12-766

To Be Argued By:
FELICE M. DUFFY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-766

MIGUEL FLAQUER,
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

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Statement of Jurisdiction

This is an appeal from a final judgment entered in the United States District Court for the District of Connecticut (Mark R. Kravitz, J.), which had subject matter jurisdiction pursuant to 28 U.S.C. § 2255. On December 1, 2011, the district court denied Flaquer's motion for relief under 28 U.S.C. § 2255. Government Appendix ("GA__") 23. On that same date, pursuant to 28 U.S.C. § 2253(c)(1)(B), the court issued a certificate of appealability as to one issue: whether Flaquer's trial counsel had rendered constitutionally ineffective assistance of counsel for deciding not to call a co-defendant to testify at Flaquer's sentencing hearing. GA23, GA39-40.

The district court's order entered on December 1, 2011, GA23, and Flaquer filed a timely notice of appeal on January 28, 2012. *See* Fed. R. App. P. 4(b), (c). Judgment entered on October 23, 2012. GA24. This Court has appellate jurisdiction over Flaquer's challenge to the district court's denial of his § 2255 motion pursuant to 28 U.S.C. § 2253(a).

Statement of Issue Presented for Review

Did defense counsel provide constitutionally ineffective assistance at sentencing by failing to call a witness in support of a challenge to a proposed two-level supervisory role enhancement when there was ample evidence in the record that the petitioner supervised the proposed witness and others?

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Preliminary Statement

From 1997-2005, petitioner Miguel Flaquer was the main supplier of multiple kilograms of cocaine to Victor Marrero in Bridgeport, Connecticut. During that time, Flaquer arranged for others (including co-defendant Luis Noboa) to deliver the cocaine to Marrero and to collect money that Marrero owed him. Flaquer ultimately pled guilty on drug conspiracy charges and after a sentencing hearing—during which he

unsuccessfully contested a two-level enhancement for his supervisory role in the offense—the district court sentenced him to 168 months' imprisonment.

After this Court affirmed Flaquer's conviction and sentence, he filed a petition under 28 U.S.C. § 2255, alleging, *inter alia*, that his lawyer provided constitutionally ineffective assistance at sentencing by failing to present testimony from Noboa to contest the role enhancement. The district court denied the § 2255 motion, finding that Flaquer was not prejudiced by any failure to call Noboa because the record was more than sufficient to establish that Flaquer supervised Noboa and others.

For the reasons set forth below, this Court should affirm the district court's judgment. First, the claim is procedurally barred because it is merely an attempt to recast an issue raised on direct appeal. Second, the claim fails because, as the district court held, Flaquer has failed to show that he was prejudiced by counsel's failure to call Noboa as a witness.

Statement of the Case

On February 24, 2006, a federal grand jury in Bridgeport returned a superseding indictment against Flaquer and several other individuals alleging various narcotics violations. GA9, GA41-43. Specifically, the superseding indictment charged Flaquer in Count One with unlaw-

fully conspiring to distribute 5000 grams or more of cocaine, in violation of 21 U.S.C. § 846, and in Count Two with possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). GA41-42. On June 20, 2006, Flaquer pleaded guilty to Count One before United States Magistrate Judge Holly B. Fitzsimmons. GA10.

On July 30, 2008, the district court (Alan H. Nevas, J.), sentenced Flaquer to 168 months' imprisonment and four years' supervised release. GA17. Judgment entered on August 27, 2008. GA17. On January 19, 2010, this Court affirmed Flaquer's conviction and sentence by unpublished, summary order. *See United States v. Flaquer,* 361 Fed. Appx. 222 (2d Cir. Jan. 19, 2010); GA289-91. On April 19, 2010, the United States Supreme Court granted Flaquer's motion for an extension of time to file a petition for certiorari until June 18, 2010. *See Flaquer v. United States*, Docket Number 09A969 (2010). Flaquer never filed the petition.

On May 2, 2011, Flaquer filed a timely *pro se* motion pursuant to 28 U.S.C. § 2255 challenging his sentence on numerous grounds. GA22; *see* 28 U.S.C. § 2255(f)(1); *Clay v. United States*, 537 U.S. 522, 524 (2003)(holding for the "purpose of starting the clock on § 2255's one-year limitation period, . . . a judgment of conviction becomes final when the time expires for filing a petition for

certiorari contesting the appellate court's affirmation of the conviction.").

On December 1, 2011, the district court (Mark R. Kravitz, J.) denied the § 2255 petition on all claims. GA23. At the conclusion of the written ruling, the district court granted a certificate of appealability only as to the claim of ineffective assistance of trial counsel for failing to introduce co-defendant Noboa's testimony at Flaquer's sentencing. GA39-40. Judgment entered on October 23, 2012. GA24.

On February 23, 2012, Flaquer filed a timely notice of appeal. GA24.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

In November 2004, the Bridgeport FBI's Safe Streets Task Force commenced a court-authorized wiretap investigation into the narcotics trafficking activities of, among others, Victor Marrero in Bridgeport. PSR ¶ 7. The investigation revealed that Marrero had been engaged in the sale of cocaine in Bridgeport for approximately ten years. PSR ¶ 8. The wiretap lasted until February 19, 2005, at which time Marrero and his co-defendants were arrested. PSR ¶ 9.

