

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN-WATERLOO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELIAS REAL-FLORES,

Defendant.

No. CR99-2016-LRR

No. C02-2033-LRR

ORDER

This matter comes before the court on the defendant's motion to vacate, set aside or correct his sentence. The motion was filed pursuant to 28 U.S.C. § 2255.¹ Also before the court is the defendant's motion for ruling regarding his 28 U.S.C. § 2255 motion. For the following reasons, the defendant's 28 U.S.C. § 2255 motion shall be denied.²

¹ If a prisoner is in custody pursuant to a sentence imposed by a federal court and such prisoner claims "that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, [the prisoner] may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. See also Daniels v. United States, 532 U.S. 374, 377, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001).

² No response from the government is required because the motion and file make clear that the defendant is not entitled to relief. See 28 U.S.C. § 2255; Rule 4(b), Rules Governing Section 2255 Proceedings. Similarly, an evidentiary hearing is not necessary. See id. See also Engelen v. United States, 68 F.3d 238, 240-41 (8th Cir. 1995) (stating district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing "if (1) the . . . allegations, accepted as true, would not entitle the [movant] to relief, or (2) the allegations cannot be accepted as true because they are (continued...)

I. BACKGROUND

On July 31, 1999, the defendant, Mr. Elias Real-Flores (“Mr. Real-Flores”), was arrested. On August 2, 1999, the government filed a criminal complaint against Mr. Real-Flores. On August 6, 1999, counsel appeared before the court on behalf of Mr. Real-Flores.³ On August 17, 1999, the government filed an indictment against Mr. Real-Flores. Specifically, the indictment charged:

[On] or about July 31, 1999, in the Northern District of Iowa, the defendants, [Mr. Alcantar] and [Mr. Real-Flores], did knowingly and unlawfully combine, conspire, confederate and agree with each other and others unknown to the federal grand jury to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance.

The conduct charged in the indictment is in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 846.

On November 2, 1999, Mr. Real-Flores filed a motion to sever and a motion to suppress. In support of the former motion, Mr. Real-Flores stated:

(...continued)

contradicted by the record, inherently incredible, or conclusions rather than statements of fact”); United States v. Oldham, 787 F.2d 454, 457 (8th Cir. 1986) (stating district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255).

³ Mr. Raphael M. Scheetz represented Mr. Real-Flores throughout all of the pre-trial proceedings except the initial appearance. He also represented Mr. Real-Flores throughout the trial and the direct appeal. At different stages, Mr. Philip A. MacTaggart and Anne M. Lavery represented Mr. Real-Flores’ co-defendant, Mr. Samuel Alcantar (“Mr. Alcantar”).

The trials of the two co-defendants have been jointly set. [Mr. Real-Flores] anticipates calling [Mr. Alcantar] as a defense witness at trial. [Mr. Alcantar] possesses information which [exculpates Mr. Real-Flores]. However, [Mr. Real-Flores] cannot compel the testimony of [Mr. Alcantar] at a trial where he is a party. Accordingly, [Mr. Real-Flores] would be prejudiced by having a joint trial.

In the latter motion, Mr. Real-Flores asked the court to suppress the statements he made while seated in the police car and the evidence obtained by officials as a result of those statements. On June 1, 2000, Chief Magistrate Judge John A. Jarvey recommended Mr. Real-Flores' motion to sever and motion to suppress be denied. On June 21, 2000, Mr. Real-Flores filed an additional motion to sever. In such motion, Mr. Real-Flores stated:

At trial, the government will introduce post-arrest statements of [Mr. Alcantar] implicating [Mr. Real-Flores]. The introduction of [Mr. Alcantar's] statements to the jury will violate [Mr. Real-Flores'] Sixth Amendment confrontation right, and [such] introduction will violate the holding set forth in [Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)].

