepting Chon's claim – that he merely continued credit policies implemented by Gateway Hotel employees – as true, Arzate's testimony shows Chon was at

⁵⁷ *Id.* at 70.

least subjectively aware of a high probability of the existence of the illegal conduct and purposely contrived to avoid learning of the illegal conduct. Thus, his “deliberate ignorance” was the legal equivalent of knowledge.

Chon has not, with this claim, overcome the ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.”⁵⁸ He is not entitled to relief on this claim.

E. Employees Exceeded Scope of Authority

Chon contends his trial counsel rendered ineffective assistance by failing to establish that employees of the Gateway Hotel exceeded the scope of their authority as Gateway Hotel employees by engaging in alien smuggling activities unrelated to their job and position as Gateway Hotel employees.⁵⁹ Chon asserts that his employees were only authorized to rent hotel rooms and perform functions related to operating a hotel. He claims he never authorized or paid these employees to conceal or harbor illegal aliens, transport illegal aliens, or otherwise violate the alien smuggling laws. Remarkably, “Chon admits he was aware that illegal aliens rented rooms at the Gateway Hotel, but he considered this to be normal.”⁶⁰

⁵⁸ *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (citation omitted).

⁵⁹ Mot. to Vacate 15, Oct. 6, 2014, ECF No. 1313.

⁶⁰ *Id.*

The Fifth Circuit found that direct evidence, including Chon’s “willingness to offer credit to alien smugglers and his subsequent complaints about alien smugglers who owed him money” raised an inference that he knowingly entered into agreement with his employees and the “alien smugglers” to allow undocumented aliens to stay at the Gateway Hotel.⁶¹ It further explained:

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could infer that Chon agreed with Arzate, among others, to encourage alien smugglers to rent rooms for illegal aliens by providing a location where illegal aliens could obtain food, shelter, and laundry services without the need to leave their rooms at the Gateway Hotel. Chon’s contention that he simply did not prevent illegal aliens from renting a room at the Gateway Hotel is belied by his facilitation of their presence and his willingness to allow alien smugglers to rent rooms on behalf of groups of illegal aliens.⁶²

The evidence presented at trial does not support an argument that Gateway Hotel employees exceeded the scope of their authority. It shows Chon willingly participated in renting rooms to illegal aliens and alien smugglers for his own profit. Under these circumstances, Chon cannot show “counsel made errors so serious that counsel was not functioning as the ‘counsel’

⁶¹ *United States v. Chon*, 713 F.3d 812, 819 (5th Cir. 2013).

⁶² *Id.*

guaranteed the defendant by the Sixth Amendment.”⁶³ He is not entitled to § 2255 relief on this claim.

F. Unlawful Prosecution

Chon maintains his trial counsel rendered ineffective assistance by not challenging the Government’s unlawful prosecution for conspiring to violate 8 U.S.C. § 1324(a)(1)(A)(v)(I), when he, as the owner of a place of public accommodation, was authorized by civil rights legislation to rent hotel rooms to illegal aliens.⁶⁴ Chon claims, based on this policy of non-discrimination, he instructed his employees to refrain from demanding immigration documentation from anyone who requested a hotel room. Chon says he informed his employees that they were not law enforcement officers and that neither he nor they possessed the authority, knowledge, or training to determine who or who was not an illegal alien.

As the Court discussed above, the Government presented sufficient evidence for a jury to find Chon guilty of harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I).⁶⁵ Section 201(a) of Title II of the Civil Rights Act of 1964 did not “authorize” Chon to rent to known illegal aliens. Any argument by counsel that the Government’s prosecution was unlawful would have been unavailing. Chon cannot show that his “counsel made errors so serious that counsel was

⁶³ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁶⁴ Mot. to Vacate 16, Oct. 6, 2014, ECF No. 1313.

⁶⁵ *United States v. Chon*, 713 F.3d 812, 819 (5th Cir. 2013).

not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”⁶⁶ He also cannot show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁶⁷ He is not entitled to relief on this claim.

G. Due Process

Chon contends his trial counsel rendered ineffective assistance by failing to challenge the constitutionality of 8 U.S.C. § 1324(a)(1)(A)(v)(I) under the Due Process Clause since Chon, as the owner of a public accommodation, was required to prove temporary shelter, food, water, and other “essential needs” for illegal aliens.⁶⁸ He argues the statute criminalizes the owners of public accommodations, like Chon, who provide temporary shelter, food, water, or other essential needs.

The Due Process Clause requires sufficiently clear civil and criminal statutes which allow affected persons a reasonably clear idea of what the law requires of them.⁶⁹ A court may find a statute unconstitutionally vague if people of “common intelligence must

⁶⁶ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁶⁷ *Porter v. McCollum*, 558 U.S. 30, 38-39 (2009) (internal quotation marks and citation omitted).

⁶⁸ Mot. to Vacate 17, Oct. 6, 2014, ECF No. 1313.

