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

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument. The United States believes that oral argument will assist this Court in its assessment of the underlying legal and factual issues presented.

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STATEMENT OF JURISDICTION

This is an appeal from an order by the district court granting defendant's motion under 28 U.S.C. § 2255 to vacate his judgment of conviction. The district court had jurisdiction under 28 U.S.C. § 1331. The defendant Charles Harris was convicted of a felony in violation of 18 U.S.C. § 242 by a jury on February 15, 2000. (1 R. 95).[1] This Court affirmed Harris's conviction on June 11, 2002. (1 R. 141). The district court granted Harris's motion to vacate his conviction and sentence on December 5, 2003. (2 R. 312-317). The United States filed a timely Notice of Appeal on January 30, 2004. (2 R. 366). This Court has jurisdiction

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

under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether the district court erred in granting defendant's motion under 28 U.S.C. § 2255 to vacate his conviction based on ineffective assistance of counsel.

STATEMENT OF THE CASE

On February 15, 2000, after a two-day jury trial, Harris was convicted of one count of using excessive force in violation of 18 U.S.C. § 242 for assaulting Geraldo Lopez with a nightstick in the course of arresting Lopez for public drunkenness.[2] (1 R. 95). At sentencing on June 13, 2000, the district court departed downward from the appropriate sentencing range of 87 to 108 months to impose a term of 13 months in prison, two years' supervised release, and a $5,000 fine. (1 R. 114-120). The court found that Lopez's wrongful conduct (to the extent that he was kicking and thrashing after he was arrested, handcuffed, and placed in the back seat of the patrol car) had significantly contributed to provoking Harris's use of excessive force, and that a downward departure was warranted pursuant to Section 5K2.10 of the Sentencing Guidelines. (1 R. 120). Harris appealed his conviction, while the United States cross-appealed the sentence. (1 R. 128, 132).

This Court affirmed Harris's conviction, found the downward departure

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[2] Section 242 makes it unlawful for anyone acting under color of state law to willfully subject any person to the "deprivation of any rights . . . protected by the Constitution or the laws of the United States . . . . [I]f bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon . . . , [the defendant] shall be fined under this title or imprisoned not more than ten years, or both."

excessive, and remanded for resentencing. See *United States* v. *Harris*, 293 F.3d 863, 870-871, 876 (5th Cir.), cert. denied, 537 U.S. 950 (2002). This Court stated that the jury was properly instructed that, in order to convict, it must find that Harris's acts either resulted in bodily injury to Lopez *or* involved the use of a dangerous weapon. *Id*. at 870. This Court concluded that there was "sufficient evidence to conclude that Harris struck Lopez in the head with a dangerous weapon, the police baton, and that this action constituted excessive force under the circumstances." *Id*. at 871. This Court also affirmed the district court's decision to depart downward on the basis of victim misconduct, but held that the degree of departure was disproportionate to that misconduct. *Id*. at 876. On April 8, 2003, the district court resentenced Harris to 15 months' imprisonment. (2 R. 218-221).

On April 11, 2003, Harris filed a pro se motion to vacate his conviction under 28 U.S.C. § 2255. (2 R. 222-226). Harris's motion alleged that he was denied effective assistance of counsel. Harris provided several grounds as support for this claim. Specifically, he stated that his trial counsel, J. Dudley Williams, did not allow him to testify in his own defense; did not present evidence of Geraldo Lopez's conviction for public drunkenness and resisting arrest, or evidence of Lopez's misconduct in the back of the patrol car (11 R. (Section 2255 transcript ("2255 Tr.") 7, 9)); did not call witnesses to testify that Harris is not racist; and did not alert the court that one juror during a trial recess had referred to Harris as a racist and stated that the African-American jurors "had their minds made up about" Harris. (2 R. 224-225). The district court appointed counsel for Harris and

conducted a two-day evidentiary hearing. (2 R. 231, 307). At the hearing, Harris's new counsel, Will Ford, called eight witnesses, including Harris and his wife, while the government called Dudley Williams. (See generally 10-12 R. (Section 2255 hearing transcripts)).

