FILED
United States Court of Appeals
Tenth Circuit

December 27, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEJUAN LESHAE HILL,

Defendant - Appellant.

No. 17-5106

ORDER

Before **LUCERO, HARTZ**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

September 4, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEJUAN LESHAE HILL,

Defendant - Appellant.

No. 17-5106
(D.C. Nos. 4:16-CV-00310-JHP-FHM and 4:12-CR-00050-JHP-9)
(N.D. Okla.)

ORDER DENYING A CERTIFICATE OF APPEALABILITY

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Defendant DeJuan Leshae Hill seeks a certificate of appealability (COA) to appeal the dismissal by the United States District Court for the Northern District of Oklahoma of his motion for relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal denial of a § 2255 motion). We deny a COA and dismiss the appeal.

On February 15, 2013, a jury found Defendant guilty of conspiring to obstruct, delay, or affect commerce by robbery, *see* 18 U.S.C. § 1951; obstructing, delaying, and affecting commerce by robbing a branch of Arvest Bank, *see id.*; and possessing a firearm in furtherance of the Arvest Bank robbery, *see* 18 U.S.C. § 924(c)(1)(A). The court sentenced him to 162 months' imprisonment. After this court affirmed his conviction in May 2015, *see United States v. Hill*, 786 F.3d 1254, 1257 (10th Cir. 2015),

Defendant filed his § 2255 motion in May 2016. The district court denied the motion and a COA.

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.* In reviewing the denial of a § 2255 motion, "we review the district court's legal rulings de novo and its findings of fact for clear error." *United States v. Garrett*, 402 F.3d 1262, 1264 (10th Cir. 2005).

Defendant's four claims on appeal assert ineffective assistance of counsel. To prevail on such claims, he must show both that his counsel's performance was deficient—"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"—and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In doing this analysis, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). Further, to establish that a defendant was prejudiced by counsel's deficient

performance, he "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." *Id.* at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700 (emphasis added).

Defendant first argues that he received ineffective assistance because his counsel, at trial and on direct appeal, failed to "move[] for a judgment of acquittal on the basis that the government never proved there was an agreement between alleged co-conspirators." Aplt. Br. at 11 (capitalization omitted). He misstates the facts. As the district court noted, his counsel at trial and on appeal both made this sufficiency-of-the-evidence argument.

Defendant next argues that he received ineffective assistance at trial because his trial counsel failed to object to (1) "improper prosecutorial comments during closing arguments" and (2) "the use of photo charts that were not submitted as evidence during the trial." Aplt. Br. at 13 (capitalization omitted). The closing-argument issue concerns a prosecutor's incorrect statement during closing that a police officer saw Defendant come out of a particular house under observation. But as the district court noted, and Defendant does not contest, defense counsel promptly pointed out the error at closing and the prosecution then corrected the error for the jury as well. The district court concluded Defendant was therefore not prejudiced by any failure of his trial counsel to object.

Defendant's photo-chart argument is that his trial counsel should have objected to a compilation of photos the prosecution used as a demonstrative exhibit that was not admitted as evidence. He complains that the photos had not previously been shown to defense counsel. He contests the district court's statement that "[i]t is clear from the [trial] transcript that [defense] counsel had obtained in discovery every photograph which was utilized by the government in its demonstrative aids." R. at 171. But he fails to show that the court's finding was clearly erroneous. Defendant's purportedly discrediting affidavit sheds no light on whether defense counsel had reviewed the relevant photos.

Defendant's third ground on appeal is that his counsel provided ineffective assistance by failing to argue that the insufficiency of the prosecution's evidence violated the Administrative Procedure Act (APA). But he does not, and could not, explain how the APA has any bearing on criminal trials.

Finally, Defendant argues that his trial counsel provided ineffective assistance by not calling an expert witness to challenge government expert testimony that Defendant was a certified member of the 27th St. Hoovers gang. But as the district court pointed out, to establish prejudice from counsel's decision not to call an expert witness, a defendant must identify what his proposed expert would have testified to. *See Boyle v. McKune*, 544 F.3d 1132, 1138–39 (10th Cir. 2008). Defendant has not done so here.

No reasonable jurist could debate the district court's resolution of Defendant's ineffective-assistance claims.