After Marrero's arrest on February 19, 2005, he cooperated with law enforcement. PSR ¶ 9; GA118. Marrero informed law enforcement that

his main cocaine supplier was Flaquer, who was from New York, and that Flaquer had supplied him with about thirty kilograms of cocaine. PSR ¶¶ 9, 15. On February 27, 2005, Marrero placed a consensually-recorded call at the direction and under the supervision of the FBI Safe Streets Task Force members. PSR ¶ 10. Marrero spoke to Flaquer on the calls and arranged on the phone for Flaquer to deliver three kilograms of cocaine to a location in Trumbull, Connecticut. PSR ¶ 10. On March 4, 2005, Flaquer traveled with his driver, Luis Noboa, to the Trumbull location, followed by another car that contained one kilogram of cocaine and which was driven by Athan Tejeda, who was accompanied by Franklin Medrano. PSR ¶ 10. Flaquer was arrested at the Trumbull location. PSR ¶ 12.

According to Marrero, Flaquer had previously delivered kilogram quantities of cocaine to Marrero's home in Trumbull, Connecticut. PSR ¶ 16. Marrero typically purchased cocaine from Flaquer on credit for between $22,000 and $24,000 per kilogram. PSR ¶ 16. Flaquer had a trap under the middle seat of one of his vehicles, and Marrero had also observed him with a firearm in the past. PSR ¶ 16. In fact, Flaquer had given Marrero a firearm in the late 1990s, which was the same firearm seized by arresting agents during the search of Marrero's home on February 19, 2005. PSR ¶ 16. Flaquer had told

Marrero to take the firearm to protect the drugs that he was fronting to Marrero. PSR ¶ 16.

Marrero identified Noboa as Flaquer's driver, saying that he had first met Noboa in 2000 or 2001 when Flaquer had told him that Noboa would meet with Marrero if Flaquer was not available. PSR ¶ 17. According to Marrero, Noboa drove Flaquer to Marrero's home and sometimes delivered cocaine to Marrero without Flaquer's presence, but always at Flaquer's behest. PSR ¶ 18. Marrero estimated that, from 2001 to 2005, Noboa delivered one kilogram of cocaine to Marrero six or seven times and picked up payment for cocaine on another six to seven occasions. PSR ¶ 18. Marrero often opened the packaged cocaine in Noboa's presence to test the product and verify its quality. PSR ¶ 18. If Noboa arrived at Marrero's home when he was not there, he sometimes hid the kilogram of cocaine in one of Marrero's vehicles parked in the driveway or in the bushes near the house. And Flaquer usually telephoned Marrero to determine what time Noboa had arrived and left from Marrero's home. PSR ¶ 18.

B. The Pre-Sentence Report

The Pre-Sentence Report[1] ("PSR") prepared by the Probation Officer calculated Flaquer's total offense level as 36, starting from a base level

[1] The government is filing the PSR separately under seal.

of 34 for 15-50 kilograms of cocaine. PSR ¶ 23. It then added two-levels because Flaquer provided Marrero with a firearm and instructed Marrero that he needed the weapon to protect the cocaine that Flaquer had sold him. PSR ¶ 24. It also added two-levels because Flaquer directly supervised the activities of co-defendant Noboa. PSR ¶ 25. With a two-level reduction for acceptance of responsibility, PSR ¶ 29, and based on a Criminal History Category I, the resulting guideline range was 188-235 months' incarceration. PSR ¶ 63.

C. The sentencing

On July 30, 2008, the district court conducted a sentencing hearing. GA17. The hearing was scheduled to address the contested factual issues concerning drug quantities attributable to Flaquer as set forth in the PSR, Flaquer's possession of a gun in connection with the offense, and his role in the offense. GA94, GA108, GA115.

At the beginning of the hearing, Flaquer withdrew his challenge to the drug quantity finding, agreeing that he was responsible for not less than 15, but not more than 50 kilograms of cocaine. GA130-31.

The government then introduced evidence regarding the remaining disputed issues, including, as relevant here, Flaquer's role in the offense. GA119.

Victor Marrero testified that Flaquer was his main source of supply from 1997 through the date of his arrest in March 2005, beginning with his purchasing five kilograms of cocaine once a month and ending with his purchasing at least one kilogram of cocaine once a month. GA136, GA151-154, GA156-57, GA162-63, GA172-73, GA179, GA181, GA183. During those years, Flaquer negotiated the terms of the cocaine deals, including the financial arrangements, GA140-42, GA155-58, GA164-65, GA168, GA172-73, GA180, and arranged the locations for, and methods of, delivering the cocaine and collecting the money, GA153-84.

At the beginning, Flaquer set up a meeting with his nephew and Marrero at a clothes shop the nephew owned in New York. GA155. Flaquer met Marrero at the shop with the nephew and arranged that Marrero would pick up the cocaine and deliver the money he owed for it to the shop. GA155-57. Marrero testified as follows:

> Q: And Mr. Flaquer had set this up with you?
>
> A: Yes.
>
> Q: And when you got to the clothes shop and one of his family members was there and Mr. Flaquer was there, what happened that – then?
>
> A: Well, he told me this is – that was his nephew. He owned the shop, and that I

> would be dealing with him, going there to pick up and bring money there when I – whenever I got so much together, to bring it there to his nephew.
>
> Q: So Mr. Flaquer arranged with you, that you would bring money or pick up cocaine from his nephew at the clothing store?
>
> A: Yes. Correct.

