IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 11-928 JH/ACT
	)	CR 06-538 JH
DANUEL DEAN QUAINTANCE,	)	
	)	
Defendant.	)	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO 28 U.S.C. § 2255

The United States of America hereby responds to Defendant Danuel Dean Quaintance's ("the Defendant") motion pursuant to 28 U.S.C. § 2255 in the above-captioned case. The United States opposes the Defendant's motion. As demonstrated below, the Defendant's motion should be denied in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. An Incident in Missouri.

On February 13, 2006, Joseph Allen Butts, the brother-in-law of the Defendant, was arrested pursuant to a traffic stop in Franklin County, Missouri. Mr. Butts was traveling eastbound on Interstate 44 in Franklin County, Missouri. Mr. Butts was driving a Chevrolet pickup truck which contained approximately 338 pounds (152 kilograms) of marijuana in the bed, underneath a locked pickup bed cover.

When officers first asked Mr. Butts for consent to search the vehicle, Mr. Butts said, "No, it's my sister's and she doesn't like people in their vehicles." The marijuana was discovered

pursuant to a K-9 alert to the vehicle's bed. Mr. Butts stated that the marijuana was for his church and that it was a hate crime to arrest him.

Twelve boxes containing eighteen bundles of marijuana wrapped in plastic wrap and clear tape were seized. Pursuant to an inventory search of the vehicle, the following items were seized: 1) paperwork indicating Butts' affiliation with the Church of the Cognizance, including a Certified Courier Certificate in Mr. Butts' name, purportedly signed by the Defendant Danuel Quaintance; 2) an open title for the vehicle, current insurance cards for the vehicle, and the vehicle registration; 3) Yahoo! maps and directions showing the destination of Indianapolis, Indiana; 4) Butts' wallet containing membership cards to the church; and 5) $1,511.00 U.S. currency. Mr. Butts stated in response to a question by law enforcement officers referring to the contraband found that, "there was 300 pounds of marijuana in the vehicle."

B. <u>The Defendant Was Arrested Near Lordsburg, New Mexico</u>.

On February 22, 2006, the Defendant, along with his wife Mary Helen Quaintance and Timothy Jason Kripner, was arrested near Lordsburg, New Mexico. Mary Quaintance was driving a minivan with Danuel Quaintance as the sole passenger. Mr. Kripner was driving a leased Chrysler 300. The aforementioned vehicles traveled east together on Interstate 10 for about ten miles, exited and traveled south on NM Highway 113. After a relatively short time, both vehicles headed north on 113 in tandem. Based on a totality of the circumstances, both vehicles were stopped by United States Border Patrol ("USBP") Agents.

The Chrysler driven by Mr. Kripner contained square bundles of marijuana packaged in clear plastic wrap. The bundles were contained in burlap bags. Three bundles were found in the vehicle's trunk. Another bundle was discovered in the vehicle's backseat. Also found in the vehicle was a handheld, short-distance capacity, two-way radio set to channel six. Mr. Kripner was in possession

of a Church of the Cognizance certificate in his name identical to that possessed by Mr. Butts, purportedly signed by Danuel Quaintance.

The minivan in which the Defendant and his wife traveled contained an identical two-way radio to that found in the Chrysler, also set to channel six. Mr. Quaintance, subsequent to his arrest, stated, "I am the head of my church and I have the right to have 'that' marijuana." The four bundles of marijuana weighed approximately 172.42 pounds (77.58 kilograms). The Defendant, his wife and Mr. Kripner were arrested and transported to the Lordsburg USBP station.

As task force agents arrived at the Lordsburg USBP station, Mr. Quaintance asked if the agents were with the Drug Enforcement Administration ("DEA"). Upon receiving an affirmative response, Mr. Quaintance immediately began shouting, among other things, that they belonged to the Cognizance Church and they were allowed to possess and transport marijuana.

Post-*Miranda*, Mr. Quaintance stated he was not going to admit ownership of the marijuana but that he is allowed under his church to transport and possess marijuana.