⁶⁹ *Jordan v. De George*, 341 U.S. 223, 230 (1951); *Champlin Ref. Co. v. Corp. Comm’n of State of Okl.*, 286 U.S. 210, 242 (1932); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 238-39 (1925).

necessarily guess at its meaning.”⁷⁰ “[O]bjections to vagueness under the Due Process Clause rest on the lack of notice and hence may be overcome . . . where reasonable persons would know that their conduct is at risk.”⁷¹ The Fifth Circuit emphasizes that a statute is not unconstitutional unless it is “impermissibly vague in all its applications, including its application to the party bringing the vagueness challenge.”⁷² If a reasonable person would know his conduct is covered by the statute, then there is no failure of notice to that individual.⁷³

As originally enacted by Congress in 1907, 8 U.S.C. § 1324 prohibited smuggling aliens into the United States.⁷⁴ Congress added concealing or harboring illegal aliens as an offense in 1917, but the amendment did not attach a punishment to the added offense.⁷⁵ In *United States v. Evans*, 333 U.S. 483 (1948), the Supreme Court held that congressional revision of the statute was required to punish the separate crime of concealing and harboring illegal aliens. Congress remedied the deficiency noted in *Evans* by amending the law in 1952.⁷⁶ This amendment continues in effect

⁷⁰ *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

⁷¹ *United States v. Clark*, 582 F.3d 607, 613 (5th Cir. 2009) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)).

⁷² *Id.* at 612.

⁷³ *Maynard*, 486 U.S. at 361.

⁷⁴ *United States v. Lopez*, 521 F.2d 437, 439 (2d Cir. 1975).

⁷⁵ *Id.* (citing 39 Stat. 880).

⁷⁶ *Id.* at 440 (citing Public Law 283, Ch. 108, 82d Cong., 2d Sess. (66 Stat. 26)).

today, as a part of 8 U.S.C. § 1324. Although Congress did not define the term “harbor,” it did state that the purpose of the Act was “to strengthen the law generally in preventing aliens from . . . remaining in the United States illegally.”⁷⁷ “In debates . . . members of Congress appear to have assumed that one providing shelter with knowledge of the alien’s illegal presence would violate the Act.”⁷⁸

Chon’s conduct clearly fell within this construction of 8 U.S.C. § 1324(a)(1)(A)(v)(I). The substantial number of illegal aliens sheltered by him and his willingness to allow alien smugglers to rent rooms on behalf of groups of illegal aliens, taken together, warranted the inference that Chon knowingly engaged in providing shelter and other services in order to facilitate the continued unlawful presence of the aliens in the United States. This amounted to harboring within the meaning of the statute. A reasonable person would have known that this conduct put him at risk.⁷⁹ The Court would have rejected a challenge to the constitutionality of 8 U.S.C. § 1324(a)(1)(A)(v)(I) under the Due Process Clause.

Chon cannot show that his counsel’s performance was deficient in that it fell below an objective standard of reasonableness or that the deficient performance

⁷⁷ *Id.* (citing H. Rep. No. 1377, 82d Cong., 2d Sess.).

⁷⁸ *Id.*

⁷⁹ *United States v. Clark*, 582 F.3d 607, 613 (5th Cir. 2009) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)).

prejudiced the defense.⁸⁰ He is not entitled to relief on this claim.

H. Right to Rent Rooms to Illegal Aliens

Chon asserts his trial counsel rendered ineffective assistance by failing to challenge the constitutionality of 8 U.S.C. § 1324(a)(1)(A)(v)(I), as applied, because the Government failed to show that Chon did not have the right to rent rooms to illegal aliens.⁸¹ He claims most the guests of the Gateway Hotel were citizens or aliens lawfully present in the United States. Chon also claims he did not discriminate while operating the hotel. Thus, according to Chon, there was no basis for the Government to prosecute him for renting rooms to illegal aliens.

As the Court discussed above, the Government presented sufficient evidence for a jury to find Chon guilty of harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I).⁸² Section 201(a) of Title II of the Civil Rights Act of 1964 did not “authorize” Chon to rent to known illegal aliens. Title II “proscribes any and all efforts to deny one ‘the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation’ of that place because of discrimination based on race, color, religion or national origin.”⁸³ “When a plaintiff brings an action under that

⁸⁰ *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984).

⁸¹ Mot. to Vacate 18, Oct. 6, 2014, ECF No. 1313.

⁸² *United States v. Chon*, 713 F.3d 812, 819 (5th Cir. 2013).

⁸³ *United States v. DeRosier*, 473 F.2d 749, 752 (5th Cir.1973).

Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”⁸⁴ The Government did not have the burden of showing that Chon did not have the right to rent rooms to illegal aliens. Chon cannot show that his counsel’s performance was deficient or prejudiced his cause.⁸⁵ He is not entitled to relief on this claim.