We **DENY** a COA and **DISMISS** the appeal. We **GRANT** Defendant's motion for leave to proceed *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	**Case Nos. 12-CR-50–009-JHP**
	)	**16-CV-310-JHP**
	)	
DEJUAN LESHAE HILL,	)	
	)	
Defendant/Petitioner.	)	

JUDGMENT

This matter came before the Court for consideration of defendant's motion to vacate, set aside, or correct sentence, pursuant to 18 U.S.C. § 2255. The issues having been duly considered and a decision having been rendered in accordance with the Order filed simultaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for respondent, United States of America, and against petitioner, DEJUAN LESHAE HILL, on his challenge to the legality of his sentence.

IT IS SO ORDERED this 27th day of July, 2017.

James H. Payne
United States District Judge
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	**Case Nos. 12-CR-50–009-JHP**
	)	**16-CV-310-JHP**
	)	
DEJUAN LESHAE HILL,	)	
	)	
Defendant/Petitioner.	)	

ORDER

This is a proceeding initiated by the above-named petitioner who is currently an inmate at the Federal Correction Complex in Yazoo City, Mississippi. This action was initiated pursuant to the provisions of 28 U.S.C. § 2255. Petitioner contends that his detention pursuant to the judgment and sentence of the United States District Court for the Northern District of Oklahoma, in Case No.12-CR-50-009-JHP, is unlawful.

The Respondent filed a response by and through the United States Attorney for the Northern District of Oklahoma. Petitioner filed a reply on December 12, 2016. In addition, the court has reviewed the relevant trial court records associated with Case No. 12-CR-50-JHP. The records reflect petitioner was named in an ten-count Superseding Indictment on July 11, 2012, charging him[1] and seven others with Conspiracy to Obstruct, Delay and Affect Commerce by Robbery, in violation of 18 U.S.C. § 1951 (Count One). The superseding

[1]The superseding indictment charged this defendant as "Dejuan Legmar Hill." On July 12, 2012, the court corrected the defendant's name by interlineation to Dejuan Leshae Hill.

indictment provided details regarding the manner and means of the conspiracy including that the "conspirators were and are members or affiliates with the Hoover Crips street gang;" the "conspirators would and did commit robberies of businesses, including pharmacies, banks and a credit union;" the "conspirators would and did use firearms during the robberies;" the "conspirators would and did use cellular phones to communicate before, during and after robberies;" and the "conspirators would and did threaten persons who were potential witnesses to robberies." Dkt. # 96, at p. 2. In addition to the conspiracy charge, the superseding indictment charged Dejuan Hill with the November 5, 2011, robbery of an Arvest Bank (Count Nine), in violation of 18 U.S.C. § 1951; and possession of a firearm in furtherance of the Arvest Bank robbery and aiding and abetting in violation of 18 U.S.C. § 2 (Count Ten). On January 23, 2013, a jury trial was commenced and on February 15, 2013, the jury returned its verdicts finding the defendant guilty on all three counts (Dkt. # 517). Additionally, the jury answered numerous interrogatories in relation to the crimes involved, specifically finding as it relates the defendant, the following:

> We, the jury, unanimously find beyond a reasonable doubt that the government proved the following overt acts:
>
> * * * * *
>
> 20. On or about November 5, 2011, V. Hill, Dejuan Leshae Hill ("Defendant D. HILL") and a person known to the Grand Jury as "Robber A", Stanley Hill used cellular phones to communicate with each other prior to and after robbery of the Arvest Bank located at 218 South Memorial Street, Tulsa, Oklahoma.
>
> * * * * *

22. On November 5, 2011, D. Hill entered into the Arvest Bank wearing a mask.

23. On November 5, 2011, V. Hill and D. Hill ordered customers and employees to get on the ground.

24. On November 5, 2011, D. Hill and V. Hill, demanded money from the bank employees.

25. On November 5, 2011, after robbing the bank, V. Hill and D. Hill, got into a get away car driven by Robber A fled from the area of the bank and traveled to a residence located at 1107 East Pine, Tulsa, Oklahoma.

26. On April 4, 2012, Defendants caused shots to be fired into a house at 2148 North Norfolk Avenue, Tulsa, Oklahoma.

(Dkt. # 517-1).

On May 28, 2013, the defendant was sentenced to 162 months consisting of 78 months on both Counts One and Nine, said terms to run concurrently, and 84 months on Count Ten, to be served consecutively to Counts One and Nine. Additionally, upon release from custody, the court ordered the defendant to be placed on supervised release for a period of three (3) years on Counts One and Nine and five (5) years on Count Ten. Further, the defendant was ordered to pay $300 special monetary assessment, a $1,000 fine, and restitution of $311.52. At the time of sentencing, the defendant was advised that he would have ten (10) days in which to appeal the judgment. The Judgment was filed of record on June 3, 2013.

