

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7085

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO DELGADO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA J92-0310-B-N(CR J88-00088-B))

(May 3, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Fernando Delgado was convicted by a jury of conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and for interstate travel in furtherance of the cocaine distribution conspiracy, in violation of 18 U.S.C. § 1952(a)(3). On direct appeal, we upheld Delgado's conviction and sentence in an unpublished opinion.¹ See *United States v. Delgado*,

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹ The facts underlying Delgado's conviction are as follows. In October 1988, agents of the Drug Enforcement

No. 89-4724 (5th Cir. Aug. 7, 1990). Delgado subsequently filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (1988). Delgado now appeals the district court's denial of that motion, contending that: (a) he was denied effective assistance of counsel at trial; (b) he was denied effective assistance of counsel on direct appeal; (c) the government withheld evidence that was favorable to his defense; (d) a government witness committed perjury at trial; (e) the district court unlawfully relied upon erroneous information at sentencing; and (f) the district court erred in denying an evidentiary hearing regarding his ineffective assistance of counsel claims.

"A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude . . . and 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." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (en banc) (citations, footnote omitted), *cert. denied*, ___ U.S. ___, 112 S. Ct. 978, 117

Administration observed a meeting in Jackson, Mississippi between Delgado, Tim Anderson, and a confidential informant. The purpose of the meeting, which occurred at the Ruby Tuesday restaurant, was for Anderson's supplier to "check out" the informant. DEA agents subsequently arrested Anderson for cocaine trafficking, and Anderson informed DEA agents that Delgado was his supplier. Consequently, DEA agent Tim Carden had Anderson attempt to contact Delgado using a pager number. When that failed, Carden and Anderson called a telephone number in California that at trial was shown to be the number for the Delgado Insurance Agency. The woman who answered the call informed Anderson that Delgado was not in and requested Anderson's telephone number. Shortly thereafter, Anderson received a call from Delgado and they discussed the terms of the cocaine deal originally discussed at the Jackson meeting. Agent Carden recorded the conversation.

L. Ed. 2d 141 (1992). "If the defendant does not meet this burden of showing cause and prejudice, he is procedurally barred from attacking his conviction." *United States v. Drobny*, 955 F.2d 990, 995 (5th Cir. 1992). Moreover, if the alleged error is not of constitutional or jurisdictional magnitude, "the defendant must show that the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice." *Shaid*, 937 F.2d at 232 n.7.

I

Delgado initially asserts that he received ineffective assistance of counsel at trial, thereby violating his constitutional right to counsel. Delgado contends that his trial counsel (J. Thomas Ash) was ineffective because he failed to: (1) call several potential witnesses at trial; (2) depose an alibi witness who testified at trial; (3) retain an expert to analyze the recording of Delgado's telephone conversation with Anderson; (4) prepare for trial and consult with Delgado; (5) object to the government's closing argument; (6) investigate certain aspects of the case; (7) object to certain evidence presented by the government at trial; and (8) present mitigating evidence.

To obtain relief under § 2255 on the grounds of ineffective assistance of counsel,

a petitioner must demonstrate not only that his counsel's performance was deficient, but also that the deficient performance prejudiced his defense. To demonstrate deficiency, the petitioner must show that his counsel's actions "fell below an objective standard of reasonableness." To demonstrate prejudice, he must show that a "reasonable probability" exists that, "but for counsel's unprofessional errors, the result of the

proceeding would have been different."

United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S. Ct. 2052, 2064-68, 80 L. Ed. 2d 674 (1984)). In reviewing an ineffective assistance claim, we must "give great deference to counsel's assistance, strongly presuming that counsel has exercised reasonable professional judgment." *Ricalday v. Procunier*, 736 F.2d 203, 206 (5th Cir. 1984).

A

Delgado first asserts that he was deprived of effective assistance of counsel because Ash failed to call several potential witnesses. "[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative.'" *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983) (quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978)), *cert. denied*, 467 U.S. 1251, 104 S. Ct. 3534, 82 L. Ed. 2d 839 (1984). Thus, in order for Delgado to demonstrate the requisite prejudice, he "must show not only that this testimony would have been favorable, but also that the witness would have testified at trial." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). Delgado has failed to demonstrate that two of the uncalled witnesses))Kelvin Anderson and Thor Hicks))would have testified at trial. Moreover, Ash stated in an affidavit submitted to the district court that he made a

tactical decision not call two other witnesses))Rusty S. McAllister, Jr. and Alvin Keys))whom he had subpoenaed.² See *id.* (noting that "the presentation of witness testimony is essentially strategy and thus within the trial counsel's domain"). Furthermore, assuming arguendo that Ash rendered ineffective assistance, Delgado has failed to demonstrate that there is a reasonable probability that, had the witnesses testified, the result of his trial would have been different. See *Cockrell*, 720 F.2d at 1428. Consequently, we find Delgado's claim to be without merit.