I. Engaging in Lawful Act

Chon claims his trial counsel rendered ineffective assistance failing to assert a constitutional challenge to 8 U.S.C. § 1324(a)(1)(A) (v)(I) based on the Government’s failure to prove nothing more than that Chon engaged in the lawful act of renting hotel rooms to or for use by illegal aliens.⁸⁶ He maintains counsel rendering effective assistance would have realized that a hotel owner or hotel clerk cannot conspire with an alien smuggler or any another person to violate 8 U.S.C. § 1324(a)(1)(A)(iii) by merely renting a hotel room to an illegal alien or to someone renting a room for use by an illegal alien. He adds the jury’s act of criminalizing the essential services hotels typically provide their guests, such as room service, laundry service, and basic shelter, is not a crime under federal law. He concludes

⁸⁴ See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam) (“When a plaintiff brings an action under [Title II], he cannot recover damages.”).

⁸⁵ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁸⁶ Mot. to Vacate 19, Oct. 6, 2014, ECF No. 1313.

there is not an illegal or improper purpose in a public hotel owner renting hotel rooms to aliens or alien smugglers.

As the Court noted above, in 1952 “members of Congress appear to have assumed that one providing shelter with knowledge of the alien’s illegal presence would violate the Act.”⁸⁷ Arguing that Chon was engaged in a legal act in the face of well-established criminal law would have been unavailing. Chon cannot show his counsel’s performance was either deficient or prejudiced his cause. He is not entitled to relief on this claim.

J. “Fair Notice”

Chon avers his trial counsel rendered ineffective assistance by failing to challenge 8 U.S.C. § 1324(a)(1)(A)(v)(I) as unconstitutional as applied because these statutes failed to give him “fair notice” that he could be found guilty of conspiring to harbor illegal aliens by merely renting rooms to or for use by such aliens.⁸⁸ Specifically, he claims the statute did not inform him that it was illegal for him to rent hotel rooms to aliens illegally in the United States or to give credit to or encourage alien smugglers to rent rooms for illegal aliens at his hotel. He further claims the manager he hired to run the Gateway Hotel had conferred with an attorney who told the manager that Chon could not inquire as to the race or national origin of the persons

⁸⁷ *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1975).

⁸⁸ Mot. to Vacate 20, Oct. 6, 2014, ECF No. 1313.

to whom he rented hotel rooms. He adds the manager conveyed this information to him and he believed that his hotel clerks could legally rent a room to an illegal alien.

Again, federal law has prohibited harboring aliens since 1952.⁸⁹ Chon's argument that he lacked "fair notice" of 8 U.S.C. § 1324(a)(1)(A)(v)(I) is absurd. He cannot show his counsel provided ineffective assistance when he failed to challenge this statute based on lack of notice. Chon is not entitled to relief on this claim.

K. Unanimity Instruction

Chon contends his trial counsel failed to render effective assistance by failing to request a unanimity instruction in the charge submitted to the jury.⁹⁰ He notes the Fifth Circuit agreed with his assertion that the evidence was not legally sufficient to prove that he conspired to bring illegal aliens into the United States; to prove that he conspired to transport illegal aliens; or to prove that he conspired to encourage illegal aliens to enter the United States. He argues that because the jury determined his guilt by a general verdict, the verdict form signed by the jury failed to reflect whether some of the jurors found guilty of one or more different object offenses. He argues his trial counsel failed to render effective assistance of counsel by not requesting and providing a unanimity-of-theory instruction for

⁸⁹ *Lopez*, 521 F.2d at 440 (citing Public Law 283, Ch. 108, 82d Cong., 2d Sess. (66 Stat. 26)).

⁹⁰ Mot. to Vacate 21, Oct. 6, 2014, ECF No. 1313.

inclusion in the charge. He explains such an instruction would have informed the jury that all twelve members had to agree that he committed at least one of the object offenses alleged in count one, before they could convict him of the conspiracy offense alleged in this count.

Chon's trial counsel requested, and the Court granted, a unanimity instruction.⁹¹ Moreover, the Court specifically overruled the Government's objection to the instruction.⁹² The Court explained:

where the conspirators can accomplish the conspiracy by agreeing to commit any one of various crimes and the jury is considering the evidence, all the jury has to agree to find a conspiracy is that they committed at least one of those, obviously. But whichever one it is, they have to unanimously agree on that. And that's what *Bilzerian* says.⁹³ So that is the reason why, on page 22 [of the jury instructions], the last sentence of the first full paragraph: "You need to agree on at least one of the objects of the conspiracy defendants conspired to commit." That's a correct statement of the law. What the government has requested was that

⁹¹ Trial Tr., vol. 9, pp. 82-84, June 20, 2011, ECF No. 1082.

⁹² *Id.* at 84:16.

⁹³ See *United States v. Bilzerian*, 926 F.2d 1285, 1302 (2d Cir. 1991) ("A conspiracy conviction based on a multi-object conspiracy may be upheld so long as evidence is sufficient with respect to at least one of the criminal objectives.").

you need not agree on a particular subject.
That is an inappropriate statement of law.⁹⁴

Because Chon's counsel successfully advocated for the unanimity instruction, his argument in his § 2255 motion is frivolous. He is not entitled to relief on this claim.