Following his conviction, Petitioner filed a direct appeal. In his appeal, Petitioner raised four issues: 1) there was insufficient evidence to convict him of the robbery of Arvest

Bank; 2) there was a substantially prejudicial variance between the single global conspiracy charged in the indictment and the evidence of the individual conspiracies produced at trial; 3) trial court erred in failing to grant his motion for misjoinder or to sever his trial from that of his co-defendants; and 4) trial court committed error when it denied his motion to exclude gang evidence based upon Fed.R.Evid. 403. On May 22, 2015, the Tenth Circuit affirmed his conviction specifically finding the evidence was sufficient to convict him of the robbery of Arvest Bank and, of conspiring to rob Arvest Bank. *United States v. Hill*, 786 F.3d 1254 (10th Cir. 2015), *cert. denied*, 136 S.Ct. 177 (2015).

On May 27, 2016, petitioner filed the instant Motion to Vacate pursuant to 28 U.S.C. §2255. In his motion, petitioner raises four grounds for relief. First, petitioner argues his Fifth Amendment right to due process was violated because the government did not prove each and every element of the conspiracy alleged in Count One. Second, petitioner claims his Sixth Amendment right to a fair trial was violated because of improper prosecutorial comments during closing arguments and the use of photo charts that were not submitted as evidence during the trial. Third, petitioner asserts the evidence was insufficient to convict him of the Arvest Bank robbery or using a gun during that robbery as alleged in Counts Nine and Ten. Finally, petitioner argues he received ineffective assistance of counsel based upon trial counsel's failure: 1) to call an expert witness to rebut the government's testimony on gang certification; 2) to object to the government's closing arguments and use of photo charts, *i.e.* demonstrative aids; and 3) to raise an insufficiency of the evidence argument as to Counts Nine and Ten. To the extent these arguments were not raised on direct appeal,

petitioner claims he received ineffective assistance of appellate counsel. The government asserts petitioner's claims are procedurally barred.

Section 2255 is not a substitute for an appeal and is not available to test the legality of matters which should have been challenged on appeal. *United States v. Khan*, 835 F.2d 749, 753 (10th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988). Failure to raise an issue on direct appeal bars the movant/defendant from raising such an issue in a § 2255 Motion to Vacate Sentence "unless he can show cause for his procedural default and actual prejudice resulting from the alleged errors, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed." *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994)(citing *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993). Moreover, issues raised on direct appeal may not be reconsidered in a § 2255 motion absent changed circumstances. *Hale v. Fox*, 829 F.3d 1162, 1171 (10th Cir. 2016)(citing *Varela v. United States*, 481 F.3d 932 (7th Cir. 2007)).

In *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995), the Tenth Circuit held claims of constitutionally ineffective counsel should be brought on collateral review. Consequently, no procedural bar will apply to ineffective assistance of counsel claims which could have been brought on direct appeal but are raised in post-conviction proceedings. A petitioner may also raise substantive claims which were not presented on direct appeal if he can establish cause for his procedural default by showing he received ineffective assistance of counsel on appeal.

A court considering a claim of ineffective assistance of appellate counsel for failure to raise an issue is required to look to the merits of the omitted issue. Where the omitted issues are meritless, counsel's failure to raise it on appeal does not constitute constitutionally ineffective assistance of counsel. *Hooks v. Ward*, 184 F.2d 1206, 1221 (10th Cir. 1999). *See also, Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000).

I. Sufficiency of the Evidence

Although petitioner claims in his first and third grounds for relief that the evidence was insufficient to convict him of the conspiracy alleged in Count One and of the bank robbery alleged in Count Nine or the use of a weapon during that robbery as alleged in Count Ten, these issues were clearly raised in both the trial and appellate courts. At trial, counsel moved for a judgment of acquittal on all three counts arguing the government had failed to present sufficient evidence to convict him. Thereafter, petitioner raised these issues in his direct appeal and the Tenth Circuit reviewed de novo whether the government presented sufficient evidence to sustain a conviction. First, the Tenth Circuit looked at the evidence surrounding the robbery count. While the government relied primarily on circumstantial evidence to tie Dejuan to the robbery of the Arvest Bank, the Circuit Court found the jury

> . . . could strongly infer from Officer Johnson's testimony that Dejuan had been inside 1107 E. Pine with Vernon and Stanley because Officer Johnson saw him drive away from a one-way alley behind the house. It could also infer from the lack of the second robber's clothing at the house that one of the robbers had either left the house soon after arriving or had been dropped off somewhere on the way to the house. The cell phone records provided the information that a call was placed on Landrum 1 to Vernon's phone at about the time Officer Johnson saw Dejuan leaving Vernon's property (and that at least three calls occurred between those two phones over the next 30 minutes).

