

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40319
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BALDEMAR SAMBRANO VILLARREAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(9:93-CV-77 (9:93-CR-4(2)))

March 29, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Baldemar Villarreal challenges the denial of § 2255 relief.

We **AFFIRM**.

I.

Villarreal was charged in a three-count indictment with (1) capital murder of a law enforcement officer during the commission of a conspiracy and a drug-related crime (21 U.S.C. § 848(e)(1)(B)); (2) conspiracy to distribute marijuana (21 U.S.C. § 846); and (3) possession with intent to distribute, and

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.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, marijuana (21 U.S.C. § 841(a)(1)). On the Government's motion, the district court dismissed counts two and three. A jury convicted Villarreal of count one, and he received a life sentence without parole. Our court affirmed the conviction and sentence. **United States v. Villarreal**, 963 F.2d 725 (5th Cir.), *cert. denied*, 113 S. Ct. 353 (1992).

Villarreal filed a motion under 28 U.S.C. § 2255, claiming, *inter alia*, that the trial court committed plain error in providing the jury with the original indictment, without instructing that counts two and three had been dismissed prior to trial; and, that his indictment was defective and therefore deprived the trial court of jurisdiction.² Finding no merit to Villarreal's request for relief, the district court denied the motion, without having the motion served on the Government.

II.

A.

Villarreal claims that the trial court improperly instructed the jury; specifically, that it should not have given the jury a copy of the indictment, without instructing also that counts two and three had been dismissed.³ "On collateral review of an

² The other issues raised in the § 2255 motion have not been pursued on appeal, and are, therefore, abandoned.

³ The Government urges that Villarreal is procedurally barred from presenting his claims, because he failed to raise them at trial or on direct appeal. Generally, the Government must assert this bar in the district court. **United States v. Drobny**, 955 F.2d 990, 994-95 (5th Cir. 1992). Obviously, in that the Government was not served with the motion, it could not do so then. Rather than address whether, under these circumstances, the Government can raise the bar now, we elect to deal with the issues on the merits.

allegedly erroneous jury instruction, we must determine whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, ... not merely whether the instruction is undesirable, erroneous, or even universally condemned." **United States v. Anderson**, 987 F.2d 251, 259 (5th Cir.). *cert. denied*, 114 S. Ct. 157 (1993) (internal quotations and citations omitted).

The district court advised the jury that the indictment was not evidence; at the close of the evidence, it instructed on the elements of count one, and further instructed that the jury was only to consider count one; and, it provided the jury with a verdict form requiring a finding only with respect to count one. In addition, we find no prejudice, because the acts constituting counts two and three were acts necessary for a conviction on count one. In sum, there was no denial of due process.⁴

B.

Villarreal claims also that the trial court lacked jurisdiction, asserting that the indictment was faulty. We consider a challenge to the sufficiency of an indictment brought for the first time on collateral review "only in exceptional circumstances", and the indictment "will be held sufficient if by any reasonable construction it is understood to charge an offense."

⁴ Villarreal also claims that he was subjected to double jeopardy resulting from the jury's consideration of the indictment containing two dismissed counts. Because Villarreal failed to raise this issue before the district court, and because we find no manifest injustice, we decline to address it here. *E.g.*, **Varnado v. Lynaugh**, 920 F.2d 320, 321 (5th Cir. 1991).

United States v. Armstrong, 951 F.2d 626, 628 (5th Cir. 1992)
(internal quotations omitted).

Villarreal maintains that the indictment was defective because the dismissal of counts two and three removed the "predicate acts" necessary to prove a violation of count one. This argument is frivolous. Count one was a separate and independent offense; the dismissal of the other two counts had no effect on its validity.⁵

III.

For the foregoing reasons the judgment is

AFFIRMED.

⁵ In his statement of issues, Villarreal included the issue of whether the trial court had jurisdiction to impose a life sentence without parole. To the extent he raises an issue not already discussed, he did not brief it; therefore, it is deemed abandoned. *E.g.*, *United States v. Maldonado*, 42 F.3d 906, 910 n.7 (1995).