L. Failure to Call a Witness

Chon contends his trial counsel rendered ineffective assistance by failing to subpoena George Garcia to show that the Gateway Hotel instituted a policy of giving credit to suspected alien smugglers and others who rented rooms for illegal aliens long before Chon became owner of the hotel.⁹⁵ He explains Garcia managed the hotel before Chon purchased it, and could testify that renting rooms to alien smugglers began in 1997. He claims Garcia was, therefore, a material witness because he could confirm that the policy of giving credit to alleged alien smugglers and others who paid for the room rent of illegal aliens existed at the Gateway Hotel long before Chon became the owner of the hotel. Subpoenaing Garcia as a defense witness, according to Chon, would have enabled him to refute the Government's contention at trial that he had instituted the policy of giving credit to suspected alien smugglers and others, when in fact the policy and practice of giving

⁹⁴ Trial Tr., vol. 9, pp. 82-83. *See also* Jury Instrs. 22, Feb. 1, 2011, ECF No. 1022; 5th Cir. Pattern Jury Instr. § 1.25.

⁹⁵ Mot. to Vacate 22, Oct. 6, 2014, ECF No. 1313.

credit to alleged alien smugglers and others had been in effect since 1997.

“‘[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative.’”⁹⁶ There is a strong presumption that counsel’s decision to not call a potential witness was strategic and, thus, hard to overcome in challenging counsel’s effectiveness.⁹⁷ “[T]o prevail on an ineffective assistance claim based on counsel’s failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.”⁹⁸ Furthermore, “mere conclusory allegations do not raise a constitutional issue in a habeas proceeding.”⁹⁹

In his closing argument, Chon’s trial counsel revealed his trial strategy concerning Garcia. He argued

⁹⁶ *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983) (quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir.1978)).

⁹⁷ *Murray v. Maggio Jr.*, 736 F.2d 279, 282 (5th Cir. 1984) (denying a § 2255 motion alleging counsel’s performance was deficient for not calling a potential witness).

⁹⁸ *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

⁹⁹ *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (citing *Schlang v. Heard*, 691 F.2d 796, 798 (5th Cir.1982) (collecting cases)).

that the jury should consider the Government's failure to call Garcia as a witness when deciding whether the Government had met its burden of proof:

MR. ABRAHAM: . . . Now, the government has the burden of proof, ladies and gentlemen. They have the burden of proof. It's required upon them to bring you the evidence. And please don't let them tell you, Well, Mr. Abraham could have brought them. He could have brought those witnesses. That's not my responsibility. That's their responsibility. The burden of proof is upon the government. I submit to you George Garcia, where is he and why –

MS. FIELDEN: Your Honor, I am going to object to that. He's the one who subpoenaed –

MR. ABRAHAM: Objection, Your Honor.

THE COURT: Counsel, do not engage in that kind of argument, please.¹⁰⁰

After this exchange, the lawyers approached the bench and the Government's counsel explained that Chon's trial counsel had subpoenaed Garcia, but, upon receiving witness statements concerning Garcia, had elected not to call him.¹⁰¹ The trial transcript suggests Chon's trial counsel, concerned about Garcia's possible testimony, made the strategic decision not to call him. Instead, he attempted to use Garcia's absence to his advantage. Chong has not, through his conclusory

¹⁰⁰ Trial Tr., vol. 10, p. 43, June 20, 2011, ECF No. 1383.

¹⁰¹ *Id.* at 44.

allegation, overcome the ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.”¹⁰² He is not entitled to relief on this claim.

M. Judgment of Acquittal

Chon claims his trial counsel rendered ineffective assistance by failing to move for a post-verdict judgment of acquittal since, he claims, the Government failed to prove the third element of its conspiracy count.¹⁰³ Specifically, he maintains the Government failed to identify a conspirator who committed at least one overt act necessary to show a conspiracy.

Chon’s trial counsel brought his first motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 at the close of the Government’s case.¹⁰⁴ He argued that the Government failed to meet its burden on count one of the indictment, the alien smuggling conspiracy charge.¹⁰⁵ The Court denied the motion.¹⁰⁶ Counsel also tendered a written Rule 29 motion to the Court on counts three, four, and five of the indictment, the false tax returns counts.¹⁰⁷ At the close

¹⁰² *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (citation omitted).

¹⁰³ Mot. to Vacate 23, Oct. 6, 2014, ECF No. 1313.

¹⁰⁴ Trial Tr., vol. 8, pp. 126-143, June 20, 2011, ECF No. 1081.

¹⁰⁵ *Id.* at 126-127.

¹⁰⁶ *Id.* at 143.