On December 5, 2003, the district court granted Harris's motion and vacated his conviction and sentence, ordered that Harris be released from prison, and set a new trial for February 23, 2003. (2 R. 317).[3] In reaching its decision to vacate the conviction, the court relied on two of Harris's allegations regarding the ineffectiveness of his trial counsel. First, the court found that Dudley Williams provided ineffective assistance of counsel when he failed to call defense witnesses to counter testimony of Harris's statements about Mexican-Americans over the police radio and to FBI agents. (2 R. 314-316). The district court found that numerous witnesses could have testified as to Harris's good relationship with Mexican-Americans in the community, that he had helped them on occasions, and that he was not bigoted toward them. (2 R. 316). In addition, Harris could have testified that he had never before arrested a Mexican-American and that he had a good relationship with Mexican-Americans. (2 R. 315-316). Although the court acknowledged that it is "uncontradicted that [Harris] used his police night club to attempt to quiet[]" Lopez, (2 R. 313), it noted that the evidence regarding whether Harris caused the laceration on Lopez's head or whether Lopez inflicted the injury

[3] On February 9, 2004, the district court granted the United States' motion to stay all proceedings below pending resolution of this appeal. (2 R. 371).

himself when he hit his head against the plexiglass divider was inconclusive; therefore, according to the court, it was critical to Harris's defense to call character witnesses to counter the government's evidence regarding racist remarks by Harris. (2 R. 314).

Second, the court determined that Harris's waiver of his right to testify, based on advice of counsel, was not knowing and voluntary. (2 R. 317). Toward the end of the trial, when the court asked Williams if "he wished to put something in the record about [Harris] not being called to testify in his own defense," (2 R. 316), Williams stated that Harris had decided not to testify and asked Harris, "Is that correct?" (5 R. (Trial transcript ("Tr.") 249); 2 R. 316). Harris responded, "[T]hat's correct." (2 R. 316; 5 R. (Tr. 249)). The district court held that Harris's response was an insufficient waiver of his right to testify.[4]

STATEMENT OF FACTS

On May 9, 1998, Charles Harris, in his official capacity as Chief of Police for the Town of Golden, Mississippi, responded to noise disturbance complaints by

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[4] The district court did not rule on Harris's arguments regarding evidence of Lopez's 1998 conviction stemming from his arrest by Harris that is the subject of this case. With respect to the alleged comment by a juror that Harris was a racist and that some members of the jury intended to convict Harris because he was a bigot, the court found that there was conflicting testimony at the evidentiary hearing as to whether the juror's comment was reported to Williams, and assumed in its order that Williams was unaware of the matter. (2 R. 315; *compare* 10 R. (2255 Tr. 17) *with* 10 R. (2255 Tr. 17-19)). Moreover, Harris's counsel conceded at the evidentiary hearing that he did not have any evidence to support Harris's arguments relating to jury misconduct. (11 R. (2255 Tr. 6, 8-9)); see also Fed. R. Evid. 606(b) (juror may not testify with respect to jury deliberations).

neighbors regarding a party in a residential home. See *United States* v. *Harris*, 293 F.3d 863, 867 (5th Cir.), cert. denied, 537 U.S. 950 (2002). After three attempts to ask the partygoers to quiet down, Harris called for backup, stating that a "bunch of wetbacks" were having a party and asking the operator to tell other officers to bring their nightsticks. (5 R. (Tr. 28)). See also 293 F.3d at 877 n.3. Harris and three other officers – Officers Bobby Flynt, James Trimm, and Delane Stacy – returned to the house and placed a number of people under arrest. *Id.* at 867-868.