> The cell phone records also detailed that Landrum 1 was near 1107 E. Pine when the first call was placed but continued to move south as the calls progressed. Thus, the jury needed to take only a single inferential step to determine that this was Dejuan calling Vernon, Dejuan having just been seen by Officer Johnson.
>
> The jury could also tell two other important things from the cell phone records introduced at trial. First, Vernon's phone placed a call to Landrum 1 right before the Arvest robbery. The government posited that this was Vernon calling Stanley, the getaway driver, before he and Dejuan entered the bank. This assertion was corroborated by an eyewitness who testified to having seen two men whose description matched that of the robbers standing outside of the bank shortly before the robbery, one of them speaking on a cell phone. And, second, the government's cell phone evidence suggested that the three phones at issue–Vernon's phone, Landrum 1, and Landrum 2–were all located in the vicinity of Whitney Landrum's house on the morning of the robbery. Taking all reasonable inferences in the government's favor, the jury could believe from this evidence that Vernon, Dejuan, and Stanley were all in the same location shortly before the robbery of Arvest Bank. This evidence also allowed the jury to infer that, after leaving 1107 E. Pine, Dejuan called Vernon using the very phone that Vernon had called when standing outside of the bank before the robbery.
>
> The evidence from inside the bank–the videotape and eyewitnesses–allowed the jury to determine that Stanley was not one of the robbers who entered the bank. It also allowed the jury to see–consistent with other testimony–that the second robber was about the same height and complexion as Dejuan.
>
> * * * * *
>
> In sum, we conclude that sufficient evidence existed for the jury to convict Dejuan beyond a reasonable doubt.

United States v. Hill, 786 F.3d 1254, 1262-1265 (10th Cir. 2015).

Next, the circuit court examined "whether there was sufficient evidence to tie Dejuan to the larger global conspiracy alleged in Count One." *Id.*, at 1266. Although the circuit court found there was a variance between the conspiracy charged in the indictment and the crimes proved at trial, the circuit court found "the evidence was sufficient to convict Dejuan of conspiring to rob Arvest Bank." *Id.*, at 1270. Moreover, in light of the circuit court's

conclusion that sufficient evidence existed to establish both that petitioner robbed Arvest Bank and conspired to do so, petitioner cannot establish that he was prejudiced by the circuit court's failure to address his sufficiency of the evidence claim as it relates to firearm charged in Count Ten since each member of a conspiracy is legally responsible for the crimes of his fellow conspirators committed in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). As a result, this court finds petitioner is procedurally barred from raising his sufficiency of the evidence claims in this proceeding.

II. Improper Closing Argument and Use of Demonstrative Aids

In his second ground for relief, Petitioner argues the prosecutor made improper comments during closing arguments and used demonstrative aids thereby violating his rights under the Sixth Amendment to a fundamentally fair trial and his Fifth Amendment right to due process. Again the government urges this court to find petitioner is procedurally barred from raising this issue. To obtain collateral relief based on trial errors to which no contemporaneous objection was made nor an appeal lodged, "a convicted defendant must show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). To overcome cause and prejudice, Petitioner argues trial counsel rendered ineffective assistance of counsel by not objecting to a single line in the prosecutor's first closing arguments.

A. Improper closing argument

Petitioner challenges the following statement by the prosecutor during the first closing argument:

> At the Arvest robbery, Officer Donnie Johnson comes in and testifies that he was there shortly after the tracking device stops, he was part of the lockdown team. And what does he see? He sees a car, a black car, coming down the alleyway, *sees this person come out of the house*, then sees the car come down the back alley.

Dkt. # 571, p. 72 (Tr. of J.T., Vol. 9, p. 1859) (italics added). Because the officer did not see the person in the black car come out of the house, petitioner asserts the statement by the prosecutor prevented the jury from making a proper determination regarding reasonable doubt thereby depriving him of a fair trial. Following this comment, however, defense counsel corrected the prosecutor's statement by stating:

> Something about a car. Officer Johnson saw someone not leaving the house at 1107 East Pine - - that's the house - - leaving an alley near the house.

