INDEX TO APPENDICES

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

May 7, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARK LEE WILKINSON,

Petitioner - Appellant,

v.

SHIOBAN BURTLOW; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 20-1452
(D.C. No. 1:20-CV-01328-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BACHARACH**, **MURPHY,** and **CARSON**, Circuit Judges.

This matter is before the court on Mark Lee Wilkinson's pro se requests for a certificate of appealability ("COA") and to proceed on appeal in forma pauperis. He seeks a COA so he can appeal the district court's dismissal, on timeliness grounds, of his 28 U.S.C. § 2254 habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from the dismissal of a § 2254 petition unless the petitioner first obtains a COA); *id.* § 2244(d)(1) (setting out a one-year limitations period running from the date on which the state conviction became final). This court **grants** Wilkinson's request to proceed on appeal in forma

pauperis. Because, however, Wilkinson has not "made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), we **deny** his request for a COA and **dismiss** this appeal.

Wilkinson was found guilty in Colorado state court of numerous counts of child sexual assault and incest. *See generally Wilkinson v. Timme*, 503 F. App'x 556, 557 (10th Cir. 2012). In the instant § 2254 habeas petition, Wilkinson asserts his counsel was ineffective during the plea bargaining process. In a thorough Report and Recommendation, a magistrate judge concluded Wilkinson's habeas petition was untimely. The magistrate judge further determined that Wilkinson was not entitled to either statutory or equitable tolling. Upon de novo review, the district court adopted the magistrate judge's Report and Recommendation and dismissed Wilkinson's habeas petition.

The obtaining of a COA is a jurisdictional prerequisite to Wilkinson's appeal from the dismissal of his § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To be entitled to a COA, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That is, he must demonstrate "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." *Miller-El*, 537 U.S. at 336 (quotations omitted). When a district court dismisses a

§ 2254 motion on procedural grounds, a petitioner is entitled to a COA only if he shows both that reasonable jurists would find it debatable whether he had stated a valid constitutional claim and debatable whether the district court's procedural ruling was correct. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). In evaluating whether Wilkinson has satisfied his burden, we undertake "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each of his claims. *Miller-El*, 537 U.S. at 338. Although Wilkinson need not demonstrate his appeal will succeed, he must "prove something more than the absence of frivolity or the existence of mere good faith." *Id.* (quotations omitted). As a further overlay, we review for abuse of discretion the district court's decision that Wilkinson is not entitled to have the § 2244(d) limitations period equitably tolled. *See Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003).

Having undertaken a review of Wilkinson's appellate filings, the magistrate judge's Report and Recommendation, and the district court order of dismissal, we conclude Wilkinson is not entitled to a COA. The district court's resolution of Wilkinson's § 2254 petition is not deserving of further proceedings or subject to a different resolution on appeal. In so concluding, there is no need for this court to repeat the analysis set out in the magistrate judge's well-stated Report and Recommendation. Instead, it is enough to note that Wilkinson's habeas petition is

clearly untimely and he has not demonstrated the types of extraordinary circumstances entitling him to equitable tolling, *Al-Yousif v. Trani*, 779 F.3d 1173, 1179 (10th Cir. 2015). Accordingly, this court **DENIES** Wilkinson's request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 20-cv-01328-LTB-GPG

MARK LEE WILKINSON,

Applicant,

v.

SHIOBAN BURTLOW, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1)[1] filed *pro se* by Applicant, Mark Lee Wilkinson, on May 11, 2020. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 24.)[2]

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[1] "(ECF No. 1)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

The Court must construe the Application liberally because Mr. Wilkinson is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

On June 8, 2020, the Court ordered Respondents to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and exhaustion of state remedies pursuant to 28 U.S.C. § 2254(b)(1)(A) if Respondent intends to raise either or both of those defenses in this action. Respondents also were directed to address whether the Application is a second or successive application subject to dismissal pursuant to 28 U.S.C. § 2244(b). On July 29, 2020, Respondents filed a Pre-Answer Response (ECF No. 18) arguing that the Application is second or successive and untimely and that the claim Mr. Wilkinson seeks to assert is unexhausted and procedurally defaulted. On September 10, 2020, Mr. Wilkinson filed a Pre-Answer Reply (ECF No. 21).

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the Application be denied and the action be dismissed.

I. DISCUSSION

Mr. Wilkinson is a prisoner in the custody of the Colorado Department of Corrections. He challenges the validity of his state court conviction in Mesa County, Colorado, District Court case number 99CR1111. The long procedural history of state court proceedings in Mr. Wilkinson's case was summarized by the Colorado Court of

Appeals in 2018 as follows:

> In 2001, the trial court sentenced Wilkinson to an aggregate term of fifty-two years to life in the custody of the Department of Corrections in connection with convictions entered for sexual assault on a child (two counts), sexual assault on a child – pattern of abuse, sexual assault on a child by one in position of trust (two counts), sexual assault on a child by one in position of trust – pattern of abuse, and aggravated incest (three counts).
>
> On direct appeal, a division of this court affirmed Wilkinson's convictions and sentences, after rejecting his contentions that reversal was required because the trial court erred in (1) not dismissing the case for speedy trial violations; (2) admitting evidence of his sexual orientation; (3) failing to suppress illegally seized evidence; (4) admitting evidence from an improperly endorsed witness; (5) discharging the subpoena served on the victim's mother without requiring her to testify; and (6) sentencing him. *See People v. Wilkinson*, (Colo. App. No. 01CA0897, May 8, 2003) (not published pursuant to C.A.R. 35(f) (*Wilkinson I*) (mandate issued on October 20, 2003).
>
> *A. Wilkinson's Prior Crim. P. 35 Proceedings*
>
> In 2004, Wilkinson filed a pro se Crim. P. 35(b) motion for reconsideration of his sentence, asserting that his sentence was illegal because, among other things, it violated double jeopardy. In 2005, Wilkinson, through counsel, filed a "supplemental" Crim. P. 35(a) and (c) motion, contending that he was entitled to relief because of (1) newly discovered evidence (i.e., an affidavit from the victim (Wilkinson's son) recanting his trial testimony; (2) ineffective assistance of trial and appellate counsel (i.e., in failing to aggressively pursue an adequate plea deal or tender a plea offer to him; in failing to prepare for, to ask for a continuance to prepare for, or to provide a defense expert to counter the testimony of the prosecution's expert witness; in adequately advising him of his potential sentence; and in failing to raise various issues on appeal); and (3) an impermissibly aggravated range sentence.
>
> After conducting evidentiary hearings on three separate days, the district court denied defendant's Crim. P. 35 motions. A division of this court affirmed the district

court's rulings in *People v. Wilkinson*, (Colo. App. No. 07CA0946, July 30, 2009) (not published pursuant to C.A.R. 35(f)) (*Wilkinson II*) (mandate issued on April 9, 2010).

In 2012, Wilkinson filed a Crim. P. 35(a) "Motion to Correct Illegal Sentence," alleging, as pertinent here, that he should have been sentenced to discretionary, not mandatory, parole with respect to six of his convictions. *See* § 17-2-201(5)(a.5), C.R.S. 2017 (providing that discretionary parole is required for persons sentenced for convictions of unlawful sexual behavior offenses committed on or after July 1, 1996, but prior to July 1, 2002). After the prosecution conceded the issue, the district court amended the mittimus accordingly. However, the district court rejected Wilkinson's other contentions, and the court's decision was affirmed in *People v. Wilkinson*, (Colo. App. No. 12CA2477, Nov. 26, 2014) (not published pursuant to C.A.R. 35(f)) (*Wilkinson III*) (mandate issued on October 15, 2015).

B. Wilkinson's Current Crim. P. 35(c) Proceeding

In July 2016, Wilkinson filed another pro se Crim. P. 35(c) motion based on claims of ineffective trial and postconviction counsel. Specifically, Wilkinson asserted that

- trial counsel was ineffective (1) during the plea bargaining phase of the case and (2) in failing to object to expert testimony that improperly vouched for the victim's veracity; and

- postconviction counsel was ineffective for failing to (1) argue that the prosecution's expert inappropriately vouched for the victim's credibility; (2) argue that trial counsel was ineffective in failing to object to the impermissible vouching evidence; and (3) adequately pursue on appeal the issue of trial counsel's ineffectiveness during plea bargaining.

Without holding a hearing, the district court denied Wilkinson's motion, finding that, although his claims were timely filed, they were successive. Specifically, the district court found that claims related (1) to trial counsel's ineffectiveness could have been brought in a prior Crim. P. 35(c) motion and (2) to postconviction counsel's ineffectiveness could have been brought in 2012 when he filed his Crim. P. 35(a) motion to correct illegal sentence.

(ECF No. 18-2 at pp.3-7 (paragraph numbering and footnotes omitted).)

Mr. Wilkinson also has filed a prior federal habeas corpus application pertinent to Mesa County case number 99CR1111 that was dismissed on the merits. *See Wilkinson v. Timme*, No. 11-cv-00454-REB (D. Colo. June 1, 2012), *appeal dismissed*, 503 F. App'x 556 (10th Cir. 2012), *cert. denied*, 569 U.S. 951 (2013).

In the instant action, Mr. Wilkinson asserts one claim that counsel was ineffective during the plea bargaining process regarding a plea offer presented by the prosecution. Mr. Wilkinson raised the same ineffective assistance of plea counsel claim in the prior federal habeas corpus action. That claim was dismissed in case number 11-cv-00454-REB as unexhausted and procedurally barred.

A. Second or Successive Application

Respondents contend the Application is a second or successive application challenging the validity of Mr. Wilkinson's Mesa County conviction that must be dismissed pursuant to 28 U.S.C. § 2244(b). Mr. Wilkinson counters that the Application is not second or successive because the Mesa County District Court entered an amended judgment in 2012 to correct an illegal sentence and the Application is his first application challenging the amended judgment. As noted above, the state court amended the judgment to clarify Mr. Wilkinson is subject to discretionary parole rather than mandatory parole for certain convictions. According to Mr. Wilkinson, the amended judgment "changes the entire judgment of conviction [and], whether the second habeas petition challenges the new sentence or the judgment of conviction as a whole, it is neither second nor successive." (ECF No. 1 at p.11.)

The Court's analysis of the second or successive issue begins with *Magwood v.*

Patterson, 561 U.S. 320 (2010). In *Magwood*, the Supreme Court held that when "there is a 'new judgment intervening between the two habeas petitions,' an application challenging the resulting new judgment is not 'second or successive' at all." *Id.* at 341-42 (citation omitted). Thus, in *Magwood*, the petitioner's second challenge to his sentence under 28 U.S.C. § 2254 was not barred as a second or successive application when it came after the petitioner had been resentenced following a successful § 2254 habeas corpus action and the petitioner asserted claims in the second petition based on the resentencing. *See id.* at 323-24. However, the Supreme Court expressly declined to extend its holding to a situation, like the instant action, where the second-in-time application challenges the original conviction and not the new sentence. *See id.* at 342.