Harris arrested Geraldo Lopez for public drunkenness. He handcuffed Lopez behind his back, placed Lopez alone in the back seat of his patrol car, and closed the door. *Id.* at 868. Intoxicated, Lopez started kicking and thrashing in the back seat. *Ibid.* Harris returned to the car and struck Lopez on his shins with a police baton. *Ibid.* Shortly after Harris shut the car door, Lopez began banging his head against the plexiglass divider separating the back seat from the front seat of the passenger compartment. *Ibid.* Harris opened the car door and hit Lopez with the baton. *Ibid.* Lopez suffered two injuries to the head – a scalp laceration and a hematoma. *Ibid.* The officers called for an ambulance, and when EMT Officer Mike Kemp arrived, Harris informed him that he had knocked the "s-h-i-t" out of Lopez and that Mexicans were not going to take over the town. *Id.* at 868, 877 n.3. Harris drove Lopez to the hospital in his patrol car after the EMT Officer insisted that an officer ride in the ambulance with Lopez. *Id.* at 868. The hospital treated Lopez's injuries and discharged him. *Id.* at 868-869.

Thereafter, Harris was indicted for using excessive force during Lopez's

arrest in violation of 18 U.S.C. § 242. 293 F.3d at 867. At trial, Officer Flynt testified that Harris hit Lopez "on the legs and just went on up; hit him in the face, hit him in the head," and that after Harris hit Lopez, "there was blood . . . on [Lopez's] face, running down his shirt . . . , on the side of his head, on his neck, [and] on his ears." (5 R. (Tr. 36, 38-39)). See also 293 F.3d at 868. Consistent with Officer Flynt's testimony, Officer Stacy testified that he had to stop Harris from hitting Lopez because Harris "had lost his composure as a law enforcement officer." *Id.* at 868. Lopez also testified at trial that he did not start bleeding until after Harris hit his head. (5 R. (Tr. 90-91)). See also 293 F.3d at 868. Officers Flynt and Trimm testified that, "in their experience, hitting Lopez in the head with the baton would have been excessive under the circumstances." *Id.* at 870. In addition, FBI Agent Newsome Summerlin testified that in an interview regarding this incident, Harris admitted hitting Lopez on the head. *Id.* at 868. During this interview, Harris told Summerlin that Mexicans did not have the same right as "real Americans" and requested FBI assistance to get the "damn" Mexicans out of his town. *Id.* at 877 n.3.

STANDARD OF REVIEW

Ineffective assistance of counsel is a mixed question of law and fact that this Court reviews *de novo*. *Sayre* v. *Anderson*, 238 F.3d 631, 634-635 (5th Cir. 2001). Unless clearly erroneous, this Court credits "the trial court's express or implied findings of discrete, historic facts." *Id.* at 635.

SUMMARY OF ARGUMENT

The purported errors by Harris's trial counsel – counsel's decision not to call certain character witnesses and his advice that Harris need not testify – do not rise to the level of constitutionally ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

First, counsel's decision not to call certain character witnesses was an informed decision based on trial strategy. Not calling witnesses to testify as to Harris's good relationship with Mexican-Americans was objectively reasonable because such evidence was not relevant to the government's case against Harris that he used a dangerous weapon – his nightstick – to hit Geraldo Lopez, who was handcuffed and sitting in a patrol car, on the head. It would not have countered the testimony by Officer Bobby Flynt and Lopez that Harris hit Lopez's head with the nightstick, or the testimony by FBI Agent Newsome Summerlin that Harris admitted that he struck Lopez in the head with his baton. Since the omitted evidence was not relevant to the government's case against Harris, the failure to call such witnesses could not have been objectively unreasonable. Moreover, based on the overwhelming evidence that Harris struck Lopez with a dangerous weapon, the failure to call witnesses who could not contradict the government's proof could not possibly have prejudiced his defense.

Second, Harris's failure to testify at trial cannot be a basis for habeas relief. Counsel's advice that Harris not testify was also objectively reasonable. The trial record reveals that counsel was able to elicit testimony similar to the account

proffered by Harris through cross-examination of government witnesses and direct examination of Gary Pounders, without subjecting Harris to cross-examination. Moreover, there is nothing in the record to suggest that Harris did not knowingly and voluntarily waive his right to testify. 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. Counsel's advice that Harris not testify also could not have affected the outcome of the trial, given the weight of the evidence against Harris and the fact that Harris's proposed testimony was little more than a self-serving denial of what other witnesses had said.

