USA v. Benzer et al

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * UNITED STATES OF AMERICA,

Plaintiff(s), v. LEON BENZER, et al.,

Defendant(s).

Case No. 2:13-CR-18 JCM (GWF)

ORDER

Presently before the court is petitioner to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 835).

motion for leave to file supplemental points and authorities. (ECF No. 836). I. Facts

On January 15, 2013, the government filed an indictment charging the petitioner with one count of conspiracy in violation of 18 U.S.C. § 1349 and fourteen counts of wire fraud in violation of 18 U.S.C. § 1343. (ECF No. 1). In March 2015, the court held a fifteen-day jury trial. See (ECF No. 537). The jury returned a guilty verdict for one count of conspiracy and one count of wire fraud. Id.

On June 17, 2015, the court sentenced petitioner to sixty (60) months of custody per count to run concurrently followed by three (3) years of supervised release to run concurrently. (ECF No. 740). On August 14, 2015, the court entered judgment. Id. Petitioner appealed and, on March 23, 2018, the Ninth Circuit affirmed the judgment. (ECF No. 823). . . . . II. Legal Standard

28 U.S.C.

§ 2255(a). Relief pursuant to § Davis v. United States, 417 U.S. 333, 345 (1974); see also

Hill v. United States, 368 U.S. 424, 428 (1962).

Limitations on § 2255 the opportunity. United States v. Frady, 456 U.S. 152, 164 (1982).

United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993). III. Discussion

leave to file supplemental points and authorities as they provide legal arguments and authorities in support of

Petitioner argues that the court should vacate her sentence based on two grounds: (1) ineffective assistance of trial counsel and (2) ineffective assistance of appeal counsel. (ECF No. 835).

a. Procedural default rule applies to bar collateral review under § 2255. Massaro v. United States, 538 U.S. 500, 504

(2003). The two noted exceptions to this rule are when a defendant can show both cause and prejudice, id. . United States v. Ratigan, 351 F.3d 957, 962 (9th Cir. 2003).

defense impeded [his] efforts to raise the [barred] claim. . . . Objective factors that constitute cause

include interference by officials that makes compliance with impracticable, and a showing that the factual or legal basis for a claim was not reasonably available

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991) (internal quotations omitted). To demonstrate prejudice, a defe e probability that his conviction or United States v. Lopez, 577 F.3d 1053, 1060 (9th Cir. 2009) (quoting Stickler v. Green, 527 U.S. 263, 296 (1999)). If defendant cannot demonstrate cause and prejudice, the defendant Schlup

v. Delo, 513 U.S. 298, 327 (1995).

Ineffective assistance of appellate counsel can constitute the cause required to establish procedural default. Murray v. Carrier, 477 U.S. 478, 488- Wildman v. Johnson, 261 F.3d 832, 840

(9th Cir. 20 Jones v. Barnes, 463 U.S. 745, 751-

issues . . . is widely recognized as one of the hallmarks of effective Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).

Here, appellate counsel raised two claims of error, as pertaining to petitioner, on appeal. Focusing on these claims was a reasonable tactical decision. See id. The additional claims that petitioner argues her appellate counsel should have made 1

were frivolous and would have detracted from the already-weak claims on appeal. Therefore,

petitioner has not established cause and prejudice to excuse her procedural default. Furt evidence suggesting that she has a viable claim of actual innocence. Accordingly, all of

s that she did not raise at the appellate level (petition s first grounds in support of her § 2255 motion) are barred. See Massaro, 538 U.S. at 504

b. Ineffective assistance of appellate counsel To prevail on a claim of ineffective assistance of counsel, a movant must show deficient performance and prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

Id. at 687. Id. at 689 1

The court discusses these claims in more detail in discussion section (b). assessment of attorney performance requires that every effort be made to eliminate the distorting Id. conduct falls within the wide range of reasonable professional assistance; that is, the defendant

must overcome the presumption that, under the circumstances, the challenged action might be Id. at 689. To establish deficient performance, the petitioner Id. at 688.

e the defendant of a fair

Id.

would have been different. A reasonable probability is a probability sufficient to undermine the Id. at 694.

Petitioner alleges that she received ineffective assistance of counsel because her appellate counsel failed of vouching. (ECF Nos. 835, 836). Petitioner specifically alleges that her closing statement, in which the prosecutor stated that (1) the prosecutors, FBI agents, members

with the Las Vegas Metropolitan Police Department, and the trial judge were monitoring the

Vouching consists of f the government behind the witnesses through personal assurances of their veracity or suggesting that information not presented to the United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991); see also United States. v. Wright, 625 F.3d 583, 610 (9th Cir. 2010).

Having reviewed the record, the court finds no support for petitioner s characterization of The government did not provide any personal assurances regarding the veracity of the witnesses. See (ECF No. 593). The government also did not refer to See id. Rather, the statements at issue merely emphasized the procedural safeguards of the trial process. Thus, the statements were not improper as a matter of law.

In light of the foregoing, prejudicial representation by refusi Accordingly, because petitioner has failed to show that her sentence is unconstitutional, the court vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

c. Certificate of appealability The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255. (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2). 28 U.S.C. § 2253.

Under § 2253, the court may issue a certificate of appealability only when a movant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a for that matter, agree that) the petition should have been resolved in a different manner or that the

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

The court holds that petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists debatable, wrong, or deserving of encouragement to proceed further. See id. Accordingly, the

court declines to issue a certificate of appealability. IV. Conclusion

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that motion to vacate, set

aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 835) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED for leave to file supplemental points and authorities (ECF No. 836) be, and the same hereby is, GRANTED.

The clerk is directed to enter a separate civil judgment denying petitioner s § 2255 motion in the matter of Gillespie v. United States, case number 2:18-cv-00801-JCM. DATED February 5, 2019.

_____ UNITED STATES DISTRICT JUDGE