IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 93-7518
Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

JOSE ALFREDO LAZCANO, Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CA-L-93-51 (CR-L89-38)

(September 23, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM[1]:

On April 4, 1989, Defendant-Appellant Jose Alfredo Lazcano ("Lazcano") was found guilty by a jury of thirteen counts of conspiracy to possess with intent to distribute heroin and cocaine in varying amounts.[2] The court sentenced him to 72 months of imprisonment on each count to run concurrently, followed by concurrent five-year terms of supervised release. While his appeal

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[1] Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that his opinion should not be published.

[2] Lazcano was charged with fourteen counts. The jury acquitted him of Count Two, which charged conspiracy to possess with intent to distribute less than 500 grams of cocaine.

was pending, Lazcano filed a motion to vacate judgment, alleging a conflict of interest based on his counsel's prior representation of Jesus Llanes ("Llanes"), a/k/a "Yanez"[3]. The district court construed the pleading as a motion for a new trial and denied the motion. He then filed a motion for reconsideration. The court noted that Lazcano's complaints could only be properly addressed on return of the case from the Fifth Circuit and invited Lazcano's counsel, Oscar Pena ("Pena"), to respond by affidavit to Lazcano's allegation of a conflict of interest.

After this Court affirmed Lazcano's conviction, Lazcano reargued his motion to vacate, arguing that he received ineffective assistance of counsel because his trial counsel had a conflict of interest. The district court denied the motion. Lazcano did not appeal the denial of his motion, but filed another motion for appointment of counsel. The court denied the motion after construing it as an untimely notice of appeal. Lazcano then filed a motion for new trial based on newly discovered evidence that Llanes acted as an informer by introducing Lazcano to a Government agent and that Llanes was not called as a witness at trial. The court denied the motion, and Lazcano did not appeal.

Lazcano subsequently filed a motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 2255. In his § 2255 motion, Lazcano alleged that he was entitled to habeas relief because he presented newly discovered evidence that would probably

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[3] "Yanez" is the Spanish pronunciation of Llanes. R. 2, 14.

result in an acquittal, that he received ineffective assistance of counsel, that his offense level was not properly computed and that he should have been awarded a two-level reduction for acceptance of responsibility. The district court denied both motions. He then filed a motion for reconsideration of the denial of his § 2255 motion and a motion for rehearing on his § 3582(c)(2) motion, both of which were denied. We AFFIRM in part, and REVERSE and REMAND in part.

FACTS

Victor Lugo ("Lugo"), a member of the Drug Enforcement Administration ("DEA") task force in Laredo, Texas, was introduced to Lazcano in an undercover capacity on July 28, 1988. Lazcano told Lugo that he was looking for a heroin supplier for customers outside of Laredo.

Lugo was also assigned to another investigation involving a heroin supplier from Mexico named Salvador Alfaro ("Alfaro") who supplied Lazcano with about two grams of heroin as a sample. After receiving the sample, Lazcano told Lugo that he would need several additional ounces of heroin so that he could distribute them to his people in Corpus Christi.

On August 16, 1988, Lazcano received two ounces of heroin worth $9,000. However, no money was exchanged because Lugo told Lazcano that the source, Alfaro, was fronting the heroin. Lugo and Lazcano agreed that Lazcano would provide Lugo the money after he sold the heroin and that Lugo would then pay the source.

On August 23, 1988, Lazcano told Lugo that he had sources who

could supply cocaine for between $750 and $900 per ounce, and Lugo, pretending to be a drug trafficker, offered to find Lazcano a customer. Then on August 29, 1988, Lugo introduced Lazcano to Johnny Whitley ("Whitley"), an investigator with the Department of Public Safety, who was posing as Lugo's buyer. Lazcano gave Whitley an ounce of cocaine in exchange for $900. Lazcano told Whitley that he could supply him with more cocaine at a good price. On August 31, 1988, Lazcano told Lugo that he could get a kilogram of cocaine for $22,000.