Post-*Miranda*, Mr. Kripner stated that Mr. Quaintance had deposited some money into an ATM account so his (Kripner's) cousin could rent the Chrysler. Kripner went on to say that Mr. Quaintance had also purchased a cellular telephone for his (Kripner's) use, but to be thrown away if they were captured. Mr. Kripner stated that he was going to get paid to transport the marijuana to the Quaintances' residence in Pima, Arizona. Kripner also stated that the Quaintances' residence or compound is made up of two trailers. Kripner further offered that the Quaintances are both unemployed and sustain their lifestyle by selling the marijuana, not only to members, but to anyone willing to buy it. Additionally, Kripner stated that he knows Mr. Quaintance and his religion is not real, but figured that if he would be able to smoke, transport and possess marijuana, that was reason enough to join the church.

C. Law Enforcement Officers Speak to the Defendant's Son-in-Law, Tim Wiedmeyer.

Tim Wiedmeyer is married to Zina Wiedmeyer. Ms. Wiedmeyer is the daughter of Danuel and Mary Quaintance. The Wiedmeyers lived in a separate trailer, but on the same or adjacent property on which the Quaintances' trailer was located. On December 21, 2005, Mr. Wiedmeyer advised officers of the Graham County Sheriff's Office, Safford, Arizona, that he "is not involved in the drug trafficking that takes place on Dan and Mary's property." Mr. Wiedmeyer went on to say that he was worried about losing his property to law enforcement due to Dan and Mary's drug activities.

D. Graham County Sheriff's Office Deputies Search the Defendant's Residence.

On March 3, 2006, Graham County deputies searched the Defendant's trailer in Pima, Arizona. Several items were seized, among which were several burlap bags. These burlap bags closely resembled those which contained marijuana seized on February 22, 2006 from the vehicle driven by Mr. Kripner. Also seized from the residence was an Ultraship Ultra-50 digital scale and an Ohaus non-electric scale.

E. Defendant Is Released on Bond.

On March 9, 2006, the Defendant appeared before United States Magistrate Judge Lourdes A. Martinez in Las Cruces, New Mexico. The Defendant was released on a $10,000.00 secured bond. The government was not opposed. As a condition of release, the Defendant agreed not to ingest marijuana.

F. Indictment.

On March 15, 2006, a Federal Grand Jury for the District of New Mexico returned a true bill against the Defendant, Mary Helen Quaintance and Timothy Jason Kripner.

G. Superseding Indictment.

On May 17, 2006, a two-count Superseding Indictment was returned by the Federal Grand Jury for the District of New Mexico.

H. Chang of Plea.

On August 18, 2008, the Defendant entered into a Conditional Plea Agreement to the two-count Superseding Indictment.

I. Sentencing.

On January 8, 2009, the Defendant was sentenced to 64 months in the custody of the Bureau of Prisons by the Honorable Judith C. Herrera, United States District Judge.

J. Appeal Denied.

On May 19, 2010, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the United States District Court.

K. Petition for Re-hearing En Banc Denied.

On June 28, 2010, the United States Court of Appeals for the Tenth Circuit denied the Defendant's Petition for Re-hearing En Banc.

L. Writ of Certiorari Denied.

On November 1, 2010, the Supreme Court of the United States denied the Defendant's Petition for Writ of Certiorari.

M. Motion Pursuant to 28 U.S.C. § 2255.

On October 12, 2011, the Defendant filed this Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

II. ARGUMENT

A. All of the Defendant's Ineffective Assistance of Counsel Claims (Grounds One, Two and Five) Fail Because Defendant Cannot Meet the Two-Prong *Strickland* Test As to Any.

All of the Defendant's ineffective assistance of counsel claims fail. The same standard should be applied to all the ineffective assistance claims, "[C]ounsel is strongly presumed to have rendered adequate assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). As such, prevailing on an ineffective assistance of counsel claim requires a two-part showing. First, Defendant must show that "counsel's performance was deficient." *Id.* at 687. To do so, the Defendant must identify acts or omissions by his attorneys that are "outside the wide range of professionally competent assistance." *Id.* at 690. Second, the Defendant must establish he was prejudiced by this attorney's deficient performance. *Strickland*, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.).

