No. 04-60103

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES HARRIS,

Petitioner-Appellee

v.

UNITED STATES OF AMERICA,

Respondent-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES

JIM M. GREENLEE
United States Attorney

PAUL D. ROBERTS
Assistant United States Attorney
Northern District of Mississippi
P.O. Drawer 886
Oxford, Mississippi 38655

R. ALEXANDER ACOSTA
Assistant Attorney General

SHELDON T. BRADSHAW
Principal Deputy Assistant
Attorney General

DENNIS J. DIMSEY
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

TABLE OF CONTENTS

PAGE

ARGUMENT 1

CONCLUSION 11

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES: **PAGE**

Hanna v. *Wainwright*, 588 F.2d 435 (5th Cir. 1979) 4

Jordan v. *Hargett*, 34 F.3d 310 (5th Cir. 1994) 8

Murray v. *Maggio*, 736 F.2d 279 (5th Cir. 1984) 3

Sayre v. *Anderson*, 238 F.3d 631 (5th Cir. 2001) 5, 10

Strickland v. *Washington*, 466 U.S. 668 (1984) 1, 6, 7, 8

United States v. *Bernloehr*, 833 F.2d 749 (8th Cir. 1987) 9

United States v. *Cockrell*, 720 F.2d 1423 (5th Cir. 1983),
cert. denied, 467 U.S. 1251 (1984) 5

United States v. *Harris*, 293 F.3d 863 (5th Cir.),
cert. denied, 537 U.S. 950 (2002) 2-4

United States v. *Leggett*, 162 F.3d 237 (3d Cir. 1998),
cert. denied, 528 U.S. 868 (1999) 8

United States v. *Mullins*, 315 F.3d 449 (5th Cir. 2002),
cert. denied, 124 S. Ct. 2096 (2004) 9

STATUTES:

18 U.S.C. 242 . . . . . 2, 4

28 U.S.C. 2255 11

RULES:

Fed. R. Evid. 404 5

Fed. R. Evid. 405 2

Fed. R. Evid. 609 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60103

CHARLES HARRIS,

Petitioner-Appellee

v.

UNITED STATES OF AMERICA,

Respondent-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES

The central theme of defendant Charles Harris's brief is that his trial attorney's failure to introduce certain character and other evidence and his advice that Harris need not testify were objectively unreasonable and prejudiced his defense. The brief, however, fails to address – let alone rebut – crucial arguments in the government's opening brief that show why the deficiencies alleged by Harris do not amount to ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

1. None of the alleged evidentiary deficiencies cited by Harris to support his ineffective assistance of counsel claim can be deemed objectively unreasonable. Nor has Harris shown how any of these alleged errors by his trial counsel prejudiced his defense. First, Harris asserts that his trial attorney's failure to call

seven witnesses – Edmundo Sanchez, David Ginn, Irene Warren Byrd, Tanya Jenkins, Roy Bethune, Craig Long, and Rhonda Boyd – constituted ineffective assistance of counsel. (Br. 10-14, 17-19). According to Harris, they would have testified about his good relationship with Mexican-Americans in the community and his reputation as an honest person. (Br. 10-14). Such evidence is not only irrelevant to Harris's conviction for using excessive force with a dangerous weapon against Geraldo Lopez because Harris's character is not an element of the criminal charge at issue, see 18 U.S.C. 242, but also would not have been admissible under Federal Rule of Evidence 405, which excludes character evidence in the form of specific incidents of conduct if that character trait is not an essential element of the charge.

Moreover, because none of these witnesses saw the events surrounding Lopez's arrest, they would not have contradicted testimony by Officer Bobby Flynt that Harris hit Lopez in the face and head with his nightstick even though Lopez's hands were handcuffed behind his back, Lopez's testimony that Harris hit him on the temple, or FBI agent Newsome Summerlin's testimony that, in a noncustodial interview, Harris admitted hitting Lopez in the head. See *United States* v. *Harris*, 293 F.3d 863, 868 (5th Cir.), cert. denied, 537 U.S. 950 (2002). Nor would evidence of Harris's character counter Officers Flynt and James Trimm's testimony that "in their experience, hitting Lopez in the head with the baton would have been

excessive under the circumstances." *Id*. at 870.[1]