GA155.

Thereafter, Marrero picked up five kilograms a month in 1997 for approximately one year, and brought the money he owed Flaquer for the cocaine to the shop of the nephew at Flaquer's instruction. GA155-58, 162.

After 1998, the arrangements with Flaquer changed. GA162. Flaquer introduced his brother-in-law Freddie Brea to Marrero and put Freddie in charge of the cocaine transactions, rather than Flaquer's nephew. GA163-64. Freddie would deliver the cocaine to, and collect the money from, Marrero in Connecticut. GA164-65. Even when Flaquer would leave the United States, Flaquer was still in charge of the cocaine deals. GA165.

In about 1999-2000, Marrero stopped purchasing cocaine from Flaquer for approximately eight to nine months. GA166. In about 2001, Flaquer visited Marrero at his restaurant and

arranged to meet later to discuss resuming the trafficking of cocaine together. GA169-70. At that meeting, Flaquer introduced Luis Noboa as the person who would be delivering the cocaine to, and picking up the money from, Marrero. GA170-71. As Marrero explained,

> A: Yes. That's when I met the driver. We met at Red Lobster off the exit in New York, and when I got there, he was there with the – with his driver, and he introduced me to him and he said this was the new guy he would be coming down with. . . .
>
> Q: Who was the driver?
>
> A: Noboa.
>
> . . .
>
> Q: And what did you and Mr. Flaquer arrange with respect to the driver and the drugs? How was that going to work?
>
> A: Well, that – when he couldn't come down, he would send this guy down, the driver, and he would take care of things for him.

GA170-71.

That arrangement lasted from about 2002 through the date of Marrero's arrest in March 2005. GA173. When Marrero had problems with the cocaine, he would complain to Flaquer about it. GA176-77. As he testified,

> Q: Was there ever a time that, in your opinion, the driver delivered bad cocaine to you?
>
> A: Yes. There was a couple of times he deliver something bad, and when I looked at it, I told him it was no good, it was compress, and then I complained to Miguel about it, and then he said that he'll make sure next time that with bad – when he had something bad in New York, he wouldn't bring it down to waste a trip going back and forth for that, so he always made sure it was shiny and good.
>
> Q: So you had the driver take the cocaine back?
>
> A: Yes.
>
> Q: And then you called Miguel Flaquer to complain about it?
>
> A: Yes.

GA176-77.

Moreover, Flaquer had arranged with Marrero that Flaquer would call to tell Marrero the driver was on his way. Marrero would then call Flaquer when the deal was complete to let him know how it went. GA177-78.

> Q: [D]id Mr. Flaquer ever call you to let them know – to let you know that the driver might be coming with cocaine?

> A: Yeah. Yeah. He let me know he's coming down.
>
> Q: Did he ever call you to check to see if his driver had made it?
>
> A: Yeah. Well, he had – I mean, once the driver got there and everything was all set, to call him and tell him, "No, everything went good and he's on his way-back." So – . . . he'd be expecting him to get there within an hour, two hours.
>
> Q: So you had arranged with Mr. Flaquer that after the driver delivered, you'd call Mr. Flaquer and let him know that the deal had gone well?
>
> A: Yeah, everything's good and he's on his way there, so he could be expecting him.

GA177-78; *see also* GA213.

By the time Flaquer was arrested, Marrero had already been arrested and had started cooperating. On February 27, 2005, at the direction of law enforcement officers, Marrero contacted Flaquer and arranged to purchase three kilograms of cocaine from him. GA136-43. Flaquer was to meet Marrero at a prearranged location, deliver one kilogram of cocaine to him, take Marrero's money for all three kilograms, and send two other individuals with Marrero's money to retrieve the remaining two kilograms. GA145. Noboa drove Flaquer to the pre-

arranged location to meet Marrero, flanked by a second car with two other individuals carrying one kilogram of cocaine. PSR ¶ 10. Law enforcement officers arrested all of the occupants of both vehicles and seized the cocaine from a black backpack found in the second vehicle. PSR ¶ 10.

Marrero's testimony was corroborated by several pieces of evidence, including his own grand jury testimony, the seizure of the cocaine at the time of Flaquer's arrest, and an FBI report of a proffer session with Flaquer, during which Flaquer confirmed that he knew Noboa and had delivered numerous kilograms of cocaine to Marrero during the course of the conspiracy. GA244-46.

After the parties presented evidence and argument regarding the various disputed factual issues in the PSR, the district court canvassed Flaquer to make sure that he had reviewed the PSR, that the PSR had been interpreted for him and that he understood its contents. GA252-56. Flaquer said that he did not understand "a lot of things that, you know, about the PSI." GA256. Trial counsel explained that "his concerns are that once the presentence report was written, that that enlarged, in some way, his role in this offense, beyond what he believes that was appropriate or correct." GA257. The court questioned Flaquer on this issue:

Q: But now you know about them?