ARGUMENT

HARRIS'S TRIAL COUNSEL'S PERFORMANCE WAS NEITHER OBJECTIVELY UNREASONABLE NOR PREJUDICIAL

Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant seeking habeas relief due to ineffective assistance of counsel must show that the trial counsel's performance "fell below an objective standard of reasonableness" *and* but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 688, 694; see also *United States* v. *Willis*, 273 F.3d 592, 598 (5th Cir. 2001). "*Strickland* review is highly deferential." *Sayre* v. *Anderson*, 238 F.3d 631, 635 (5th Cir. 2001). To prevail, a defendant must overcome a strong presumption that counsel's performance was reasonable and adequate. See *Strickland*, 466 U.S. at 696; *Willis*, 273 F.3d at 598. Additionally, in order to show

prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Sayre*, 238 F.3d at 635.

In this case, the district court erred in concluding that two decisions made by Harris's counsel – the decision not to call certain witnesses and his advice that Harris need not testify – were objectively unreasonable and prejudicial to Harris's defense at trial.

A. Failure To Call Witnesses

1. Decision Was Objectively Reasonable

The district court found defense counsel's decision not to call as witnesses five individuals who would have testified that Harris had good relationships with Mexican-Americans, that he was not bigoted toward them, and that he had never previously arrested a Mexican-American to be objectively unreasonable. (2 R. 315-316). This Court has frequently held, however, that complaints that counsel was ineffective for failing to call witnesses are disfavored because the decision to present evidence is one of trial strategy. See *United States* v. *Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984); see also *Sayre*, 238 F.3d at 635-636. Moreover, "[a] conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *United States* v. *Jones*, 287 F.3d 325, 331 (5th Cir.) (quoting *Garland* v. *Maggio*,

717 F.2d 199, 206 (5th Cir. 1983)), cert. denied, 537 U.S. 1018 (2002).

For the reasons set forth in greater detail below (and briefly summarized here), counsel's conscious and informed decision to not call the witnesses in question was not ill chosen, but rather was objectively reasonable. First, as revealed at the Section 2255 hearing, none of the five individuals actually witnessed the events surrounding Lopez's arrest and, as a result, none of the individuals could have corroborated the sole eyewitness bystander whose testimony was favorable to Harris. Second, with respect to four of the five individuals the proffered testimony was inadmissible character evidence and, with respect to the fifth, the proffered testimony was not relevant as it did not contradict the government's overwhelming proof that Harris used a dangerous weapon. Third, even if the character testimony was admissible, Harris's views about Mexican-Americans was simply not relevant to his defense as it was not an element of the offense.

Section 242 makes it unlawful for anyone acting under color of state law to willfully subject any person to the "deprivation of any rights . . . protected by the Constitution or the laws of the United States." In order to convict Harris of a felony violation of Section 242, the jury had to find that Harris's acts either (1) resulted in bodily injury to Lopez *or* (2) involved the use of a dangerous weapon. *United States* v. *Harris*, 293 F.3d 863, 870 (5th Cir.), cert. denied, 537 U.S. 950 (2002). In light of the relevant legal standard, Harris's counsel made the strategic decision to argue that Lopez sustained his injuries by banging his head against the plexiglass divider in the patrol car and that Harris never hit Lopez in the head with his baton.

As for the first point, several individuals testified that Lopez repeatedly slammed his head against the plexiglass divider in the patrol car, that the injuries to his head were consistent with such behavior, and that there was blood on the plexiglass. (See, *e.g.*, 5 R. (Tr. 63-66, 123, 176)). As for the second point, the defense presented testimony by Gary Pounders, who lived near the site of Lopez's arrest and witnessed part of the incident underlying Harris's conviction. Pounders saw the second of the two occasions when Harris opened the door to the patrol car and testified that he saw Harris strike Lopez on the leg but did not see him strike Lopez on the head. *Harris*, 293 F.3d at 868 n.5.