The United States Court of Appeals for the Tenth Circuit has declined to extend the holding in *Magwood* to cases where an amended judgment was entered only to correct a clerical error. *See May v. Kansas*, 562 F. App'x 644, 645-646 (10th Cir. 2014) (amended journal entry of judgment correcting clerical error that indicated sentences were consecutive was not a "new intervening judgment" from which an otherwise second or successive habeas petition may be filed); *see also In re Martin*, 398 F. App'x 326, 327 (10th Cir. 2010) (denying authorization to file second or successive application challenging intervening judgment that "merely corrected a clerical error"). The parties disagree as to whether correction of the mittimus to reflect that Mr. Wilkinson is subject to discretionary rather than mandatory parole for certain convictions qualifies as a clerical error. The Court need not resolve this issue because, even assuming the Application is not a second or successive application subject to dismissal under 28 U.S.C. § 2244(b), the Application is untimely.

B. One-Year Limitation Period

An application for a writ of habeas corpus under § 2254 is subject to a one-year limitation period. The relevant statute provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In order to apply the one-year limitation period the Court first must determine the date on which Mr. Wilkinson's conviction became final. *See* 28 U.S.C. § 2244(d)(1)(A). In general, a conviction becomes final following a decision by the state court of last resort on direct appeal when the United States Supreme Court denies review, or, if no petition for writ of certiorari is filed, when the time for seeking such review expires. *See*

Locke v. Saffle, 237 F.3d 1269, 1273 (10th Cir. 2001). Pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States, Mr. Wilkinson had ninety days to seek review in the United States Supreme Court after the Colorado Supreme Court denied his petition for writ of certiorari on direct appeal on October 14, 2003. (*See* ECF No. 18-19.) Mr. Wilkinson does not allege, and there is no indication in the record before the Court, that he filed a petition for certiorari review in the United States Supreme Court on direct appeal. Therefore, Mr. Wilkinson's conviction was final in January 2004 when the time to seek such review expired.

Mr. Wilkinson disagrees and argues that the one-year limitation period did not start until the amended judgment was entered in October 2012. The Court is not persuaded because the one-year limitation period applies on a claim-by-claim basis. *See Prendergast v. Clements*, 699 F.3d 1182, 1187 (10th Cir. 2012). Thus, the one-year limitation period does not restart following imposition of a new sentence when the habeas application challenges only the original conviction. *See id.* at 1184 (declining to disturb the district court's correct conclusion that claims challenging original conviction in 2003 are untimely despite resentencing in 2009 following probation violations); *Burks v. Raemisch*, 680 F. App'x 686, 687 (10th Cir. 2017) (holding that resentencing does not restart the one-year limitation period for "matters originally decided and put to rest through direct appeal, state post-conviction remedies and the running of the time allotted for federal habeas review"); *Carillo v. Zupan*, 626 F. App'x 780, 781-82 (10th Cir. 2015) (amended judgment that reduced the amount of restitution did not trigger a new one-year period for claims challenging conviction rather than corrected sentence). As noted above, Mr. Wilkinson asserts one ineffective assistance of plea counsel claim

in the Application that is unrelated to the parole issue corrected in the amended judgment. As a result, the Court agrees with Respondents that Mr. Wilkinson's conviction was final in January 2004 for purposes of the claim he asserts.

The Court also finds that the one-year limitation period for the ineffective assistance of counsel claim in the Application began to run in January 2004 because Mr. Wilkinson does not allege he was prevented by unconstitutional state action from filing this action sooner, he is not asserting any constitutional rights newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, and he knew or could have discovered the factual predicate for his claims before his conviction became final. *See* 28 U.S.C. § 2244(d)(1)(B) - (D).

The next issue is tolling. Pursuant to § 2244(d)(2), a properly filed state court postconviction motion tolls the one-year limitation period while the motion is pending. An application for postconviction review is properly filed within the meaning of § 2244(d)(2) "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). These requirements include:

> (1) the place and time of filing; (2) the payment or waiver of any required filing fees; (3) the obtaining of any necessary judicial authorizations that are conditions precedent to filing, such as satisfying any filing preconditions that may have been imposed on an abusive filer; and (4) other conditions precedent that the state may impose upon the filing of a post-conviction motion.

Habteselassie v. Novak, 209 F.3d 1208, 1210-11 (10th Cir. 2000) (footnote omitted).

The issue of whether a state court postconviction motion is pending for the purposes of § 2244(d)(2) is a matter of federal law, but "does require some inquiry into relevant state procedural laws." *See Gibson v. Klinger*, 232 F.3d 799, 806 (10th Cir.

2000). The term "pending" includes "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999). Furthermore, "regardless of whether a petitioner actually appeals a denial of a post-conviction application, the limitations period is tolled during the period in which the petitioner *could have* sought an appeal under state law." *Gibson*, 232 F.3d at 804.

In addition to statutory tolling under § 2244(d)(2), the one-year limitation period also may be tolled for equitable reasons. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Generally, equitable tolling is appropriate if the petitioner shows both "that he has been pursuing his rights diligently" and "that some extraordinary circumstance stood in his way" and prevented him from filing in a timely manner. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). A showing of excusable neglect is not sufficient to justify equitable tolling. *See Gibson*, 232 F.3d at 808. Furthermore, in order to demonstrate he pursued his claims diligently, the petitioner must "allege with specificity 'the steps he took to diligently pursue his federal claims.'" *Yang v. Archuleta*, 525 F.3d 925, 930 (10th Cir. 2008) (quoting *Miller*, 141 F.3d at 978).