By September 6, 1988, Lazcano had not yet paid Lugo for the heroin. Lazcano offered Lugo a stolen pickup truck worth $5000 as partial payment. Lugo refused, saying that his source needed cash. On September 7, 1988, Lugo, Whitley and Lazcano met, and Lazcano reported that his source was having problems, but that he might be able to get them a kilogram of cocaine at a better price than the $22,000 he had previously quoted. Whitley stated that he would take a kilogram of cocaine if Lazcano could get it.

Lugo and Lazcano arranged to meet again on September 12, 1988 so that Lazcano could pay Lugo the money owed him for the heroin. Instead Lazcano's wife arrived and handed him an envelope containing $1000. On September 14, 1988, Lugo spoke with Lazcano by telephone, and Lazcano told Lugo that his sources were in route with several ounces of cocaine. Lugo and Lazcano met the following day, and Lazcano gave Lugo $500 toward the heroin debt. They discussed getting more cocaine for Whitley. Lazcano called Lugo later that evening and said that his cocaine source never showed up

and that he had an ounce of heroin that he needed to sell.

Through another investigation, Lugo knew that Gilberto Flores-Hinojosa ("Flores-Hinojosa") was interested in buying a kilogram of heroin. Lugo arranged Lazcano and Flores-Hinojosa's daughter, Margie Garcia ("Garcia") to meet on October 5, 1988. At the meeting, Lazcano gave Garcia one-half ounce of heroin, worth approximately $2500, after Lugo agreed to offset the heroin against the debt owed Lugo's heroin source.

Lugo and Lazcano met again on October 11, 1988 to discuss selling cocaine to Whitley, at which time Lazcano paid Lugo $800. Lazcano sold Whitley another ounce of cocaine for $1000. After Lugo stated that Whitley was interested in purchasing a larger quantity of cocaine, Lazcano told him that he could probably supply him with a kilogram for $20,000 and gave him his home phone number.

From that point forward, Lazcano dealt directly with Whitley. On October 18, 1988, Whitley called Lazcano to discuss the purchase of a kilogram of cocaine. When they met the next day, Lazcano said that he did not have the kilogram, but that his suppliers could bring five kilograms. Whitley said that he only wanted one kilogram. On October 28, 1988, Whitley called Lazcano and Lazcano told him that the cocaine had not arrived. Whitley called Lazcano again on October 30, 1988 when Lazcano told him the cocaine had arrived and to come to San Antonio to get it. Whitley arranged to meet Lazcano that afternoon, but before terminating his telephone conversation with Lazcano, and after he thought that Lazcano had hung up the phone, Whitley identified himself as an investigator

for purposes of the recording that he had made. Whitley had no further contact with Lazcano.

On November 8, 1988, Lazcano told Lugo that his friend Whitley was a "narc" and described how he had stayed on the telephone and heard him identify himself as an investigator. Lazcano explained that was why he had not delivered the cocaine. Lazcano told Lugo that he and his cocaine sources were going to set Whitley up and "get rid of him." He told Lugo that he was still willing to sell a kilogram of cocaine, but that it would be from a different source.

Due to an administrative error, Lazcano received a letter from the DEA stating $500 of his money was being forfeited. Lazcano then began to suspect that Lugo was a "narc." Lugo temporarily convinced Lazcano to ignore the DEA letter. Lazcano made one more payment toward the two-ounce heroin purchase. On November 30, 1988, Lugo and Lazcano discussed Lazcano delivering five ounces of cocaine, but the deal never materialized. Lazcano was arrested on January 23, 1989.

Lazcano testified at trial that he was introduced to Lugo by a friend. Lugo told him that he could make a lot of money selling drugs, and that he would only get probation if he were caught because it would be his first offense. Lazcano stated that he was interested in the offer because he needed money for an operation on his son's ears.