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Miles v. Dorsey*, 61 F.3d 1459, 1475 (10th Cir. 1995) (quoting *Strickland*, 466 U.S. at 700). Notably, the Court can dispose of an ineffectiveness claim for lack of prejudice, without determining whether the alleged errors were legally deficient. *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir. 1993); accord *Cooks v. Ward*, 165 F.3d 1283, 1292-93 (10th Cir. 1998) ("This court may address the performance and prejudice components in any order, but need not address both if [a defendant] fails to make a sufficient showing of one.").

B. The Defendant's Ground One; Ineffective Assistance of Counsel on Direct Appeal Should Be Summarily Dismissed.

The Defendant complains that appellate counsel failed to raise on direct appeal the issue of whether the District Court denied fundamental trial rights. In his attachment, Defendant alleges he has included facts supporting Ground One. He does not. We are left in a quandry and must attempt to decipher the Defendant's meaning. Pursuant to Defendant's factual *[sic]* ground A2.) he states, "Inadequate communication as apparent in erroneous statements and arguments to issues that were presented on appeal." Equally baffling is the Defendant's point A3.), "Insufficient and or untimely legal research into the specific areas of law essential to providing effective assistance on appeal."

Even a cursory review of appellate counsel's work reveals a well-thought out, logical presentation on the issues contested. By way of background, the issues have always stemmed from whether the Religious Freedom Restoration Act ("RFRA") applies to the Defendant's case. It does not. The District and Appellate Courts agreed that Defendant never satisfied the requirements for RFRA protection. Under RFRA, a plaintiff must establish, by a preponderance of the evidence, three threshold requirements to state a *prima facie* free exercise claim. *United States v. Meyers*, 95 F.3d, 1475, 1482 (10th Cir. 1996). The government action must (1) substantially burden, (2) a religious belief rather than a philosophy or a way of life, (3) which beliefs are sincerely held by the plaintiff. The government need only accommodate the exercise of actual religious convictions. *Id.*

Appellate attorney Scott Davidson filed not just an appellate brief consisting of 124 pages, but also a reply brief, 17 pages. Mr. Davidson goes above and beyond the call of duty. In these briefs appellate counsel logically sets out justification for RFRA protection. For example, Mr. Davidson, in his reply brief, states, "After the district court denied Mr. Quaintance's motion to dismiss, he asked the court for permission to present a religious use defense to the jury. Vol. I, Doc. 187 at 2, ¶ 4. The district court denied the request. Vol. I, Doc. 326. Now, on appeal. . . ."

(Defendant Quaintance's Reply Brief p. 12.) The foregoing is but one example of how Mr. Davidson "raised the issue of" whether the District Court denied fundamental trial rights." This demonstrates that appellate counsel did, in fact, do what the Defendant claims he did not. As a result, Defendant is unable to show "counsel's performance was deficient," pursuant to *Strickland*, 466 U.S. 688, 690 (1984). Further, the Defendant does not identify acts or omissions by counsel "outside the wide range of professionally competent assistance." *Id.* at 690. Nor did the Defendant establish he was prejudiced by his attorney's performance. Based on the foregoing, the record demonstrates that Defendant's claim set out in Ground One should be summarily denied.

C. The Defendant's Ground Two; Ineffective Assistance by Pre-trial Counsel Marc Robert, Should Also Be Summarily Denied.

Mr. Robert is an Assistant Federal Public Defender in the District of New Mexico. Previously assigned to the Las Cruces office, he is now at the Albuquerque office. Mr. Robert is a highly respected attorney throughout the District. His reputation is impeccable and his dedication to his clients is legendary.