In finding Harris's trial counsel to be constitutionally ineffective, the district court specifically identified the following additional witnesses who, the court believed, should have been called to testify at Harris's trial:

Edmundo Sanchez. Sanchez, who hosted the party that Lopez attended, testified at the Section 2255 hearing that Harris is honest and has a good relationship with Mexican-Americans in the community. (10 R. (2255 Tr. 130-131)). He further testified that Lopez was an uninvited guest, that Lopez was drunk, and that the police had told Lopez to quiet down prior to his arrest. (10 R. (2255 Tr. 128-129)). He did not, however, see Harris arrest Lopez or anything that happened after the arrest because he remained inside his house at all times. (10 R. (2255 Tr. 134, 137-138, 140)).

Davie Ginn. Ginn, the former Mayor of Golden, Mississippi, and a neighbor of Sanchez's, testified at the Section 2255 hearing that Harris is an honest person and

that Harris has a good relationship with Mexican-Americans in the community. (10 R. (2255 Tr. 92-93)). Ginn admitted that he "wasn't on the scene" at the party or arrest, and did not learn about Lopez's arrest until the next day. (10 R. (2255 Tr. 104)).

Irene Warren Byrd. Byrd, another neighbor of Sanchez's, testified at the Section 2255 hearing that Harris has a reputation as an honest, peaceful person. (10 R. (2255 Tr. 146)). She testified that the party at Sanchez's house was noisy, but did not know anything about Lopez's arrest because she took a sleeping pill and went to sleep. (10 R. (2255 Tr. 150, 153-155)).

Tanya Jenkins. Jenkins, also a neighbor of Sanchez's, testified at the Section 2255 hearing that Harris has a reputation as a truthful person and was not aware of Harris's having harassed or arrested any Mexican-Americans prior to May 1998. (10 R. (2255 Tr. 156)). She did not know any of the facts underlying this case aside from the fact that the party at Sanchez's house was noisy. (10 R. (2255 Tr. 158)).

Roy Bethune. Bethune testified at the Section 2255 hearing that he heard on his police radio scanner Harris's request for backup because "he had a bunch of . . . wetbacks." (10 R. (2255 Tr. 124)). Although he did not see Lopez's arrest, he went down to the City Hall out of curiosity and saw a bolt with blood on the plexiglass in the patrol car that held Lopez. (10 R. (2255 Tr. 119)).[5]

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[5] Two other proposed defense witnesses, Craig Long and Cal Ross (10 R. (2255 Tr. 46)), did not testify at the Section 2255 hearing. According to Harris's counsel, they had no personal knowledge of whether or not Harris hit Lopez on the

(continued...)

Importantly, not one of the five potential witnesses could testify regarding the events surrounding Lopez's arrest. Indeed, as Harris's counsel explained at the Section 2255 hearing, he excused these witnesses, in part, because none of them actually witnessed Harris arresting Lopez. As a result, they could not have corroborated Pounders' eyewitness testimony and, unlike Pounders' testimony, their testimony would not have directly challenged the government's evidence that Harris used a dangerous weapon. (12 R. (2255 Tr. 11, 37)). In fact, Harris's counsel consulted with him about this very problem and they decided together, as a matter of trial strategy, to call only Pounders, the sole eyewitness bystander whose testimony was favorable to Harris. (12 R. (2255 Tr. 15-17)).

At most, the first four individuals identified above were competent to testify only as to Harris's character in general and his views about Mexican-Americans in particular. As an initial matter, we would simply note, as the district court itself recognized, that the crime for which Harris was charged and convicted was "not a 'hate crime'" and "animus toward Mexican Americans [wa]s not an element of the offense." (2 R. 314). As a result, evidence of Harris's relationship with Mexican-Americans was simply not relevant. For example, such evidence could not have countered the overwhelming evidence that Harris struck Lopez on the head with a dangerous weapon. As the courts of appeals have frequently noted, the deliberate

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[5](...continued)
head with his nightstick and, therefore, were excused. (12 R. (2255 Tr. 11, 14-15, 37, 48-49)).

decision to not introduce evidence unrelated to one of the elements of the underlying offense is not objectively unreasonable. See, *e.g.*, *United States* v. *Craycraft*, 167 F.3d 451, 455 (8th Cir. 1999) (failure to introduce evidence irrelevant to underlying statute does not amount to ineffective assistance); *White* v. *Singletary*, 972 F.2d 1218, 1223-24 (11th Cir. 1992) (failure to present irrelevant evidence does not amount to ineffective assistance), cert denied, 514 U.S. 1131 (1995).

