

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10124
USDC No. 4:16-CV-1168
USDC No. 4:13-CR-158-1



A True Copy
Certified order issued Dec 07, 2017

Lyfe W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CALEB DEASON,

Defendant-Appellant

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

O R D E R:

Caleb Deason, federal prisoner # 46873-177, has applied for a certificate of appealability (COA) to challenge the denial of his 28 U.S.C. § 2255 motion. He filed the § 2255 motion to attack his jury trial convictions of wire fraud and money laundering, as well as the concurrent 120-month sentences of imprisonment imposed on these convictions.

In his COA application, Deason claims that his trial counsel was ineffective for failing to investigate the issue of venue and for failing to move to dismiss the wire fraud charge based on a lack of venue. He claims that his trial counsel was ineffective at sentencing because counsel failed to move for a downward departure or a variance and failed to advocate effectively for a lower

sentence. Finally, renewing a venue-related issue that was raised in a memorandum supporting his § 2255 motion, Deason claims that the Government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence showing that the wire transaction charged in the indictment did not touch the Northern District of Texas. Deason notes that the district court did not address the *Brady* claim in its order denying his § 2255 motion, and he contends that a remand is required for adjudication of the claim.

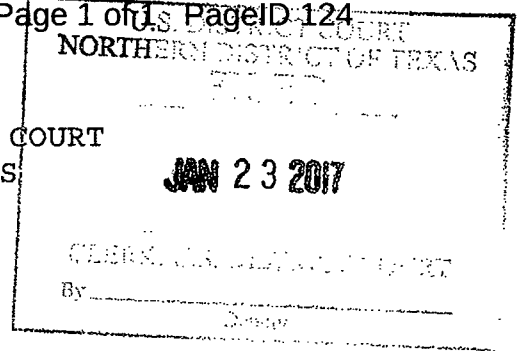
This court will grant a COA only if the applicant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327. Where the district court has rejected the application on a procedural ground, the applicant must also show “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

Deason has failed to make the required showing. Accordingly, his request for a COA is DENIED.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



CALEB DEASON,

Movant,

VS.

UNITED STATES OF AMERICA,

Respondent.

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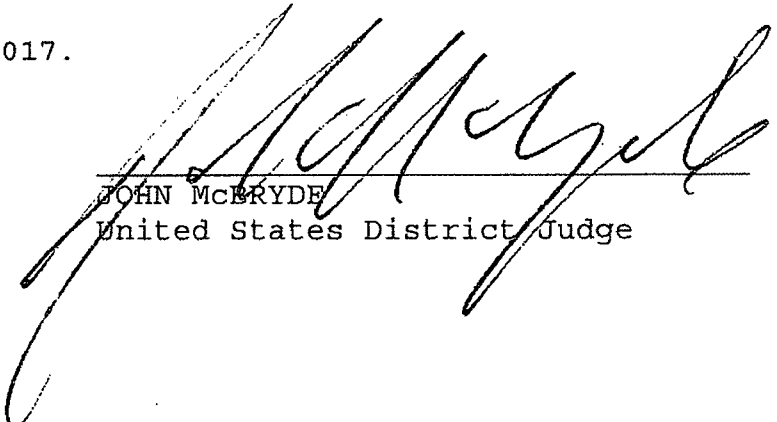
NO. 4:16-CV-1168-A
(NO. 4:13-CR-158-A)

FINAL JUDGMENT

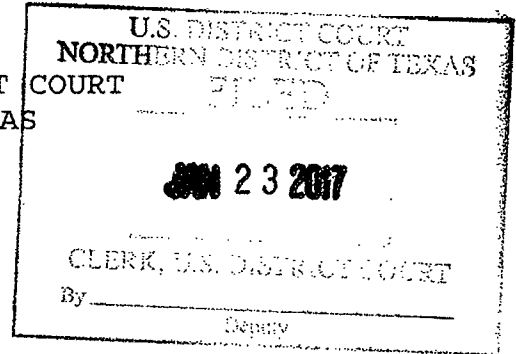
In accordance with the memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES, and DECREES that all relief sought by Caleb Deason in the motion he filed on December 22, 2016, under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody be, and is hereby, denied.

SIGNED January 23, 2017.


JOHN MCBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



CALEB DEASON,

Movant,

VS.

UNITED STATES OF AMERICA,

Respondent.

