IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

RONZELL MITCHELL, #21155-078	§	
VS.	§	CIVIL ACTION NO. 4:15cv750 CRIM. NO. 4:13CR00130-001
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Movant Ronzell Mitchell, an inmate confined at U.S.P. Lewisburg, brings this motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The motion was referred for findings of fact, conclusions of law and recommendations for the disposition of the motion.

Background

On February 6, 2014, after a plea of guilty, Mitchell was sentenced to 46 months of imprisonment for the offense of mail fraud, in violation of 18 U.S.C. § 1341. Following the Government's motion for a reduction pursuant to Federal Rule of Criminal Procedure 35(b), the Court amended the judgment on March 11, 2014, reducing the sentence to 31 months of imprisonment. On appeal, his attorney filed a no merit brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Flores*, 632 F.3d 229 (5th Cir. 2011). The Fifth Circuit agreed with counsel's assessment and dismissed the appeal as frivolous. *United States v. Mitchell*, 616 F. App'x 755 (5th Cir. Sept, 29, 2015). Mitchell then filed a motion to modify his sentence, which was denied on November 2, 2015.

The present motion was filed on October 23, 2015. Mitchell alleges that he was denied the right to effective assistance of counsel because his attorney, Phillip Lender, represented both himself

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and Roslyn Long despite a blatant conflict of interest. The Court observes that Ms. Long is discussed in paragraphs 7, 10 and 11of Mitchell's Presentence Investigation Report. She was convicted of the offense of conspiracy to commit mail fraud in Case Number 4:12CR00248-001. The Government filed a response (docket entry #6) on December 8, 2015. Mitchell filed a reply (docket entry #7).

Discussion and Analysis

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). The 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). The role of § 2255 has been defined by the Fifth Circuit as follows:

> Section 2255 provides relief for a petitioner who can establish that either (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.

United States v. Seyfert, 67 F.3d 544, 546 (5th Cir. 1995) (citations omitted). "Section 2255 does not reach errors of constitutional or jurisdictional magnitude that could have been reached by a direct appeal." *Id.*

The conflict of interest issue was fully developed in a hearing conducted on May 30, 2013. The people in attendance at the hearing included Mitchell, Long, defense attorney Linder and Assistant United States Attorney J. Andrew Williams. The transcript shows the following:

> Mr. Linder: Your Honor, if I may approach. I had both clients sign a waiver of conflict of interest just for the Court's record if we need it. I know you want to put it on the record, but I had them do that.

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The Court: Yes, that's fine. Has Mr. Williams seen those?

Mr. Williams: I perused them, Your Honor. We would ask the Court to still conduct a dialogue between the two, but that's -- I don't think it's a sufficient enough inquiry, but it certainly doesn't hurt. I have no objection.

Mr. Linder: Your Honor, Mr. Mitchell is here.

The Court: Okay. Very good. And, Mr. Mitchell, we're here first on a motion for inquiry the government filed in both of your cases, and let's just make sure -- Ms. Long, you'll be -- Is that okay? The order there?

The Reporter: That's fine.

The Court: And, of course, the issue is that the government wants us to inquire regarding whether or not there's a conflict of interest with the fact that Mr. Linder is representing both of y'all. And the reason that is is because, based on what I understand the government is representing as the facts, is that Ms. Long -- who has already pled guilty to a conspiracy to commit mail fraud, a violation of 18 United States Code, Section 1349 -- the information alleged that she conspired with an individual named RM, and that RM refers to Ronzell Mitchell. And, so, Mr. Linder representing both, that set up a question of conflict.

Okay. And let me -- we'll start off and we'll just have Mr. Mitchell answer these questions first.

Have you discussed the issue of this potential conflict of interest with Mr. Linder?

Mr. Mitchell: Yes, sir.

The Court: And have you, also?

Ms. Long: Yes, sir.

The Court: And do you understand there's a potential for conflict even though you're both -- Mr. Mitchell, you're planning on entering a plea of guilty, as well, today, but until the case is over, there's still -- got a potential that a conflict could arise if there's problems later during sentencing. Do you understand that?

Mr. Mitchell: Yes, sir.

Ms. Long: Yes, sir.

The Court: And, Mr. Linder, do you -- the government or Mr. Linder, do you have any idea whether there would be an actual conflict arise?

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Mr. Linder: No, Your Honor. And just for the record, I'll go ahead and let the Court know, I've been involved -- in fact, Your Honor, you appointed me on a case styled United States versus John Berry three years ago, which was a 60-defendant mortgage fraud indictment.

The Court: I do remember that case.

Mr. Linder: And that stemmed, of course, a bunch of other smaller indictments and a bunch of other investigations on mortgage fraud in the North Dallas and Plano area.

Ms. Long came to me two years ago being investigated, and so, I went and we did several debriefings. And then Mr. Mitchell hired me -- they kind of know each other, but they have both debriefed and given information on lots of other people, which is why they're not being indicted, they're doing informations and waiving that. The information they have each given has been consistent. They've cooperated. There's been multiple meetings. So, we've all been on the same page kind of from Day One.

He came to me second. Ms. Long came to me first, but when he came to me, they both knew this was all going on, so . . .

The Court: Okay. And let me ask, do you agree with what Mr. Linder just indicated?

Ms. Long: Yes, sir.

The Court: Well, I need to have -- that's fine, but we'll have Mr. Mitchell answer first in the order y'all are in.

Mr. Mitchell: Yes, sir.

The Court: That's fine. I'm think -- I'm sure she got it, but I just wanted to make -- try to keep it orderly so the record is clear.

Now, do both of you understand that you have a right to have conflict-free counsel?

Mr. Mitchell: Yes, sir.

Ms. Long: Yes, sir.

The Court: And although as we stand here today, Mr. Linder is not aware of any conflict -- but something could come up later and you understand that -- I mean, I can't conceive right now what that would be but there's always a chance of conflict -- between the two of you or something breaks down before sentencing. Do you understand that?

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Mr. Mitchell: Yes, sir.

Ms. Long: Yes, sir.

The Court: Mr. Williams, you're not aware of any conflict?

Mr. Williams: I'm not aware of any at this time, You Honor.

The Court: Now, I know that each of you have entered into waiver of conflicts. And have you been provided a copy?

Mr. Williams: Yes, Your Honor. She gave us copies.

The Court: Is that your signature, each of you?

Mr. Mitchell: Yes, sir.

Ms. Long: Yes, sir.

The Court: And it states that -- your name and that you're a defendant in the above-styled case, and you're each charged with mail fraud, and it says that the attorney representing you in this case is Phillip A. Linder and that he represents the other, as well, on a similar charge in a related indictment.

Mr. Linder: Actually, that should say information, Your Honor. That's my typo.

The Court: It should say related information -- and that you understand that because of the representation of each of you, he may have a conflict of interest representing each of you and that you fully understand that you have a right to have a conflict-free counsel representing you and that you waive and give up any right you have now or in the future to object on the grounds that your lawyer has or may have had a conflict of interest because of the joint representation. Considering that, you want to waive that and your desire is to have Mr. Linder represent you. Is that correct?

Mr. Mitchell: Yes, sir.

Ms. Long: Yes, sir.

The Court: And that's why you went ahead and executed the waiver form?

Mr. Mitchell: Yes, sir.

Ms. Long: Yes, sir.

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