More importantly, such character evidence, *e.g.*, testimony about how Harris "helped [Mexican-Americans] on occasions" (2 R. 314), 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. Fed. R. Evid. 405. As a result, much of the testimony that the district court cited as unreasonably omitted would not have been admissible. It is well settled that the failure to introduce inadmissible evidence is never objectively unreasonable. See, *e.g.*, *Capps* v. *Collins*, 900 F.2d 58, 61 (5th Cir. 1990) ("Defense counsel did not perform deficiently for failing to proffer inadmissible evidence."), cert. denied, 498 U.S. 1049 (1991).

Moreover, evidence about Harris's character might actually have hurt the defense. Harris's derogatory remarks about Mexican-Americans to the dispatcher, EMT Officer Kemp, and FBI Agent Summerlin were already in evidence, and Harris was not planning to testify. (12 R. (2255 Tr. 10-11, 38)). Defense evidence that Harris always spoke the truth may have had the unintended consequence of

suggesting that these derogatory remarks reflected his true feelings about Mexican-Americans. Such strategic decisions not to call witnesses "made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

As for the fifth potential witness, although Bethune could have testified about the bolt covered with blood on the plexiglass in the patrol car holding Lopez, this testimony only would have gone to whether Harris's use of excessive force resulted in Lopez's bodily injury (or whether Lopez's bodily injuries were caused by his own thrashing around in the back of the patrol car). As this Court found on appeal and as discussed *supra*, 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); *Murray* v. *Maggio*, 736 F.2d 279, 282 (5th Cir. 1984) (failure to call witness whose testimony "would have been merely cumulative of testimony already given" does not amount to ineffective assistance of counsel); *Cockrell*, 720 F.2d at 1428 (same). In addition, calling Bethune as a witness would have caused him to testify about the "wetbacks" statement that he

heard Harris make over the radio. *Buckley* v. *Collins*, 904 F.2d 263, 265-66 (5th Cir.) (failure to call witness to testify for defense not ineffective assistance of counsel where witness, in addition to providing potentially favorable testimony for defendant, would also have provided unfavorable testimony), cert. denied, 498 U.S. 990 (1990); *Cockrell*, 720 F.2d at 1428 (failure to call witness not ineffective assistance of counsel where "any possible benefit of [the witness's] testimony" would have been undermined by other statement made by witness). Thus, it was objectively reasonable for Harris's counsel not to place Bethune on the stand. (12 R. (2255 Tr. 12-13, 38-41)).

2. Decision Did Not Prejudice Harris's Defense

Even assuming that Harris's counsel's performance fell below an objective standard of reasonableness, omitting the testimony of the individuals identified by the district court simply did not prejudice his defense at trial. The district court placed great emphasis on the fact that conflicting testimony was presented at trial on whether Harris had caused a laceration to Lopez's head or whether Lopez caused the laceration himself by banging his head against a plexiglass divider in the patrol car. The district court concluded that, since the evidence was in conflict on a "critical" fact in the case, the failure to call five additional witnesses was prejudicial. However, this conclusion is clearly erroneous and directly conflicts with this Court's analysis of the evidence against Harris.

As an initial matter, we note that only one of the five potential witnesses identified by the district court, Bethune, could have offered any testimony even

tangentially related to the conflict identified above. At best, Bethune could have testified that he saw blood on the plexiglass divider, an uncontroverted fact that the government's own witnesses established at trial. As a result, Harris was simply not prejudiced by Bethune's failure to testify.