Respondents concede, and the Court agrees, that the one-year limitation period already was tolled under § 2244(d)(2) when it began to run in January 2004 because a state court postconviction motion was properly filed in November 2003. The Court further agrees with Respondents that the state court postconviction proceedings

pertinent to that motion remained pending until the Colorado Supreme Court denied Mr. Wilkinson's petition for writ of certiorari on March 22, 2010 (*see* ECF No. 18-20), and thus the one-year limitation period was tolled until that time. Mr. Wilkinson did not file any further postconviction motions in state court within one year after statutory tolling ended in March 2010. (*See* ECF No. 18-1 at pp.18-19.) Therefore, the one-year limitation period expired in March 2011.

Mr. Wilkinson did file his prior federal application in case number 11-cv-00454-REB within one year after March 2010. However, the federal habeas corpus action did not toll the one-year limitation period under § 2244(d)(2). *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) (holding "that an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)"). The additional state postconviction motions Mr. Wilkinson filed beginning in July 2012 also did not toll the one-year limitation period under § 2244(d)(2) even if the motions were properly filed under state law because those motions were filed after the one-year limitation period already had expired in March 2011. *See Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006) (stating that properly filed state court postconviction motions toll the one-year limitation period under § 2244(d)(2) only if they are filed within the one-year limitation period).

Because the instant action was not commenced until May 2020, the action is untimely in the absence of some other reason to toll the one-year limitation period. Mr. Wilkinson does not identify any extraordinary circumstances beyond his control that prevented him from filing a timely application. Therefore, the Court finds no basis for

equitable tolling and the Application is barred by the one-year limitation period in § 2244(d).

II. RECOMMENDATION

For the reasons set forth herein, this Magistrate Judge respectfully

RECOMMENDS that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) be denied and the action be dismissed as barred by the one-year limitation period.

DATED September 22, 2020.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01328-LTB-GPG

MARK LEE WILKINSON,

Applicant,

v.

SHIOBAN BURTLOW, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge (ECF No. 25) filed September 22, 2020. Applicant has filed timely written objections to the Recommendation (ECF No. 28). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct.

Accordingly, for the foregoing reasons, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 25) is accepted and adopted. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied and the action is dismissed as barred by the one-year limitation period. It is

FURTHER ORDERED that no certificate of appealability will issue because

Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith. It is

FURTHER ORDERED that Applicant's Motion for Electronic Service (ECF No. 22) is denied as moot.

DATED: November 23, 2020

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

APPENDIX D

16CA2111 Peo v Wilkinson 07-26-2018

COLORADO COURT OF APPEALS

DATE FILED: July 26, 2018
CASE NUMBER: 2016CA2111

Court of Appeals No. 16CA2111
Mesa County District Court No. 99CR1111
Honorable Brian J. Flynn, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Mark Lee Wilkinson,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by JUDGE DAILEY
Dunn and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 26, 2018

Cynthia H. Coffman, Attorney General, Brittany L. Limes, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Mark Lee Wilkinson, Pro Se

¶ 1 Defendant, Mark Lee Wilkinson, appeals the district court's order denying, on successiveness grounds, his motion for postconviction relief. We affirm.

I. Background

¶ 2 In 2001, the trial court sentenced Wilkinson to an aggregate term of fifty-two years to life in the custody of the Department of Corrections in connection with convictions entered for sexual assault on a child (two counts), sexual assault on a child — pattern of abuse, sexual assault on a child by one in position of trust (two counts), sexual assault on a child by one in position of trust — pattern of abuse, and aggravated incest (three counts).

¶ 3 On direct appeal, a division of this court affirmed Wilkinson's convictions and sentences, after rejecting his contentions that reversal was required because the trial court erred in (1) not dismissing the case for speedy trial violations; (2) admitting evidence of his sexual orientation; (3) failing to suppress illegally seized evidence; (4) admitting evidence from an improperly endorsed witness; (5) discharging the subpoena served on the victim's mother without requiring her to testify; and (6) sentencing him. *See People v. Wilkinson*, (Colo. App. No. 01CA0897, May 8, 2003) (not

published pursuant to C.A.R. 35(f)) (*Wilkinson I*) (mandate issued on October 20, 2003).

A. Wilkinson's Prior Crim. P. 35 Proceedings

¶ 4 In 2004, Wilkinson filed a pro se Crim. P. 35(b) motion for reconsideration of his sentence, asserting that his sentence was illegal because, among other things, it violated double jeopardy. In 2005, Wilkinson, through counsel, filed a "supplemental" Crim. P. 35(a) and (c) motion, contending that he was entitled to relief because of (1) newly discovered evidence (i.e., an affidavit from the victim (Wilkinson's son) recanting his trial testimony); (2) ineffective assistance of trial and appellate counsel (i.e., in failing to aggressively pursue an adequate plea deal or tender a plea offer to him; in failing to prepare for, to ask for a continuance to prepare for, or to provide a defense expert to counter the testimony of the prosecution's expert witness; in inadequately advising him of his potential sentence; and in failing to raise various issues on appeal); and (3) an impermissibly aggravated range sentence.

¶ 5 After conducting evidentiary hearings on three separate days, the district court denied defendant's Crim. P. 35 motions. A division of this court affirmed the district court's rulings in *People v.*

Wilkinson, (Colo. App. No. 07CA0946, July 30, 2009) (not published pursuant to C.A.R. 35(f)) (*Wilkinson II*) (mandate issued on April 9, 2010).

