

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

CIRINO GONZALEZ,)
)
 Petitioner)
)
 v.) 1:12-cv-00375-GZS
) AND
 UNITED STATES OF AMERICA,) 1:07-cr-00189-GZS-3
)
 Respondent)

RECOMMENDED DECISION ON
SECTION 2255 MOTION
and
ORDERS ON PENDING MOTIONS

Cirino Gonzalez, convicted of several counts in relationship to providing assistance to Edward and Elaine Brown during their efforts to evade capture by federal law enforcement officers, has filed a motion to vacate his conviction. Gonzalez is currently serving a 96-month sentence of incarceration. The details of the case can be found in the First Circuit opinion affirming Gonzalez’s conviction on direct appeal.¹ United States v. Gerhard, 615 F.3d 7 (1st Cir. 2010). According to the Court of Appeals, Gonzalez was a thirty year old man from Alice, Texas who often stayed with the Browns from early April 2007 until late June 2007. He came to the Browns’ New Hampshire property “anticipating violence and brought at least one weapon with him to the Browns’ home.” Id. at 14.

His current motion to vacate filed pursuant to 28 U.S.C. § 2255 is fifteen pages long and

¹ The Court of Appeals denied Gonzales’s direct appeal on July 20, 2010. He filed a petition for writ of certiorari which the Supreme Court denied on October 3, 2011. Gonzalez v. United States, 132 S. Ct. 288 (Mem.). On September 13, 2012, Gonzalez filed a motion to extend time to file a section 2255 petition in his underlying criminal case, 1:07-cr-00189-GZS-3, ECF No. 693. On October 3, 2012, Gonzalez filed this petition. I directed the United States to respond to the motion to extend time in the context of any statute of limitations defense it chose to raise regarding the petition. No such defense has been raised and I now order the motion to extend, filed in the criminal case, to be dismissed as moot.

is accompanied by close to three hundred pages of attachments. (ECF No. 1.) Additionally, after the government responded to his motion, Gonzalez filed what he calls a “motion of traverse” and an addendum (ECF Nos. 17 & 18). I construe these pleadings as his reply to the government’s terse response to his motion. It is obvious from the context of his own pleadings that Gonzalez had received and reviewed the government’s response to his motion to vacate because he notes that “the Government [did] not address ANY key factual averments made by Movant with a record or file that would contradict it.” (Motion of Traverse at 1, emphasis in original.) His reply, directly acknowledging receipt of the response, caused me to conclude that his motion relating to the failure of the government to provide him with a copy of its response was moot and I issued an order to that effect. Gonzalez now requests that I clarify that endorsed order. (ECF No. 19.) I have no reason to do so, the order speaks for itself and the motion for clarification is denied.

MERITS OF THE SECTION 2255 PETITION

As the government notes in its responsive pleading, Gonzalez has presented the court with “a laundry list of undeveloped claims.” (Response at 1.) Those claims include the following: (1) his trial lawyer was ineffective; (2) his appellate lawyer was ineffective; (3) the district court was biased against him in making certain rulings and was complicit in prosecutorial misconduct; and (4) the Bureau of Prisons has treated him unfairly pertaining to his ability to receive mail and make telephone calls. Although Gonzalez has filed a huge quantity of material with his motion, he has not refuted that his claims are as characterized by the government. A few general principles have guided my review. “When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing.” United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993) (citations omitted). “A district court may

forego such a hearing when the movant's allegations, even if true, do not entitle him to relief, or when the movant's allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible." Owens v. United States, 483 F.3d 48, 57 (1st Cir. 2007) (internal quotation marks omitted). See also McGill, 11 F.3d at 225 ("In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations..."). Furthermore, when a "petition for federal habeas relief is presented to the judge who presided at the petitioner's trial, the judge is at liberty to employ the knowledge gleaned during previous proceedings and make findings based thereon without convening an additional hearing." McGill, 11 F.3d at 225.

Ineffective Assistance of Trial and Appellate Counsel

The First Circuit set forth the standard for 28 U.S.C. § 2255 ineffective assistance claims in United States v. De La Cruz:

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). In order to prevail, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). In other words, a defendant must demonstrate both seriously-deficient performance on the part of his counsel and prejudice resulting therefrom.

514 F.3d 121, 140 (1st Cir. 2008). In this case Gonzalez has demonstrated neither deficient performance nor prejudice. "[C]ounsel inevitably must decide where to focus his or her efforts; not every fact can be double-checked." Peralta v. United States, 597 F.3d 74, 82 (1st Cir. 2010). As the Supreme Court observed in Strickland: "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466

U.S. at 690.