> A: Yes. Now, I understand.
>
> Q: And also, the record should reflect that the last hearing, when many of these issues arose, I give you the opportunity, if you wished to, to withdraw your guilty plea and go to trial. You recollect that?
>
> A: Yes. Yes, I remember.
>
> Q: And you – Your response, after conferring with your attorney, was that you did not wish to withdraw your guilty plea, you wanted to proceed with sentencing based on your guilty plea, correct?
>
> A: Yes. Yes, that's correct, that I pled guilty, and yes, that's correct.

GA257-58; *see also* GA105-06. Moreover, trial counsel confirmed that she was "satisfied . . . that all of the issues that could be raised have been raised, and that [her] client understands the nature of these proceedings, what's in the presentence – the current presentence report." GA259.

As to role, trial counsel argued that the government had not "proved by a preponderance of the evidence, that Mr. Marrero supervised Mr. Noboa." GA261. She maintained:

> I think that the fairest reading of Mr. Marrero's testimony is that over the course of the period of time that he knew Mr. Flaquer, and did business with him,

> he had a number of business partners, one being Freddie, one being Roy, and that – one being the Dominican man, who was well-dressed, who came to try to get Mr. Marrero to pay off his $12,000 debt, and I think the fact that the government has characterized or described Mr. Noboa as "the driver" doesn't make him a – doesn't make him an employee – subordinate –

GA261. In response, the court noted, "The one constant, the one constant in this case is Mr. Flaquer. He's the constant. He's always there." GA261. Counsel replied, "Right. But I think the question of whether he was in a supervisory relationship, which is how the . . . PSR describes it . . . ." GA262. The court clarified, "[M]y point. But that's my point, that he was always there, and in the Court's view, he was the supervisor. He was running this operation." GA262.

The court ultimately concluded that Flaquer's role in the offense was correctly calculated in the PSR, but refused to adopt the two-level gun enhancement, so that the total offense level in the PSR reduced from 36 to 34, and the guideline range reduced to 151 to 188 months. GA260. With the exception of the gun enhancement, the court expressly adopted the factual findings in the PSR. GA264-65.

In ultimately imposing a sentence of 168 months' incarceration, the court set forth the following reasons to justify its sentence:

> I've already indicated, Mr. Flaquer, that you were responsible for putting large quantities of cocaine onto the streets of Bridgeport, and apparently, based on other evidence I've heard, not just Bridgeport, but apparently Boston, as well, and there very well may be other communities that I'm not aware of, and I can't take those into consideration, but certainly, I have heard considerable evidence with respect to the quantities you've put out here in Bridgeport.
>
> The estimate is 15 to 50 kilograms, and that's what your guidelines are based on, but certainly, based on the testimony I heard today from Mr. Marrero, if you just did the simple arithmetic, it's probably a lot more than that, but I'm bound by the 15 to 50 kilograms, and that's what the sentence will be based on.
>
> . . .
>
> This sentence that I'm going to impose takes into consideration that you were Victor Marrero's main source of supply of cocaine for several years, and that you were able to supply multi-kilogram quantities of cocaine on relatively short notice,

and you did so over a period – a fairly long period of time.

The Court doesn't find that there is any justification for a nonguideline sentence in this case. A sentence within the guideline range is consistent with the statutory purposes of sentencing, as defined in 18 United States Code, Section 3553(a), and the sentence to be imposed will reflect the seriousness of the offense, taking into account your role as the supplier of large, wholesale quantities of cocaine, and I believe that the sentence to be imposed will provide just punishment for your involvement in drug trafficking, and hopefully will serve to deter you from future criminal conduct, and others who may be similarly inclined.

Although the sentence that I am going to impose is a guideline sentence, the record should reflect that the Court would have imposed the same sentence as a nonguideline sentence, considering all of the factors provided for in 18 U.S. Code, Section 3553(a).

GA281-84.

D. The direct appeal

Flaquer appealed, and as relevant here, argued that (1) defense counsel was ineffective for

failing to contend that the government breached the plea agreement, and (2) the district court clearly erred in finding that a two-level enhancement was appropriate based on Flaquer's supervisory role in the offense. GA489-90, 509-13.

With respect to the first claim, Flaquer argued that his lawyer was ineffective for failing to object to the government's violation of the plea agreement when the government argued for a role enhancement despite the fact that the plea agreement "did not provide for a role in the offense enhancement." GA507. Although Flaquer noted the preference for raising ineffective of assistance of counsel claims in a § 2255 motion, he raised the claim on direct appeal "to avoid a future claim by the Government that appellant waived his right to claim ineffective assistance because it was not raised first on direct appeal." GA507.

With respect to the second claim, Flaquer claimed that the sentencing court erred in finding that he was a supervisor and awarding a two-level role enhancement. GA509-12. He argued, *inter alia*, that "the fact that conspirator Marrero identified Noboa as someone who drove a car which sometimes contained appellant does not make Noboa subject to the supervision of appellant in this case." GA511-512. In response, the government pointed out that, according to Marrero's testimony,

> [In] 2001, Flaquer introduced Luis Noboa to Marrero as the individual who thereafter would be delivering the cocaine and picking up the money owed to Flaquer; . . . Noboa sometimes came alone to deliver the cocaine and sometimes Flaquer accompanied him; . . . when Marrero had problems with the quality of the cocaine that Noboa delivered, he would complain to Flaquer about it, and Flaquer would take the cocaine back; . . . and Flaquer also arranged with Marrero that Flaquer would call to tell Marrero Noboa was on his way with the cocaine and Marrero should call Flaquer when the deal was complete to let him know how the deal went. . . .