On June 28, 2000, the court adopted Chief Magistrate Judge John A. Jarvey's June 1, 2000 report and recommendation and entered an order denying the November 2, 1999 motion to sever and motion to suppress. On July 3, 2000, the court conducted a Bruton hearing. During such hearing, Mr. Steven Eric Freeman ("Mr. Freeman") testified. Based on the hearing, the court granted Mr. Real-Flores' June 21, 2000 motion to sever. In addition, the court ordered the jury trial for Mr. Alcantar to proceed as scheduled and the trial for Mr. Real-Flores to be reset after the jury trial for Mr. Alcantar concluded.

On October 3, 2000, Mr. Real-Flores' jury trial commenced. On October 5, 2000, the jury found Mr. Real-Flores guilty. The court set January 2, 2001 as the date for Mr. Real-Flores' sentencing hearing. Mr. Real-Flores appeared for the scheduled sentencing hearing. Based on a total offense level of 30 and a criminal history category of II, the court

determined Mr. Real-Flores' sentencing range to be between 120 and 135 months.⁴ The court sentenced Mr. Real-Flores to 120 months imprisonment. The court entered judgment the same day.

Mr. Real-Flores appealed his criminal conviction on January 12, 2001. The Eighth Circuit Court of Appeals consolidated Mr. Real-Flores' appeal with Mr. Alcantar's appeal. On appeal, Mr. Real-Flores and Mr. Alcantar argued the district court erred in denying their motions to suppress evidence found during the search of the truck in Waterloo, Iowa.⁵ In addition, Mr. Real-Flores appealed from the district court's ruling precluding him from

⁴ Before reaching the total offense level of 30, the court determined the base offense level should be 32 pursuant to U.S.S.G. § 2D1.1 and two levels should be subtracted for Mr. Real-Flores' role in the offense under U.S.S.G. § 3B1.2. The court did not reduce the offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. When calculating Mr. Real-Flores' criminal history under U.S.S.G. § 4A1.1(b), the pre-sentence investigation report assessed two criminal history points for Mr. Real-Flores' prior convictions. Mr. Real-Flores did not object to such calculation. A total of two criminal history points results in a criminal history category of II. Although a total offense level of 30 and a criminal history category of II results in a sentencing range between 108 and 135 months imprisonment, the applicable sentence for Mr. Real-Flores falls within Zone D of the Sentencing Table. Pursuant to U.S.S.G. § 5C1.1(f), the minimum term shall be satisfied by a sentence of imprisonment if the applicable guideline range is in Zone D of the Sentencing Table. Pursuant to 21 U.S.C. § 841(b)(1)(A), a minimum of 120 months up to life imprisonment is authorized for Mr. Real-Flores' offense.

⁵ In support their position, Mr. Real-Flores and Mr. Alcantar argued: 1) the stop in California was pretextual and, therefore, the stop in Iowa was the fruit of an illegal search; 2) the search of their truck was unreasonable in length and scope; and 3) the stop violated Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

learning the identity of the confidential informant.⁶ On November 14, 2001, the Eighth Circuit Court of Appeals affirmed both convictions and resulting sentences.⁷

Mr. Real-Flores filed the instant motion on September 8, 2000. In his 28 U.S.C. § 2255 motion, Mr. Real-Flores raises several arguments challenging his conviction and resulting sentence. Specifically, Mr. Real-Flores argues:

- 1) Actual [Innocence]–[Mr. Real-Flores] did not commit this crime. [Mr. Real-Flores] always maintain[ed] his [innocence]. [Mr. Alcantar] states in his affidavit that he will testify on [Mr. Real-Flores'] behalf. (See Exhibit A). [Mr. Real-Flores] is entitled [to] a new trial.
- 2) Newly Discovered Evidence–[Mr. Alcantar] is presently incarcerated at [the] Federal Correctional Institution [in] Milan, Michigan. [Mr. Alcantar] wrote [Mr. Real-Flores] an affidavit, stating that [Mr. Real-Flores] did not conspire with him to possess with the intent to distribute methamphetamine. [Mr. Real-Flores] had no knowledge about this drug inside the car. (See Exhibit A). [Mr. Real-Flores] is entitled [to] a new trial.
- 3) [Inconsistent Evidence Is Inadmissible]–the district court allowed the transcripts of . . . [the] tape [recording] of [the] traffic stop on July 29, 1999 to be admitted into evidence. There were three separate transcripts. They are conflicting with each other. (See Exhibit B). Also, no Miranda rights were read. [Mr. Real-Flores] is entitled [to] a new trial.