¶ 6 In 2012, Wilkinson filed a Crim. P. 35(a) "Motion to Correct Illegal Sentence," alleging, as pertinent here, that he should have been sentenced to discretionary, not mandatory, parole with respect to six of his convictions. *See* § 17-2-201(5)(a.5), C.R.S. 2017 (providing that discretionary parole is required for persons sentenced for convictions of unlawful sexual behavior offenses committed on or after July 1, 1996, but prior to July 1, 2002). After the prosecution conceded the issue, the district court amended the mittimus accordingly. However, the district court rejected Wilkinson's other contentions, and the court's decision was affirmed in *People v. Wilkinson*, (Colo. App. No. 12CA2477, Nov. 26, 2014) (not published pursuant to C.A.R. 35(f)) (*Wilkinson III*) (mandate issued on October 15, 2015).

B. Wilkinson's Current Crim. P. 35(c) Proceeding

¶ 7 In July 2016, Wilkinson filed another pro se Crim. P. 35(c) motion based on claims of ineffective trial and postconviction counsel. Specifically, Wilkinson asserted that

- trial counsel was ineffective (1) during the plea bargaining phase of the case and (2) in failing to object to expert testimony that improperly vouched for the victim's veracity; and
- postconviction counsel was ineffective for failing to (1) argue that the prosecution's expert inappropriately vouched for the victim's credibility; (2) argue that trial counsel was ineffective in failing to object to the impermissible vouching evidence; and (3) adequately pursue on appeal the issue of trial counsel's ineffectiveness during plea bargaining.[1]

¶ 8 Without holding a hearing, the district court denied Wilkinson's motion, finding that, although his claims were timely filed,[2] they were successive. Specifically, the district court found

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[1] The same attorney acted as postconviction counsel in both the district court and on appeal.

[2] The district court recognized that, for time-bar purposes, a conviction does not become final until an illegal sentence has been corrected. *See Leyva v. People*, 184 P.3d 48, 50 (Colo. 2008). In this case, the district court in *Wilkinson III* corrected illegal sentences with respect to six of Wilkinson's nine convictions. Consequently, the applicable three-year limitations period of section 16-5-402, C.R.S. 2017, began to run again when mandate issued in

that claims related (1) to trial counsel's ineffectiveness could have been brought in a prior Crim. P. 35(c) motion and (2) to postconviction counsel's ineffectiveness could have been brought in 2012 when he filed his Crim. P. 35(a) motion to correct illegal sentence.

II. Analysis

¶ 9 We review de novo a district court's summary denial of a Crim. P. 35(c) motion. *People v. Joslin*, 2018 COA 24, ¶ 5. It may be affirmed on any ground supported by the record, regardless of whether that ground was relied upon by the district court. *People v. Scott*, 116 P.3d 1231, 1233 (Colo. App. 2004).

A. Successiveness of Wilkinson's 2016 Motion

¶ 10 A district court may summarily deny a Crim. P. 35(c) motion if the motion was successive — that is, if its allegations are the same as or similar to ones that were either raised and resolved in a prior appeal or postconviction proceeding, Crim. P. 35(c)(3)(VI),[3] or could

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Wilkinson III (i.e., October 15, 2015), and Wilkinson's 2016 motion for postconviction relief was timely filed.

[3] For successive motions purposes, "[a]n issue is essentially the same issue as one previously raised if review 'would be nothing more than a second appeal addressing the same issues on some

have been raised in a prior appeal or postconviction proceeding, Crim. P. 35(c)(3)(VII). *See, e.g.*, *People v. Hampton*, 187 Colo. 131, 133, 528 P.2d 1311, 1312 (1974) ("Post-conviction proceedings are provided as a method of preventing injustices from occurring after a defendant has been convicted and sentenced, but not for the purpose of providing a perpetual right of review . . . ."); *People v. Hubbard*, 184 Colo. 243, 247, 519 P.2d 945, 947 (1974) (considering a motion under earlier version of Crim. P. 35(b), now Crim. P. 35(c), and stating that postconviction proceedings do not "authorize the defendant to file successive motions based upon the same or similar allegations in the hope that a sympathetic judicial ear may eventually be found"); *People v. Valdez*, 178 P.3d 1269, 1275 (Colo. App. 2007) (Absent an exception, claims "previously resolved on appeal or in prior postconviction proceedings cannot be raised again," and "claims that could have previously been brought on direct appeal or in postconviction proceedings must be denied.").

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recently contrived constitutional theory.'" *People v. Turley*, 18 P.3d 802, 805 (Colo. App. 2000) (quoting *People v. Bastardo*, 646 P.2d 382, 383 (Colo. 1982)); *see also Sanders v. United States*, 373 U.S. 1, 16 (1963) (indicating that, for successive motions purposes, "identical grounds may often be proved by different factual allegations" or "legal arguments"), *quoted with approval in People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996).

¶ 11 With this in mind, we consider Wilkinson's current claims of ineffectiveness of trial and postconviction counsel.

1. Ineffectiveness of Trial Counsel

¶ 12 In his opening brief, Wilkinson does not dispute that his claims regarding trial counsel are "successive" in nature. He asserts, however, that the rule barring review of successive claims is inapplicable because

- the district court lacked jurisdiction to consider his prior motion for postconviction relief in *Wilkinson II* because Wilkinson was still subject to illegal sentences at the time;
- he is entitled to the benefit of a supreme court decision that was rendered after the district court proceedings in *Wilkinson II*; and
- he presented newly discovered evidence on his claim of ineffectiveness in handling the prosecution's expert at trial.

a. District Court's Jurisdiction in Wilkinson I.