GA516.

On January 19, 2010, this Court affirmed Flaquer's conviction by summary order. *See United States v. Flaquer*, 361 Fed. Appx. 222 (2d Cir. Jan. 19, 2010); GA289-91. As to the ineffective assistance claim, the Court ruled that the government had not breached the plea agreement, and that, "[b]ecause we find that no breach of the plea agreement occurred . . . , we also conclude that defense counsel was not ineffective for failing to claim that the government breached the plea agreement." GA291. As to the role enhancement, the Court found that the district court "did not err – much less 'abuse its dis-

cretion'" in calculating the guideline range with the two-level increase. The Court did not analyze the particular facts relied upon by the district court to support the enhancement, but instead simply concluded, "The record shows that the District Court considered a properly calculated advisory guidelines range, properly considered the factors listed in 18 U.S.C. § 3553(a), and stated its reasons for assigning the sentence it did." GA291.

E. The section 2255 petition

On May 2, 2011, Flaquer filed a petition under 28 U.S.C. § 2255 challenging his sentence. GA292-395. In his initial motion, he raised several claims, including, as relevant here, an argument that sentencing counsel Diane Polan was ineffective because she failed to properly challenge the government's evidence of Flaquer's leadership role by failing to call Noboa to counter the evidence that he was Flaquer's driver. GA298.

On December 1, 2011, the district court (Mark R. Kravitz, J.) issued a fifteen-page Ruling and Order, which denied the § 2255 motion. GA26-40. The court noted that it was "not necessary to conduct an evidentiary hearing in this case, as the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." GA28.

As to Flaquer's claim that trial counsel was ineffective because of her "failure to call Mr. Noboa to the stand when contesting the role enhancement," GA36, the court found that, because "Polan has not filed an affidavit, there is no information before the Court as to why counsel declined to call Mr. Noboa. As a result, the Court cannot determine whether this failure to call trial counsel was strategic or constituted ineffective assistance of counsel." GA36-37. The court did not need to resolve this issue, however, because it found both that the claim was procedurally barred and that any alleged ineffectiveness did not prejudice Flaquer.

As to the procedural bar, the court explained that "ineffective assistance of counsel claims in a § 2255 proceeding are barred 'when the factual predicates of those claims, while not explicitly raised on direct appeal, were nonetheless impliedly rejected by the appellate court mandate.' *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010)." GA38. The court then held that the factual predicate of this particular ineffective assistance claim was rejected on direct appeal. As the court stated:

> In evaluating Mr. Flaquer's appellate claims, the Second Circuit found that the Government had not breached the plea agreement in arguing for enhancement based on Mr. Flaquer's role, Ms. Polan's counsel was not ineffective for failing to

> claim that the Government breached the agreement, and that the sentencing court did not abuse its discretion when it applied a two-point enhancement for Mr. Flaquer's role and sentencing him within the relevant Guidelines range. . . . Although the Second Circuit did not explicitly consider whether Mr. Noboa's testimony would have altered the sentencing court's opinion, to the extent Mr. Flaquer attempts to attack the Second Circuit's ruling through a § 2255 petition, it is procedurally barred.

GA38 (internal citation omitted).

And as to the prejudice issue, the court explained,

> Mr. Flaquer does identify testimony, from Mr. Noboa's June 27, 2006 plea hearing, that the two did not know each other well . . . and one of Ms. Polan's offhand statements implies that she would have liked to question Mr. Noboa had the government called him, ...
>
> However, the Government's witness testified to Mr. Noboa's extensive involvement in Mr. Flaquer's operations. . . . Not only is it unclear if Mr. Noboa would have testified as Mr. Flaquer wished, it is not obvious that the sentencing court would have found such

> testimony more persuasive than that of the Government's witness. Furthermore, even if it could be demonstrated conclusively that Mr. Flaquer was not Mr. Noboa's supervisor, there is still extensive testimony in the record to support the sentencing court's conclusion that Mr. Flaquer supervised others. The sentencing court did not find the argument that others involved in the conspiracy were merely Mr. Flaquer's "business partners," rather than subordinates, convincing. After Ms. Polan advanced that claim, the court stated: "[Mr. Flaquer] was always there, and in the Court's view, he was the supervisor. He was running this operation." . . . Nothing in the record indicates that the sentencing court based its role determination solely on Mr. Noboa's relationship to Mr. Flaquer. As Mr. Flaquer cannot demonstrate prejudice, this claim fails.

GA37-38.

At the conclusion of its decision, the court refused to grant a certificate of appealability as to all of the issues raised in the § 2255 petition except for the claim that trial counsel was ineffective for failing to call Noboa as a witness to challenge the role enhancement. The court reasoned:

> [A]s the Court has no affidavit from Ms. Polan explaining why she made the strategic decision not to call Mr. Noboa as a witness, and as there is a slim chance that a reasonable juror might find that Mr. Noboa's testimony may have altered the sentencing court's opinion to the extent that the failure to call him was prejudicial, the Court grants Mr. Flaquer a COA with regard to his third claim.

