

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20636



A True Copy
Certified order issued Jul 13, 2018

Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit
Plaintiff-Appellee

UNITED STATES OF AMERICA,

v.

KIRAN SHARMA,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

O R D E R:

Dr. Kiran Sharma moves for a certificate of appealability (COA) to appeal the denial of her 28 U.S.C. § 2255 motion raising claims of ineffective assistance of counsel. She has also moved to proceed in forma pauperis (IFP) and for a refund of the \$505 filing fee. Sharma argues that she received ineffective assistance of counsel that affected the validity of her guilty plea when counsel (1) failed to timely object in a third-party proceeding to the forfeiture of funds in the \$1.5 million educational trust created for her son and (2) failed in his assurance that she would be credited for legitimate medical injection services and failed to retain competent billing and accounting experts to calculate the amount of restitution owed.

Sharma, however, has failed to show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"

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or “that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Her motion for COA is therefore DENIED. Her motions for IFP and refund of the filing fee are also DENIED.

/s/ *Priscilla R. Owen*
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE

ENTERED

August 17, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KIRAN SHARMA,

§

Petitioner,

§

v.

§

Civil Action No. H-16-2977

§

Criminal Action No. H-09-409-2

§

UNITED STATES OF AMERICA,

§

Respondent.

§

ORDER

Pending before the Court are Petitioner Kiran Sharma's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Criminal Document No. 544), the United States' Motion For Summary Judgment and Response to Motion Under 28 U.S.C. § 2255 (Criminal Document No. 571), and Kiran Sharma's *Pro Se* Reply to the United States Response to Motion Under 28 U.S.C. § 2255 And *Pro Se* Motion for Summary Judgment (Criminal Document No. 580). Having considered the motions, submissions, and applicable law, the Court determines the Petitioner's motions should be denied and the Government's motion for summary judgment should be granted.

I. BACKGROUND

On November 4, 2009, Dr. Kiran Sharma ("Sharma") was indicted on sixty-four counts, including conspiracy, healthcare fraud, mail fraud, unlawful

was only thirty-two thousand dollars.⁷ As to Sharma's contention that the restitution amount included non-fraudulent allergy charges, the Fifth Circuit addressed on direct appeal that the restitution amount calculation did not include any potentially non-fraudulent procedures. *See United States v. Sharma*, 609 F. App'x 797, 806 (5th Cir. 2015). As such, Sharma cannot show deficient performance because the non-fraudulent aspects of her practice were not part of the conspiracy or included in the attributable loss amount calculation. Accordingly, the Court denies Sharma's fourth ground for relief.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that Petitioner Kiran Sharma's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Criminal Document No. 544) is **DENIED**. The Court further

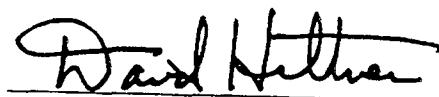
ORDERS that the United States' Motion For Summary Judgment and Response to Motion Under 28 U.S.C. § 2255 (Criminal Document No. 571) is **GRANTED**. The Court further

ORDERS that Kiran Sharma's *Pro Se* Reply to the United States Response to Motion Under 28 U.S.C. § 2255 And *Pro Se* Motion for Summary Judgment (Criminal Document No. 580) is **DENIED**.

⁷ *Declaration of Dan Cogdell*, Document No. 569 at 5.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 17 day of August, 2017.



DAVID HITTNER
United States District Judge

ENTERED

August 17, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KIRAN SHARMA,

§

Petitioner,

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v.

§ Civil Action No. H-16-2977

§ Criminal Action No. H-09-409-2

UNITED STATES OF AMERICA,

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Respondent.

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ORDER

Pending before the Court are Petitioner Kiran Sharma's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Criminal Document No. 544), the United States' Motion For Summary Judgment and Response to Motion Under 28 U.S.C. § 2255 (Criminal Document No. 571), and Kiran Sharma's *Pro Se* Reply to the United States Response to Motion Under 28 U.S.C. § 2255 And *Pro Se* Motion for Summary Judgment (Criminal Document No. 580). Having considered the motions, submissions, and applicable law, the Court determines the Petitioner's motions should be denied and the Government's motion for summary judgment should be granted.