¶ 13 We reject Wilkinson's argument that his claims cannot be considered "successive" because the district court lacked jurisdiction to rule (and consequently, cannot be held to have ruled) on those or similar claims in *Wilkinson II*.

¶ 14 To be sure, a district court acts in excess of its jurisdiction when it imposes an illegal sentence. *See People v. White*, 179 P.3d 58, 61 (Colo. App. 2007). But acting in excess of jurisdiction on one matter does not mean that the court loses (or lacks) jurisdiction to rule on all other matters. We are aware of no authority to that effect and see no reason why we should adopt such a position. *Cf. Lochbrunner v. Sherman*, 26 Colo. 164, 164–65, 56 P. 575, 576 (1899) ("We cannot assume that, because it may not have jurisdiction for one reason, it has not for any or all others . . . .").[4]

b. New Rule

¶ 15 Wilkinson asserts that he is entitled to re-open the claim, decided in *Wilkinson II*, of ineffective trial counsel during plea bargaining, based on the supreme court's decision in *Carmichael v. People*, 206 P.3d 800 (Colo. 2009). We disagree.

¶ 16 In *Carmichael*, 206 P.3d 800, the defendant asserted that trial counsel had been ineffective in explaining the benefits of a plea offer that the defendant had rejected before trial. The supreme court

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[4] Indeed, adopting Wilkinson's argument here would logically lead us to conclude that the district court lacked jurisdiction to even entertain his 2012 motion to correct illegal sentence. That, in our view, would be an absurd result.

noted that, to succeed on that claim, the defendant had to meet the two-prong standard identified in *Strickland v. Washington*, 466 U.S. 668 (1984), for demonstrating ineffective assistance of counsel: the defendant had to show both that "the attorney's performance was 'deficient,'" and that the defendant "suffered prejudice as a result of this deficient performance." 206 P.3d at 806.

¶ 17 The supreme court noted that, to show prejudice in the plea bargaining context, a defendant "must demonstrate there is a reasonable probability that, but for counsel's errors, he [or she] would have accepted the plea offer rather than going [sic] to trial." *Id.* at 807. The supreme court held that while "a defendant's post-conviction testimony that he would have accepted the plea offer is, in and of itself, insufficient to establish prejudice,"[5] his or her

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[5] In this respect, the court said,

> [w]e look for some objective corroborating evidence of the reasonable probability that [the defendant] would have accepted the plea offer if not for [the attorney's] deficient counsel. . . . Once objective evidence has been supplied to support a defendant's claim, the trial court should review the evidence without supplying additional weight or suspicions to either side's claims.

"protestations of innocence, standing alone, are insufficient to support a finding of no prejudice when weighed against objective evidence of prejudice." *Id.* at 807, 809.

¶ 18 Similar to the trial court in *Carmichael*, the district court in *Wilkinson II* found that Wilkinson suffered no prejudice because he "consistently maintained that he [was] innocent and that he therefore would not have accepted a plea agreement."

¶ 19 Under Crim. P. 35, the bar on reviewing successive claims is inapplicable to

- "[a]ny claim based on a new rule of constitutional law that was previously unavailable, if that rule has been applied retroactively by the United States Supreme Court or Colorado appellate courts," Crim. P. 35(c)(3)(VI)(b); or
- "[a]ny claim based on a new rule of constitutional law that was previously unavailable, if that rule should be applied retroactively to cases on collateral review," Crim. P. 35(c)(3)(VII)(c).

Carmichael v. People, 206 P.3d 800, 807, 808 (Colo. 2009).

¶ 20 Both provisions address "new rules" that were "previously unavailable" to a defendant. The *Carmichael* case does not, in our view, fall within these provisions. Even if it set forth a "new rule," *Carmichael* was decided prior to the division's decision in *Wilkinson II* and thus was "available" for use in that appeal. Indeed, one of Wilkinson's present ineffective assistance of counsel claims is based on postconviction counsel's failure to argue *Carmichael* in the appeal in *Wilkinson II.*

c. Newly Discovered Evidence

¶ 21 A district court shall not deny, as successive, "[a]ny claim based on evidence that could not have been discovered previously through the exercise of due diligence." Crim. P. 35(c)(3)(VI)(a); Crim. P. 35(c)(3)(VII).

¶ 22 Here, Wilkinson asserts that he has newly discovered evidence pertaining to trial counsel's ineffectiveness addressing the testimony of a prosecutorial expert at trial. The "newly discovered evidence" to which he points, though, is an unpublished opinion of another division of this court holding improper certain "vouching" testimony in a different case by the same expert who testified for

the prosecution in this case. *See People v. Jarrell*, (Colo. App. No. 12CA2598, Apr. 2, 2015) (not published pursuant to C.A.R. 35(f)).

¶ 23 An opinion from this court is not "evidence." Nor is an unpublished opinion in an unrelated case binding on the district court. *See Bittle v. Brunetti*, 750 P.2d 49, 51 n.2 (Colo. 1988) ("[U]npublished decisions are not binding precedent . . . ."). Finally, the *Jarrell* decision does not represent any change in the law; it was based on case law that had been in existence for some time. *See* No. 12CA2598, slip op. at 14-15 (citing, as supporting authority, *People v. Snook*, 745 P.2d 647 (Colo. 1987); *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007); and *People v. Morrison*, 985 P.2d 1 (Colo. App. 1999)).

¶ 24 Consequently, Wilkinson's claim of "newly discovered evidence" is without merit.

2. Ineffectiveness of Postconviction Counsel

¶ 25 The district court denied Wilkinson's claims of ineffective assistance of postconviction counsel as successive because they could have been brought in 2012 when he filed his Crim. P. 35(a) motion to correct illegal sentence.

