IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civ. No. 11-928 JH/ACT
Cr. No. 06-538 JH

DANUEL DEAN QUAINTANCE,

Defendant.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION[1]

1. This is a proceeding brought pursuant to 28 U.S.C. § 2255. Defendant and his co-defendants "were charged with possession of more than 50 kilograms of marijuana with the intent to distribute in violation of the Controlled Substances Act (CSA), 21 U.S.C. § 841, and with conspiracy to possess more than 100 kilograms with the intent to distribute in violation of the CSA, 21 U.S.C. § 846." *United States v. Quaintance*, 471 F.Supp.2d 1153, 1154 (D.N.M. 2006). On August 28, 2008, Defendant entered into a Conditional Plea Agreement [Cr. Doc. 374] ("Plea Agreement"), in which he reserved "the right to appeal any and all issues litigated through the pendency of the proceedings." Plea Agreement [Cr. Doc. 374] at 5.

2. The issue Defendant wanted to appeal was whether his prosecution violated his First Amendment right to exercised his religion under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. The district court held a three-day hearing on the issue and concluded his rights were not violated. *See* 471 F.Supp.2d 1153. The issue was then appealed to

[1] Within 14 days after a party is served with a copy of the Magistrate Judge's Report and Recommendation (R&R) that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to the R&R in the United States District Court. A party must file any objections within the 14-day period allowed if that party wants to have appellate review of the R&R. If no objections are filed, no appellate review will be allowed.

the Court of Appeals for the Tenth Circuit, *see United States v. Quaintance*, 608 F.3d 717 (10th Cir.), *cert. denied*, --U.S.--, 131 S.Ct. 544, *cert. denied*, -- U.S. -- 131 S.Ct. 547 (2010), which affirmed the district court.

3. The issue in this § 2255 proceeding is whether Defendant received constitutionally ineffective assistance of trial and appellate counsel on several issues. The Government has filed its Answer [Doc. 8]. For the reasons set forth below, the Court recommends that the Motion to Vacate Judgment and Sentence Pursuant to 28 U.S.C. § 2255 [Doc. 1] be denied and the case dismissed with prejudice.

4. Defendant raises several grounds for relief, all premised on ineffective assistance of trial and appellate counsel. The Court agrees with the Government that it is difficult to determine exactly what Defendant is arguing (*e.g.*, "Inadequate communication as apparent in erroneous statements and arguments to issue that were presented on appeal."). Taken as a whole, however, the Court determines that Defendant argues counsel did not properly present his RFRA claims either to the district court or the Tenth Circuit and that counsel overlooked proper case law, failed to properly examine the evidence, and other failures concerning the evidence.

Factual Background

5. On February 22, 2006, Defendant, his wife, Mary, and Timothy Jason Kripner encountered Border Patrol Agents who stopped their vehicles near Lordsburg, New Mexico. Mr. Kripner's vehicle contained four bundles of marijuana weighing approximately 172 pounds; Agents determined that the Kripner and Quaintance vehicles were driving in tandem and all three individuals were arrested. Kripner was in possession of a "Church of the Cognizance certificate signed by Defendant. After Defendant was arrested he stated that he was the head of the Church of the Cognizance and had a right to the marijuana. United States' Response [Doc. 8], at 2-3.

Defendant, his wife, and Kripner were subsequently indicted and on August 18, 2008, Defendant entered into his Conditional Plea Agreement. On January 8, 2009, Defendant was sentenced to 64 months' imprisonment. *Id*. at 4-5.

Procedural History

6. On April 7, 2006, Defendant filed a Motion to Dismiss Indictment and Incorporated Memorandum [Cr. Doc. 34]. *See Quaintance*, 471 F. Supp.2d at 1154. Defendant's primary argument was that application of the CSA to the Church of Cognizance "constitutes a substantial burden on the exercise of religion by members of the Church . . . ." *Id*. at 1155. The Government agreed that the CSA substantially burdened Defendant's religious beliefs. As stated by the district court, "[a]ccordingly, the only questions before the Court are (1) whether Defendants' beliefs are religious, and not simply a philosophy or way of life, and (2) whether those beliefs are sincerely held." *Id*.

7. "A person claiming that the government has placed a substantial burden on his or her practice of religion must establish that the governmental action (1) substantially burdens (2) a religious belief, not just a philosophy or way of life, (3) which belief is sincerely held. *United States v. Meyers*, 95 F.3d 1475, 1482 (1996)." *Quaintance*, 471 F. Supp.2d at 1155. The district court then noted that in *Meyers*

> the Tenth Circuit set forth the following five factors a district court should consider in determining whether a belief is religious for purposes of RFRA: (1) the ultimate ideas, (2) metaphysical beliefs, (3) moral or ethical system, (4) comprehensiveness of beliefs, and (5) accouterments of religion.