GA39-40.

Summary of Argument

This claim is procedurally barred. On direct appeal, Flaquer challenged both the effectiveness of his trial counsel in failing to claim that the government breached the plea agreement by arguing for a role enhancement and the reasonableness of the district court's factual finding that a two-level supervisory role enhancement was appropriate. His most recent claim of ineffective assistance is simply a badly disguised attempt to revisit this Court's summary order.

Moreover, Flaquer's sentencing counsel was not constitutionally ineffective for failing to call Noboa to the stand to contest the role enhancement. As the district court explained, even if trial counsel's decision not to call Noboa as a witness was unreasonable, Flaquer has not shown that any such deficiency in counsel's performance prejudiced him. First, in light of Mar-

rero's testimony as to Noboa's extensive involvement in Flaquer's operations, which was corroborated by Flaquer's own proffer statements, as well as evidence seized during Flaquer's arrest, there is no evidence that, had Noboa testified, he would have supported Flaquer's position or he would have been found to be credible by the sentencing court. And, even had Flaquer demonstrated conclusively that he was not Noboa's supervisor, there was extensive testimony in the record to support the sentencing court's conclusion that Flaquer supervised others. Thus, Flaquer has failed to show that, had Noboa testified, there is a substantial likelihood that the sentencing court would have declined to award a two-level role enhancement.

Argument

I. Flaquer's ineffective assistance of counsel claim is procedurally barred and, in any event, fails under the prejudice prong of *Strickland*.

Flaquer's § 2255 motion was properly dismissed both because it was procedurally barred and because any deficiency caused by his trial counsel's failure to call Noboa as a witness at sentencing did not impact Flaquer's overall incarceration term.

A. Governing law and standard of review

To obtain collateral relief under 28 U.S.C. § 2255, an aggrieved defendant must show that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Section 2255 essentially codifies the common-law writ of habeas corpus in relation to federal criminal offenses. *United States v. Hayman*, 342 U.S. 205 (1952) (describing history of § 2255). Habeas corpus relief is an extraordinary remedy and should only be granted where it is necessary to redress errors that, were they left intact, would "inherently result[] in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962). The strictness of this standard embodies the recognition that collateral attack upon criminal convictions is "in tension with society's strong interest in [their]

finality." *Ciak v. United States*, 59 F.3d 296, 301 (2d Cir. 1995); *see also Strickland v. Washington*, 466 U.S. 668, 693 (1984) (recognizing the "profound importance of finality in criminal proceedings").

"[N]ot every asserted error of law can be raised on a § 2255 motion." *Napoli v. United States*, 32 F.3d 31, 35 (2d Cir. 1994), *amended on reh'g on other grounds*, 45 F.3d 680 (2d Cir. 1995) (internal quotation marks omitted). "The grounds provided in section 2255 for collateral attack on a final judgment in a federal criminal case are narrowly limited, and it has long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (internal quotation marks omitted). "[R]elief is available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* (internal quotation marks omitted). "Constitutional errors will not be corrected through a writ of habeas corpus unless they have had a 'substantial and injurious effect,' that is, unless they have resulted in 'actual prejudice.'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 637-38 (1993)).

Although, in general, a writ of habeas corpus will not be allowed to do service for an appeal, *see Reed v. Farley*, 512 U.S. 339, 354 (1994),

"failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003). But "a Section 2255 petitioner may not relitigate questions which were raised and considered on direct appeal, . . . including questions as to the adequacy of counsel." *Yick Man Mui*, 614 F.3d at 55 (applying mandate rule to ineffective assistance of counsel claims) (internal quotation marks and citation omitted).

"[W]here a defendant alleges varying factual predicates to support identical legal claims relating to a particular event, all claims constitute a single 'ground' for relief for purposes of applying the mandate rule in collateral proceedings." *Id.* "With regard to ineffective assistance of claims, it makes sense to require all legal or factual arguments to be made in the case of a particular strategy, action, or inaction of a lawyer alleged to constitute ineffective assistance." *Id.* at 56. But "a single ineffective assistance claim" does not preclude "a later" claim addressed to "a different strategy, action, or inaction of counsel." *Id.* "[T]he only barrier to raising ineffective assistance claims in a Section 2255 proceeding after raising such claims on direct appeal is the mandate rule, i.e., strategies, actions, or inactions of counsel that gave rise to an ineffective assistance claim adjudicated on the merits on

direct appeal may not be the basis for another ineffective assistance claim in a Section 2255 proceeding." *Id.* at 57.

A person challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. In *Strickland*, the Supreme Court held that a defendant must establish (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's unprofessional errors actually prejudiced the defense. *See Strickland*, 466 U.S. at 688.

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Id.*, 466 U.S. at 689. A defendant's *post hoc* accusations alone are not sufficient to overcome this strong presumption because a contrary holding would lead to constant litigation by dissatisfied criminal defendants and harm the effectiveness, and potentially even the availability, of defense counsel. *See id.* The ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections. *See Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000).

