

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8382  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE RAMON ROLDAN,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Western District of Texas  
(A-93-CA-40-JN (!-90-CR-23-10-JN)

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(February 17, 1994)

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

PER CURIAM:\*

I

Enrique Ramon Roldan pleaded guilty to conspiracy to possess with intent to distribute, less than fifty kilograms of marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The district court sentenced Roldan to 60 months of imprisonment to be followed by three years of supervised release and a \$5,000 fine.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Roldan did not file a direct appeal. Instead, he filed a pro se motion to correct a misapplication of the sentencing guidelines, which the district court dismissed for lack of jurisdiction. With the aid of counsel, Roldan voluntarily dismissed his appeal of the district court's dismissal of his motion, and, instead, he filed the motion--now before us--to vacate his sentence under 28 U.S.C. § 2255.

Roldan's § 2255 motion asserted that he received ineffective assistance of counsel because: 1) counsel told him he would receive only a 30-month sentence; 2) counsel failed to advise him to cooperate with the government in order to reduce his sentence; 3) counsel advised Roldan not to appeal; and 4) counsel had a conflict of interest because he represented Roldan and a codefendant. Roldan also asserted in his § 2255 motion that his guilty plea was involuntary because he did not understand that he would receive a 60-month sentence considering his counsel's promise that he would receive only a 30-month sentence. The magistrate judge determined that Roldan did not receive ineffective assistance of counsel and that Roldan's guilty plea was knowing and voluntary. The magistrate judge recommended denying Roldan's motion. Over Roldan's objections, the district court denied Roldan's § 2255 motion. Roldan now appeals.

## II

Section 2255 relief is available only for constitutional violations and "that narrow compass of other injury that could not

have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.'" U.S. v. Perez, 952 F.2d 908, 909 (5th Cir. 1992) (quoting U.S. v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)).

Roldan states that the issues for appeal are whether his plea was involuntary, whether he received ineffective assistance of counsel, and whether the district court erred in denying him an evidentiary hearing regarding those claims. Roldan argues his ineffective assistance of counsel claim based on conflict of interest and the district court's refusal to grant him an evidentiary hearing on that issue. However, he does not argue his other ineffective assistance of counsel claims asserted in his § 2255 motion, nor his claim that his guilty plea was unknowing and involuntary. "Fed. R. App. P. 28(a)(4) requires that the appellant's argument contain the reasons he deserves the requested relief `with citation to the authorities, statutes and parts of the record relied on.'" Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), cert. denied, 498 U.S. 966 (1990) (citations omitted). Roldan has abandoned these arguments by failing to argue them on appeal. See id.; Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988) (considering pro se appellate briefs).

### III

Additionally, Roldan argues, for the first time on appeal, that his case should be remanded to the district court to consider the same issues that were raised before this court in his

codefendant's case, U.S. v. Borders, 992 F.2d 563, 564-68 (5th Cir. 1993). As Roldan has not raised before the district court the same issues in these § 2255 proceedings that were before this court in Borders, we will not consider them on appeal. Borders, 992 F.2d at 569.

Roldan has also filed a separate motion to remand to the district court in reliance upon Borders. Roldan has not demonstrated on appeal that these arguments were unavailable to him at the time he filed his motion or why he failed to address them in his § 2255 motion. Roldan previously raised--and abandoned--similar arguments as discussed in Borders in his pro se motion to correct an incorrect application of the sentencing guidelines. Borders, 992 F.2d at 564-68. Consequently, we will not grant Roldan's motion to remand to the district court to consider issues Roldan failed to present to the district court.

#### IV

Roldan argues that his counsel in the criminal trial operated under a conflict of interest because he represented a codefendant who had hired counsel for himself and Roldan. Roldan contends that because of this conflict of interest, Roldan's counsel did not correctly inform Roldan that the mandatory minimum sentence under the applicable statute was 60 months and that he could avoid this sentence by cooperating with the government and testifying against his codefendant.

Multiple representation does not necessarily violate the Sixth Amendment unless it gives rise to a conflict of interest. Holloway v. Arkansas, 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Roldan must show that his counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

The record reflects that although Roldan's codefendant hired the same counsel for himself and Roldan, Roldan's codefendant became a fugitive of justice shortly after the filing of the indictment, and had not yet been apprehended at the time of Roldan's § 2255 motion. Because of the codefendant's fugitive status, Roldan's counsel at the district court did not believe he was actively representing conflicting interests.

Even if we assume that Roldan has established a predicate to an ineffective assistance of counsel claim because of a conflicting interest, Roldan, nevertheless, has not demonstrated that the conflicting interest adversely affected his counsel's performance. His counsel was able to negotiate a plea agreement that exposed Roldan to a maximum sentence that was less than the possible guidelines sentence that Roldan would have received if he had gone to trial.

Assuming that Roldan has alleged a generic ineffective assistance of counsel claim, he still must prove his counsel's ineffectiveness by demonstrating that counsel's performance was

both deficient and prejudicial to him. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts indulge a strong presumption that counsel's performance was not deficient. Id. at 689. In order to establish prejudice, Roldan must show that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, \_\_\_ U.S. \_\_\_, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). Such unfairness or unreliability results only if counsel's ineffectiveness deprives a defendant of a substantive or procedural right to which the law entitles him. Id.

Roldan's allegations of prejudice are conclusory. Roldan admits that he did not conceive of the possibility of reducing his sentence by cooperating with the government until he was already serving his sentence in prison. Further, nothing in the record indicates that the government ever made such an offer to Roldan. Consequently, Roldan has not demonstrated any alleged errors by counsel were so serious that they rendered his proceedings unfair or the result unreliable.

V

Finally, Roldan argues that the district court should have granted him an evidentiary hearing on his ineffective-assistance-of-counsel claim. If the record is adequate to evaluate the claims in a § 2255 motion fairly, the district court need not hold an evidentiary hearing. See U.S. v. Smith, 915 F.2d 959, 964 (5th Cir. 1990). Because such is the case here, the district court did

not err by refusing to convene an evidentiary hearing. See Byrne v. Butler, 845 F.2d 501, 513 (5th Cir. 1988) (conclusory allegations are insufficient to require an evidentiary hearing).

VI

For the reasons set out above, the judgment of the district court is

A F F I R M E D.