⁶ Apart from those arguments, Mr. Alcantar argued: 1) the district court erred in admitting the taped conversation between him and Mr. Real-Flores on the grounds that admitting the tape violated the holding of Bruton; and 2) the government violated the Bruton rule against admitting the confessions of non-testifying co-defendants by introducing evidence that Mr. Real-Flores confessed to Mr. Freeman.

⁷ See United States v. Alcantar, 271 F.3d 731, 733-35 (8th Cir. 2001) (providing extensive factual background regarding both convictions).

4) Testimony Of County-Jail Inmate Is Inadmissible–[Mr. Real-Flores] was arrested and confined in [a] county jail pending trial. During trial, the [government] brought the inmate who was locked up in the same dorm to testify falsely against [Mr. Real-Flores]. As such, the testimony should not be admitted. [Mr. Real-Flores] is entitled [to] a new trial.

Explaining why these arguments were not previously presented, Mr. Real-Flores states:

Trial counsel was ineffective. [Mr. Alcantar] wanted to testify. Counsel stated that was not necessary. With [Mr. Alcantar's] testimony, [Mr. Real-Flores] would have been acquitted.

On September 30, 2002, Mr. Real-Flores submitted a “proffer for supplement to motion under 28 U.S.C. § 2255” and an affidavit. In the former, Mr. Real-Flores asks the court to: 1) release him back to his family; 2) restore his status as if the conviction had not occurred; 3) expunge his criminal record in this case; and 4) grant such other and additional relief as the court deems just and equitable. On July 23, 2003, Mr. Real-Flores filed a request for preliminary consideration under Rule 4 of the Rules Governing Section 2255 Proceedings. Mr. Real-Flores’ motion for ruling regarding his 28 U.S.C. § 2255 motion shall be granted. Accordingly, the court turns to consider Mr. Real-Flores’ motion pursuant to 28 U.S.C. § 2255.

II. ANALYSIS

A. Standard Applicable to 28 U.S.C. § 2255 Motion

The Eighth Circuit Court of Appeals described 28 U.S.C. § 2255 as “the statutory analogue of habeas corpus for persons in federal custody.” Poor Thunder v. United States, 810 F.2d 817, 821 (8th Cir. 1987). With regard to its purpose, the Eighth Circuit Court of Appeals stated:

[28 U.S.C. § 2255] provides remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was ‘imposed in

violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.’

Id. (quoting 28 U.S.C. § 2255). Although it appears to be a broad remedy, a motion under 28 U.S.C. § 2255 is limited. Because a final judgment commands respect, “[r]elief 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 for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.” United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996). See also Poor Thunder, 810 F.2d at 821-22 (While a direct appeal is the exclusive route for complaining about trial errors significant enough to require reversal, 28 U.S.C. § 2255 is intended to rectify “a fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.”). Stated differently, a collateral challenge under 28 U.S.C. § 2255 is not interchangeable or a substitute for a direct appeal, and “an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.” United States v. Frady, 456 U.S. 152, 164-65, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982) (citation omitted). In sum, “to obtain collateral relief, a prisoner must clear a significantly higher hurdle than would exist on direct appeal.” Id. at 166. Specifically, “a convicted defendant must show both (1) ‘cause’ excusing his [or her] double procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he [or she] complains.” Id. at 167-68.