Id., at p. 78 (Tr. of J.T., *id.*, at p. 1865). Thereafter, in the second closing argument, the prosecutor corrected the earlier statements when she said:

> Now, the testimony of Officer Donnie Johnson was not that he simply saw this car coming out of the alley. If you remember his testimony, he said he first saw that car in back of the residence at 1107 East Pine. I showed him a diagram and there's a fenced-n area. He said that was first time I saw it.
>
> And what did he tell you he was doing at that time? He told you that he was looking for a GPS device, and so his orders had been look for this tracking device, it's moving at walking speed at this time, look for this tracking device, and don't let anyone go into or come out of 1107 East Pine.
>
> Now, *he didn't see anyone come out of 1107 East Pine* so he's still thinking he's following orders, but he had the wherewithal to write in his report and to take note of the person. Once he saw that car move from the back of 1107 East Pine, then come into the alleyway, and drive along Norfolk, he had the wherewithal to pay attention. And fortunately he did, because what

> he describes to you is that he saw a darker-skinned black male wearing a white shirt. He was able to notice that because the window was partially down.

Id., at pp. 142-143 (Tr. of J.T., *id.*, at pp.1929-1930) (italics added).

Since both defense counsel and the prosecutor corrected the misstatement, within a very short time after it was made, by clarifying that the defendant was NOT seen coming out of the house at 1107 E. Pine before he drove out of the alley, this court finds petitioner has failed to establish counsel was ineffective for not objecting to the misstatement. Moreover, petitioner has not established that he was prejudiced by the misstatement given the fact the misstatement was corrected and the jury was repeatedly cautioned by the court that the lawyers' statements and arguments were not evidence. *Id.*, at pp. 25 and 39 (Tr. of J.T., *id.*, at pp. 1812 and 1826). *See also,* Dkt. # 515, at pp. 22 and 45. Accordingly, this court finds petitioner is procedurally barred from raising this issue.

B. Use of Demonstrative Aids

Next, petitioner argues his counsel rendered ineffective assistance of counsel by failing to object to the use of a demonstrative aid, a compilation of photo charts, utilized by the government during closing arguments. Petitioner also claims the government never provided the demonstrative aid to defense counsel and, therefore, there was a failure to disclose discovery material to the defense. While counsel acknowledged he had not seen the exact document utilized by the government, he admitted he had seen all of the pictures used in the compilation of the demonstrative aid. *Id.*, at p. 118 (Tr. of J.T., *id.*, at p. 1905). Despite the government stating in their response that counsel objected to the use of the demonstrative

aids at trial,[2] the transcript reflects counsel did not initially object to the use of demonstrative aids, *id.*, at pp. 118-119 (Tr. of J.T., *id*, at pp. 1905-1906); but, counsel did object to some of the information contained within a single demonstrative aid related to the Arvest Bank robbery. *Id.*, at pp. 135-136 (Tr. of J.T., *id.*, at pp. 1922-23). According to defense counsel, the demonstrative aid, in addition to containing photographs of individuals involved in the robbery, displayed times regarding the start of the Arvest robbery and the time that the defendant, Dejuan Hill, purportedly left the residence at 1107 East Pine which conflicted with the evidence introduced at trial. *Id.*, at p. 133 (Tr. of J.T., *id.*, at p. 1920). The government argued because defense counsel suggested a time line in reference to the Arvest Bank robbery, it should have a fair opportunity to respond to that time line. The court overruled the objection; but, indicated that demonstrative aids which had not been admitted into evidence would not go back with the jury. *Id.*, at pp. 135-136 (Tr. of J.T., *id.*, at pp. 1922-1923). It is clear from the transcript that counsel had obtained in discovery every photograph which was utilized by the government in it demonstrative aids. Simple compilation of photographs which were introduced at trial into a single demonstrative aid for purposes of closing argument did not violate the defendant's right to a fundamentally fair trial under the Sixth Amendment or his right of fair notice under the due process clause of the Fifth Amendment. Accordingly, this court finds appellate counsel was not ineffective for failing to appeal this court's ruling. *Hooks v. Ward*, 184 F.2d 1206, 1221 (10th Cir. 1999). As a result, petitioner is procedurally barred from raising this issue.

[2]Dkt. # 771, at p. 31.