471 F. Supp.2d at 1155-56 (citing *Meyers*, 95 F.3d. 1475, 1483). The district court held a three-day evidentiary hearing to make these factual determinations.

8. At the conclusion of the hearing, the district court determined that Defendant had only established one of the five *Meyers* criteria "indicative of whether a particular set of beliefs is 'religious' for purposes of RFRA. The Court therefore concludes that Defendants have not met their burden of demonstrating by a preponderance of the evidence that their beliefs are 'religious' within the meaning of RFRA. Accordingly, the Court denies the Motion to Dismiss the Indictment." 471 F. Supp.2d at 1170.

9. The district court then went on to note "that Defendants' beliefs are more aptly characterized as secular and therefore not entitled to statutory protection." *Id.* Notable among the beliefs was Defendant's belief that "marijuana is a provider of all things needed by human beings." *Id.* The district court found that Defendant's beliefs were not sincerely held, because Defendant testified that after a few years of smoking marijuana for recreational or medicinal purposes, he then began to believe the physical effects were "religious." *Id.* at 1171. The court stated that the sum of the evidence "indicates that Defendants created their 'religion' to justify their civil and social belief that marijuana produces no victim and should be legalized." *Id.*

10. Finally, the court noted that the quantity of marijuana found in Defendant's possession supported the finding of religious insincerity. "Two hundred and twenty-nine kilograms of marijuana is equivalent to 229,000 marijuana cigarettes. This quantity of marijuana suggests that Defendants possessed marijuana for commercial, as opposed to religious, purposes." *Id.* at 1172.

11. After entering his guilty plea, Defendant appealed the district court's decision to the Tenth Circuit. *See* 608 F.3d 717 (10th Cir. 2010). The district court's decision was affirmed.

Discussion

12. The standard for ineffective assistance of trial or appellate counsel is set forth in *Strickland v. Washington*: the defendant must show both that counsel's performance fell below an

objective standard of reasonableness, and, but for this deficient performance, the result of the proceeding would have been different. 466 U.S. 668, 687-88, 694 (1984). Counsel's errors which have no effect on the judgment do not constitute ineffective assistance of counsel. *Id*. at 691. "To be deficient, the performance must be outside the wide range of professionally competent assistance. In other words, it must [be] completely unreasonable, not merely wrong." *Hooks v. Workman*, 606 F.4d 715, 723 (10th Cir. 2010 (quotation omitted).

13. In Ground one, as near as the Court can determine, Defendant argues that appellate counsel was ineffective for not listing all issues presented for review in his brief before the Tenth Circuit. In its opinion affirming the district court, the Tenth Circuit noted that counsel had not briefed the issue of whether the district court erred in not sending the RFRA claim to the jury, but only raised it in oral argument. 608 F.3d at 721 n.2. The court stated it would not "entertain this late-blossoming objection." *Id*. However, the court noted, "it's unclear whether Mr. Quaintance even *could* raise such objections to the district court's decision, given that the Quaintances specifically *asked* the district court to take evidence and rule on the religiosity and sincerity question before trial as it did." *Id*.

14. Because the "religiosity and sincerity" issues were put in the motion to dismiss at the Defendant's request, then appellate counsel cannot be deemed ineffective for failing to raise the issue in his briefing before the Tenth Circuit. To the extent Defendant argues, and it is not at all clear, that trial counsel was ineffective for putting the "religiosity and sincerity" questions in a motion to dismiss rather than insisting on a trial to let the jury decide these questions, *see* 608 F.3d at 732 n.2, that claim also fails. The Tenth Circuit noted, among other things, the "overwhelming . . . evidence that the Quaintances were running a commercial marijuana business with a religious front . . . ." *Id*. at 724. Even if trial counsel were deemed ineffective for putting these issues in a

motion to dismiss, Defendant cannot show prejudice; *i.e.*, that he would have prevailed at a trial on the merits.

15. Defendant's Ground two alleges that trial counsel was ineffective for failing to argue "that *Meyers* was inapplicable to claims related to a religious defense" because *Meyers* was distinguishable on the facts. The Tenth Circuit used the "clearly erroneous" standard of review. Defendant argued that sincerity should be "viewed as a 'constitutional fact' meriting 'independent' or *de novo* review." 608 F.3d at 721 n.3 (citation omitted). The court stated:

> Even assuming without deciding we were free to revisit the governing standard of review, we question whether *de novo* review would be appropriate or make any difference in this case. Even when the constitutional fact doctrine applies, credibility determinations remain subject to clear error . . . , and a sincerity finding is in the end "almost exclusively a credibility assessment . . . ." Further, for reasons that follow, we consider the district court's sincerity finding persuasive under any standard of review that conceivably might pertain.

Id. (citations omitted). Accordingly, even if counsel was ineffective for failing to raise this distinction, Defendant cannot show prejudice: the Tenth Circuit would have ruled the same way under any standard of review.