¶ 26 It is true that Wilkinson could have brought a Crim. P. 35(c) proceeding at the same time that he brought his motion to correct his illegal sentences in *Wilkinson III*. But we know of no authority that would have required him to do so. What we do have is (1) authority recognizing that Wilkinson's ineffective assistance of postconviction claims could not have been brought prior to the conclusion of proceedings in *Wilkinson II* (i.e., the proceedings in which postconviction counsel had represented Wilkinson), *see People v. Clouse*, 74 P.3d 336, 339 (Colo. App. 2002); (2) authority recognizing that Wilkinson had three years from the completion of the correction of illegal sentence proceedings in *Wilkinson III* to bring such claims, *see Leyva v. People*, 184 P.3d 48, 50 (Colo. 2008); and (3) Wilkinson, for the very first time, questioning the effectiveness of his postconviction counsel in this, his (under *Leyva*) timely filed Crim. P. 35(c) motion. "Because defendant raised ineffectiveness of his postconviction counsel in his second [Rule 35(c)] motion, we agree that his motion was not successive." *People v. Russell*, 36 P.3d 92, 94 (Colo. App. 2001).

¶ 27 But, the People argue, two of Wilkinson's claims must be considered successive because, although they do not precisely

duplicate an issue raised previously, they are, in reality, "nothing more than a second appeal addressing the same issues." *People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996) (quoting *People v. Bastardo*, 646 P.2d 382, 383 (Colo. 1982)). The claims to which the People refer are those concerning postconviction counsel's ineffectiveness in failing to argue (1) that the prosecution's expert inappropriately vouched for the victim's credibility or (2) that trial counsel was ineffective in failing to object to the expert's impermissible vouching evidence.

¶ 28 This issue turns, in our view, on how closely related these claims are to Wilkinson's prior challenges to the admissibility of (and trial counsel's response to) the expert's testimony. *Cf. Russell*, 36 P.3d at 98 (rejecting consideration of the defendant's claim that postconviction counsel was ineffective for failing to proffer evidence to support his alibi because this argument was "essentially the same" as a claim that counsel had failed to call alibi witness that had been raised and fully litigated in his prior Crim. P. 35(c)).

¶ 29 In his prior Crim. P. 35(c) motion, Wilkinson focused on the manner in which counsel prepared for and handled the witness. In his current postconviction motion, Wilkinson focuses on the

substance (or nature) of the expert's testimony. In our view, Wilkinson's current claims are not "essentially the same" as or closely related to his prior claims; indeed, the claims are sufficiently different that they could have been made with respect to two different witnesses.

¶ 30 Consequently, we conclude that Wilkinson's claims are not successive in nature.

B. Other Grounds for Dismissing Wilkinson's Ineffective Postconviction Counsel Claim

¶ 31 The People nonetheless argue that Wilkinson is, as a matter of law, not entitled to relief on any of his claims regarding ineffective assistance of postconviction counsel. There are, again, two types of claims: (1) postconviction counsel failed to challenge the admissibility (and trial counsel's failure to challenge the admissibility) of an expert's testimony at trial; and (2) postconviction counsel failed to argue the effect of the *Carmichael* decision on appeal in *Wilkinson II*.

1. The Failure to Challenge the Admissibility of the Expert's Testimony

¶ 32 In support of his claim that postconviction counsel was ineffective in not recognizing the impermissible nature of the

expert's testimony, Wilkinson again cites to the unpublished decision from another division holding that the same expert had improperly vouched for the credibility of a victim. *See Jarrell*, No. 12CA2598.

¶ 33 In *Jarrell*, the division determined that the expert's testimony that only four out of every one hundred fifty children falsely reported sexual abuse was error because "the jury was left with expert opinions that children tell the truth about sexual abuse ninety to one hundred percent of the time." *Jarrell*, slip op. at 14; *see People v. Wittrein*, 221 P.3d 1076, 1081-82 (Colo. 2009) (holding trial court erred by allowing the expert to testify "that an eight-year-old child is unlikely to hyper-report sexual abuse allegations"); *Snook*, 745 P.2d at 648-49 (holding that the expert's testimony that "children tend not to fabricate stories of sexual abuse" was error because it "necessarily refer[red] to [the victim's] character for truthfulness" and constituted "an expert opinion that [the victim was] almost certainly telling the truth").

¶ 34 Unlike in the *Jarrell* case, the expert in this case did not point to numerical ratios or percentages about the number of children who tell the truth about sexual assault. Nor did the expert testify

that most or many children tell the truth about sexual assault. In Wilkinson's Crim. P. 35(c) motion, he challenged the expert's testimony about the way children's memories work.[6] That was not the challenge made in *Jarrell*. Nor, in any event, would the testimony Wilkinson challenged in the district court constitute impermissible vouching on the part of the witness; rather, it was permissible evidence of typical demeanor and behavioral traits of children.[7] *See People v. Fasy*, 829 P.2d 1314, 1317 (Colo. 1992) (The doctor's "testimony clearly assisted the jury in understanding the victim's behavior after the incident."); *cf. People v. Relaford*, 2016 COA 99, ¶ 28 ("'[A]n expert may testify as to the typical demeanor and behavioral traits displayed by a sexually abused child' . . . because it assists the jury in understanding the victim's behavior after the incident — why the victim acted the way he or she did." (quoting *People v. Mintz*, 165 P.3d 829, 831 (Colo. App. 2007))).

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[6] Even then, he challenged the testimony mainly on the ground that it was not sufficiently reliable.