I. BACKGROUND

On November 4, 2009, Dr. Kiran Sharma ("Sharma") was indicted on sixty-four counts, including conspiracy, healthcare fraud, mail fraud, unlawful

distribution of controlled substances, and money laundering. On April 26, 2010, pursuant to a written plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), Sharma pleaded guilty to Counts One and Four: (1) Conspiracy to Commit Offense or Defraud the United States, in violation of 18 U.S.C. § 371; and (4) Health Care Fraud, in violation of 18 U.S.C. § 1347. The remaining counts were dismissed.

As part of the 11(c)(1)(C) plea agreement, Sharma agreed to the following: (1) a sentence of ninety-six months and a term of three years supervised release; (2) joint and several liability with co-defendant and husband Dr. Arun Sharma for complete restitution to all victims in an amount to be determined by the Court; and (3) establishment of an irrevocable trust holding \$1.5 million in the name of Sharma's son, Gaurav Sunny Sharma, for payment of his undergraduate and medical school tuition and related living expenses. Additionally, Sharma waived her right to appeal and collaterally attack her sentence.

After Sharma pleaded guilty to two counts, a presentence investigation was made and the final presentence report was filed on January 31, 2011. The report assessed four enhancements: twenty-six levels for the intended loss of more than \$100,000,000, but less than \$200,000,000; two levels for an offense involving ten or more victims; four levels for her role as a leader or organizer of criminal activity involving five or more participants; and two levels for the abuse of her position of

trust as a physician with patients and insurance companies during the commission of the offense. The report also deducted two levels for acceptance of responsibility. These findings resulted in a total offense level of thirty-eight. The report suggested a criminal history category of I because Sharma had no criminal history. In addition, the report determined that Sharma was liable for restitution totaling approximately \$43 million.¹

At the time of sentencing, absent the plea agreement, the offense level of thirty-eight and criminal history category of I would have resulted in a guideline sentence of 235 to 293 months; however, the guideline sentence would have been reduced to the statutory maximum sentence of 180 months. Sharma's counsel, Dan Cogdell ("Cogdell") objected to the offense level and the guideline sentence, arguing that a downward adjustment to an offense level of 9 or 10 and a sentence of 4 to 12 months was appropriate, because the loss attributable to Sharma should have been approximately \$32,000 not \$43,000,000. Cogdell's objection was overruled. The Court accepted Sharma's plea agreement and sentenced her to ninety-six months and three years of supervised release and ordered restitution totaling approximately \$43 million. The judgment was entered on March 8, 2011. Sharma filed a direct appeal and the Fifth Circuit vacated the restitution order and remanded for further calculation. At resentencing, the Court altered the restitution

¹ *Report, supra* note 1, at 16.

award to \$37 million dollars, but did not otherwise modify the judgment of conviction or prison sentence. Sharma again appealed and the Fifth Circuit affirmed the Court on April 21, 2015.

Sharma placed her § 2255 motion in the prison mailing system on September 27, 2016.² The petition alleges the following four grounds for relief based on alleged ineffective assistance of counsel. First, Sharma contends that Cogdell failed to challenge the offense level prior to her entry of a guilty plea and that Cogdell failed to challenge an ex post facto violation during Sharma's sentencing hearing. Second, Sharma contends that Cogdell's failure to hire a medical billing expert to rebut the Government's calculation of intended loss constituted ineffective assistance. Third, Sharma contends that she was prejudiced by Cogdell's failure to timely object to the forfeiture of the remaining funds in the trust established for her son pursuant to her plea agreement. Fourth, Sharma contends that Cogdell failed to challenge the joint and severable nature of the restitution award and failed to argue that her restitution should be reduced on the basis of offsets for Sharma's provision of medically necessary services.