¹⁰⁷ Mot. J. Acquittal, Jan. 31, 2011, ECF No. 1032.

of his case, Chon's trial counsel brought a third Rule 29 Motion.¹⁰⁸ He argued:

I believe the evidence with regards to Count I and II are insufficient as a matter of law, with regards to elements of proof that the government has not proved beyond a reasonable doubt. If there is evidence, it certainly falls below beyond a reasonable doubt. And I would ask the Court for judgment of acquittal on Count I.¹⁰⁹

After hearing argument from the Government and Chon's rebuttal, the Court denied Chon's motion.¹¹⁰

Rule 29(c) permits counsel to file a motion for judgment of acquittal within fourteen days of the jury rendering a guilty verdict or the court discharging the jury.¹¹¹ The Fifth Circuit's standard for reviewing post-verdict Rule 29 motions requires a district court to "assess whether a reasonable jury could have properly concluded, weighing the evidence in a light most deferential to the verdict rendered by the jury, that all of the elements of the crime charged had been proven beyond a reasonable doubt."¹¹²

Chon's trial counsel moved three times for a directed verdict. The Court denied each motion. In doing

¹⁰⁸ See Trial Tr., vol. 9, pp. 42-47, June 20, 2011, ECF No. 1083.

¹⁰⁹ *Id.* at 42-43.

¹¹⁰ *Id.* at 47.

¹¹¹ Fed. R. Crim. P. 14(c)(1).

¹¹² *United States v. Lucio*, 428 F.3d 519, 522 (5th Cir. 2005).

so, the Court found that a reasonable juror could find Chon guilty of the crimes alleged beyond a reasonable doubt. There is no genuine basis to believe the Court would have found differently after the jury found Chon guilty. Moreover, the Fifth Circuit subsequently determined the evidence was sufficient to uphold the conviction and the Supreme Court denied certiorari.

In sum, Chon has not demonstrated why this Court would have reached a different conclusion upon hearing a fourth motion for judgment of acquittal. He has not shown a reasonable probability of success had trial counsel urged another motion. He has failed to show either ineffectiveness or prejudice under the *Strickland* standard, and he is not entitled to relief.

N. Motion to Quash

Chon maintains his trial counsel rendered ineffective assistance by failing to move to quash the alien-smuggling-conspiracy count of the second superseding indictment because it did not allege the “overt act” element of the offense.¹¹³ According to Chon, count one alleged four separate and distinct alien smuggling charges. Chon argues it was imperative that he know what overt acts the Government was relying on in order to defend against the conspiracy offense. He asserts the failure of his trial counsel to object to this indictment deprived him of effective assistance of counsel. Without knowing what overt acts the Government was relying on, Chon claims he was never given

¹¹³ Mot. to Vacate 24, Oct. 6, 2014, ECF No. 1313.

“fair notice” of what conspiracy offense he was defending against.

The indictment charged Chon and his co-defendants with conspiracy under 8 U.S.C. § 1324(a)(1)(A)(v)(I). Supreme Court case law instructs that the Government is not required to prove an overt act because § 1324(a)(1)(A)(v)(I) is silent with regard to an overt act.¹¹⁴

Furthermore, the Government offered proof of numerous overt acts performed by Chon and his co-conspirators in the furtherance of an agreement to harbor aliens. At trial, the Government provided overwhelming evidence of dozens of violations. In addition, the Fifth Circuit held there was sufficient evidence for a rational trier of fact to find that Chon conspired with others to rent out the Gateway Hotel as an alien smuggling way station where undocumented aliens could “obtain food, shelter, and laundry services without the need to leave their rooms.”¹¹⁵

¹¹⁴ See, e.g., *Whitfield v. United States*, 543 U.S. 209, 219 (2005) (“we hold that conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), does not require proof of an overt act in furtherance of the conspiracy” because no such requirement is contained in the statute); *Salinas v. United States*, 522 U.S. 52, 63 (1997) (“There is no requirement [under the RICO conspiracy statute, 18 U.S.C. §1962(d)] of some overt act or specific act in the statute . . . unlike the general conspiracy provision applicable to federal crimes . . .”); *United States v. Shabani*, 513 U.S. 10, 17 (1994) (“the plain language of the statute and settled interpretive principles reveal that proof of an overt act is not required to establish a violation of 21 U.S.C. § 846”).

¹¹⁵ *United States v. Chon*, 713 F.3d 812, 819 (5th Cir. 2013).

Under these circumstances, Chon cannot show that his “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”¹¹⁶ He is not entitled to relief on this claim.

O. Money Laundering

Chon asserts that if the Court grants relief on any of the previous fourteen grounds of his complaint, it must also vacate and set aside his conviction on count two, the money laundering count.¹¹⁷ He reasons that by the wording of this count, the Government had to prove that he was guilty of count one, the conspiracy to smuggle aliens count, before it could prove that he was guilty of count two, the money laundering count. The Court will not grant relief on any of Chon’s previous grounds. Additionally, it will not grant Chon relief on the money laundering count for the reasons discussed below. Accordingly, the Court will not grant relief on this claim.