More importantly, however, even if Bethune's testimony could have conclusively established that Lopez caused the injuries to his head, Harris would not have been prejudiced by his failure to testify. In affirming Harris's conviction, this Court held that the jury was properly instructed that it could convict Harris if it found bodily injury *or* the use of a dangerous weapon. *Harris*, 293 F.3d at 870. This Court found that it was uncontradicted at trial that Harris hit Lopez in the head with a nightstick, and that it was reasonable for the jury to conclude that a nightstick was a dangerous weapon. *Ibid*. Thus, the Court found that it was unnecessary to decide whether the government proved that Harris had caused "bodily injury" to Lopez to affirm the felony conviction.[6] *Ibid*. Since the issue regarding how – and even whether – Lopez was injured was irrelevant to Harris's conviction, the district court erred in finding that the omission of Bethune's testimony prejudiced Harris's defense.

The other four potential witnesses were, as noted above, competent to testify

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[6] Although this Court stated in dicta contained in the footnote quoted by the district court that the evidence as to whether Harris caused Lopez's laceration and hematoma or whether Lopez caused them by banging his head against the plexiglass in the patrol car was close, this Court concluded that there was more than enough evidence that Harris in fact caused some bodily injury to Lopez. 293 F.3d at 870 n.6.

only about Harris's good character, and not to elements essential to the government's case against Harris. Generally, as this Court stated in *United States* v. *Cockrell*, 720 F.2d at 1428, "character witnesses, unlike eyewitnesses, usually are not crucial." This is particularly true where, as here, the defendant's character is not an element of the criminal charge at issue. The government was not required to prove motive in this case. A felony violation of 18 U.S.C. § 242 is proven if there was a "use, attempted use, or threatened use of a dangerous weapon." *Harris*, 293 F.3d at 870 (citing 18 U.S.C. § 242). Thus, counsel's decision to not call these witnesses to testify did not prejudice Harris's defense.

Finally, even if the witnesses had testified at trial about Harris's character and were believed by the jury, the evidence that Harris used a dangerous weapon was so overwhelming, see *Harris*, 293 F.3d at 870-871, that there is no reasonable probability that the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 688. Specifically, the government presented evidence that Harris hit Geraldo Lopez in the head with his nightstick, a dangerous weapon. *Harris*, 293 F.3d at 870-871. Officer Bobby Flynt testified that Harris hit Lopez in the face and head with his nightstick, while Lopez testified that Harris hit him on the temple. *Id*. at 868. In addition, FBI agent Newsome Summerlin testified that, in a noncustodial interview, Harris admitted to hitting Lopez in the head. *Ibid*. Furthermore, Officer Stacy testified that he had to stop Harris from hitting Lopez because Harris "had lost his composure as a law enforcement officer," while Officer Kemp testified that Harris confessed that he "knocked the s-h-i-t" out of

Lopez. *Ibid*. Officer Flynt also testified that Harris hit Lopez in the head with the nightstick even though Lopez's hands were handcuffed behind his back and Lopez was already in a patrol car. *Ibid.* Officers Flynt and Trimm testified that, "in their experience, hitting Lopez in the head with the baton would have been excessive under the circumstances." *Id*. at 870.

B. Harris's Failure To Testify

Similarly, the district court erred in finding that Harris's failure to testify at trial was a basis for habeas relief.

1. Decision Was Objectively Reasonable

Harris argues that his trial counsel interfered with his right to testify. (2 R. 224). Harris states that his trial counsel "did not advise him of his right to testify;" that he continually expressed his desire to testify to his attorney; and that he did not acquiesce in his lawyer's advice not to testify. (2 R. 331, 334). As a result, Harris claims that his trial counsel's performance was deficient.

This Court has held that where a defendant contends that his counsel interfered with his right to testify, the appropriate vehicle for such claims is ineffective assistance of counsel. *Sayre*, 238 F.3d at 634. In making an ineffective assistance claim of this type, a defendant "must overcome a strong presumption that counsel's decision not to place him on the stand was sound trial strategy." *Id.* at 635. Moreover, the decision not to have a defendant testify "is a 'judgment call' which should not easily be condemned with the benefit of hindsight." *Robison* v. *Johnson*, 151 F.3d 256, 261 (5th Cir. 1998), cert. denied, 526 U.S. 1100 (1999).

