

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

OSCAR CANTU-RAMIREZ, #15325-078	§	
	§	
VS.	§	CIVIL ACTION NO. 4:13CV11
	§	CRIMINAL ACTION NO. 4:08CR107 (1)
UNITED STATES OF AMERICA	§	

**REPORT AND RECOMMENDATION**  
**OF UNITED STATES MAGISTRATE JUDGE**

Movant Oscar Cantu-Ramirez filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, alleging constitutional violations concerning his Eastern District of Texas, Sherman Division conviction. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

**I. FACTUAL BACKGROUND**

The United States Court of Appeals for the Fifth Circuit provided a broad factual background:

This case arises from the successful investigation and prosecution of an international criminal organization that trafficked in significant amounts of marijuana and cocaine. The conspirators brought drugs from Mexico to the United States in a conspiracy so large that law enforcement investigated it on two fronts simultaneously. The first front was based in Texas, the second in Mississippi. The conspirators regularly shipped thousands of pounds of marijuana and hundreds of kilograms of cocaine at a time across the Mexican border and to various destinations in the United States ranging from Laredo to New York.

Nazario Cavazos ran the drug trafficking organization, and Cantu-Ramirez and Grimaldo were major figures in his organization. Cantu-Ramirez's co-conspirators

testified that he was one of Cavazos's most trusted confidantes. Cantu-Ramirez negotiated the sale of marijuana and cocaine with an undercover agent; was responsible for the delivery of four marijuana samples to the agent; discussed customers who did not pay for drugs with co-conspirators; took orders for cocaine and marijuana from customers and co-conspirators; transported and collected payment for drugs on behalf of Cavazos; and was present when a vast quantity of marijuana was delivered to a business called Landmark Tile that testimony showed acted as a regular stopping point on the drugs' journey from Mexico to their ultimate destinations in the United States.

The more specific factual background as it concerns Movant's trial is taken from the Government's Response, which, in turn, was gathered from the presentence report (citations omitted):

Investigation in this case began when law enforcement officers received a tip relating to Cantu-Ramirez's marijuana trafficking activities. During the investigation Cantu-Ramirez was identified as lieutenant in a well-organized and influential drug organization.

During trial, numerous government witnesses testified that Cantu-Ramirez was intimately involved with the shipment and sale of marijuana, cocaine, and MDMA. Wiretaps revealing the sale of 251 pounds of marijuana were introduced at trial. The wiretaps also revealed that Cantu-Ramirez used his minor son to negotiate drug deals.

According to the testimony of numerous government witnesses, Cantu-Ramirez was responsible for a total of 14,101.33 pounds or 6,396.36 kilograms of marijuana, 3,000 tablets of MDMA, and 406.12 kilograms of cocaine. For example, Fabian Lara testified that he delivered 6,500 pounds of marijuana to Landmark Tile Supply Company and observed Cantu-Ramirez supervising the unloading of the marijuana. Landmark Tile Supply was located directly across the street from a Dallas ISD elementary school. In addition, Victor Rodriguez, an undercover law enforcement officer, witnessed Cantu-Ramirez negotiate the sale of cocaine and a total of 4,865 pounds of marijuana. Finally, Victor Thomas testified that Cantu-Ramirez picked up \$879,000 from Thomas as payment for previous sales of cocaine and marijuana.

## **II. PROCEDURAL BACKGROUND**

Movant was charged with conspiracy to manufacture, distribute, or possess with intent to manufacture or distribute a controlled substance, in violation of 18 U.S.C. § 846. On August 26,

2009, Movant proceeded to a jury trial. The court gave the jury several instructions regarding the testimony of witnesses and the finding of guilty on a conspiracy charge. The jury found Movant guilty, holding him responsible for five kilograms of cocaine, 1,000 kilograms of marijuana, and some amount of 3,4 methylenedioxymethamphetamine. On March 19, 2010, the court sentenced Movant to 360 months' imprisonment. On February 6, 2012, the United States Court of Appeal for the Fifth Circuit affirmed Movant's conviction and sentence. *United States v. Cantu-Ramirez*, 669 F.3d 619, 622 (5th Cir. 2012).

Movant filed the present motion pursuant to § 2255, asserting that he is entitled to relief based on ineffective assistance of counsel and trial court error. The Government filed a Response, asserting that Movant's claims are without merit. Movant did not file a Reply.

### **III. § 2255 PROCEEDINGS**

As a preliminary matter, it should be noted that a § 2255 motion is “fundamentally different from a direct appeal.” *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a § 2255 proceeding may not bring a broad-based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A “distinction must be drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other.” *United States v. Pierce*, 959 F.2d 1297, 1300-01 (5th Cir. 1992). A collateral attack is limited to alleging errors of “constitutional or jurisdictional magnitude.” *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991).

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Movant claims, in several grounds for relief, that his trial counsel was ineffective.

##### **Legal Standard**

A movant who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). In order to succeed on a claim of ineffective assistance of counsel, a movant must show that “counsel’s representation fell below an objective standard of reasonableness,” with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed.2d 864 (1984). The standard requires the reviewing court to give great deference to counsel’s performance, strongly presuming counsel exercised reasonable professional judgment. 466 U.S. at 690, 104 S. Ct. at 2066. The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981). *See also Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984).

Secondly, the movant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Movant must “affirmatively prove,” not just allege, prejudice. *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067. If he fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.*, 466 U.S. at 697, 104 S. Ct. 2052.

### **Failure to Object**

In several issues, Movant asserts that trial counsel was ineffective for failing to object. A trial counsel's failure to object does not constitute deficient representation unless a sound basis exists for objection. *See Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (a futile or meritless objection cannot be grounds for a finding of deficient performance). Even with such a basis, however, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy. *See Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (noting that a failure to object may be a matter of trial strategy as to which courts will not second guess counsel). To succeed on such a claim, a petitioner must show that the trial court would have sustained the objection and that it would have actually changed the result of his trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to make frivolous objections does not cause counsel's performance to fall below an objective level of reasonableness. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). On habeas review, federal courts do not second-guess an attorney's decision through the distorting lens of hindsight, but rather, the courts presume that counsel's conduct falls within the wide range of reasonable professional assistance and, under the circumstances, that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

### **Failure to Object to Testimony Concerning Wiretap**

Movant claims that counsel's failure to object to "irrelevant" testimony regarding the procedures required to obtain a Title III wiretap caused prejudice to his case. He claims that the evidence regarding the procedure used to obtain wiretaps was not needed for the jury to evaluate the conversations recorded by the wiretap or his guilt or innocence. Specifically, Movant complains that the testimony of Agents Mark Styron and John Gottlob was overly prejudicial. He argues the

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