Sharma filed her § 2255 motion on September 27, 2016. The Government moved to dismiss on May 4, 2017, requesting the Court grant summary judgment for the Government on each ground for relief as to Sharma's ineffective assistance

² There is no allegation that Sharma's motion was untimely.

of counsel claim. The Government concedes that Sharma's claim for ineffective assistance is properly brought under her § 2255 motion³, but contends summary judgment is appropriate on all four grounds for relief because they fail to meet the standard outlined in *Strickland*. Sharma filed her reply on July 11, 2017.

II. STANDARD OF REVIEW

A. Relief Under 28 U.S.C. § 2255

“Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Mimms*, 43 F.3d 217, 219 (5th Cir. 1995) (quoting *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992)). Even if a defendant alleges a constitutional error, he may not raise an issue for the first time on collateral review without showing both cause for his procedural default and actual prejudice resulting from the error. *United States v. Frady*, 456 U.S. 152, 167 (1982); *United States v. Acklen*, 47 F.3d 739, 741–42 (5th Cir. 1995). A petitioner must show “cause” to explain the reason why the objection was not made originally at trial or on direct appeal and show “actual prejudice” was suffered from the alleged errors. *Frady*, 456 U.S. at 167. To prove “cause,” a petitioner must show an external obstacle prevented him from raising his claims either at trial

³ Motion for Summary Judgment, Document No. 571 at 5.

or on direct appeal. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). To prove “actual prejudice,” the petitioner must show he has suffered an actual and substantial disadvantage. *Frady*, 456 U.S. at 170.

To succeed under the “cause” and “actual prejudice” standard, a petitioner must meet a “significantly higher hurdle” than the plain error standard required on direct appeal. *Id.* at 166. This higher standard is appropriate because once a petitioner’s chance to appeal has been exhausted, courts are allowed to presume the defendant was fairly convicted. *Id.* at 164; see also *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998) (presuming defendant to be fairly and finally convicted after direct appeal was heard and decided). Ineffective assistance of counsel, if shown and applicable, will satisfy the requisite cause and prejudice. *Acklen*, 47 F.3d at 742. Additionally, a claim for ineffective assistance of counsel is properly brought for the first time in a § 2255 motion. *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (en banc).

B. Ineffective Assistance of Counsel

The court analyzes an allegation of ineffective assistance of counsel in a § 2255 motion under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). The movant must show his counsel’s performance was both deficient and prejudicial to prevail on an ineffective assistance of counsel claim. *Strickland*, 466

U.S. at 700; *Willis*, 273 F.3d at 598. To show deficiency, the movant must show his counsel's assistance was outside a broad range of what is considered reasonable. *Strickland*, 466 U.S. at 669. To show that the deficiency caused prejudice during the plea process, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The movant must prove both prongs of the analysis: counsel tendered deficient performance and the movant suffered prejudice. *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997).

III. LAW AND ANALYSIS

A. Failure to Object to Offense Level and Ex Post Facto Violations

Sharma contends her counsel was ineffective because he failed to challenge her offense level prior to her plea and what she alleges is an ex-post-facto clause violation based on the use of the 2010 Affordable Care Act guidelines at the time of sentencing. The Government contends Sharma cannot show deficient performance or prejudice because she entered into plea under Federal Rule of Criminal Procedure 11(c)(1)(C) and understood the terms of her sentence. Sharma cannot show deficient performance because her offense level was not calculated until the issuance of the Presentence Investigation Report after she pleaded and because the record reflects her counsel did file a written objection to the use of the

2010 Affordable Care Act guidelines in calculating the loss amounts on the ground that it was an *ex post facto* violation.⁴ Nor can Sharma show prejudice because at the time of plea she averred that she understood the terms of the 11(c)(1)(C) plea agreement and that she would receive a ninety-six month sentence.⁵ Accordingly, the Court denies Sharma's petition as to Ground One because she cannot show prejudice or deficient performance under *Strickland*.

B. Failure to Hire Medical Billing Expert

Sharma contends counsel was ineffective in failing to retain a medical billing expert to mitigate the attributable loss amount calculation. The Government contends Sharma has not met her burden to show that failure to call the medical billing witness amounted to ineffective assistance of counsel. "To prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day v. Quartermar*, 566 F.3d 527, 538 (5th Cir. 2009). Although Sharma references several potential expert witnesses—Dean Richardson, Dr. Prithvi Raj, Dr. Ian J. Reynolds, Dr. Victor Hirsch, Dr. Marie Kusick—she

⁴ *Declaration of Dan Cogdell*, Document No. 569, Exhibit 1, ¶ 6 (*Defendant Kiran Sharma's Objections to Presentence Investigation Report*).