B. Mr. Real-Flores’ Arguments

In the interest of efficiency, the court summarizes Mr. Real-Flores’ 28 U.S.C. § 2255 arguments in the following manner: 1) a new trial is warranted because newly discovered evidence exists and such evidence proves he is actually innocent; 2) trial counsel provided ineffective assistance because he did not call Mr. Alcantar to testify; 3) the court

erred when it admitted into evidence the conflicting transcripts of the tape recorded conversation; 4) no Miranda rights were read;⁸ and 5) the government called Mr. Freeman to falsely testify.

As previously noted, the court is unable to review any claim which could have been presented on direct appeal absent a showing of cause for the failure and actual prejudice resulting from the failure; a defendant who fails to raise an issue on direct appeal is thereafter barred from raising that issue for the first time in a 28 U.S.C. § 2255 proceeding. Clearly, argument three and argument four are related to Mr. Real-Flores' motion to suppress, and, therefore, both arguments should have been brought on direct appeal.⁹ Similarly, argument five should have been raised on direct appeal.¹⁰ Mr. Real-Flores' 28 U.S.C. § 2255 motion fails to allege an ineffective assistance of appellate counsel theory.

⁸ See Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

⁹ Prior to Mr. Real-Flores' jury trial, the court considered and rejected his motion to suppress the statements he made while seated in the police car and the evidence obtained by officials as a result of those statements. On appeal, the Eighth Circuit Court of Appeals denied Mr. Real-Flores' argument that the district court erred in denying his motion to suppress the evidence found during the search of the truck in Waterloo, Iowa. To the extent the Eighth Circuit Court of Appeals previously considered and rejected arguments three and four, they are not cognizable. See United States v. Kirk, 723 F.2d 1379, 1381 (8th Cir. 1983) (citing Anderson v. United States, 619 F.2d 772, 773 (8th Cir. 1980) and Houser v. United States, 508 F.2d 509, 514 (8th Cir. 1974)).

¹⁰ At trial, the government presented evidence that Mr. Real-Flores confessed to Mr. Freeman. On cross, trial counsel thoroughly examined Mr. Freeman. During such examination, trial counsel did a remarkable job of calling into question Mr. Freeman's credibility by asking questions about his: 1) motive for providing testimony; 2) reason for serving time in the county jail—a forgery conviction and burglary conviction 3) lengthy criminal history; 4) ability to look through court papers related to the proceeding; and 5) prior “inconsistent” testimony. On appeal, Mr. Alcantar raised several arguments related to Mr. Freeman's testimony. Evidently, Mr. Real-Flores elected not to appeal issues related to Mr. Freeman's testimony.

See United States v. Craycraft, 167 F.3d 451, 457 (8th Cir. 1999) (stating failure to raise ineffective assistance of appellate counsel claim creates a jurisdictional defect). Accordingly, apart from the claim asserting newly discovered evidence and the claim asserting ineffective assistance because trial counsel did not call Mr. Alcantar to testify, the court lacks authority to review any of Mr. Real-Flores' arguments.¹¹

1. Newly Discovered Evidence Proving Actual Innocence

Mr. Real-Flores maintains newly discovered evidence exists. In support of such argument, Mr. Real-Flores asserts Mr. Alcantar is able to offer testimony proving he is actually innocent. Specifically, Mr. Real-Flores believes Mr. Alcantar will testify that they did not enter into a conspiracy to possess with the intent to distribute methamphetamine. Mr. Real-Flores relies on an "affidavit" submitted by Mr. Alcantar. The document Mr. Real-Flores declares is an affidavit is signed by Mr. Alcantar, but it is not notarized. Within the "affidavit," Mr. Alcantar states "[Mr. Real-Flores] don't have anything to do with this case."