B

Delgado next contends that Ash was ineffective because he failed to depose an alibi witness, Michael Peoples. Delgado's defense at trial was that he was in Mississippi in October 1988 to purchase an automobile from Anderson, not to meet with the DEA's confidential informant and Anderson regarding a proposed narcotics deal. Peoples, Delgado asserts, witnessed a conversation that Delgado had with Anderson regarding Delgado's possible purchase of the vehicle. At trial, however, Peoples testified that he did not remember witnessing such a conversation. Delgado now submits that had counsel deposed Peoples prior to trial, he "would have had a chance to challenge" Peoples' testimony.

² Ash stated that he "originally notified the Government's attorneys of several potential witnesses to be called for the defense but that developments during the course of the trial influenced decisions on the use of these witnesses."

Assuming that Ash erred in failing to depose Peoples,³ Delgado has not demonstrated that he was prejudiced by the lack of a deposition. Although deposing Peoples may have provided Delgado with material with which to impeach Peoples))a defense witness))at trial, the fact that Delgado discussed purchasing Anderson's vehicle in Peoples' presence is not mutually exclusive with the proposition that Delgado also participated in a meeting regarding a drug transaction during his October trip to Jackson. Moreover, the evidence presented at trial overwhelmingly supports Delgado's conviction. See note 1 *supra*. Consequently, we conclude that Ash's failure to depose Peoples did not prejudice Delgado. See *Lockhart v. McCotter*, 782 F.2d 1275, 1282-83 (5th Cir. 1986), *cert. denied*, 480 U.S. 911, 107 S. Ct. 1360, 94 L. Ed. 2d 530 (1987).

C

Delgado asserts that Ash rendered ineffective assistance because he failed have an expert analyze the recording of his telephone conversation with Anderson. Although Delgado does not specifically disclose what expert analysis of the recording would reveal, he contends that the analysis would provide him with a "viable" defense. We disagree.

In upholding Delgado's conviction on direct appeal, we

³ *But see* Fed. R. Crim. P. 15(a):

Whenever due to *exceptional circumstances* of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition

(Emphasis added).

concluded that "[t]he circumstantial evidence that it was Delgado on the tape is overwhelming." *Delgado*, slip op. at 5. Moreover, Ash stated in his affidavit that Delgado admitted his "guilt and participation in the crimes charged in the indictment" and that such admissions "negated the need to do such things as have [the recording] analyzed for tampering or alteration." Thus, Ash reasonably concluded that scientific examination of the tape would be a futile exercise. Consequently, Delgado's contention that Ash rendered ineffective assistance is without merit.⁴

D

Delgado next contends that Ash failed to prepare for trial or consult with him prior to trial, thereby constituting ineffective assistance. Contrary to Delgado's assertions, however, Ash stated in his affidavit that "every strategic decision concerning Delgado's defense, calling of witnesses, production of evidence, etc. was made by [Delgado] with [Ash's] comments and advice, and was made by [Delgado] in the presence of a third party other than [Delgado] and [Ash]." Moreover, we presume that Ash provided adequate assistance, because Delgado has failed to enumerate specific instances of neglect committed by Ash sufficient to overcome that presumption. *See United States v. Green*, 882 F.2d

⁴ Delgado further contends that because it was not his voice on the tape, Ash rendered ineffective assistance by not objecting to the government's use of his name in its closing argument. Because the evidence supports the conclusion that it was Delgado on the tape, we reject his claim. To the extent we can construe Delgado's claim as arguing that the government's use of his name created a presumption of guilt, we further reject it as without merit.

999, 1003 (5th Cir. 1989) ("A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."). Finally, we note that Delgado has not attempted to demonstrate either how the alleged lack of consultation prejudiced his defense or how increased consultation would have aided it. Consequently, we find Delgado's claim of ineffective assistance without merit.