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NO. 4:16-CV-1168-A
(NO. 4:13-CR-158-A)

MEMORANDUM OPINION AND ORDER

Came on for consideration the motion of Caleb Deason ("movant") under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. After having considered such motion, its supporting memorandum, the government's response, the reply, and pertinent parts of the record in Case No. 4:13-CR-158-A, styled "United States of America v. Caleb Deason," the court has concluded that the motion should be denied.

I.

Background

Information contained in the record of the underlying criminal case discloses the following:

On September 4, 2013, movant was named in a two-count indictment charging him in count one with wire fraud, in violation of 18 U.S.C. § 1343, and in count two with money

laundering, in violation of 18 U.S.C. § 1957. CR Doc.¹ 1. The Federal Public Defender was appointed to represent movant, but he later retained counsel to appear on his behalf. CR Docs. 7 & 15. Movant's retained counsel filed a motion for continuance, citing the voluminous records to be reviewed and the need for further independent investigation, including out-of-state interviews and forensic retrieval of electronic files on computer servers of a third party provider. CR Doc. 19. The court granted the motion for continuance. CR Doc. 22. The court had several conferences with counsel regarding pretrial matters. CR Docs. 41, 43, 44. Movant's case was tried to a jury, which convicted him of both counts of the indictment. CR Doc. 71.

Movant's advisory guideline range was 78 to 97 months. CR Doc. 86 at ¶ 85. The court gave notice that, except as accepted by the probation officer, movant's objections to the presentence report were without merit and that a sentence of imprisonment significantly above the top of the advisory guideline imprisonment range would be appropriate. CR Doc. 92. Movant's counsel argued at sentencing that his case was not much different from other fraud cases and that a guideline sentence would be appropriate. CR Doc. 118 at 15-18. Movant was sentenced to a term

¹The "CR Doc. ____" reference is to the number of the item on the docket in the underlying criminal case, No. 4:130CR-158-A.

of imprisonment of 120 months as to each count, to run concurrently. CR Doc. 95. He appealed and his conviction, sentence, and restitution order were affirmed. United States v. Deason, 622 F. App'x 350 (5th Cir. 2015). His motion for rehearing was denied on September 24, 2015.

II.

Grounds of the Motion

Movant urges three grounds in support of his motion, worded as follows:

GROUND ONE: Deason Was Denied Effective Assistance of Counsel at Sentencing, A Critical Stage.

GROUND TWO: Defense counsel failed to conduct an adequate pre-trial investigation, and the failure was prejudicial to Deason, in violation of Amendment VI to the Constitution.

GROUND THREE: Movant Was Denied Due Process of Law and Effective Assistance of Counsel, through Counsel's Failure to Object that there was no Venue in the Northern District of Texas to the Wire Fraud Charge.

Doc. 1 at 7-8.

III.

Applicable Legal Standards

A. 28 U.S.C. § 2255

After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S.

152, 164-165 (1982); United States v. Shaïd, 937 F.2d 228, 231-32 (5th Cir. 1991). A defendant can challenge his conviction or sentence after it is presumed final on issues of constitutional or jurisdictional magnitude only, and may not raise an issue for the first time on collateral review without showing both "cause" for his procedural default and "actual prejudice" resulting from the errors. Shaïd, 937 F.2d at 232.

Section 2255 does not offer recourse to all who suffer trial errors. It is reserved for transgressions of constitutional rights and other narrow injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981). In other words, a writ of habeas corpus will not be allowed to do service for an appeal. Davis v. United States, 417 U.S. 333, 345 (1974); United States v. Placente, 81 F.3d 555, 558 (5th Cir. 1996). Further, if issues "are raised and considered on direct appeal, a defendant is thereafter precluded from urging the same issues in a later collateral attack." Moore v. United States, 598 F.2d 439, 441 (5th Cir. 1979) (citing Buckelew v. United States, 575 F.2d 515, 517-18 (5th Cir. 1978)).

B. Ineffective Assistance of Counsel Claims

To prevail on an ineffective assistance of counsel claim, movant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Missouri v. Frye, 566 U.S. ___, 132 S. Ct. 1399, 1409-11 (2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697; see also United States v. Stewart, 207 F.3d 750, 751 (5th Cir. 2000). "The likelihood of a different result must be substantial, not just conceivable," Harrington v. Richter, 562 U.S. 86, 112 (2011), and a movant must prove that counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (quoting Strickland, 466 U.S. at 686). Judicial scrutiny of this type of claim must be highly deferential and the defendant must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. Simply making conclusory allegations

of deficient performance and prejudice is not sufficient to meet the Strickland test. Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000).