Prior to trial, Mr. Real-Flores sought to sever Mr. Alcantar from his trial because he believed Mr. Alcantar possessed exculpatory information. At trial, Mr. Real-Flores tried to present evidence which showed he wanted to go to Iowa to find work and he did not

¹¹ Although it is without jurisdiction to review Mr. Real-Flores' third argument, fourth argument and fifth argument, the court notes each argument is wholly without merit. Regarding argument three, no discussion is warranted. With respect to argument four, Miranda does not appear to be applicable to Mr. Real Flores' case because he did not make his statements in response to any question or statement by law enforcement officers. See United States v. Hatten, 68 F.3d 257, 262 (8th Cir. 1995) (stating a Miranda warning is required when a suspect is both in custody and subject to interrogation). See also United States v. Clark, 22 F.3d 799, 802 (8th Cir. 1994) (concluding no reasonable or legitimate expectation of privacy in statements made to a companion while seated in a police car). Concerning argument five, Mr. Real-Flores does not offer any evidence supporting his assertion that the government knowingly called Mr. Freeman to give false testimony, and a review of the record reveals the government did not engage in inappropriate conduct.

know there were drugs in the truck. In support of such defense, several witnesses testified on behalf of Mr. Real-Flores. And, in the instant motion pursuant to 28 U.S.C. § 2255, Mr. Real-Flores alleges trial counsel provided ineffective assistance because he refused to obtain Mr. Alcantar's testimony even though he wanted to testify on his behalf. Based on the record, it does not appear the evidence Mr. Real-Flores relies on is newly discovered or exculpatory, that is, it was available to counsel at the time of trial and it is merely cumulative. Moreover, the government presented overwhelming evidence which contradicts Mr. Real-Flores' allegation of actual innocence, and a jury convicted Mr. Alcantar of entering into the same criminal conspiracy. Because Mr. Real-Flores' argument is inherently incredible, the court finds it is unavailing.

2. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defense.” U.S. Const., Amend. VI. Furthermore, criminal defendants have a constitutional right to effective assistance of counsel in their first appeal. Evitts v. Lucey, 469 U.S. 387, 393-95, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); Douglas v. California, 372 U.S. 353, 356-57, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

The Sixth Amendment right to effective counsel is clearly established. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In Strickland, the United States Supreme Court explained that a violation of that right has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were

so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. See also Williams v. Taylor, 529 U.S. 362, 390, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (reasserting Strickland standard). Thus, Strickland requires a showing of both deficient performance and prejudice. However, “a court deciding an ineffective assistance claim need not address both components of the inquiry if the defendant makes an insufficient showing on one.” Strickland, 466 U.S. at 697. “If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed.” Id. See also United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996) (“[A court] need not address the reasonableness of the attorney’s behavior if the movant cannot prove prejudice.”).

To establish unreasonably deficient performance, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. The “reasonableness of counsel’s challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690. There is a strong presumption of competence and reasonable professional judgment. Id. See also United States v. Taylor, 258 F.3d 815, 818 (8th Cir. 2001) (operating on the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”) (quoting Strickland, 466 U.S. at 689); Sanders v. Trickey, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing Strickland, 466 U.S. at 694). In sum, the court must “determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance.” Strickland, 466 U.S. at 690.

To establish prejudice, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Rather, a

defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. In other words, “the question is whether there is a reasonable probability that, absent those errors, the fact finder would have had a reasonable doubt respecting guilt.” *Id.* at 695. In answering that question, the court “must consider the totality of the evidence before the judge or jury.” *Id.*

In his 28 U.S.C. § 2255 motion, Mr. Real-Flores alleges Mr. Alcantar wanted to testify but trial counsel stated such testimony was not necessary. Mr. Real-Flores believes Mr. Alcantar, if called to testify, would have stated: “[Mr. Real-Flores] did not conspire with [me] to possess with the intent to distribute methamphetamine.” Based on such testimony, Mr. Real-Flores asserts the jury would have acquitted him.