Harris also argues that Bethune would have testified about the blood on the bolt of the plexiglass divider in the patrol car and Sanchez would have testified that Lopez was drunk at his party, and omission of their testimonies prejudiced his defense. (Br. 11, 12, 19). Other witnesses, however, testified about both these points at trial. (See, *e.g.*, 5 R. (Tr. 63-66, 123, 176), 12 R. (Section 2255 Hearing Tr. (2255 Tr.) 12-13) (testimony about what caused Lopez's laceration and hematoma); 5 R. (Tr. 246), 12 R. (2255 Tr. 15) (Gary Pounders' testimony that he did not see Harris hit Lopez in the head); 5 R. (Tr. 84, 185, 235), 12 R. (2255 Tr. 45-47) (evidence that Lopez was drunk and was flailing in the back seat of the patrol car after his arrest)).[2] Omission of such cumulative evidence, therefore, could not possibly have prejudiced Harris's defense. As this Court stated in *Murray* v. *Maggio*, 736 F.2d 279, 282 (5th Cir. 1984), failure to call witnesses whose testimony would have amounted to cumulative evidence does not constitute ineffective assistance of counsel.

Furthermore, Bethune's testimony regarding the blood on the bolt would not have contradicted the evidence that Harris hit Lopez on the head while he already

---

[1] In addition, as Harris concedes, he "made derogatory remarks about striking Lopez and that Mexicans were not going to take over the town." (Br. 7). In light of that fact, it was objectively reasonable for his attorney not to make his character an issue at trial by calling character witnesses or Harris to testify about his relationship with Mexican-Americans.

[2] References to "__ R. __-__" are to the volume number and page number or page range of the record on appeal.

was sitting in the patrol car with his hands handcuffed behind his back or precluded a reasonable jury from finding that a nightstick was a dangerous weapon. To prove a violation of Section 242 here, the government needed to show only that Harris deprived Lopez of his rights by using a dangerous weapon. 18 U.S.C. 242. Thus, how and when Lopez was injured was irrelevant to Harris's conviction, and omission of Bethune's testimony cannot be the basis of finding ineffective assistance of counsel.

Harris argues that the evidence supporting his conviction was weak by relying upon a footnote in *United States* v. *Harris*, 293 F.3d at 870 n.6, in which this Court noted that the evidence at trial was inconclusive as to whether Lopez's injuries were caused by Harris or were self-inflicted. (Br. 23; see also 2 R. 314). This is misleading. Contrary to Harris's argument that the causes of Lopez's laceration and hematoma are "essential elements of the crime" (Br. 23), this Court expressly stated that in order to convict Harris under Section 242, the government had to prove only that Harris's acts *either* resulted in bodily injury to Lopez *or* involved the use of a dangerous weapon. 293 F.3d at 870. While Bethune's testimony would have added to the uncontradicted evidence that there was blood on the plexiglass (see, *e.g.*, 5 R. (Tr. 63-66, 123, 176)), it would not have shed any light on whether Harris hit Lopez with a dangerous weapon. See, *e.g.*, *Hanna* v. *Wainwright*, 588 F.2d 435, 436 (5th Cir. 1979) (failure to introduce testimony on uncontradicted point that does not shed any light on contradicted points not objectively unreasonable).

In sum, not calling the witnesses cited by Harris was objectively reasonable and did not prejudice Harris's defense.[3] To the extent that Harris implies that Williams' performance was deficient because he believed that they did not need to call those witnesses because they "had the case won" (Br. 11-14, 23), he cites no legal authority supporting the proposition that strategic trial decisions based on an attorney's judgment regarding the likelihood of a successful outcome are objectively unreasonable if the client ultimately loses at trial. To be sure, Harris's argument underscores the fact that decisions relating to calling witnesses at trial are inherently strategic decisions. Indeed, this Court has recognized that the decision to present evidence is one of trial strategy and, consequently, held that complaints that counsel was ineffective for failing to call witnesses are disfavored. See *United States* v. *Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984); see also *Sayre* v. *Anderson*, 238 F.3d 631, 635-636 (5th Cir. 2001).