IV.

Analysis

In each of his grounds, movant complains that his counsel was ineffective. In the first ground, he generally argues that his counsel failed to urge argument against an upward variance and also failed to argue in favor of a downward variance. In his memorandum, he cites a number of cases regarding sentencing, arguing that he should have received a lighter sentence. Movant's unsupported conclusory allegations fail to meet his heavy Strickland burden. In any event, the record reflects that movant's counsel made appropriate objections and arguments on his behalf. That movant received a harsher sentence than he would have liked does not mean that he received ineffective assistance of counsel.

In his second ground, movant alleges that his counsel failed to conduct an adequate pretrial investigation into the wire transmission the subject of the indictment. His contention is that venue was improper in the Northern District of Texas, because the wire at issue never went from, to, or through Texas. His third ground says that he was denied due process through his

counsel's failure to object to lack of venue due to the wire transmission not taking place in Texas. Neither of these grounds has merit. The court is satisfied that movant's counsel thoroughly investigated the wire transfer and made every plausible argument on movant's behalf. The wire transfer was a subject of movant's appeal and, as the appellate court noted, the evidence at trial included a copy of the wire transfer authorizing wiring of funds to movant's account in Fort Worth and a copy of his bank account statement reflecting a wire transfer from HSBC Bank USA to his account. 622 F. App'x at 360. There was never any question that movant received a wire to his Wells Fargo account in Fort Worth. Id. at 354. The evidence at trial overwhelmingly established movant's guilt. And, venue in the Northern District was proper as it is the place where defendant orchestrated the crimes for which he was convicted. United States v. Rogriguez-Moreno, 526 U.S. 275, 279 (1999); United States v. Pace, 314 F.3d 344, 349-50 (9th Cir. 2002). Counsel cannot have been ineffective for failing to raise meritless claims. United States v. Kimler, 167 F.3d 889, 893 (5th Cir. 1999).

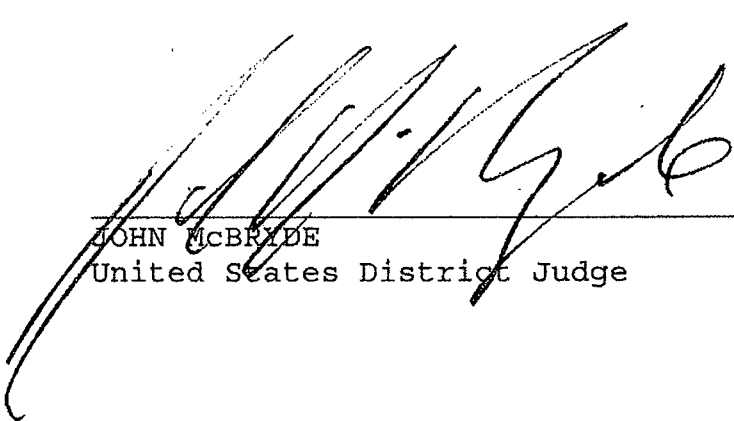
V.

Order

The court ORDERS that all relief sought by movant in his motion under 28 U.S.C. § 2255 be, and is hereby, denied.

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts, and 28 U.S.C. § 2253(c)(2), for the reasons discussed herein, the court further ORDERS that a certificate of appealability be, and is hereby, denied, as movant has not made a substantial showing of the denial of a constitutional right.

SIGNED January 23, 2017.



JOHN MCBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10124

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CALEB DEASON,

Defendant - Appellant

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

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

- (X) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

W. Eugene Davis
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

February 05, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-10124 USA v. Caleb Deason
USDC No. 4:16-CV-1168

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

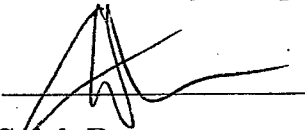


By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

Mr. Caleb Deason
Mr. James Wesley Hendrix

CERTIFICATE OF COMPLIANCE

In accordance with Supreme Court Rule 33, Deason certifies this pleading complies with the type volume limitations of these Rules. This pleading contains less than forty (40) pages, which is less than permitted by Supreme Court Rule 33.



Caleb Deason