Firstly, Defendant contends that Mr. Robert failed to comprehend or assert that *Meyers*[1] was inapplicable to claims related to a religious defense in the instant case because defendants were distinguished by the facts that : (a) their beliefs were not "purely secular", and (b) their beliefs were asserted to be based on teachings that were clearly religious in nature, *i.e.*, primarily Zoroastrian. The Defendant goes on to state that he founded a "church" and not a "new and unique religion." Semantics aside, RFRA offers no protection to anything but a sincerely held religious belief. *Meyers* infra. The Defendant goes on to offer in support six points or supporting facts *[sic]*. Points two and three (2.); 3.)) are essentially restatements of points 1.) and 2.) of Ground One. Again, making an

[1] *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

appearance is the puzzling, "Inadequate communication as apparent in erroneous statements and arguments to issues related to presenting a religious defense." Along with her equally mysterious sister, "Insufficient and or untimely legal research into specific areas of law essential to providing effective assistance toward a religious defense."

The United States interprets the foregoing to mean that Defendant claims Mr. Robert failed to assert a RFRA defense. Nothing could be further from the truth. Mr. Robert filed both a Motion to Dismiss Indictment and Incorporated Memorandum (Doc. 34) and a Reply to Government's Response to Motion to Dismiss Indictment (Doc. 68); in each, he vigorously champions what the Defendant claims he did not. "Mr. Quaintance submits that this '*Meyers* matrix' is an inappropriate and dangerous imposition of convention on the determination of what constitutes a sincere religious belief for purposes of the instant inquiry." (Doc. 34, ¶ 6, p. 3.) Mr. Robert goes on to argue that the Defendant has founded a church and should fall under the protection of RFRA, as Danuel Quaintance sincerely believes that cannabis is a deity and a sacrament which is essential to the practice of his religion. (Doc. 34, ¶¶ 12 and 13, p. 1.)

In reply to the Government's Response to Defendant's Motion to Dismiss Indictment, Mr. Robert writes, "As with most religious traditions, the COC[2] has adopted those parts of Zoroastrian belief which comport with their own spiritual mission." (Doc. 68, ¶ 15, p. 17.) Contrary to the Defendant's implication that Mr. Robert did not assert that Zoroastrian teaching allegedly formed the basis, at least in part of the Defendant's belief, the record proves he did.

The Defendant's points 3.) and 4.) assert insufficient, untimely and or inadequate legal research on Mr. Robert's part. Mr. Robert's filings specifically (Doc. 34 and Doc. 68) prove the contrary. Additionally, a three-day pre-trial evidentiary hearing was held on the issues discussed

[2] Church of the Cognizance, the church founded by Defendant in 1991 (Doc. 34, p. 12).

before United States District Judge Judith C. Herrera in Santa Fe, New Mexico, on August 21-23, 2006.

Defendant's point 4.) alleges Mr. Robert did not exercise due diligence that a.) the ". . . $100,000 cash bond that the court speculated provided motive other than religious *[sic]* did not exist at the time alleged." Defendant's statement refers to the aforementioned hearing in Santa Fe before Judge Herrera. Judge Herrera, in her decision as to whether RFRA applied (Doc. 192), stated that, while testifying, co-defendant Kripner said he was hired to transport the marijuana he and the Defendant were in possession of in order to raise bond money for Defendant's brother-in-law. Defendant's brother-in-law, Joseph Butts, was arrested in Missouri while transporting marijuana for the Defendant his "church". (Doc. 41, p. 1, 2.) Kripner testified consistently before Judge Herrera in Santa Fe. Judge Herrera found Kripner credible (Doc. 192, ¶¶ 2 and 3, p. 35). The Defendant falsely claims Mr. Robert was not aware of Mr. Kripner's criminal history and that the government did not disclose exculpatory information as to Mr. Kripner. This is simply not the case. Mr. Kripner's criminal history was known to Mr. Robert as disclosed by the government. Mr. Kripner had at the time four misdemeanor convictions for Drug Paraphernalia (2001 age 17, 2002 age 19, 2003 age 20, 2005 age 22). He also had four misdemeanor convictions stemming from domestic issues; Threats or Intimidation 2003 age 20, Interference with Judicial Proceedings 2003 and 2004 age 20, and Disorderly Conduct 2004 age 21 (Kripner PSR, pgs. 12-15, ¶¶43-50, 06-CR-538-003 JH). This was known to Mr. Robert and he had an opportunity to cross-examine Kripner in a pre-trial hearing before Judge Herrera on August 22, 2006 in Santa Fe, New Mexico. Further, Mr. Robert had knowledge that not only had Mr. Kripner been convicted of several misdemeanors, he knew Kripner had been involved in drug dealing.