2. Similarly unavailing is Harris's argument that his trial counsel rendered ineffective assistance in failing to report alleged jury misconduct to the district

---

[3] Although the district court did not base its decision on the omission of evidence of Lopez's convictions for public drunkenness, Harris asserts his counsel was deficient in failing to present the testimony of Rhonda Boyd, Clerk for the Town of Golden, Mississippi, about Lopez's conviction for public drunkenness and resisting arrest stemming from the event at issue in this case and other incidents of public drunkenness. (Br. 12-13, 19). As the court stated at the beginning of Harris's trial, however, evidence of Lopez's misdemeanor convictions was inadmissible unless they involved crimes of dishonesty (which they do not). (5 R. (Tr. 6); see also Fed. R. Evid. 404 and 609). In addition, Craig Long, the remaining witness cited in Harris's brief (Br. 9), did not testify at the Section 2255 hearing about what he would have added to Harris's defense; accordingly, his failure to testify at trial cannot support an ineffective assistance of counsel claim.

court. Harris asserts, without any citation to the record, that his trial counsel improperly failed to bring to the court's attention (a) that one of the jurors was overheard during a break in the trial saying that she was going to convict Harris because he was a racist, and (b) that one or more of the jurors were asleep during the defense's presentation of evidence. (Br. 19-21). Neither of these claims, however, warrants relief under *Strickland*.

a. Alleged Juror Remark

At the Section 2255 hearing, Harris testified that his friend, Luther Goddard, and a witness for the defense, Gary Pounders, told him that they overheard an African-American juror tell another juror that she thought Harris was a "racist" and had her "mind made up before the court instructed" the jury. (10 R. (2255 Tr. 17); see also 10 R. (2255 Tr. 36-37)). Harris testified that he told his trial counsel about this statement by a juror and that he thought his counsel was going to "do something about it." (10 R. (2255 Tr. 38)). Harris's wife testified at the hearing that Harris had told her about the alleged juror statement after speaking with Goddard. (10 R. (2255 Tr. 163, 169)). In contrast, Harris's trial counsel testified at the Section 2255 hearing that, during the course of the trial, no one told him about the alleged comment by a juror about Harris being a racist. (12 R. (2255 Tr. 84-85)). Harris's trial counsel testified that if he had been informed of this allegation, he would have immediately reported it to the court. (12 R. (2255 Tr. 85)). Moreover, Harris's new counsel stated at the outset of the Section 2255 hearing that "I do not believe that I have any material evidence to present to this Court regarding any impropriety of a

juror by any witness that actually saw that conduct." (11 R. 2255 Tr. 6)).[4]

Even though Harris presented this allegation to the court at the Section 2255 hearing, the district court, after considering the evidence, declined to find that trial counsel's failure to alert the court to the alleged remark constituted ineffective assistance of counsel under *Strickland*. (2 R. 315). Specifically, the district court found that "[t]here is a conflict in the testimony of whether this information about the juror's statements concerning the defendant was reported to defense counsel so that he could call the juror's violation of the court's instruction to the court's attention." (*Ibid.*).

Harris's allegation concerning the juror's statement, therefore, cannot be a basis for finding ineffective assistance of counsel under *Strickland*. The district court's acknowledgment of the conflicting evidence about whether Harris's trial counsel was aware of the alleged juror statement underscores the fact that Harris did not carry his burden of showing that his trial counsel's failure to bring that statement to the court's attention is objectively unreasonable. On this record, it is clear that Harris failed to present sufficient evidence to overcome the strong presumption that his counsel's performance was reasonable and adequate.

---

[4]Harris's new counsel stated at the Section 2255 hearing that he had subpoenaed one person to support this allegation, but "the Marshal could not find him." (11 R. (2255 Tr. 6)). Thus, he was "not ready to present any evidence from a factual personal knowledge standpoint from any witness regarding the allegation" of juror misconduct. (*Ibid.*). Rather, he stated that he was going to rely only on Harris's testimony that he had informed his trial counsel "that jurors had made prejudicial statements," which his counsel had failed to bring to the court's attention. (11 R. (2255 Tr. 8-9)).

Strickland, 466 U.S. at 696.

b. Allegation Of Juror Sleeping

Similarly, Harris's allegation that his trial counsel improperly failed to advise the court that one or more jurors were asleep during the defense's presentation of evidence (Br. 19) does not warrant relief under *Strickland*. Defense witness Roy Bethune testified at the Section 2255 hearing that he observed "one, possibly two" jurors asleep during Pounders' testimony on behalf of Harris. (10 R. (2255 Tr. 117)). Bethune, however, did not testify that he brought this to the attention of Harris's trial counsel. Harris's trial counsel testified at the Section 2255 hearing that no one had told him about any juror sleeping, and had he been so informed, he would have immediately brought it to the court's attention. (12 R. (2255 Tr. 85)).