The *Strickland* standard "is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Bell v. Miller*, 500 F3.d 149 (2d Cir. 2007) (quoting *Linstadt v. Keane*, 239 F.3d

191, 199 (2d Cir. 2001)). "The court's central concern is not with 'grad[ing] counsel's performance,' but with discerning 'whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.'" *United States v. Aguirre*, 912 F.2d 555, 560 (2d Cir. 1990) (quoting *Strickland*, 466 U.S. at 696-97) (internal citations omitted).

The Supreme Court recently cautioned courts about the application of the *Strickland* test:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. . . . Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. . . . The question is whether an at-

> torney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (internal citations and quotation marks omitted); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1406-1407 (2011) (holding that lower court had "misapplied" *Strickland*, failed to apply the "strong presumption of competence that *Strickland* mandates," and "overlooked the constitutionally protected independence of counsel and the wide latitude counsel must have in making tactical decisions") (internal quotation marks and ellipse omitted).

The second element of the *Strickland* test requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cullen*, 131 S. Ct. at 1403 (internal quotation marks omitted). "That requires a substantial, not just conceivable, likelihood of a different result." *Id.* (internal quotation marks omitted).

"A court of appeals reviews a district court's denial of a 28 U.S.C. § 2255 petition *de novo*." *Elfgeeh v. United States*, 681 F.3d 89 (2d Cir. 2012); *Fountain v. United States*, 357 F.3d 250,

254 (2d Cir. 2004). To the extent that the district court's decision relies on findings of historical fact, those findings are upheld unless clearly erroneous; to the extent that the court's decision relies on conclusions of law, those conclusions are reviewed *de novo*. *See Harrington v. United States,* 689 F.3d 124, 129 (2d Cir. 2012); *United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004).

B. Discussion

Flaquer contends that trial counsel was ineffective when she "failed to properly contest Flaquer's role enhancement." GA331. Flaquer claims that he received a leadership role "based on Marrero's statement that Noboa was Flaquer's driver," GA331, and asserts that "Noboa would have testified that he was not Flaquer's driver," and that counsel was ineffective for not subpoenaing Noboa to testify. GA332. This argument has no merit. Flaquer's § 2255 motion was properly dismissed both because it is procedurally barred and because his trial counsel's decision not to call Noboa did not prejudice him.

1. The claim is procedurally barred.

Flaquer made two claims on direct appeal related to his role in the offense. First, he claimed that his counsel was ineffective for failing to argue that the government breached the plea agreement by advocating for a role enhance-

ment. GA507. Second, he claimed that the district court clearly erred in finding that Flaquer was a supervisor, and in applying a two-point enhancement for a leadership role in the offense. GA509-13. Now, he is attempting to circumvent this Court's ruling on direct appeal by crafting yet a third attack on the role enhancement, this time through a claim that his counsel was ineffective for failing to call Noboa as a witness at the sentencing hearing.

To decide this issue, the Court will need to rely on facts that it previously rejected. More specifically, it will have to re-evaluate the various facts underlying the role enhancement to determine whether counsel's failure to call Noboa as a witness prejudiced him. Thus, this ineffective assistance claim is merely an attempt to recast Flaquer's appellate claims and, as such, is procedurally barred. *See Yick Man Mui*, 614 F.3d at 54 (holding that ineffective assistance claims in a habeas proceeding are barred "when the factual predicates of those claims, while not explicitly raised on direct appeal, were nonetheless impliedly rejected by the appellate court mandate"); *United States v. Pitcher*, 559 F.3d 120, 124 (2d Cir. 2009) (rejecting ineffective assistance claims because they were "premised on the same facts and rest on the same legal ground" as the argument made on direct appeal).

As the district court noted, although this Court did not explicitly consider whether

Noboa's testimony would have impacted the application of the role enhancement, it did find that the government had not breached the plea agreement by arguing for the enhancement, that trial counsel was not ineffective for failing to claim breach of the plea agreement, and that the facts presented at the sentencing hearing supported the application of the role enhancement. Although the Court did not explicitly consider whether Noboa's testimony would have altered the sentencing court's opinion, it did consider both the reasonableness of the underlying decision to apply a two-level role enhancement and the effectiveness of counsel in failing to claim that the government breached the plea agreement by arguing for a role enhancement, which are "factual arguments" directed at the same "strategy, action, or inaction of a lawyer alleged to constitute ineffective assistance." *Yick Man Mui*, 614 F.3d at 56. As a result, his claim in this appeal is procedurally barred.

2. Any deficiency in counsel's performance did not prejudice Flaquer.

This claim should also be rejected because Flaquer has failed to show he was prejudiced by his attorney's decision not to call Noboa as a witness at the sentencing hearing.[2] In particu-

[2]Because the district court declined to decide whether trial counsel's decision not to call Noboa to the

lar, there is no evidence that Noboa would have testified that he was not Flaquer's driver. And even had Noboa testified that he was not Flaquer's driver, the district court could have rejected this testimony or determined independently that a role enhancement was warranted, based on Marrero's testimony and the corroborating evidence, that Flaquer supervised Noboa as a drug courier who delivered the cocaine and collected drug proceeds owed to Flaquer. GA170-71, 176-78.