P. Proceeds of an Unlawful Activity

Chon contends his trial counsel rendered ineffective assistance of counsel by failing to demonstrate and prove to the jury that he never possessed proceeds of an unlawful activity.¹¹⁸ According to Chon, the evidence

¹¹⁶ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹¹⁷ Mot. to Vacate 25, Oct. 6, 2014, ECF No. 1313.

¹¹⁸ *Id.* at 26.

adduced at his trial established that the only proceeds he collected from illegal aliens or suspected alien smugglers was legitimate hotel room rent. He notes that in the charge submitted to the jury, the Court instructed that “A hotel clerk may legally rent a room to an illegal alien. It is not unlawful to do so.”¹¹⁹ This instruction, according to Chon, informed the jury that the proceeds Gateway Hotel he received from renting hotel rooms to illegal aliens were not proceeds of an unlawful activity.

Testimony presented at trial clearly showed Chon knew hundreds of illegal aliens stayed, and he profited from their presence, at the Gateway Hotel.¹²⁰ Moreover, Chon’s trial counsel argued that 8 U.S.C. § 1324(a)(1)(A)(v)(I) did not prohibit a hotel from renting rooms to illegal aliens.¹²¹ Despite this argument, the jury found Chon guilty as charged. Furthermore, Chon raised a sufficiency-of-the-evidence claim in his direct appeal. The Fifth Circuit Court of Appeals also rejected his arguments, explaining the concerted action among Chon and his co-defendants supported an inference of an agreement to violate the law, and Chon was aware of the scope and objectives of the conspiracy.¹²²

¹¹⁹ *Id.*

¹²⁰ *See, e.g.*, Trial Tr. Excerpt (Testimony of Armando Arzate), June 7, 2011, ECF No. 1066.

¹²¹ Trial Tr., vol. 10, p. 41, June 20, 2011, ECF No. 1383.

¹²² *United States v. Chon*, 713 F.3d 812, 819 (5th Cir. 2013).

Accordingly, Chon cannot show that his counsel's performance was outside the broad range of what is considered reasonable assistance, or that this deficient performance led to an unfair and unreliable conviction and sentence.¹²³ He is not entitled to relief on this claim.

Q. Underpaying Taxes

Chon claims his trial counsel rendered ineffective assistance by failing to object to the prosecutor's argument that Chon committed a money laundering offense by underpaying his federal and hotel occupancy taxes and by pocketing cash rent receipts he "skimmed" from the Gateway Hotel.¹²⁴ Chon argues that whether he evaded the payment of taxes he owed had nothing to do with whether he received proceeds of the specified unlawful activity of conspiring to smuggle aliens.

"The money laundering promotion statute, 18 U.S.C. § 1956(a)(1)(A)(i), prohibits involving the "proceeds" of specified criminal activities in transactions intended to "promote" the carrying on of further unlawful activity."¹²⁵ "To sustain a conviction under the money laundering promotion statute, the Government must show that the defendant: (1) conducted or attempted to conduct a financial transaction, (2) which

¹²³ *United States v. Dovalina*, 262 F.3d 472, 474-75 (5th Cir. 2001).

¹²⁴ Mot. to Vacate 27, Oct. 6, 2014, ECF No. 1313.

¹²⁵ *United States v. Brown*, 553 F.3d 768, 782 (5th Cir. 2008)

the defendant then knew involved the proceeds of unlawful activity, (3) with the intent to promote or further unlawful activity.”¹²⁶ “To prove the offense of money laundering under 18 U.S.C. § 1956(a)(1)(B)(i), the government must prove that the defendant: (1) conducted or attempted to conduct a financial transaction, (2) which the defendant knew involved the proceeds of unlawful activity, and (3) which the defendant knew was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity.”¹²⁷

During closing argument, Chon’s counsel argued, in pertinent part, that his client had not engaged in an unlawful activity:

Now, money laundering, money laundering is where money goes into a certain situation where there’s some sort of illegal business that’s taking place, and then that money is later spent. What we are submitting to you . . . is that the Gateway Hotel by Mr. Chon was not an illegal action. It was not an illegal business so far as Mr. Chon was concerned

. . .

And then, ladies and gentlemen, there’s some discussion about Mr. Chon taking 3- or 400 dollars a day from the hotel. He owns it. He’s the owner of the hotel. He owns the

¹²⁶ *United States v. Miles*, 360 F.3d 472, 477 (5th Cir. 2004).

¹²⁷ *United States v. Burns*, 162 F.3d 840, 847 (5th Cir. 1998).

property. He can do, ladies and gentlemen, whatever he wants to do with the money that comes into his place of business. He can do that. He's the owner. He's the owner. He can whatever he wants to do.

I submit to you – and what they are claiming is that there are two sets of books – ladies and gentlemen, what you don't do – what you don't do is you keep – you don't keep one set of books here and then one set of books right next to it. That just doesn't happen. That doesn't happen.¹²⁸

In the Government's rebuttal, the prosecutor responded to defense counsel's arguments by explaining the jury could find Chon guilty of money laundering by either using the proceeds of unlawful activity to further unlawful activity or to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity.