In his opinion granting Harris's Section 2255 petition, the district court did not even mention, much less rely upon, Harris's allegation that his trial counsel denied him effective assistance of counsel by failing to alert the court about jurors sleeping. Given the lack of any evidence that his trial counsel had been advised about sleeping jurors, Harris has plainly failed to meet his burden of overcoming the presumption that his counsel's performance in this regard was reasonable and adequate. *Strickland*, 466 U.S. at 696.

3. This Court has held that an explicit waiver of the right to testify is not required. See *Jordan* v. *Hargett*, 34 F.3d 310, 315 (5th Cir. 1994); see also *United States* v. *Leggett*, 162 F.3d 237, 246 (3d Cir. 1998) (citing cases supporting proposition), cert. denied, 528 U.S. 868 (1999). Thus, the district court erred in

holding that Harris's express agreement, on the record during trial, when the court asked him "if it was correct that he chose not to testify in the case" was insufficient to waive his right to testify. (2 R. 316). Although not required, when such an explicit waiver occurs in the presence of the trial judge as here, this Court's inquiry regarding whether there was a knowing and voluntary waiver should be at an end. See *United States* v. *Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987) ("The defendant may not * * * indicate at trial his apparent acquiescence in his counsel's advice that he not testify, and then later claim that his will to testify was 'overcome.'").

Indeed, as a matter of fact, Harris cannot assert that he was not aware of his right to testify. He cannot do so because he conceded at the Section 2255 hearing that he "knew [he] could testify" and that his trial counsel "told [him] that he had the case won and that [Harris] didn't need to testify." (10 R. (2255 Tr. 76, 80); see also 12 R. (2255 Tr. 8-9)). Where a defendant knows of his right to testify, and is persuaded by counsel's advice not to testify or acquiesces in such advice as in this case, this Court has consistently rejected claims that counsel was ineffective for interfering with the defendant's right to testify. See *United States* v. *Mullins*, 315 F.3d 449, 453-454 (5th Cir. 2002) (citing numerous examples), cert. denied, 124 S. Ct. 2096 (2004).

Even if the Court examines the objective reasonableness of the trial counsel's advice, it is undeniable that the advice not to testify was reasonable. Harris's brief fails to address the fact that the district court had already found Harris's performance on the stand at an earlier suppression hearing not to be credible (3 R.

(2255 Tr. 29)), and that it is reasonable for an attorney to weigh the risks with the benefits and advise his client not to testify based on the client's "prior performance on the stand," see *Sayre*, 238 F.3d at 635. Moreover, Williams was able to enter into the record most of the points that Harris would have testified about at trial (that he had not struck Lopez in the head, that Lopez had kicked Harris, that Lopez got his injuries by banging his head against the plexiglass in the patrol car, that Lopez was drunk and resisted arrest, and that Harris did not make the statements attributed to him by the FBI and others (10 R. (2255 Tr. 58-67))), through the cross-examination of government witnesses and direct examination of Gary Pounders, without subjecting Harris to cross-examination – which would have required Harris to repeat racist remarks that he made during Lopez's arrest. (See, *e.g.*, 5 R. (Tr. 63-66, 123, 176), 12 R. (2255 Tr. 12-13); 5 R. (Tr. 246), 12 (2255 Tr. 15); 5 R. (Tr. 84, 185, 235), 12 R. (2255 Tr. 45-47). Nor could Harris's testimony conceivably have affected the result of the trial, given the weight of the evidence against him.

CONCLUSION

The Court should reverse the district court's order granting relief pursuant to 28 U.S.C. 2255.

Respectfully submitted,

JIM M. GREENLEE
United States Attorney

PAUL D. ROBERTS
Assistant United States Attorney
Northern District of Mississippi
P.O. Drawer 886
Oxford, Mississippi 38655

R. ALEXANDER ACOSTA
Assistant Attorney General

SHELDON T. BRADSHAW
Principal Deputy Assistant
Attorney General

_____

DENNIS J. DIMSEY
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2004, two copies of the foregoing REPLY BRIEF FOR THE UNITED STATES and a diskette containing the brief were served by first-class mail, postage prepaid, on:

Will R. Ford
P.O. Box 890
New Albany, MS 38652-0890

_____
DENNIS J. DIMSEY
Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing REPLY BRIEF FOR THE UNITED STATES complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 2682 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

_____
DENNIS J. DIMSEY
Attorney

Date: August 27, 2004