Marrero's testimony on Flaquer's role in the offense went far beyond the statement that Noboa was Flaquer's driver. Marrero testified that Flaquer was his main source of supply from 1997 through the date of his arrest in March 2005. GA136, GA151-54, GA156-57, GA162-63, GA172-73, GA179, GA181, GA183. During those years, Flaquer negotiated the terms of the cocaine deals, including the financial arrangements, GA140-42, GA155-58, GA164-65, GA168, GA172-73, GA180; and arranged the locations for, and methods of, delivering the cocaine and collecting the money, GA153-84.

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stand was reasonable, the record is insufficient to resolve the claim on that basis. Thus, if this Court disagrees with the government's arguments on appeal, it should remand the case back to the district court to conduct factual finding as to whether trial counsel rendered deficient performance.

Marrero further described Flaquer's role in supervising a series of "aides" who would conduct the actual transactions on his behalf. At the beginning, Flaquer set up a meeting with his nephew and Marrero at a clothes shop the nephew owned in New York. GA155. Flaquer arranged to meet Marrero at the shop with his nephew, and arranged with his nephew and Marrero that Marrero would pick up the cocaine and deliver the money he owed for it to his nephew at the shop, which he did. GA155-57.

After 1998, Flaquer introduced his brother-in-law to Marrero and put him, rather than his nephew, in charge of the cocaine transactions. GA163-64. His brother-in-law would drive the cocaine to Connecticut for Flaquer. GA163-65. Flaquer would insist that Marrero call him after these deals and let him know how many kilograms he had purchased, so Flaquer would know how much money to collect from his brother-in-law. GA165. In 2001-2002, Marrero explained that Flaquer introduced Noboa to Marrero as the individual who thereafter would be delivering the cocaine and picking up the money owed to Flaquer. GA170-71. When Marrero had problems with the quality of the cocaine, he would complain to Flaquer about it, and Flaquer would take back the cocaine. GA176-77. Flaquer would also tell Marrero when Noboa was on his way with the cocaine and have Marrero call him back

when the deal was complete to let him know how it went. GA177-78.

In sum, Marrero's testimony made clear that Noboa was a lower-level participant, in that he was a drug courier for Flaquer, who delivered the cocaine, and collected the money owed to Flaquer, at Flaquer's instruction. Moreover, the testimony also set forth that Flaquer similarly instructed his nephew and his brother-in-law. This testimony was corroborated by the report of Flaquer's proffer session, which included the fact that Flaquer knew Noboa and that Flaquer had delivered kilograms of cocaine to Marrero, GA244, and the transcript of Marrero's grand jury testimony, which was consistent with his testimony at the sentencing hearing, GA244-46.

Thus, as the trial court found, Noboa was extensively involved in Flaquer's drug trafficking operation, there is no evidence that Noboa would have testified as Flaquer wished, and there is no reason to conclude that the sentencing court would have credited any contrary testimony by Noboa. *See United States v. Mendez*, 315 F.3d 132, 135 (2d Cir. 2002) (stating that this Court affords particularly strong deference to credibility determinations of witnesses); *see also Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

Moreover, the record was replete with evidence that, in addition to Noboa, Flaquer supervised others, and the trial court was not persuaded by the argument that others involved in

the conspiracy were merely Flaquer's "business partners," rather than subordinates. As the court explained, "[Mr. Flaquer] was always there, and in the Court's view, he was the supervisor. He was running this operation." Nothing in the record indicates that the sentencing court based its role determination solely on Noboa's relationship to Flaquer. GA37-38. Thus, Flaquer has not shown that, even had Noboa testified and provided helpful information as to his role in the offense, there was a substantial likelihood that the district court would have declined to apply a two-level role enhancement based on Flaquer's supervision of other people.

Furthermore, even if the role enhancement was improperly applied, it would not have affected the ultimate sentence. The trial court imposed the 168-month incarceration term based on evidence (1) that Flaquer was responsible for putting large quantities of cocaine onto the streets of Bridgeport, and in neighboring communities; (2) that, though the guideline range was based on a 15-50 kilogram quantity, Marrero's testimony established a much higher quantity; and (3) that Flaquer was Marrero's main source of supply for several years and "that you were able to supply multi-kilogram quantities of cocaine on relatively short notice, and you did so over a period – a fairly long period of time." GA281-84. It specifically explained that it would have imposed the same sentence "as a nonguide-

line sentence, considering all of the factors provided for in 18 U.S. Code, Section 3553(a)." GA284. *See United States v. Batista*, 684 F.3d 333, 346 (2d Cir. 2012) (noting that district court did not err, but "even if the District Court could be said to have committed legal error by calling [defendant] a 'supervisor' rather than a 'leader' or 'organizer,' or by imposing any role enhancement at all, any such error was harmless . . . here, the record indicates clearly that the district court would have imposed the same sentence in any event") (internal quotation marks omitted); *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (holding that procedural error is harmless if record clearly indicates that district court would have imposed same sentence anyway). As a result, even assuming that defense counsel should have called Noboa as a witness to rebut the government's role evidence, her failure to do so did not prejudice him.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 17, 2012

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,119 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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