⁵ *Transcript of Rearraignments*, Document No. 182 at 11–12.

fails to present competent evidence that any of the referenced individual were available and willing to testify, the content of the proposed testimony, and that the content of the testimony would be favorable to her. Accordingly, the Court denies Sharma's petition as to Ground Two because she has not met her burden to show the failure to call any of the referenced individuals to testify constituted ineffective assistance of counsel.

C. Failure to Timely Object to Forfeiture of Trust Funds

Sharma contends counsel was ineffective in failing to timely object to the terms of the 1.5 million dollars placed in trust for her son's education as part of her plea and that she would not have pleaded guilty if she understood how the trust would be distributed and subsequently dissolved. The Government contends that Sharma cannot show prejudice because the Fifth Circuit held in Sharma's husband's direct appeal that the dissolution of the trust was not a violation of the plea agreement. In regards to the trust on direct appeal, the Fifth Circuit held there was no breach of Sharma's husband's plea agreement where: "the plea agreement did not address the balance of the \$1.5 million educational trust. As the trust contained seized funds, and Arun agreed to forfeit proceeds of the fraud, he could not reasonably expect any remainder of the trust to revert to him." *United States v.*

Sharma, 703 F.3d 318, 327 (5th Cir. 2012).⁶ Even if Sharma could show that counsel failed to timely object to the preliminary order of forfeiture as to the trust's remainder, she cannot show prejudice. The Fifth Circuit held the forfeiture of the trust's remainder was not a breach of the plea agreement. Sharma stated in open court at the time of her plea that she understood the terms of the plea. Accordingly, the Court denies Sharma's third ground for relief.

D. Ineffective Assistance of Counsel in Restitution Calculation

Sharma contends she should not be jointly and severally liable with her husband, that her restitution should only be thirty-two thousand dollars, and that her counsel failed to object that not all her practice was fraudulent. The Government contends she cannot show deficient performance or prejudice by counsel as to any of these contentions.

As to Sharma's joint and several liability with her husband for the restitution, Sharma cannot show prejudice because the Fifth Circuit has upheld the imposition of joint and several liability for restitution among multiple defendants who conspired to defraud. *See United States v. Chaney*, 964 F.2d 437, 453–54 (5th Cir. 1992). As to the amount of Sharma's restitution, she cannot show deficient performance because counsel did argue that the loss amount attributable to Sharma

⁶ Kiran Sharma's case was consolidated into her husband's appeal, however it does not appear she argued on direct appeal the Government breached her plea by requesting a forfeiture of the educational trust's remainder.

was only thirty-two thousand dollars.⁷ As to Sharma's contention that the restitution amount included non-fraudulent allergy charges, the Fifth Circuit addressed on direct appeal that the restitution amount calculation did not include any potentially non-fraudulent procedures. *See United States v. Sharma*, 609 F. App'x 797, 806 (5th Cir. 2015). As such, Sharma cannot show deficient performance because the non-fraudulent aspects of her practice were not part of the conspiracy or included in the attributable loss amount calculation. Accordingly, the Court denies Sharma's fourth ground for relief.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that Petitioner Kiran Sharma's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Criminal Document No. 544) is **DENIED**. The Court further

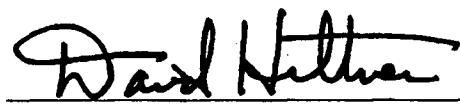
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⁷ *Declaration of Dan Cogdell*, Document No. 569 at 5.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 17 day of August, 2017.



DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20636

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

KIRAN SHARMA,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

Before CLEMENT, OWEN, and WILLETT Circuit Judges.

PER CURIAM:

() Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

() Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and

a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Priscilla A. Owen
UNITED STATES CIRCUIT JUDGE