Lazcano admitted taking the samples of heroin to distribute to his friends. When no one wanted to buy it, Lugo would not take it

back, but suggested that Lazcano cut the heroin and sell it in pieces. Lazcano never made any money on the heroin transactions because his wife accidentally threw some of the heroin away and Lazcano gave back to Lugo one-half ounce of the heroin. Lazcano admitted that he delivered heroin to three or four people in Corpus Christi, but that they said the price was too high. The money he paid to Lugo came out of his own pocket.

Lazcano testified that Lugo asked him to supply him with the cocaine as a favor, and Lazcano complied with his request in order to buy more time to pay Lugo back for the heroin. He received a free sample of cocaine in the bar and delivered an ounce to Whitley.

DISCUSSION

A federal prisoner may move to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 if: 1) the sentence was imposed in violation of the Constitution or laws of the United States; 2) the court was without jurisdiction to impose the sentence; 3) the sentence exceeds the statutory maximum sentence; or 4) the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255; see *United States v. Cates*, 952 F.2d 149, 151 (5th Cir.), *cert. denied*, ___U.S.___, 112 S.Ct. 2319, 119 L.Ed.2d 238 (1992).

A person who has been convicted and has exhausted or waived his right to appeal is presumed to have been "`fairly and finally convicted.'" *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc) (citation omitted), *cert. denied*, ___U.S.___, 112

S.Ct. 978, 117 L.Ed.2d 141 (1992). "[A] `collateral challenge may not do service for an appeal.'" *Id.* at 231 (citation omitted).

On direct appeal, Lazcano raised two grounds of error; the indictment was multiplicious and the evidence was not sufficient to support a conviction. He now raises additional issues, several of which revolve around the status of Llanes, the Government informant, and the person who Lazcano alleges introduced him to Lugo.

Motion for New Trial

Lazcano challenges the denial of his motion for new trial on the ground of his recent acquisition of new evidence that Llanes was cooperating with the Government when he introduced Lazcano to Lugo, and that Llanes received a lesser sentence in a prior case for his cooperation. Lazcano asserts that this evidence would have acquitted him of the instant conviction.

Lazcano did not appeal the district court's May 2, 1991 order denying his motion for a new trial. This Court must examine the basis of its jurisdiction on its own motion if necessary. *Mosely v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). The time limitation for filing a notice of appeal is jurisdictional, and the lack of a timely notice mandates dismissal of the appeal. *United States v. Garcia-Machado*, 845 F.2d 492, 493 (5th Cir. 1988). Lazcano's appeal of the denial of his motion for new trial must therefore be dismissed.

New Evidence

Because Lazcano argued in his § 2255 motion that he had newly

discovered evidence that would "probably acquit" him and he appealed the denial of that motion, we will address his argument on appeal that he is entitled to habeas relief based on the newly discovered evidence. Allegations of error that are not of constitutional or jurisdictional magnitude, and that could have been raised on direct appeal, may not be asserted on collateral review in a § 2255 motion. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). Such errors will be considered only if they could not have been raised on direct appeal, and, if not corrected, would result in a complete miscarriage of justice. *Shaid*, 937 F.2d at 232 n.7. The Supreme Court has held that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation. . . ." *Herrera v. Collins*, ___U.S.___, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993).

By arguing that he received ineffective assistance of counsel, Lazcano asserts an independent constitutional violation. He contends that his retained trial counsel, Pena, had a conflict of interest from having represented Llanes in a prior criminal proceeding. Lazcano argues that Pena knew Llanes had set him up because Pena represented Llanes in a case where Llanes made a plea bargain for a lesser sentence if Llanes would help Lugo get the defendant into the drug business. Pena never informed Lazcano about the prior representation, and used a false name for Llanes during trial so that Lazcano would not discover Pena's disloyalty. Lazcano further argues that Pena was ineffective in that he did not

call Llanes as a witness in order to reveal his agreement to help the Government. Evidence of that agreement may have allowed Lazcano to establish an entrapment defense.