III. Ineffective Assistance of Counsel

Finally, petitioner argues in his fourth ground that his counsel was ineffective for not calling a "professional witness" to rebut the testimony of Tulsa Police Officer Steven Sanders regarding how a person becomes a certified gang member. Sanders testified he was assigned as a gang investigator and "[t]he 107 Hoover Crips is one of [the] more powerful African-American gangs in Tulsa." Dkt. # 570, at p. 101 (Tr. of J.T., Vol. III, at p. 1624). Additionally, the officer testified how gangs work and that there are different sets and different cliques; different ways to become members; and that a person gains respect by committing various criminal activities. *Id.*, at pp. 101-104 (Tr. of J.T., *id.*, at pp. 1624-1627). Further, the officer testified about the "certification process" used by local law enforcement to identify gang members or their associates. *Id.*, at pp. 105-108 (Tr. of J.T., *id.*, at pp. 1628-1631). Finally, as it relates to the defendant, the officer testified Dejuan Hill was a certified member of the 27th Street Hoovers, which was based, in part, on Hill's gang tattoo. *Id.*, at pp. 115, 118, 121-122 (Tr. of J.T., *id.*, at pp. 1638, 1640, 1644-1645).

Petitioner's claim of ineffective assistance of counsel is governed by the familiar two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, Petitioner must demonstrate that (1) the representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance prejudiced the defense. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. Failure to establish either prong of the Strickland standard will result in a denial of petitioner's Sixth Amendment claims. *Id.*, 466 U.S. at 696, 104 S.Ct. at

2069-2070. While ensuring that criminal defendants receive a fair trial, considerable judicial restraint must be exercised. As the Supreme Court cautioned in Strickland,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all to easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id., at 466 U.S. at 689, 104 S.Ct. at 2065. In addition, the Court indicated the conduct of counsel is "strongly presumed" to have been within the wide range of reasonable professional assistance. *Id.* The Tenth Circuit has indicated before representation will be considered ineffective, it must have made the trial "a mockery, sham, or farce, or resulted in the deprivation of constitutional rights." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1537 (10th Cir. 1994); see also *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997) (holding counsel's performance must have been "completely unreasonable, not merely wrong," to be constitutionally ineffective). A reviewing court "may address the performance and prejudice components in any order, but need not address both if [petitioner] fails to make a sufficient showing of one." *Foster v. Ward*, 182 F.3d 1177, 1184 (10th Cir. 1999).

A court considering a claim of ineffective assistance of appellate counsel for failure to raise an issue is required to look to the merits of the omitted issue. Where the omitted issues are meritless, counsel's failure to raise it on appeal does not constitute constitutionally ineffective assistance of counsel. *Hooks v. Ward*, 184 F.2d 1206, 1221 (10th Cir. 1999). *See also*, *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000).

While petitioner challenges counsel's trial strategy in not calling a witness to rebut the police officer's testimony, he does not identify who counsel should have called or what the witness would have testified about, let alone establish that this unknown expert witness would have testified differently than the Tulsa Police Officer put on by the government. The Sixth Amendment demands only that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney. *United States v. Miller*, 643 F.2d 713, 714 (10th Cir. 1981)(citing *Dyer v. Crisp*, 613 F.2d 275, 278 (10th Cir.), cert. denied, 445 U.S. 945, 100 s.Ct. 1342, 63 L.Ed.2d 779 (1980). The focus of the first prong on *Strickland* is "not what is prudent or appropriate, but only what is constitutionally compelled." *Breechen v. Reynolds*, 41 F.3d 1343, 1365 (10th Cir. 1994). "For counsel's performance to be constitutionally ineffective, it must have been 'completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy.'" *Le v. Mullin*, 311 F.3d 1002, 1025 (10th Cir. 2002) (citing *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997) (quoting *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n. 1 (10th Cir. 2001)).

Decisions regarding what witnesses to call are generally a matter of trial strategy for the trial attorney. *Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008). Moreover, in order to meet the first prong of *Strickland*, a petitioner is required to identify what his proposed expert would have testified to. *Id.*, at p. 1138 (recognizing that a "speculative witness is often a two-edged sword"). In this case, even if a defense gang expert might have provided helpful testimony on direct examination, the admissions and qualifications elicited

by prosecutors on cross examination could have been even more damaging where the Tulsa Police Officer's testimony was based, in part, on petitioner's gang tattoo. Moreover, because of his tattoo, this court finds petitioner has failed to establish that he was prejudiced. Finding no merit to petitioner's ineffective assistance of counsel claim, this court finds appellate counsel was not ineffective for failing to raise this issue on appeal.

CONCLUSION

For the reasons stated herein, the court hereby **denies** petitioner's Motion to Vacate, pursuant to 28 U.S.C. § 2255. Further, pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the court hereby declines to issue a certificate of appealability.

It is so ordered on this 27th day of July, 2017.

James H. Payne
United States District Judge
Northern District of Oklahoma