E

Delgado suggests that the prosecutor improperly vouched for the credibility of Agent Carden with regard to Carden's testimony as to why the confidential informant was not wired during the October meeting with Delgado in Jackson. During closing arguments, the prosecutor stated, "So you've got to trust the agent's testimony as to what occurred. You've got to trust how the transcripts, after and before that meeting, tell you beyond a reasonable doubt what they were talking about at that meeting." 5 R. at 272.

An attempt to bolster a witness by vouching for his credibility ordinarily is improper and constitutes error. Improper vouching occurs if the prosecutor makes explicit personal assurances of a witness's veracity. *United States v. Casel*, 995 F.2d 1299, 1309 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1308, 127 L. Ed. 2d 659 (1994). We must evaluate the allegedly improper comments in light of the context in which they were made. *Id.* Here, "it is clear from the context in which the statement was

made that the prosecutor was not expressing [his] personal opinion about" the credibility of the witness. *Id.* Instead, the prosecutor simply informed the jury that because a recording of the meeting did not exist, the jurors should rely on the testimony of the agent. Thus, the prosecutor's comments were not improper. See *id.* (collecting cases). Consequently, Ash did not have a basis upon which to object, and Delgado's claim of ineffective assistance is without merit.⁵

II

Delgado contends that the representation provided by his counsel on direct appeal (John Colette) was constitutionally deficient under *Strickland* because he failed to raise several issues suggested by Delgado. Colette, however, stated in an affidavit submitted to the district court that he could not in good faith raise the issues suggested by Delgado "and not be subject to sanctions, etc. for raising a frivolous issue and/or one that was not raised nor preserved" at trial.

"[A] defendant does not have a constitutional right to have his appointed counsel raise every nonfrivolous argument requested by the client." *Smith v. Collins*, 977 F.2d 951, 962 (5th Cir. 1992) (citing *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)), *cert. denied*, ___ U.S. ___, 114 S. Ct. 97, 126

⁵ Delgado points to several other instances as evidence that Ash rendered ineffective assistance. After reviewing the record, we conclude that Delgado's remaining arguments are without merit. Moreover, assuming arguendo that Ash rendered a deficient performance, Delgado has not demonstrated that the deficient performance prejudiced his defense.

L. Ed. 2d 64 (1993). Thus, Colette's tactical decision not to raise each claim that Delgado felt should be argued did not violate any of Delgado's constitutional rights. See *id.*

III

Delgado submits that the government failed to produce several tapes favorable to his defense, in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Delgado, however, failed to raise this issue on direct appeal. Thus, the district court properly found this claim to be procedurally barred. See *Drobny*, 955 F.2d at 995. Moreover, because Delgado has demonstrated neither "cause" for his procedural default nor "actual prejudice" resulting therefrom, see *id.*, we uphold the district court's determination that Delgado's *Brady* claim is procedurally barred.

IV

Delgado argues that he was convicted based upon perjurious testimony given by a government witness. Because Delgado did not raise this argument before the district court, we will not consider it on appeal. See *Drobny*, 955 F.2d at 995; *United States v. Cates*, 952 F.2d 149, 152 (5th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 2319, 119 L. Ed. 2d 238 (1992).

V

Delgado next alleges that the district court abused its discretion and violated Fed. R. Crim. P. 32 by relying during sentencing upon erroneous information contained in the Presentence Investigation Report. We rejected this very allegation on direct

appeal. See *Delgado*, slip op. at 5-6. "It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 motions." *U.S. v. Kalish*, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118, 106 S. Ct. 1977, 90 L. Ed. 2d 660 (1986); see also *United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.) (noting that a claim that the sentencing court violated Rule 32 could not be raised on collateral attack where it could have been raised on direct appeal), cert. denied, 493 U.S. 932, 110 S. Ct. 321, 107 L. Ed. 2d 312 (1989). Accordingly, we reject Delgado's claim.

VI

Delgado's final contention is that the district court erred in denying his request for an evidentiary hearing. "A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992). We review the district court's determination that a hearing is not required using the abuse of discretion standard. *Id.*

We find nothing in Delgado's alleged claims that required the district court, which also presided over Delgado's trial, to look outside the record and documents attached to Delgado's motion to make a determination as to the validity of the claims. See *id.* at 42. Consequently, the district court did not err in refusing to hold an evidentiary hearing regarding Delgado's motion.

VII

For the foregoing reasons, we AFFIRM the judgment of the district court.