All right. Now, let's talk about the money laundering because I told you before this is all about the money. There's two ways that we have alleged that money laundering occurred. Now, this is the proceeds that Song U. Chon got from harboring the undocumented aliens, and that is to promote the carrying on of the conspiracy to conceal and harbor undocumented aliens.

What does he do with the money that he gets? He puts it in his bank accounts. . . . And

¹²⁸ Trial Tr., vol. 10, pp. 41-42, June 20, 2011, ECF No. 1083.

then what does he [Chon] do? He pays the salaries of all the individuals involved with the alien smugglers. And on top of that, he then takes those salaries out of his income tax on the 1120s. . . . He pays the utilities, the gas, electric, water, all the utilities for the hotel that's being used to harbor the undocumented aliens, and he takes those out, those expenses out on his income tax, and then miscellaneous expenses for paying the plumbing, plumbing repair, for the elevator, for painting over the 'graffitied' rooms that he has that he just doesn't understand how they got there. And, finally, he makes payments for the hotel itself out of that account. . . . And you can pull those cards up or those statements up and look at all of them.

And then he pays the tax, the underpayment of the tax. That's money laundering, ladies and gentlemen. Paying the taxes for the hotel occupancy taxes and his federal income taxes using dirty money from the alien smuggling fees that he got for harboring people at the hotel.

The second way is to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the conspiracy to harbor and conceal undocumented aliens. . . . What we are talking about is the 300 to 400 dollars cash per day. We are talking 9,000 to 12,000 dollars a month that he sticks in his pocket and doesn't report to anyone. It's his money. Okay, maybe. But it's dirty money. And he's supposed to report it someplace. He sure

doesn't report it on his 1040s, his income tax records.

So he's concealing the nature and source of that when he sticks it in his pocket, never makes it to the bank, never makes it to any of his tax reporting, never makes it to any of the federal income tax reporting. That's concealing the nature, source, ownership and control of the proceeds of the alien smuggling.¹²⁹

The prosecutor's rebuttal argument was proper and consistent with both facts before the jury and the law. Thus, Chon's trial counsel had no valid objection to lodge concerning the prosecutor's argument. A trial counsel's failure to make a frivolous objection does not constitute ineffective assistance of counsel and, thus is not grounds for relief under § 2255.¹³⁰ Chon has not shown that his counsel was ineffective, and he cannot show that the prosecutor's remarks and trial counsel's failure to object prejudiced his defense. He is not entitled to relief on this claim.

R. Motion to Sever

Chon maintains that by not timely moving to sever his case from the alien smugglers and Gateway Hotel employees named in the second superseding indictment, his trial counsel deprived him of effective assistance.¹³¹ He argues that by not complaining of the

¹²⁹ *Id.* at 85-87.

¹³⁰ *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994).

¹³¹ Mot. to Vacate 28, Oct. 6, 2014, ECF No. 1313.

Government’s attempt to link him to these alien smugglers and employees, the Government could portray him as the “kingpin” of the alleged conspiracy. He adds the failure of his trial counsel to sever his case from that of the other alien smugglers deprived him of any chance of a fair trial.

Federal Rule of Criminal Procedure 8(b) provides, “[t]he indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same set of facts or transactions, constituting an offense or offenses.”¹³² Federal Rule of Criminal Procedure 14 adds, “[i]f the joinder of offenses or defendants in an indictment, an information or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.”¹³³

The general rule “is that persons indicted together should be tried together, especially in conspiracy cases.”¹³⁴ Chon proceeded to trial with three other defendants: his company, his employee, and a single alien smuggler. The four defendants were alleged to have participated in the same set of facts or transactions.

¹³² Fed. R. Crim. P. 8(b).

¹³³ Fed. R. Crim. P. 14.

¹³⁴ *United States v. Pofahl*, 990 F.2d 1456, 1483 (5th Cir. 1993); see also *United States v. Thomas*, 627 F.3d 146, 156 (5th Cir. 2010) (explaining a defendant moving for severance faces high burden to demonstrate significant prejudice to overcome the judicial economy and expense of separate trials).

There was no spill-over evidence or co-defendant testimony which caused undue prejudice to Chon. Chon was not on trial with “several alien smugglers.”¹³⁵ In sum, there was no basis for Chon’s trial counsel to seek severance. Moreover, the Court would have denied a motion to sever his case.

Chon couches his trial counsel’s failure to move for severance in terms of an ineffective assistance of counsel claim. However, he must show that he was prejudiced by trial counsel’s failure to move for severance, which would require him to demonstrate that had the motion been brought the court would have granted it. He cannot do this. He is not entitled to relief on this claim.

S. Cumulative Effect

Chon also maintains the cumulative effect of his trial counsel’s errors and omissions during the course of representing him deprived him of effective assistance.¹³⁶ Fifth Circuit “precedent indicates that ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions.”¹³⁷ He may not obtain relief on this claim.

¹³⁵ Mot. to Vacate 28, Oct. 6, 2014, ECF No. 1313.