"Question (by Mr. Robert): It turns out you are a drug dealer, though, doesn't it?"

"Answer (by Kripner): Correct."

(Motion Hearing on August 22, 2006, 06-CR-538 TR at 296, ¶¶15-17.)

Hence, it is clear that Mr. Robert was well aware of Mr. Kripner's criminal history and, in fact, utilized it in impeaching Kripner. It should be noted that Defendant's subsequent counsel, Jerry Daniel Herrera, actually received the discovery, including Mr. Kripner's criminal history, from Mr. Robert (see Affidavit of Jerry D. Herrera attached hereto as Exhibit A). Mr. Herrera was appointed Defendant's attorney on May 17, 2007.

The Defendant's point 5.) is no less convoluted than most of Defendant's assertions made pursuant to his instant motion. The Defendant complains that Mr. Robert apparently failed to assert that Dr. Bagli's[3] testimony was an implicit concession that Defendant was professing to hold beliefs based on Zoroastrian teachings and, regardless as to who's beliefs were more correct, they were thereby conceded to be religious in nature.

To the extreme contrary, Dr. Jehan Bagli's testimony was directly opposed to the idea that the Defendant's beliefs even remotely resembled Zoroastrian teachings. During direct examination in a pre-trial hearing before Judge Herrera, Dr. Bagli testified:

Q: And is this a result of any intoxication?

A: No, not that I know of, absolutely not.

Q: And what does intoxication mean in the Zoroastrian faith? How would that be viewed in the Zoroastrian faith?

A: Zoroastrian faith of mind is a crucial core of existence. Mind is something that leads you to find truth and what is right, to reason and intelligence. And mind is consider *[sic]* as a priceless gift to mankind. Any mind-altering

[3] Dr. Jehan Bagli, an ordained Zoroastrian priest as well as a renowned chemist specializing in medical chemistry of drugs/plants who testified during the hearing in Santa Fe before Judge Herrera on August 23, 2006 (TR at 309 06-CR-538) as an expert witness in the areas of medical chemistry and Zoroastrian religion (TR at 315, ¶¶23-24 August 23, 2006).

substances used are defiling and abusing that gift of God, and that is not acceptable in Zoroastrianism and in fact, prophet Zoroathustra opposed the use of these kind of substances that were used in the preexisting religions of his time.

Q: Tell us of the concept of Ahoudamasta, you mentioned that?

A: Ahoudamasta, Zoroathustra taught the worship of one god, and that's why Zoroastrianism is unanimously considered as the first monotheistic religion in the history of mankind. And that god he called or named Ahoudamasta, meaning the lord of wisdom or the wise lord. And that is the entity that we worship.

Q: Is haoma a god equal to. . . .

A: Haoma is not a god, no. **In Zoroathustra** *[sic]* **time haoma was not worshiped, there was no plant in the religious practices in his era.** (Emphasis added.)

Q: Is haoma worshiped today?

A: Is haoma ceremony is performed today, it's the central sacrament, yes.

Q: But is it worshiped as a god?

A: No; it's not worshiped as a god, no.

Q: Let me show you government's exhibit 2. If someone were to smoke a cigarette, is that a violation of Zoroastrian faith?