Counsel's advice that Harris not testify was objectively reasonable. Harris testified at the Section 2255 hearing that he wanted to testify 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)). However, Harris failed to address "countervailing tactical reasons that his counsel may have had for declining to call him to the stand." *Willis*, 273 F.3d at 598. For instance, at trial, counsel was able to elicit testimony similar to most of the account proffered by Harris through cross-examination of government witnesses and direct examination of Gary Pounders, without subjecting Harris to cross-examination. (See, *e.g.*, 5 R. (Tr. 63-66, 123, 176), 12 R. (2255 Tr. 12-13) (testimony about what caused Lopez's laceration and hematoma); 5 R. (Tr. 246), 12 R. (2255 Tr. 15) (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 he was flailing in the back seat of the patrol car after his arrest)). In addition, while Harris stated at the Section 2255 hearing that he would have testified at trial that he did not make all of the statements attributed to him by the FBI, and thus would have challenged directly some of the government's evidence, he also would have admitted calling the Mexican-Americans at the party "wetbacks" over the radio. (10 R. (2255 Tr. 62-63)).

Further, the reasonableness of counsel's decision not to have Harris testify is supported by Harris's testimony at a suppression hearing, which occurred one week

prior to commencement of the criminal trial. At that hearing, the district court found that Harris's testimony was not credible and denied Harris's motion to suppress the statements he made to FBI agents. (3 R. (2255 Tr. 29)). Given Harris's "prior performance on the stand," it was reasonable for Harris's counsel to determine that "the potential risks of [defendant's] testifying outweighed the potential benefits." *Sayre*, 238 F.3d at 635.

At the hearing on the 2255 motion, the district court did not find that Harris's testimony, except with respect to his relations with Mexican-Americans, would have been useful at trial or that Williams was unreasonable for failing to call Harris on any other matter. (2 R. 316-317). Rather, the district court suggested that more was required at trial to establish a knowing and voluntary waiver than Harris's agreement with his counsel's assertion that he did not wish to testify. (2 R. 316). The district court clearly erred on this point, as this Court has held that an explicit waiver of the right 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).

At trial, in the presence of the district judge, Harris's counsel asked Harris "if it was correct that he chose not to testify in the case." (2 R. 316). Harris responded, "'that's correct.'" *(Ibid.)*. Although not required, when such an explicit waiver occurs in the presence of the trial judge, 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, 751-752 (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, where a defendant knows of his right to testify, and is persuaded by counsel's advice not to testify or acquiesces in such advice, 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).

Other than the conclusory statements noted above, Harris presented no evidence that his decision was either unknowing or involuntary. The district court also made neither finding. Thus, there is no basis in the record to support a finding that Williams improperly interfered with Harris's right to testify. Williams' advice that Harris not testify was objectively reasonable, and the district court erred when it concluded that such advice constituted ineffective assistance of counsel.

2. Decision Did Not Prejudice Harris's Defense

Furthermore, Harris failed to show that he suffered prejudice as a result of his failure to testify.[7] As the Supreme Court stated in *Strickland*, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691. The decision not to have Harris testify could not have affected the outcome of the trial, given the weight of the evidence against Harris (see, *supra*, pp.

[7] The district court failed to make a finding as to this issue below.

19-20) and the fact that Harris's proposed testimony was little more than a self-serving denial of what other witnesses had said. As a result, counsel's advice that Harris not take the stand did not constitute ineffective assistance of counsel. See *Mullins*, 315 F.3d at 456-457 (finding trial counsel was not ineffective in his assistance to defendant, even though counsel coerced defendant not to testify, as defendant failed to show that he was prejudiced by such action).

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2004, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT and a diskette containing the brief were served by first-class mail, postage prepaid, on:

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

I certify that the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 6368 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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