I have reviewed the record on direct appeal, the docket entries in the underlying criminal proceeding, and Gonzalez's motion pursuant to § 2255. I cannot identify any conduct by either trial or appellate counsel that rises to the level of ineffective assistance of counsel, either through deficient performance or resulting prejudice. Much of Gonzalez's argument in the section 2255 petition appears to be supported by a motion for continuance filed by his trial counsel in the context of a potential retrial that was scheduled on two of the counts that were mistried during the first trial. Ultimately the two counts were dismissed. How these exhibits support a claim of ineffective assistance is beyond my understanding. I believe that Gonzalez's argument is that counsel's request for a continuance in the context of the retrial is further evidence of his lack of preparation for the actual trial held a couple of months earlier. The record does not support that argument.

Appellate counsel's major alleged failure was his failure to get Gonzalez released on conditions pending his appeal in order for Gonzalez to be able to assist in pursuing the appeal. Gonzalez has not shown any prejudice from appellate's counsel conduct nor has he shown that counsel's apparent decision not to pursue frivolous courses of action at Gonzalez's direction amounted to deficient performance.

Judicial Bias and Prosecutorial Misconduct

The District Court judge has already ruled that even though Gonzalez disagrees with various rulings he made before, during, and after trial there is no judicial bias present in this case warranting recusal. (Endorsed Order, denying Motion for Recusal, November 5, 2012.) No more need be said. The prosecutorial misconduct arguments in Gonzalez's motion are undeveloped and appear to hinge in large measure on conclusory assertions made by him or his

co-defendants.

The prosecutorial misconduct argument appears primarily directed at Gonzalez's inability to get his legal mail, interfering with his ability to prepare his defense. He also accuses the prosecutors of intimidating several of his witnesses, but these arguments are not supported by the record materials he provides. One of the intimidated witnesses, Jose Gonzalez, (see Ex. Cg088 at 31, ECF No. 1-7), was apparently accused of assaulting Amy Williamson, another potential defense witness, by the Round Rock Police in Williamson County, Texas, on January 29, 2008. How these events relate to the March 2008 trial are not explained in Gonzalez's motion and the exhibits are certainly not self-explanatory. Gonzalez has made no cogent argument based on prosecutorial misconduct.

Bureau of Prisons Legal Mail and Telephone Call Issues

At least some of the issues relate to ongoing arguments between Gonzalez and his custodians at the Bureau of Prisons. His motion recounts a dispute over legal mail occurring sometime in 2010 involving the federal institution in Phoenix, Arizona. These events occurred well after Gonzalez's conviction and do not provide a basis for relief under section 2255. If Gonzalez is unable to receive administrative relief regarding the conditions of his confinement, his remedy is to file a petition pursuant to 28 U.S.C. § 2241 against his current custodian. See Muniz v. Sabol, 517 F.3d 29, 34 (1st Cir. 2008) (“[A] habeas petition seeking relief from the manner of execution of a sentence is properly brought under 28 U.S.C. § 2241 against the current custodian”).

CONCLUSION

For the reasons stated above, Gonzalez's motion for clarification (ECF No. 19) is denied. I recommend that the Court deny Gonzalez relief under 28 U.S.C. § 2255, with prejudice, and

dismiss the petition. I further recommend that a certificate of appealability not issue in the event Gonzalez files a notice of appeal because there is no substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c). Finally, Gonzalez's motion to extend, filed in 1:07-cr-00189-GZS-3 (ECF No. 693) is dismissed as moot for reasons stated in footnote 1.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within fourteen (14) days of being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

March 12, 2013

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Gonzalez v. USA

Assigned to: Judge George Z. Singal

Related Case: [1:07-cr-00189-GZS-3](#)

Cause: 28:2255 Motion to Vacate / Correct Illegal Sentence

Date Filed: 10/03/2012

Jury Demand: None

Nature of Suit: 510 Prisoner: Vacate Sentence

Jurisdiction: U.S. Government

Defendant

Petitioner

Cirino Gonzalez

represented by **Cirino Gonzalez**
Phoenix - FCI
Inmate Mail/Parcels
37910 N 45th Ave
Phoenix, AZ 85086
PRO SE

V.

Respondent

USA

represented by **Seth R. Aframe**
US Attorney's Office (NH)

James C. Cleveland Federal Building
53 Pleasant St, 4th Flr
Concord, NH 03301-0001
603 230-2532
Email: seth.aframe@usdoj.gov
ATTORNEY TO BE NOTICED