¹³⁶ *Id.* at 29.

¹³⁷ *United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) (citing *Miller v. Johnson*, 200 F.3d 274, 286 n.6 (5th Cir.2000) (stating that in the absence of specific demonstrated error, a defendant cannot, by definition, show that cumulative error of counsel deprived him of a fair trial); *Yohey v. Collins*, 985 F.2d 222, 229

T. Appellate Error

Chon finally asserts he has been deprived of effective assistance of counsel because the Fifth Circuit's decision in his case does not properly address whether the evidence was legally sufficient to affirm his conviction of conspiring to harbor or conceal illegal aliens.¹³⁸ In his view, the Fifth Circuit's analysis and holding does not correlate with the offense elements of the harboring and concealing offense under the alien-smuggling statute. He also believes the Fifth Circuit's analysis also appears to irreconcilably conflict with Sections 201(a) and (b) of Title II of the Civil Rights Act of 1964. Chon asserts, based on the Civil Rights Act and Supreme Court precedent construing it, that the holding of the Fifth Circuit opinion affirming his conviction for conspiracy to commit an alien smuggling offense does not properly address whether the evidence was legally sufficient to affirm his conviction.

In his petition for certiorari, Chon, through his counsel, posed the following question:

5. Has the Fifth Circuit impermissibly broadened the scope of the harboring statute by equating 'facilitating the presence' of an

(5th Cir.1993) (stating that because certain alleged errors did not rise to constitutionally ineffective assistance of counsel, and because certain other claims were meritless, a petitioner had "presented nothing to cumulate").

¹³⁸ Mot. to Vacate 30, Oct. 6, 2014, ECF No. 1313.

illegal alien with the harboring offense of the statute?¹³⁹

Chon argued to the Supreme Court that the Fifth Circuit's sufficiency-of-the-evidence of analysis was predicated upon a "watered-down 'facilitation of presence' analysis" that "has greatly transformed the nature of a 'harboring' offense prosecution in the Fifth Circuit."¹⁴⁰ He went on to postulate that:

[u]nder the new definition, the pizza delivery man who delivers a hot pizza to an illegal alien's room can be found guilty of harboring because his conduct would facilitate the alien's stay or presence at his hotel.¹⁴¹

The Supreme Court denied certiorari, which means the Fifth Circuit's decision is not only the law of this case, but also the law within this jurisdiction.¹⁴² "It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions."¹⁴³ Even assuming there is merit to this argument, which there is not, the matter is barred because the Fifth Circuit decided it against Chon on direct appeal.

¹³⁹ Pet. for Writ of Certiorari, *Chon v. Verrilli*, 2013 WL 3484363 at *1, *cert. denied*, 134 S. Ct. 255 (2013).

¹⁴⁰ *Id.* at *30.

¹⁴¹ *Id.*

¹⁴² *Chon v. United States*, 134 S. Ct. 255 (2013).

¹⁴³ *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) (citing *United States v. Jones*, 614 F.2d 80, 82 (5th Cir.1980)).

EVIDENTIARY HEARING

A motion brought pursuant to § 2255 may be denied without a hearing if the motion, files, and records of the case conclusively show that the defendant is not entitled to relief.¹⁴⁴ The record in this case is adequate to dispose fully and fairly of Chon’s claims. The Court need inquire no further on collateral review and an evidentiary hearing is not necessary.

CERTIFICATE OF APPEALABILITY

A petitioner may not appeal a final order in a habeas corpus proceeding “[u]nless a circuit justice or judge issues a certificate of appealability.”¹⁴⁵ A certificate of appealability “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.”¹⁴⁶ Here, Chon’s § 2255 motion fails because he has not made a substantial showing of the denial of a constitutional right. Thus, the Court will deny him a certificate of appealability.

CONCLUSION AND ORDERS

For the reasons stated above, the Court finds that Chon is not entitled to § 2255 relief. The Court,

¹⁴⁴ See *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992) (per curiam) (holding that there was no abuse of discretion in denying a § 2255 motion without a hearing where the movant’s assertions of ineffective assistance were wholly conclusory in nature and refuted by reference to the record itself).

¹⁴⁵ 28 U.S.C. § 2253(c)(1)(B) (2012).

¹⁴⁶ *Id.* § 2253(c)(2).

therefore, concludes that it should deny Chon's motion and dismiss his civil cause. The Court further concludes that Chon is not entitled to a certificate of appealability. Accordingly, the Court enters the following orders:

IT IS ORDERED that Chon's *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct a sentence (ECF No. 1313) is **DENIED**, and his civil cause is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Chon is **DENIED a CERTIFICATE OF APPEALABILITY**.

IT IS ALSO ORDERED that all pending motions in this cause are also **DENIED**.

IT IS FINALLY ORDERED that the Clerk shall **CLOSE** this case.

SIGNED this 6 day of December, 2016.

/s/ Frank Montalvo

FRANK MONTALVO
UNITED STATES
DISTRICT JUDGE
