**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-1070
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ELIAS GOMEZ RIVERA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
(4:92-CV-270-K(3:89-CR-076-K)

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(February 17, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Elias Rivera appeals the denial of his motion for relief under 28 U.S.C. § 2255. Finding no error, we affirm.

I.

The fact are set forth in United States v. Rivera, 898 F.2d 442 (5th Cir. 1990). In June 1989, Rivera pleaded guilty to

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

distribution of a quantity of heroin. His sentence included a ninety-two-month term of imprisonment. Id. at 445. Rivera appealed. Id.

On appeal, Rivera argued that the district court made various errors when calculating his sentence and that the guidelines unconstitutionally deprived him of effective assistance of counsel because they did not permit his attorney to estimate the minimum sentence he could receive if he pleaded guilty. Id. at 445-47. In April 1990, we rejected Rivera's ineffectiveness-of-counsel argument but vacated and remanded because the record did not indicate that the district court had considered the appropriateness of the firearms enhancement. See id. at 446-47.

On resentencing, the district court found that the firearms enhancement was not supported by the evidence and imposed a new term of eighty-two months. In January 1991, we affirmed in an unpublished opinion, rejecting Rivera's sole argument that his sentence was erroneous because a government witness who testified at the resentencing hearing did not identify him.

In April 1992, Rivera filed a pro se § 2255 motion, alleging, inter alia, that his guilty plea was involuntary because it was made in reliance upon the government's promise, as communicated by counsel, that his sentence would be in the range of only twenty-one to twenty-seven months. The district court denied the motion.

II.

Rivera argues pro se that his guilty plea was not knowing and voluntary. "[A] `collateral challenge may not do service for an appeal.'" United States v. Shaid, 937 F.2d 228, 231 (5th Cir. 1991) (en banc) (quoting United States v. Frady, 456 U.S. 152, 165 (1982)), cert. denied, 112 S. Ct. 978 (1992). Relief under § 2255 is reserved for violations of a defendant's constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981). Short of this, claims that could have been raised on direct appeal, but were not, may not be raised in a collateral proceeding. Id.

Even if a defendant alleges a fundamental constitutional error, he "may not raise an issue for the first time on collateral review without showing both `cause' for his procedural default and `actual prejudice' resulting from the error." Shaid, 937 F.2d at 232 (citation omitted). The only exception to the cause-and-prejudice test is the "extraordinary case . . . in which a constitutional violation has probably resulted in the conviction of one who is actually innocent." See id. at 232. Rivera does not argue or suggest actual innocence.

A.

The government argues that Rivera was procedurally barred from raising all the issues asserted in his § 2255 motion, noting that Rivera's argument that his plea was not knowing and voluntary was

not raised on either direct appeal. "To invoke the procedural bar . . . the government must raise it in the district court." United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992). To determine whether the government has invoked the procedural bar, we review the government's pleadings. Id. The government pleaded that all issues, except the fifth )) which involved those raised in the instant appeal[1] )) were not raised in district court at all, nor on direct appeal. The government also pleaded that "such" issues were barred by Shaid. Rivera did not respond other than to request an evidentiary hearing.

The district court held that all issues other than Rivera's "fifth issue" were procedurally barred. The district court addressed the merits of that issue, holding, inter alia, that Rivera's plea was knowing and voluntary and denied his § 2255 motion. As in Drobny, the district court's confusion as to whether the government had properly invoked the procedural bar apparently resulted from the language of the pleading. See Drobny, 995 F.2d at 995. Because Rivera's voluntariness argument could have been, but was not, raised on direct appeal, and the procedural bar was sufficiently raised and addressed by the district court,[2] the government can invoke the procedural bar as to the fifth issue.

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[1] The government characterized the "fifth issue" as "[w]hether the plea was involuntary by reason of defense's [sic] counsel's misrepresentation as to sentence or the prosecutor's failure to keep a promise or by reason of the manner in which the hearing was conducted."

[2] In Drobny, the issue whether the defendant was procedurally barred was never addressed by the magistrate judge or the district court. See id. at 995.

B.

Rivera argues pro se that his guilty plea was involuntary because it was induced by the "working agreement" between the government and counsel that his sentence would be in the range of twenty-one to twenty-seven months. Rivera fails to demonstrate cause for not raising this argument on direct appeal. Nor can he demonstrate actual prejudice. His allegation that there was a "working agreement" upon which he relied is contradicted by his testimony at the plea hearing in which he said that there were no other agreements than that contained in the written plea bargain. See United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985). Further, Rivera failed to supply an affidavit from a reliable third party to provide "independent indicia of the likely merit of [his] contentions" that his guilty plea was not knowing and voluntary. Harmason v. Smith, 888 F.2d 1527, 1529 (5th Cir. 1989) (citation and internal quotation omitted). Because Rivera has shown neither cause nor actual prejudice, he is barred by Shaid from raising the issue in his § 2255 motion. See Shaid, 937 F.2d at 232.

C.

Rivera also argues that his guilty plea was involuntary because he was not adequately informed of the maximum and minimum penalties by the district court. He argues further that he thus was not informed of the consequences of his guilty plea.

This issue was addressed on direct appeal, in an ineffectiveness-of-counsel context. See Rivera, 898 F.2d at 447

(citation and internal quotation omitted). We held that counsel was not ineffective, because Rivera was adequately informed of the consequences of his plea, which included, inter alia, a maximum twenty-year term of incarceration. To the extent that this issue has already been disposed of, it will not be considered in a § 2255 motion. United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986).

Further, Rivera failed to raise this issue separately in either of his two direct appeals. Because he has not shown cause or actual prejudice for his procedural default, he is barred by Shaid from raising this issue in his § 2255 motion. Shaid, 937 F.2d at 232.

AFFIRMED.