The court notes it is not clear from the “affidavit” that Mr. Alcantar would testify as Mr. Real-Flores suggests. Even if Mr. Alcantar did testify as Mr. Real-Flores wanted, it is likely that the government would have impeached his testimony or at least minimized its effect by asking about the conviction for the same conspiracy charge and the facts surrounding such conviction. Clearly, the decision not to call Mr. Alcantar as a witness is part of reasonable trial strategy. That being the case, the court finds trial counsel was effective in this regard. The court also finds Mr. Real-Flores was not prejudiced when trial counsel failed to call Mr. Alcantar as a witness because he does not attempt to explain the overwhelming evidence in the record which contradicts his assertion that he did not enter into a conspiracy with Mr. Alcantar. Because Mr. Real-Flores’ argument is conclusory and contradicted by the record, the court finds it is devoid of merit.

Even if the court construes Mr. Real-Flores’ four other arguments as ineffective assistance of trial counsel claims, all of them fail. Given the record and the law, the court finds trial counsel’s failure to submit futile issues or claims does not constitute ineffective

assistance. In addition, the court is unable to find trial counsel's conduct with respect to Mr. Real-Flores' four other arguments prejudiced him because he fails to offer any reliable evidence supporting such position. These findings are bolstered by the fact that the government presented overwhelming evidence of Mr. Real-Flores' guilt at trial. If any error occurred, it was harmless beyond a reasonable doubt. Accordingly, the court concludes Mr. Real-Flores failed to establish trial counsel denied him effective assistance.

C. Certificate of Appealability

A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). See Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may only issue if a defendant has made a substantial showing of the denial of a constitutional right. See Miller-El v. Cockrell, 537 U.S. 322, ___, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003); Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000); Carter v. Hopkins, 151 F.3d 872, 873-74 (8th Cir. 1998); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997); Tiedeman, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. Cox, 133 F.3d at 569 (citing Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir. 1994)). See also Miller-El, 537 U.S. at ___, 123 S. Ct. at 1039 (reiterating standard). Moreover, "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [defendant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller-El, 537 U.S. at ___, 123 S. Ct. at 1040 (quoting Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)).

For the reasons stated above, Mr. Real-Flores fails to meet the standards set forth for the issuance of a certificate of appealability. Having thoroughly reviewed the record

in this case, the court finds Mr. Real-Flores failed to make the requisite “substantial showing” with respect to all of the claims he raised in his 28 U.S.C. § 2255 motion. See 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because Mr. Real-Flores did not present questions of substance for appellate review, the court concludes a certificate of appealability is not warranted.

If he desires further review of his 28 U.S.C. § 2255 motion, Mr. Real-Flores may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with Tiedeman, 122 F.3d at 520-22.

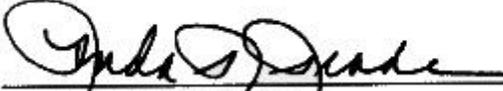
III. CONCLUSION

In sum, Mr. Real-Flores fails to meet the standard applicable to a 28 U.S.C. § 2255 motion, that is, Mr. Real-Flores offers no “‘cause’ excusing his double procedural default and ‘actual prejudice’ resulting from the errors of which he complains.” Fraday, 456 U.S. at 167-68. The arguments Mr. Real-Flores offers are unavailing because they are contradicted by the record, inherently incredible or conclusions rather than statements of fact. Further, because Mr. Real-Flores did not present questions of substance for appellate review, issuing a certificate of appealability under 28 U.S.C. § 2253(c) is not appropriate.

IT IS THEREFORE ORDERED:

- 1) Mr. Real-Flores’ motion for ruling regarding his 28 U.S.C. § 2255 motion is **GRANTED**.
- 2) Mr. Real-Flores’ 28 U.S.C. § 2255 motion is **DENIED**.
- 3) A certificate of appealability is **DENIED**.

DATED this 2nd day of December, 2003.



LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA