IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 07-cv-00803-WYD
Criminal Action No. 00-cr-00481-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROD SCHULTZ,

Defendant.

ORDER

THIS MATTER is before the Court on the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 filed by Rod Schultz ("Schultz"). Also pending is a request for reconsideration of my ruling denying Schultz leave to interview the trial jurors. For the reasons stated below, Schultz's motion for reconsideration is denied. Schultz's Motion to Vacate, Set Aside, or Correct Sentence is also denied.

I. BACKGROUND

This case arose out of an investigation of widespread abuse of prisoners and falsifying records to cover up that abuse at the United States Penitentiary, Florence, Colorado. On February 6, 2001, Schultz and six other corrections officers were charged in a superseding indictment with one count of violating 18 U.S.C. 241 (conspiracy to deprive the inmates of their rights) and nine counts of violating 18 U.S.C. 242 (deprivation of rights under color of law).

On June 24, 2003, the jury convicted Schultz on the conspiracy count and one count of violating 18 U.S.C. § 242. That count charged Schultz with unlawfully beating inmate Pedro Castillo ["Castillo"] on April 5, 1996. Schultz was acquitted on two other counts of allegedly unlawfully beating inmates. On November 21, 2003, Schultz was sentenced to 41 months' imprisonment. Schultz appealed his conviction and sentence.

On June 14, 2004, while the appeal from his conviction was pending, Schultz filed a motion for a new trial under FED. R. CRIM. P. 33 based on newly discovered evidence. The proffered newly discovered evidence was a statement from Castillo indicating that he did not believe that Schultz was one of the guards who assaulted him. At the trial, Officers Charlotte Gutierrez ["Gutierrez"] and Kenneth Mitchell ["Mitchell"] testified regarding the beating of Castillo and Schultz's role in it. Castillo did not testify. On September 14, 2004, Schultz filed an amended motion for new trial, adding a claim that the government had suppressed exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to produce a videotape made on April 6, 1996, the day after the assault on Castillo.

On October 4 and December 6, 2004, I held hearings on the new trial motions and heard testimony from Castillo and other witnesses. By Order dated December 10, 2004, I denied the motions for a new trial. I first found that Schultz had not been diligent in obtaining this evidence. *Id.* at 4. Second, I found that even if Schultz had been diligent, the newly discovered evidence was merely impeaching. *Id*. at 4-5. And, third, I found that there was not a reasonable probability that Castillo's testimony would result in an acquittal because Castillo's testimony was inconsistent with Schultz's defense, Castillo's own prior statements, and the testimony of the two corrections officers who

testified at trial. *Id*. at 6. I also denied Schultz's motion for new trial based on the alleged *Brady* violation. *Id*. at 7-8. Schultz appealed.

On October 21, 2005, while his appeals were pending, Schultz filed another motion for a new trial based on more newly discovered evidence. Schultz alleged that the government had falsely accused the defendants of destroying the videotape of the April 5, 1996 assault on Castillo. Schultz raised this issue in his direct appeal, but had not previously raised it in this Court.

On February 28, 2006, the Tenth Circuit affirmed Schultz's convictions, rejecting the arguments Schultz raised on appeal regarding the destruction of the April 5, 1996 videotape. See *United States* v. *LaVallee*, 439 F.3d 670, 701 (10th Cir. 2006). The Tenth Circuit affirmed this Court's denial of the 2004 motion for new trial on the ground that Schultz had not shown due diligence. *Id*. at 700-701. The Tenth Circuit also found no *Brady* violation for failing to produce the April 6, 1996, videotape. *Id.* at 699.

On August 24, 2006, I denied Schultz's second motion for new trial. On April 19, 2007, Schultz filed a motion to vacate his conviction under 18 U.S.C. § 2255. The government was ordered to file an answer or other pleading by May 11, 2007. The government was later granted an extension of time to June 18, 2007, and filed a response in opposition to Schultz' motion on that date. Instead of filing a reply, Schultz filed a "Motion for Leave to Interview Trial Jurors and to Stay the Proceedings Until Such Interviews Can Be Completed." That motion was denied on October 30, 2008, and Schultz was ordered to file a reply in support of his § 2255 motion within twenty (20) days of the Order.

On November 25, 2008, after being granted leave to file the motion out of time, Schultz filed a motion seeking an extension of time to file a responsive pleading regarding his motion seeking leave to interview the trial jurors. By Minute Order of November 26, 2008, that request was denied as moot since the motion had already been denied. However, I noted that to the extent Schultz may seek an extension to file a reply to his § 2255 motion, he was granted up to December 1, 2008, in which to file that reply. Schultz filed a reply brief to his § 2255 motion on November 30, 2008.

On both November 30, 2008 and December 16, 2008, Schultz filed a "Response to October 30, 2008 Order". Those filings appear to be identical. In those filings, Schultz first moves for reconsideration of the Order denying Schultz leave to interview trial jurors. Second, the filings contain a reply to the § 2255 motion.

On December 31, 2008, Schultz filed a "Corrected Motion for Stay of Proceedings to Permit Defendant to Present Supplemental Information" regarding the § 2255 motion. That information related to an expert report to be tendered that Schultz stated would address whether a reasonable jury would acquit Schultz if it had the benefit of Castillo's testimony as well as the evidence presented at trial. The motion did not seek to present supplemental information beyond the allegations of ineffective assistance of counsel regarding Castillo. On January 21, 2008, a Minute Order was filed that granted the motion to stay. The proceedings related to Schultz's § 2255 motion were stayed until February 10, 2009, in order to allow Schultz to present additional information to the Court.

On February 10, 2009, Defendant filed a "Supplement to Response to October 30, 2008 Order. That supplement did not address the expert report that Schultz had

stated was the basis of his motion to stay the proceedings. Instead, I construe this filing to be a supplemental reply to the § 2255 motion.

II. ANALYSIS

I first note that the procedural posture of this case is somewhat complicated due to the fact that Schultz made a motion for reconsideration in a document that was not filed as a motion but as a response to a Court order. The motion for reconsideration should have been filed as a separate motion, and I will treat it is such even though it was not filed correctly. Further, Schultz purported to reply to the § 2255 motion in that same response to the Court Order, but did not properly caption it is a reply brief. He then made another filing purporting to be a reply on a later date, which was also not correctly captioned as a reply brief. To the extent that this later filing was a supplemental reply, Schultz should have asked for leave of Court to make this filing. Nevertheless, I will consider both filings as part of Schultz's reply, and deem the § 2255 motion at issue from the date of the last filing on February 10, 2009.

A. Motion for Reconsideration

I first address the motion for reconsideration of the Court's Order denying Schultz leave to interview trial jurors. Schultz asserts that the Court's reliance on FED R. EVID. 606(b) and *Tanner v. United States*, 483 U.S. 107, 117 (1987) suggests that he was not clear in his request for permission to interview the trial jurors. His purpose is not to attack the juror's deliberative process, but to determine whether there is a reasonable probability that the jury would have returned the same verdict if it had heard Castillo testify. Thus, he asserts that his request is not barred by Rule 606(b) or the cases relied on by the Court in its previous Order.

Schultz further asserts that his request to interview the jurors is in direct response to the government's responsive pleading which relied on language from the Order of December 10, 2004. In that Order, the Court opined that even if Castillo had testified at trial it would probably not have resulted in an acquittal. The government adopted that language as its total response to Schultz's § 2255 motion. Schultz does not agree with the conclusion of the Court or the government. He states that he is confident that if he is allowed to conduct a very limited interview of the jurors he can quickly establish there is a reasonable probability that they would have reached a different verdict if Castillo had testified before them. Schultz argues that the authorities cited by the Court indicate that it has much discretion to allow inquiry of the jurors post-trial. Further, Schultz notes that he could not locate any authority on this precise fact situation, but submits it would be in the interest of justice to allow inquiry of the jurors.

Turning to my analysis, "[g]enerally, the 'law of the case' doctrine dictates that prior judicial decisions on rules of law govern the same issues in subsequent phases of the same case." *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1224 (10th Cir. 2007). A motion to reconsider "'is not at the disposal of parties who want to rehash old arguments.'" *Nat. Business Brokers, Ltd. v. Jim Williamson Productions, Inc.*, 115 F. Supp. 2d 1250, 1255 (D. Colo. 2000) (quotation and internal quotation marks omitted). "Rather, as a practical matter, '[t]o succeed [on such a motion], a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Id.* (quotation omitted). "'A motion to reconsider . . . should be denied unless it clearly demonstrates manifest error of law or fact or presents newly discovered evidence.'" *Id*. (quotation and internal quotation marks omitted); *see also Major v.*

Benton, 647 F.2d 110, 112 (10th Cir. 1981) ("[c]ourts have generally permitted a modification of the law of the case when substantially different, new evidence has been introduced, subsequent, contradictory controlling authority exists, or the original order is clearly erroneous").

In the case at hand, I find no error with my previous Order of October 30, 2008, denying Schultz's motion for leave to interview the trial jurors. First, Schultz has not stated any manifest error of fact or law. Contrary to Schultz's motion, I did not misapprehend the relief sought in the motion and there was no factual error. Further, I find that Schultz has not demonstrated a manifest error of law; indeed, he has cited absolutely no authority in support of his motion and he indicates that he found no such authority. This lack of authority demonstrates that a request for habeas relief needs to be supported by the facts and law of the case, not through *ex post facto* interviews of trial jurors asking them hypothetically what they would have done if the evidence had been different at trial. The motion to reconsider is also not based on newly discovered evidence. As noted in my previous Order, this request amounts to a fishing expedition and asks the jury to improperly speculate about what they would have done had the trial been tried differently. Accordingly, I reaffirm my Order of October 30, 2008, and deny Schultz's request for reconsideration of that Order.

B. Motion to Vacate, Set Aside, or Correct Sentence

I now turn to the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. Schultz asserts that he was denied due process and acknowledges that this was raised in the direct appeal. However, it is asserted that the claim raised in this motion is more complex and raises new grounds not asserted in the direct appeal.

Schultz also asserts that he was denied the effective assistance of counsel. This argument does not appear to have been raised in the direct appeal. Schultz requests in this motion that his conviction be set aside and the charges dismissed. In the alternative, if the charges are not dismissed, Schultz requests that the conviction be set aside and that he be granted a new trial.

Generally, the government contends in response that the Court should deny Schultz's motion to vacate his conviction without holding a hearing because he merely recycles arguments that have already been rejected by this Court, the Court of Appeals or both. Schultz has not shown why the Court should revisit these issues.

Turning to my analysis, Congress created a mechanism in 28 U.S.C. § 2255 for a defendant to challenge his sentence on specific grounds and also to raise any permitted collateral attacks on his judgment of conviction. A motion under § 2255 does not serve as an alternative to a direct appeal nor as a forum to recycle issues already raised and decided. "Failure to present an issue on direct appeal bars a defendant from raising it in a § 2255 motion 'unless he can show cause excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur.'" *United States* v. *Bolden*, 472 F.3d 750, 751-752 (10th Cir. 2006) (quoting *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993)). Also, arguments rejected on direct appeal will generally not be reviewed on a § 2255 motion absent an intervening change in the law of a circuit. *United States* v. *Pritchard*, 875 F.2d 789, 791 (10th Cir. 1989).

After reviewing the entire file, I find that an evidentiary hearing is not necessary. I note that I held a hearing on many of the same issues in connection with Schultz's

motion for new trial. At that hearing, I heard argument about the denial of due process, and heard testimony from Castillo as to what his testimony would have been if he had been called to testify at trial and/or would be called to testify at a new trial. I find no reason for another hearing on many of the same issues, and find that the motion and file conclusively shows that Schultz is not entitled to relief. 28 U.S.C. § 2255(b).

1. Denial of Due Process

I first address Schultz's argument that he was denied due process of law as guaranteed by the Fifth Amendment to the United States Constitution because of prosecutorial misconduct. I find that such claims are barred because they were raised and rejected in the direct appeal and/or because Schultz has not shown that he can succeed on the merits of these claims.

First, Schultz asserts that the prosecution failed to produce the April 6, 1996 videotape evidence that was favorable to the defense until after the trial was completed. Defendant argues that this tape should have been produced pursuant to *Brady v. Maryland*, 373 U.S. 83 (1969) and that he was denied his constitutional right to due process when the tape was not timely produced. I previously rejected this claim in connection with my denial of Schultz's motion for new trial (Doc. # 1615 at 7), and the Tenth Circuit affirmed. *United States* v. *LaVallee*, 439 F.3d 670, 699 (10th Cir. 2006). In affirming, the Tenth Circuit noted that while there was no dispute that the prosecution suppressed evidence within the meaning of *Brady*, there was not a reasonable probability that had the videotape been timely disclosed to the defense, the result would have been different. *Id*. at 698-99. In so finding, the Tenth Circuit noted, among other things, that "[t]he tape merely shows Mr. Castillo cooperating with officers on the day

after the assault and as such, it has little bearing on what occurred the previous day." *Id*. at 699. Accordingly, the Tenth Circuit held that the videotape was not material and that Schultz's due process rights were not violated. *Id*. Since Schultz has not shown an intervening change in the law, this argument is procedurally defaulted. Indeed, Schultz appears to acknowledge this in his reply brief.

Schultz also argues that there was a violation of due process because of the presentation of false evidence by the prosecution to convict him; namely, the prosecution wrongfully claimed throughout the proceeding that the defendants had destroyed a destroyed a videotape dated April 5, 1996 as part of their wrongdoing. Thus, it is argued that the destruction of this videotape meets the tests set forth in *California v. Trombetta*, 467 U.S. 479 (1984) and supports the dismissal of the indictment against Schultz.

Again, I rejected this argument in denying Schultz's 2005 new trial motion (Doc. # 1679 at 5-6) and the Tenth Circuit also rejected this argument. *LaVallee*, 439 F.3d at 701-702. In rejecting this argument, the Tenth Circuit acknowledged that part of the Government's pre-trial theory of the case was that the conspirators destroyed the tape to cover up any evidence of abuse. *Id*. At trial, however, the Tenth Circuit noted that the only statement that Schultz complained of on this issue "came in closing argument when Mr. Blumberg said that 'the removal of the video *camera* was a fake.'" *Id*. at 702 (emphasis added). The Tenth Circuit stated:

> This statement in no way indicates that Mr. Schultz destroyed the tape inside the camera. Rather, it references Mr. Schultz's role in the conspiracy-his job was to knock over the video camera so that it would not record the ensuing abuse. Because Mr. Blumberg did not argue before the

> jury that the defendants destroyed this evidence to cover up their crime, Mr. Schultz's argument is simply without merit.

Id.

The Tenth Circuit also found that there not a violation of *Trombetta*. It stated on this issue:

> Even if Mr. Schultz could show that the exculpatory value of the video was apparent before the video was destroyed, he fails to show that the tape was destroyed in bad faith. He argues that the failure of the Government to preserve the tape undermines the only reason the tape was created in the first place and it was therefore done in bad faith. To the contrary, there is unrebutted testimony that these tapes, used to ensure that the correctional officers used the proper procedures during forced-cell moves, were routinely destroyed in the ordinary course of business approximately two years after their creation. Mr. Schultz notes that the Government first became aware that Mr. Castillo was beaten when it spoke with Ms. Gutierrez in February 2000, nearly four years after the incident. When the defendants made their first request for the video in 2001, it had already been destroyed. . . .

Id. at 699. Schultz has not shown that the procedural bar is inapplicable to this claim and has not shown any intervening change in the law on this issue. Accordingly, I find that this claim is also barred.

Schultz also argues that the prosecutors had an affirmative duty to seek exculpatory evidence pursuant to *Brady* and that his due process rights were violated by the government's failure to seek out and preserve exculpatory evidence in the case, including the April 5, 1996 videotape that was destroyed by the government. As the government notes in its response, this appears to be the same argument made by Schultz on appeal, and I believe this claim was rejected through the Tenth Circuit's decision. Even if it was not, however, the Tenth Circuit's finding in the previous paragraph shows that this claim is without merit. As the Tenth Circuit noted, the

government did not find out that Castillo was beaten until February 2000. By the time it made its request for the video, the video had already been routinely destroyed in the course of business. Finally, I note that if this claim was not raised on direct appeal, Schultz has not shown cause excusing his failure to raise the issue on appeal.

It is also argued by Schultz that his due process rights were violated because the prosecution threatened witnesses to change their statements. He argues that the *modus operandi* of the prosecution team during the investigation was to routinely threaten potential witnesses with perjury charges, tell them their children would grow up without them while they were incarcerated, and other threats. It does not appear that this was addressed by the Tenth Circuit on direct appeal. Further, Schultz has not shown cause or explained why this was not raised in the appeal. Thus, it appears it is barred.

Even as to the merits of this claim, however, I find that Schultz cannot succeed. Courts have recognized that a due process violation can occur due to threatening remarks to witnesses from judges or the prosecution. *See Webb v. Texas*, 409 U.S. 95 (1972); *United States v. Nystrom*, No. 96-8082, 1997 WL 345973, at *3 (10th Cir. 1997); *see also United States v. Gabaldon*, 91 F.3d 91, 93 (10th Cir. 1996) ("[w]hen prosecutorial misconduct deprives a criminal defendant of a fair trial, the defendant's due process rights are violated"). According to the Tenth Circuit, "the ultimate issue is whether a prosecutor's statements result in 'such duress that [a] witness could not freely and voluntarily decide to testify . . ., thus depriving [the defendant] of his defense.'" *Nystrom*, 1997 WL 345973, at *3 (quoting *United States v. Smith*, 997 F.2d 674, 679 (10th Cir. 1993)).

In the case at hand, I find that Schultz has not shown that the government exerted such duress on the witnesses' minds as to preclude a witness from making a free and voluntary choice whether or not to testify. While Schultz references alleged threats that were made, he has not presented any evidence from any witness that these alleged threats impacted their decision to testify. Moreover, these so-called threats appeared to be advisements to the witnesses of what could happen if they testified untruthfully, *i.e.*, that they could face perjury charges and that their children would grow up without them if they were incarcerated. These type of threats do not rise to the level of prosecutorial misconduct. *Id*.

Finally, Schultz argues that the prosecution used "ostrich" tactics to refrain from discovering exculpatory evidence. For example, while the government interviewed Castillo on two separate occasions concerning the alleged assault, it never presented photographs of the officers working in SHU and never obtained corroboration by Castillo as to the persons who assaulted him, other than two officers whose names he could remember. From the testimony of Castillo in October 2004 before this Court, Schultz asserts that it is clear that if the government had shown him photographs of Schultz, he would have told them that Schultz did not beat him. Schultz contends that he would then not have been charged or, if charged, would have been found not guilty. Schultz argues in his reply that this is further evidence of prosecutorial misconduct.

Turning to my analysis, I first note that this claim is related to the previous argument that the prosecution failed to seek out and obtain exculpatory evidence, an argument which I already found was raised before the Tenth Circuit and was rejected through the Tenth Circuit's decision. However, it appears that Schultz did not make the

specific argument to the Tenth Circuit that he poses as an example to his argument, *i.e.*, that the prosecution did not show Castillo photographs of the officers or obtain corroboration from him as to the persons who assaulted him. As noted above, he asserts in his reply that this is another example of prosecutorial misconduct. To the extent that this is a new claim, not made in the direct appeal, Schultz has not shown why this claim should not be dismissed as procedurally barred, *i.e.*, he has not attempted to demonstrate cause and prejudice or a fundamental miscarriage of justice.

Even on the merits, however, I find that Schultz cannot prevail on this claim. Defendants face a high burden in seeking to reverse a conviction because of prosecutorial misconduct. "Unless the alleged misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process," the conviction will not be reversed. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 477 U.S. 168, 181 (1986)).

In the case at hand, I find that the alleged misconduct did not meet this test. First, the alleged misconduct is not affirmative misconduct but omissions of the government in connection with its failure to adequately confirm the identity of the officers who allegedly beat Castillo. However, it is undisputed that the government did interview Castillo about the beatings, as noted by the Tenth Circuit, and while he did not identify Schultz by name, Castillo stated that all of the officers who took part in the forced-cell move committed the abuse. *LaVallee*, 439 F.3d at 700. Several of Schultz's co-conspirators identified him as a participant in the forced-cell-move, and Schultz admitted that he participated in that move. *Id*. at 700-01. Schultz has not argued that any omissions in connection with confirming the identity of the officers who beat Castillo

were deliberate. I find that the fact that the government may not have been as thorough as Schultz would have liked does not rise to the level of a due process violation or prosecutorial misconduct. This is particularly true since the government had other evidence to substantiate its allegations that Castillo was beaten by Schultz, as noted above, and in the form of testimony from Officers Mitchell and Guttierez. Accordingly, I find that Schultz has not shown he was denied a fair trial in connection with the government's omissions in this regard.

2. Ineffective Assistance of Counsel

Schultz asserts as to his ineffective assistance of counsel that he had a good relationship with Castillo and was confident that Castillo would not testify against him. Schultz also asserts that he repeatedly asked counsel up through the trial to contact and interview Castillo, and that to the best of his knowledge his counsel did not contact or interview Castillo. Further, his counsel did not advise or suggest that it would be wise not to contract or subpoena Castillo as a matter of trial strategy, tactics or for any other reason. At trial, his counsel did not call any witnesses to testify on behalf of Schultz, relying only on their cross-examination of the government witnesses and closing arguments. On June 24, 2003, the jury returned a verdict finding Schultz guilty of assaulting Castillo. He was acquitted of the other two counts alleging he had struck and abused inmates. The jury found another defendant had acted with Schultz and convicted both of the conspiracy count.

After Schultz was sentenced his brother retained a private investigator to locate Castillo. According to Schultz, as soon as Castillo saw a photograph of him he stated that Schultz had never abused or struck him. He further stated that Schultz always

treated him fairly. Castillo made these same statements in testimony before the Court on a hearing on Schultz's motion for new trial. Further, Castillo testified that no one contacted him after he was interviewed by the FBI on December 1, 2000, until the date he was interviewed by the private investigator hired by Schultz's brother (on February 24, 2004).

Schultz asserts that only two witnesses were called to testify about the Castillo incident, Kenneth Mitchell and Charlotte Guttierez. Guttierez did not testify that she saw Schultz strike Castillo, although Mitchell did. Schultz argues that the testimony of these two witnesses regarding many of the facts of the Castillo incident were directly contrary to each other.

Schultz argues that it is clear that he was denied effective assistance of counsel because his counsel did not investigate what Castillo would say about whether he was beaten by Schultz as charged or subpoena Castillo to testify for Schultz as trial. He further argues that if his counsel had located and subpoenaed Castillo, he would have testified that Schultz never struck or abused him, and that this testimony would have been given greater weight by the jury than the testimony of Mitchell and Gutierrez. Thus, Schultz argues that Castillo's testimony would have resulted in a not guilty verdict on his behalf. Schultz asserts that there are a substantial number of cases where negligent pre-trial investigation and/or failing to locate and call witnesses to testify in the defendant's behalf resulted in a finding of ineffective assistance of counsel in violation of the Sixth Amendment.

Turning to my analysis, the Supreme Court has established a two-prong test to review ineffective-assistance-of-counsel claims. *See Strickland v. Washington*, 466

U.S. 668 (1984). Schultz must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance was prejudicial. *See id*. at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. There is a "strong presumption" that counsel's performance falls within the range of "reasonable professional assistance." *Id*. It is the defendant's burden to overcome this presumption by showing that the alleged errors were not sound strategy under the circumstances. *Id.*

In the case at hand, assuming that Schultz's allegations are correct about counsel's deficiencies, I find that Schultz has established that his counsel's performance fell below an objective standard of reasonableness.[1] The issue of whether Castillo was beaten by Schultz was obviously crucial to the case, and Schultz's counsel's alleged failure to try to locate and interview Castillo sufficiently alleges performance falling below the objective standard of reasonableness. *See Medina v. Barnes*, 71 F.3d 363, 367-68 (10th Cir. 1995) (trial counsel's failure to adequately investigate the only eyewitness and failure to fell below an objective standard of reasonableness).

Thus, I turn to whether Schultz has demonstrated prejudice. In order to demonstrate prejudice, Schultz must establish that counsel's performance rendered the proceedings "fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). In other words, he "must show that there was a 'reasonable probability' that the result would have been different but for the error." *Smith v. Workman*, 550 F.3d

[1] I have no response from defense counsel who represented Schultz at trial about the allegations and thus have no way to determine if these allegations are true. However, I will assume these allegations are true for purposes of the § 2255 motion.

1258, 1265 (10th Cir. 2008) (quotation omitted). I find that Schultz has not established that his counsel's performance was prejudicial, and thus find that this claim lacks substantive merit.

Specifically, I find that even if defense counsel had called Castillo to testify at trial regarding his new statements that Schultz did not beat him, there is not a reasonable probability that there would be a different outcome, *i.e.,* an acquittal. As noted in my Order denying Schultz's motion for new trial, testimony from Castillo would be merely impeaching. *See* Order of December, 2004, at 4-6. It is inconsistent with Schultz's own defense that Schultz was on duty that day and that no one who was on duty beat Castillo. This inconsistency is not, as Schultz argues, of *de minimus* weight.

More importantly, Castillo's new statements are inconsistent with other statements he gave to the FBI (that he does not know if Schultz beat him and/or that all of the officers who moved him on the day in question beat him). Further, at least one correctional officer testified that Schultz beat Castillo (Kenneth Mitchell) and the testimony of another correctional officer, Charlotte Gutierrez, also supported the charges against Schultz. Given the inconsistencies, even in Castillo's own statements, I find that an acquittal would not probably result from Castillo's statements.

In so finding, I have carefully considered all the arguments made by Schultz in his motion and replies. I recognize that there inconsistencies in the testimony of Mitchell and Gutierrez, but note that there were also substantial inconsistencies in the testimony/statements of Castillo. As such, I am not persuaded that the testimony of Castillo would outweigh that of Mitchell and Gutierrez. Further, the cases cited by Schultz are distinguishable. For example, in *Medina*, there was very little evidence in

the case to support the conviction, other than the eyewitness that counsel failed to adequately investigate. *Id*. at 368-69. Here, there was other evidence to support the conviction of Schultz, through the testimony of correctional officers Mitchell and Gutierrez. Moreover, the statements of Castillo are conflicting, as noted previously.

Schultz also raises for the first time in his Supplement to Response to October 30, 2008 Order that there were other failures to investigate by defense counsel that support his ineffective assistance of counsel claim. First, he asserts that defense counsel failed to contact or interview Cecil Freeman, a correctional officer who was part of the team and entered the cell and removed Castillo. Schultz argues that Freeman could have testified, contrary to the government's theory, that the brief meeting of the officers prior to the entry was simply to make everyone aware that Castillo was acting out, and that the entry into the cell was justified and necessary. Further, Schultz asserts that his counsel did not contact any of the persons who might have reviewed the video tape of the removal of Castillo which was destroyed in the normal course of business before the indictment. Interviews of those persons might have uncovered favorable evidence of what occurred. Finally, Schultz asserts that his counsel failed to contact or interview Castillo's cellmate, Mendez, and failed to investigate the removal of Castillo from his cell on April 6 and April 30, 1996.

I first address whether Schultz should be allowed to make these new arguments regarding failures to investigate. The defense submits it may bring these claims at this time even though it has not discussed them before, citing *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000) and *United States v. Ohiri*, 133 Fed. Appx. 555 (10th Cir. 2005). Schultz asserts that these claims clarify or amplify his claim of

ineffective assistance of counsel based on his trial counsel's failure to investigate and present evidence in his behalf.

The Tenth Circuit holds that "pursuant to Rule 15(c), an untimely amendment to a § 2255 motion 'which, by way of additional facts, clarifies or amplifies a claim or theory in the [original motion] may, in the District Court's discretion, relate back to the date of [the original motion] if and only if the [original motion] was timely filed and the proposed amendment does not seek to add a new claim or to insert a new theory into the case.'" *Espinoza-Saenz*, 235 F.3d at 504-05 (quoting *United States v. Thomas*, 221 F.3d 430, 431 (3d Cir. 2000)). Here, however, Schultz has not actually sought to amend his § 2255 motion to add these claims, instead asserting these claims only in a filing I have interpreted as a supplemental reply brief. Since these arguments were made in a reply brief, the government did not have the opportunity to respond to these arguments. Thus, I do not believe that a requested amendment to the § 2255 motion is properly before the Court.

Even if I were to construe the reply as containing a proper request to amend, I find that an amendment to the original § 2255 motion is not appropriate. The bulk of the arguments are new claims that do not clarify or amplify Schultz's original ineffective assistance of counsel arguments. This includes the claims that his counsel should have talked to Cecil Freeman about the facts surrounding the entry into Castillo's cell, the alleged failure to investigate the removal of Castillo from his cell on April 6 and April 30, 1996, and the alleged failure to contact any of the persons who might have reviewed the video tape of the removal of Castillo. None of these claims clarify or amplify his argument that his counsel failed to contact or interview the alleged victim in this case,

who would have had testified that Schultz did not beat him.[2] While the claim regarding the failure to contact Castillo's roommate may relate to his initial claim, Schultz has not shown how this failure to investigate amplifies or clarifies his original claim of ineffective assistance of counsel since he has not shown that Mendez actually would have anything favorable to the defense to testify about. Accordingly, I find that any request for leave to amend the § 2255 motion is properly denied.

Finally, although not raised by the government, it appears that Schultz's ineffective assistance of counsel claim asserted by Defendant may be procedurally barred. *See United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994) (court can raise this issue sua sponte). Schultz does not address the fact that this claim was not raised on direct appeal. Further, he makes no fact-based attempt to demonstrate cause and prejudice or a fundamental miscarriage of justice. However, I have decided this claim on the merits, not on this procedural bar.

IV. CONCLUSION

For the reasons stated above, it is

ORDERED that Schultz's Motion for Reconsideration of Order Denying Leave to Contact Trial Jurors (contained in Schultz's Response to October 30, 2008 Order) is **DENIED**. It is

[2] Moreover, with the exception of Freeman, Schultz is simply speculating that some of these other investigations would have resulted in evidence that was favorable to him. Accordingly, he cannot show prejudice in connection with the failure to make these investigations. Even as to Freeman, the testimony he would have allegedly rendered if defense counsel had contacted him would be merely impeaching of other correctional officers who testified consistent with the government's theory that the real purpose of the forced cell move was to beat Castillo. As such, I cannot find that there is a reasonable probability that his testimony would have changed the outcome of the trial.

FURTHER ORDERED that Schultz's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 filed by Rod Schultz (doc. # 1680) is **DENIED**, and the civil action is **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that each party shall bear their own costs and attorney fees.

Dated: June 17, 2009

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Chief United States District Judge