16. As the Government points out, Defendant also raises, in Ground two, several *non sequitur* issues that are all belied by the record. Contrary to Defendant's assertions, Judge Herrera found co-defendant Timothy Jason Kripner's testimony to be credible. [Cr. Doc. 192 at 35.) Trial counsel was aware of Kripner's past criminal history. *See* Doc. 8-1, Affidavit of Jerry Daniel Herrera.

17. Defendant next argues in Ground two that counsel "[f]ailed to assert that governments stated purpose for Dr. Bagli's testimony was an implicit concession that defendant's were professing to hold beliefs based on Zoroastrian teachings, and regardless as to who's beliefs

are more correct, they were thereby conceded to be religious in nature[.]" The Court assumes that Defendant is arguing that because Zoroastrianism is a religion and the Church of Cognizance follows some of its precepts, then the Church of Cognizance should also be considered a religion. However, Dr. Bagli, an ordained Zoroastrian priest, testified that "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." Response [Doc. 8] at 11-12 (quoting August 23, 2006 transcript, ¶¶ 322-324).

18. Finally, for his Ground two claims, Defendant says counsel was ineffective for moving to suppress evidence obtained from Defendant's and his adult children's residences. It is unclear to what evidence Defendant refers, why counsel was ineffective, or how Defendant was prejudiced thereby.

19. All of Defendant's arguments set forth in ¶¶ 16-18, *supra*, are included in Ground two and are without merit. None of his arguments indicate how counsel fell below an objective standard of reasonable representation, nor did Defendant indicate how he was prejudiced thereby.

20. Ground three asserts that Defendant's "conviction" was "obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant." He states that the unidentified evidence would have challenged the credibility of Kripner, case agent Zarate, and the credibility of various border patrol agents. "The Due Process Clause of the Fifth Amendment requires the prosecution to disclose all evidence that favors the defendant and is material either to guilt or punishment." *United States v. Ford*, 550 F.3d 975, 981 (10th Cir. 2008). A defendant claiming the prosecution withheld exculpatory evidence must establish by a preponderance of the evidence: (1) the prosecution suppressed the evidence; (2) the

evidence was favorable to the defendant; and (3) the evidence was material. "Material" means there is a reasonable probability that the result of the trial would have been different. *Id*. at 981.

21. Defendant does not apprise the Court of the nature of the evidence to which he refers. He has asserted that the prosecution did not provide Kripner's criminal history to Defendant's counsel, but as to the other individuals cited he does not state what evidence he believes was withheld and why he believes it was material. As was shown above, Kripner's criminal history was apparently known to defense counsel. But there is no indication that Judge Herrera would have changed her finding of Kripner's credibility on the matters to which he testified. The record indicates that *all* Defendants were transporting large amounts of marijuana and had done so for quite some time. Given these activities, whether or not Kripner had previously been arrested would seem to have little effect on Judge Herrera's credibility determination. As for the other individuals, there is simply nothing put forth by Defendant to overcome the Government's contention that it fully complied with the mandates of *Giglio v. United States*, 405 U.S. 150 (1972).

22. Ground four alleges Defendant was denied his right to a fair trial.

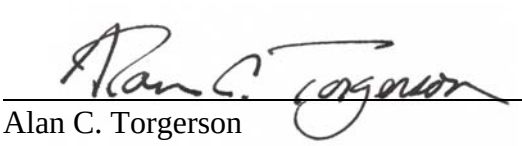
> Facial evidence of judicial bias that resulted in a prohibition of presenting evidence in an adversarial forum with the hope of influencing the juries determination of guilt or innocence, there were off bench ties and activities seen as hostile to the use of cannabis for any purpose, as well as questionable holdings and findings from the bench.

Motion [Doc. 1] at ¶ D (Ground four), at 6. The Court agrees with the Government that this ground should be summarily dismissed. An unfavorable ruling is not evidence of judicial bias; the claims are conclusory and without substance, *see Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991) (conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based).

23. Ground five claims counsel Jerry Daniel Herrera (who was appointed in 2007) was ineffective for the same reasons he asserted against his first attorney, *see* ¶¶ 4 & 13-15, *supra*. Those issues of mis-communication have been addressed. As the Government points out, Defendant's other claims about counsel's failure to file responses are negated by the docket entries. *See* Response at 15 and docket entries therein. Again, Defendant has failed to show that counsel's performance was constitutionally deficient or that he was prejudiced thereby. *Strickland*, *supra*.

RECOMMENDED DISPOSITION

I recommend that Defendant's Motion to Vacate Judgment and Sentence Pursuant to 28 U.S.C. § 2255 be denied; that no Certificate of Appealability be issued; and that this case be dismissed with prejudice.



Alan C. Torgerson
United States Magistrate Judge