Whether the facts in a particular case give rise to a conflict of interest is a mixed question of law and fact to be reviewed *de novo*. See *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a Sixth Amendment violation in this context, the movant must demonstrate that a conflict of interest adversely affected his counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). A "conflict of interest" exists when defense counsel places himself in a position conducive to divided loyalties. *United States v. Carpenter*, 769 F.2d 258, 263 (5th Cir. 1985). Prejudice is presumed when the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. *United States v. McCaskey*, 9 F.3d 368, 381 (5th Cir. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994). An "adverse effect" is a less onerous standard than the prejudice requirement normally required by *Strickland*, and injury sufficient to justify reversal is presumed from the showing of adverse effect. *Id.*

Whether Pena had an actual conflict of interest cannot be determined from the record. Pena swore in his affidavit that once he learned of Llanes' presence at the initial meeting between Lazcano and Lugo, he requested Lazcano to permit him to withdraw from the case. He stated that Lazcano refused, assuring him that

Llanes had nothing to do with the drug deals between Lazcano and Lugo. Pena also attested that Lazcano never requested that Llanes be called as a witness and, in fact, insisted that Llanes had nothing to do with his case.

Despite Pena's disclosure of his prior representation, if Pena had arranged a plea bargain in Llanes' case wherein Llanes was to receive a lesser sentence for assisting in Lazcano's arrest, Pena might not have wanted to jeopardize that plea agreement by having Llanes testify for Lazcano in support of Lazcano's entrapment defense. Thus, if Pena knew that Llanes acted as a Government informant when he introduced Lazcano to Lugo and did not call Llanes to testify as to this in Lazcano's trial, Pena's performance was arguably "adversely affected" by his divided loyalties, regardless of what Lazcano might have told him.

Pena's assertion that he requested Lazcano to permit him to withdraw supports the precept that Pena's loyalties may have been divided. The affidavit, however, is unclear regarding what Pena knew about Llanes' precise status when he introduced Lazcano to Lugo, and what sort of deal Pena was privy to on behalf of Llanes. Moreover, by virtue of Lazcano's argument that Llanes' role constitutes newly discovered evidence, Lazcano could not have known what Llanes' involvement was at the time of his trial, or how it could have helped his entrapment defense. Because the record is unclear, a determination must be made regarding Llanes' role in Lazcano's case and what Pena knew about it. See *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992) (§ 2255 motion 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).

Prosecutorial Misconduct

Lazcano further asserts that he is entitled to habeas relief based on prosecutorial misconduct. First, Lazcano argues that the Government permitted Lugo to parade himself before the jury in false colors by hiding his relationship with Llanes. It appears that Lazcano is referring to Lugo's misspelling of Llanes' name as "Gamez" as evidence of this transgression. Lazcano adds that the prosecutor should have disclosed to the court and the jury that Llanes was to receive a lighter sentence because Lazcano was indicted. Because we find that Llanes' status as a Government informant cannot be determined from the record, we must remand for further consideration, including an evidentiary hearing, if necessary.

Sentencing

Lazcano challenges his sentence on two grounds: 1) that his offense level was improperly calculated because the Government could have stopped at the first drug transaction but instead caused him to engage in further transactions, and 2) that he was entitled to a downward departure for acceptance of responsibility.

> Relief under 28 U.S.C. § 2255 is reserved for transgressions of 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. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). A

district court's technical application of the sentencing guidelines is not of constitutional dimension. *Id.*

As noted above, a nonconstitutional claim that could have been raised on direct appeal, but was not, may not be raised in a collateral proceeding. *Shaid*, 937 F.2d at 232 n.7. We find that Lazcano's arguments regarding his sentence do not raise constitutional claims and could have been resolved on direct appeal. See *United States v. Smith*, 844 F.2d 203, 206 (5th Cir. 1988).

CONCLUSION

Having found that the record is unclear regarding Llanes' role as a Government agent and Pena's knowledge of that role, we REVERSE the district court's denial of Lazcano's § 2255 motion to modify his sentence, and REMAND for proceedings consistent with this opinion. All remaining issues on appeal are AFFIRMED.