

MAR 12 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICARDO BRIONES,

Defendant - Appellant.

No. 03-16299

D.C. Nos. CV-99-02095-RCB-02
CR-96-00464-RCB-02

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RILEY BRIONES, JR., also known as
Spitz Mr,

Defendant - Appellant.

No. 03-16300

D.C. Nos. CV-99-02094-RCB-04
CR-96-00464-RCB-04

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RILEY BRIONES, SR., also known as
Joker,

Defendant - Appellant.

No. 03-16302

D.C. Nos. CV-99-02169-RCB-03
CR-96-00464-RCB-03

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Submitted March 8, 2006**

Before: KOZINSKI, Chief Judge, CANBY and BEEZER, Circuit Judges.

In these consolidated appeals, Riley Briones, Sr. (“Riley, Sr.”) and his sons Ricardo Briones (“Ricardo”) and Riley Briones, Jr. (“Riley, Jr.”) appeal from the district court’s judgments denying their 28 U.S.C. § 2255 motions, challenging their convictions and sentences for various crimes related to their activities as gang members. We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo, *see United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003), and we

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Ricardo Briones’ request for oral argument is denied.

affirm.

Ricardo and Riley, Sr. each contend that their trial counsel provided ineffective assistance by failing to request a specific unanimity jury instruction with regard to the predicate acts underlying a charge for conspiracy to participate in a racketeering enterprise. To demonstrate ineffective assistance of counsel, Ricardo and Riley, Sr. must establish both that their counsel's performance was deficient and that they were prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Even assuming counsel was deficient in failing to request a unanimity instruction, we conclude that Ricardo and Riley, Sr. were not prejudiced. The jury's verdict on Counts 2, 12 and 14 make clear its unanimity with respect to the required overt acts alleged in the conspiracy count. *See* 18 U.S.C. § 1961(5) ("pattern of racketeering activity" requires at least two predicate acts). Thus, this contention fails.

Ricardo contends that his appellate counsel rendered ineffective assistance by failing to raise a Sixth Amendment Confrontation Clause claim. Because Ricardo's appellate counsel *did* raise the issue, *see United States v. Briones*, 165 F.3d 918 (9th Cir. 1998) (unpublished memorandum disposition), this contention fails. *See also Lockhart v. Fretwell*, 506 U.S. 364, 371-72 (1993) (noting that, under *Strickland*, the assessment of the reasonableness of counsel's performance is

based on the law as it existed at the time of counsel's conduct).

Riley, Sr. contends his trial counsel provided ineffective assistance by failing to investigate and to argue effectively an alleged Confrontation Clause violation. Because Riley, Sr.'s counsel adequately addressed the Confrontation Clause issue under the law as it existed at the time of trial, his contention fails. *See Lockhart v. Fretwell*, 506 U.S. 364, 371-72 (1993) (explaining that, under *Strickland*, the assessment of the reasonableness of counsel's performance is based on the law at the time of counsel's conduct).

Riley, Jr. contends that, because of an intervening change in the law, his Sixth Amendment right to confrontation was violated at trial. We reject this contention. *See Whorton v. Bockting*, 127 S. Ct. 1173, 1181-84 (2007) (holding that *Crawford v. Washington*, 541 U.S. 36 (2004), could not be applied retroactively on collateral review).

Ricardo's and Riley, Sr.'s contentions that they are entitled to relief under *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), are foreclosed because such relief is not available retroactively on collateral review. *See United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005) (holding that *Booker* does not apply retroactively in § 2255 proceedings where the conviction was already final when *Booker* was decided).

To the extent that appellants raise uncertified issues, we construe such argument as a motion to expand the Certificate of Appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

The Clerk shall file Riley, Sr.'s motion to take judicial notice. Appellants' motions to take judicial notice are denied.

Ricardo's and Riley, Jr.'s motions to appoint counsel are also denied.

AFFIRMED.