UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GESNER DELVA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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MEMORANDUM AND ORDER
Case No. 12-CV-0757 (FB)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

GESNER DELVA, a/k/a "Ti Blan,"

Defendant.

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Case No. 04-CR-0314 (FB)

Appearances:
For the Petitioner/Defendant:
ROBERT A. CULP, ESQ.
Law Officers of Robert A. Culp
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P.O. Box 550
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For the Respondent/Plaintiff:
LORETTA LYNCH, ESQ.
United States Attorney
Eastern District of New York
BY: WHITMAN G.S. KNAPP, ESQ.
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BLOCK, Senior District Judge:

Petitioner Gesner Delva moves to vacate his sentence pursuant to 28 U.S.C. § 2255. He also moves, *pro se*, for a new trial pursuant to Federal Rule of Criminal Procedure 33. Both motions are denied.

I

Following a second jury trial, Delva was convicted of cocaine importation and related crimes.[1] *See* 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1)(B)(ii); 21 U.S.C. § 963; 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(ii)(II). The Court sentenced him principally to 293 months' imprisonment. Prior to sentencing, Delva requested that his conviction be vacated because his trial counsel, John P. Dell'Italia, had provided ineffective assistance by refusing to permit him to testify.[2] After inquiring into the matter, the Court issued an oral decision declining to hold a hearing on Delva's claim, and did not vacate the conviction on this or on any other basis. On appeal, the Second Circuit upheld the Court's decisions, affirming the judgment of conviction and sentence in a Summary Order. *See United States v. Fleurimont*, 401 F. App'x 580 (2d Cir. 2010). It concluded that in light of the "overwhelming" evidence of Delva's guilt, his single ineffective assistance of counsel claim was "easily disposed of based on a lack of prejudice." *Id.* at 583.

II

Delva's Rule 33 motion requests a new trial on grounds of "newly discovered

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[1]Delva's first trial took place in June 2008 and resulted in a hung jury. During the second trial, five of Delva's co-conspirators testified on the government's behalf as cooperating witnesses: Pascal Garoute, Jean Gardy Bapteau, Fenol Bernadelle, Milot Maitre, and Wista Louis. While Delva testified at his first trial, he did not take the stand during the second trial nor did he call any witnesses.

Delva's offenses included cocaine importation, conspiracy to import cocaine, and conspiracy to distribute and possess with intent to distribute cocaine. He was arrested in September 2007 by Haitian police with the assistance of the Drug Enforcement Administration ("DEA"), after which he was extradited to the United States.

[2]Dell'Italia represented Delva at both trials.

evidence." In contrast, his § 2255 petition seeks to vacate his sentence due to ineffective assistance of counsel and other reasons slightly differing from the substance of his Rule 33 motion. The § 2255 petition is addressed first, followed by the Rule 33 motion.

A. Section 2255 Petition

The Court has made its best efforts to comprehend the long-winded, incoherent, and rambling arguments in Delva's § 2255 petition. As best the Court can glean, he claims that his conviction should be vacated because—for several reasons—he received ineffective assistance of counsel during his second trial and on appeal, had a conflict of interest with his trial counsel because of a fee dispute, and was illegally extradited from Haiti to the United States. His petition is meritless.

1. Ineffective Assistance of Counsel

Delva argues that his trial counsel and first appeals counsel,[3] Alan Nelson, provided ineffective assistance by: (1) failing to object to impermissible character evidence; (2) permitting introduction of "flight evidence"; (3) not requesting a Court instruction regarding transcripts of recorded conversations in evidence; (4) failing to request corrective jury instructions relating to cooperating witnesses and the conspiracy charge; (5) improperly providing the jury with trial transcripts; (6) denying Delva the right to testify; and (7) failing to compare Delva's actions with those of a co-conspirator during sentencing.

To prevail on his ineffective assistance of counsel claims, Delva must show "(1) that [each] attorney's performance fell below an objective standard of reasonableness, and (2) that as

[3]Following Delva's appeal to the Second Circuit, he retained attorney Robert A. Ratliff. While Delva's petition does not distinguish between these appellate counsel, the Court understands his ineffective assistance claims to be directed toward Dell'Italia and Nelson.

a result he suffered prejudice." *United States v. Jones*, 482 F.3d 60, 76 (2d Cir. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "A reviewing court must indulge a strong presumption that counsel's [performance] falls within the wide range of reasonably professional assistance." *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004). Prejudice is shown only if "there is a reasonable probability that, but for counsel's unprofessional error, the outcome of the proceeding would have been different." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

a. Failure to Object to Impermissible Character Evidence

Delva contends that Dell'Italia should have objected to the Court's improper admission of character evidence from several of the government's witnesses, and that counsel was ineffective in failing to raise this issue on appeal. Specifically, Delva points to portions of testimony from witnesses Pascal Garoute and Wista Louis regarding his involvement in drug transactions preceding the conspiracy, and argues that their testimony constituted impermissible character evidence not falling within any Rule 404(b)(2) exception.

Trial counsel's decision not to object to Garoute and Louis' testimony was a reasonable one. First, Louis' testimony concerned Delva's involvement in the crimes for which he was being tried, and thus was not character evidence of Delva's prior bad acts. *See* Tr. at 717 (during the conspiracy Delva was one of Louis' suppliers); 724-26 (discussing details of the conspiracy including how Louis bought cocaine from Delva to sell to her clients). Likewise, to the extent that these witnesses' testimony discussed Delva's prior acts, this testimony was clearly admissible under Rule 404(b).[4] *See* FED. R. EVID. 404(b)(2) (evidence of "crimes, wrongs, or other

[4]In accordance with Rule 404, the government provided advanced notice of its intent to offer character evidence and the grounds for its admission. *See* Fed. R. Evid. 404(b)(2) (requiring that a prosecutor provide "reasonable notice of the general nature of any such

acts" may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."). For example, Garoute testified about a similar cocaine importation scheme taking place in 1996-1997 that also involved transportation of contraband by boat and airplane from Haiti into the United States.[5] Tr. at 317-25 (describing that in the boat scheme, Delva "loaded" the drugs "in the tires . . . had the tools [] to open the tires . . . [and] was the one . . . that took them" to the port of departure."). Throughout this testimony, the government was careful to elicit generalized responses concerning the importation scheme. Tr. at 321 ("Now, describe again without using any particular names just generally how it was that the boat scheme that you participated in [] worked."). Accordingly, it was not error for trial counsel to refrain from objecting to such testimony, and neither was appeals counsel ineffective in choosing not to raise this argument. *See United States v. Cohen*, 427 F.3d 164, 170 (2d Cir. 2005) (a choice to not raise a futile objection does not render trial counsel's performance constitutionally ineffective).

b. Failure to Object to "Flight Evidence"

Delva asserts that his trial counsel failed to object to the government's improper introduction of "flight evidence" as circumstantial evidence of his guilt. However, the government did not seek to establish his guilt with circumstantial evidence that he either fled or sought to flee from the crime scene. *See United States v. Al-Sadawi*, 432 F.3d 419, 424 (2d Cir. 2005) (providing that "flight evidence" is used to show "an admission [of defendant's guilt] by

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evidence that [he] intends to use at trial.").

[5]The government alleged that beginning in 2002, Delva assumed control of a cocaine importation scheme involving transportation of the drugs from Haiti to the United States by boat and aircraft. Tr. at 318, 321-25.

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