A: Right. Well, fire is, again, a central symbol of Zoroastrian rituals, and it is actually interpreted by prophet Zoroathustra as the representation of truth and what is right. And it is, it is in fact, in Zoroastrian religion our embodiment of god in the corporal existence. So fine, a practicing Zoroastrian is not supposed to smoke because it is the desecration of that sacred element of fire.

Q: And what if one smokes a narcotic, or marijuana, for instance?

A: Well, smoking marijuana, or any hallucinogenic substance is a desecration of good mind that Zoroathustra taught is crucial to the living of life of truth and right (Tr. Aug. 23, 2006 06-CR-538 JH ¶¶322-324).

We can see that the testimony of Dr. Bagli, an ordained Zoroastrian priest, shows that Defendant's main tenant, the smoking of marijuana, is wholly incompatible with the Zoroastrian

faith. Mr. Robert could not do what the Defendant wanted, because to do so would not be truth, would not be right. The Defendant's logic is flawed for in no way can Dr. Bagli's testimony be construed as an "implicit concession" that the Defendant was "professing to hold beliefs on Zoroastrian teachings . . . as thereby conceded to be religious in nature." The Defendant would have had Mr. Robert argue that which was untrue. That Mr. Robert could not do. Defendant's fifth point pursuant to his fifth ground should be summarily dismissed.

Defendant's sixth and last point under his second ground asserts Mr. Robert "failed to motion for suppression *[sic]* of evidence gathered under questionable circumstances from Defendant's*[sic]* and their adult childrens *[sic]* Arizona residences *[sic]*. The United States interprets this to mean Defendant asserts Mr. Robert failed to pursue a baseless motion to suppress. The Defendant's complaint appears not to involve the motion to suppress filed on Defendant's behalf by Mr. Robert on April 18, 2006 (Doc. 39). As this motion, which was denied by Judge Herrera on July 5, 2006 (Doc. 117) involves the Defendant's Lordsburg arrest. Instead the Defendant seems to complain about the statements given by his son-in-law, Tim Wiedmeyer regarding Defendant's drug activities. (Doc. 41, p. 4, ¶C.) Of course, the Defendant had no standing to complain, he cannot assert a right which did not belong to him. Hence, Mr. Robert was precluded from asserting such a motion.

Clearly, Defendant failed to show that Mr. Robert's performance was deficient as required by *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Defendant failed to identify acts or omissions by Attorney Robert that are "outside the wide range of professionally competent assistance." *Id.* at 690. Defendant also failed to establish he was prejudiced by his attorney's deficient performance. As set out previously, this court can dispose of an ineffectiveness claim for lack of prejudice, without determining whether the alleged errors were legally deficient. *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir. 1993).

D. Defendant's Ground Three Alleging a Failure to Disclose Evidence Favorable to the Defendant Is Also Groundless and Should Also Be Summarily Dismissed.

The United States is under a continuing obligation to dislcose evidence favorable to the Defendant in a criminal prosecution. *Giglio v. United States*, 405 U.S. 150 (172). *Giglio* inquiries were made of case agent Zarate, as well as all testifying United States Border Patrol agents. further, the same inquiries were made of all government witnesses.

After diligent inquiry, all government witnesses responded that they had never been found not to be credible by any presiding judge. Furthermore, none had ever been found to be in violation of or were under a pending investigation by their respective agency, including any violations or investigations involving moral turpitude.

The Defendatn cannot identify any such violation on the part of the United States. Additionally, any and all of co-defendant Kripner's criminal history and/or information which might lead to impeachable information was given to Defendant's attorney(s). This included Kripner's propensity to smoke, transport and possess marijuana. (Doc. 41, pgs. 3, 4.) It should be again noted that Kripner was subject to cross-examination during the three-day Santa Fe hearing. Kripner's marijuana activities were noted by Judge Herrera in her Memorandum Opinion and Order (Doc. 192, p. 33, fn. 21).

Finally, Defendant's attorney Jerry Daniel Herrera sets out in his affidavit (Exhibit A) that he did indeed receive discovery from Mr. Robert which included Kripner's criminal history. Therefore, Defendant's third ground should be dismissed as baseless.

E. Defendant's Fourth Ground, a Claim That He Was Denied a Right to a Fair Trial Should Be Summarily Dismissed.

As supporting facts, the Defendant asserts "facial evidence of judicial bias that resulted in a prohibition of presenting evidence in an adversarial forum with the hope of influencing the juries

[sic] determination of guilt or innocence . . . there were off bench ties and activities *[sic]* seen as hostile to the use of cannabis for any purpose, as well as questionable holdings and findings from the bench." The Defendant is again apparently making accusations that District Judge Herrera was biased and demonstrated bias via her rulings. The Defendant can demonstrate no such unfair bias on Judge Herrera's part. Just as all his previous tirades were baseless, so is this one. The United States Court of appeals for the Tenth Circuit agreed with Judge Herrera, affirming her judgment (Doc. 018424733).

F. Defendant's Fifth and Last Ground, an Attack on His Second Pretrial Counsel Jerry Daniel Herrera Should Also Be Summarily Dismissed.

Defendant sets out three sub-points. The second and third are familiar and predictable – those terrible twins, "inadequate communication . . ." and "insufficient and/or untimely legal research . . .", which offer little. Before discussing Defendant's sub-point one, it should be noted that Defendant's second counsel, Mr. Herrera, is board certified. Mr. Herrera is board certified in the area of criminal law trial specialization and has been so certified continuously since 1991. Mr. Herrera, like Mr. Robert, enjoys an excellent reputation as an attorney.

Addressing Defendant's sub-point one, the Defendant once again asserts impropriety on the court's part. The Defendant claims Mr. Herrera was ineffective because he "failed to address the impropriety of the court's *[sic]* issuing a memorandum opinion and order prior to the deadline for or reply to governments *[sic]* response to the joint second motion to dismiss." (Doc. 347.)

Firstly, the Defendant's point one is convoluted and confused. docuemnt 347, "Defendant's Joint, Second Motion to Dismiss the Indictment", was filed on July 31, 2008. The government replied on August 5, 2008 (Doc. 355). The Court issued a Memorandum Opinion and Order (Doc. 359) on August 6, 2008. This obviously negates the Defendant's claim. The Court's Memorandum was issued subsequent to the government's response. Hence, all was done in due course and in

proper sequence. The Defendant's claims are facially groundless and show no ineffectiveness on Mr. Herrera's part. As a result, Defendant's ground five should also be summarily dismissed as it missed the *Strickland* "target" by a mile.

III. CONCLUSION

The Defendant's frustration appears to stem from his disagreement with the law of the land. Statutes which make Conspiracy to and Possession of distributable amounts of Marijuana illegal.[4] His frustration is again exhibited by his latest filing. His frustration is demonstrated by his unfounded, unsubstantiated and cavalier assertions. Since the Defendant fails to set out actionable grounds and conversely offers no factual basis for any of his assertions, his motion should be summarily denied without a hearing.

STATEMENT REGARDING EVIDENTIARY HEARING

"Under 28 U.S.C. § 2255, the district court is required to conduct an evidentiary hearing unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Kennedy*, 225 F.3d 1187, 1193 (10th Cir. 2000). "Denial of an evidentiary hearing is reviewed for abuse of discretion." *United States v. Hardridge*, 285 F. App'x. 511, 517 (10th Cir. 2008) (citing *United States v. Clingman*, 288 F.3d 1183, 1187 n. 4 (10th Cir. 2002)). As previously discussed, the record conclusively demonstrates that Defendant is entitled to no relief. Hence, no evidentiary hearing is required or appropriate.

Based on the foregoing arguments and authority, the United States respectfully asks the Court to dismiss Defendant's § 2255 motion with prejudice.

[4] 21 U.S.C. §§ 846 and 841.

Respectfully submitted,

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I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court using CM/ECF, which will electronically deliver a copy to defense counsel of record, on this date.

/s/ Luis A. Martinez
LUIS A. MARTINEZ
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