[7] And more specifically, as they related to the victim's conduct during his interview with the police.

¶ 35 Because the record does not support a claim of impermissible vouching by the expert, postconviction counsel was not, as a matter of law, ineffective for failing to challenge the testimony's admissibility or trial counsel's failure to oppose its admissibility. *See Gray v. Bowersox*, 281 F.3d 749, 756 n.3 (8th Cir. 2002) (stating that where the underlying claim would have been without merit, a claim of ineffective assistance of counsel in not making it is not viable); *People v. Torrez*, 37 Cal. Rptr. 2d 712, 717 (Cal. Ct. App. 1995) (defense counsel is not required to make futile motions).

2. The Failure to Argue Carmichael on Appeal

¶ 36 Wilkinson also asserts that postconviction counsel was ineffective when she failed to argue on appeal in *Wilkinson II* the effect of the *Carmichael* decision. *Carmichael*, remember, addressed the issue of prejudice arising from counsel's deficient performance during plea bargaining.

¶ 37 In his Rule 35(c) motion, Wilkinson said:

> At no time did [postconviction] counsel petition the Appellate court for permission to file supplemental briefing addressing the impact that *Carmichael* had on [Wilkinson's] arguments.
>
> . . . .

> [H]ad the court applied the principles established in *Carmichael* to [his] claim, [Wilkinson] would have prevailed and the conviction would have been vacated and the parties returned to the plea bargaining stage. [Postconviction counsel's] failure to petition the Appellate Court to include this precedential case amounted to below professional standards. Thus, the first prong of the *Strickland* test is met.
>
> The above argument clearly establishes that [Wilkinson] is entitled to relief on this claim. . . . Thus, the second prong of the *Strickland* test is met and [Wilkinson] is entitled to relief.

¶ 38 "Appellate counsel is not required to raise on appeal every nonfrivolous issue a defendant desires to raise." *People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007). In support of a claim of ineffective appellate counsel, a defendant must allege that appellate counsel "ignored issues that are clearly stronger than those presented." *People v. Long*, 126 P.3d 284, 286 (Colo. App. 2005) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). No such allegation was made by Wilkinson in his Crim. P. 35(c) motion. Nor, in our view, could or should such an allegation be implied.

¶ 39 In his petition and on appeal, Wilkinson overlooks the fact that the issue to which *Carmichael* related — ineffectiveness of trial

counsel during plea negotiations — had not been raised on appeal in *Wilkinson II*. Indeed, the *Carmichael* decision was rendered nine months after the appellate briefing in *Wilkinson II* had been closed and about two months before the division announced its decision in that case. Injecting an entirely new issue (i.e., ineffectiveness of trial counsel during the plea process) into the appeal — based on a new decision — at that late stage of the appellate proceeding would have been highly irregular.

¶ 40 And to have had any chance of prevailing on this belatedly brought "new" claim in *Wilkinson II*, postconviction counsel would have had to do more than demonstrate prejudice under *Carmichael*; she would have also had to demonstrate deficient performance of trial counsel during the plea process. *Cf. People v. Gandiaga*, 70 P.3d 523, 526 (Colo. App. 2002) ("If a court determines that counsel's performance was not constitutionally deficient, it need not consider the prejudice prong of the ineffective assistance of counsel test. Similarly, if a court determines that a defendant failed to affirmatively demonstrate prejudice, it may resolve the claim on that basis alone.") (citation omitted).

¶ 41 The district court in *Wilkinson II* found that trial counsel's performance throughout the case was not deficient. Postconviction counsel did not argue on appeal in *Wilkinson II* that trial counsel's performance during the plea process was deficient,[8] and Wilkinson did not, in his Crim. P. 35(c) motion, take postconviction counsel to task for failing to do so. Because Wilkinson did not, in his Rule 35(c) motion, allege postconviction counsel's performance in this regard was deficient, there was no basis for believing that she had overlooked a meritorious argument that was more likely to succeed than the other ineffective assistance of counsel arguments she pursued on appeal.

¶ 42 Consequently, albeit for different reasons, we conclude that the district court properly denied this ineffective assistance of postconviction counsel claim without a hearing. *See Ardolino v.*

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[8] In the *Wilkinson II* appellate briefs, postconviction counsel referenced one obscure matter that could have potentially related to a claim of ineffective assistance of counsel during the plea process. That matter, however, was not one of the "plea process" deficiencies of which Wilkinson complained in either his *Wilkinson II* Rule 35(c) motion or his current Rule 35(c) motion. Further, an obscure reference to a matter in one sentence in a brief does not an argument make. *See, e.g., United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

People, 69 P.3d 73, 77 (Colo. 2003) (recognizing that a trial court may summarily deny a Crim. P. 35(c) motion if the allegations, even if true, do not provide a basis for relief).

III. Disposition

¶ 43 The order is affirmed.

JUDGE DUNN and JUDGE TOW concur.

APPENDIX E

DISTRICT COURT 125 North Spruce St. Grand Junction, Mesa County, Colorado	DATE FILED: August 18, 2016 3:36 PM CASE NUMBER: 1999CR1111
THE PEOPLE OF THE STATE OF COLORADO, v. MARK LEE WILKENSON, Defendant.	COURT USE ONLY
	Case Number: 99CR1111 Division: 10
ORDER RE: MOTION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(c)	

Before the Court is Defendant's successive Crim. P. 35(c) petition filed on July 8, 2016. In the present motion, Defendant contends that he received ineffective assistance from both trial counsel and postconviction counsel. For the reasons below, these claims are denied as successive.

Defendant first alleges that his trial counsel rendered ineffective assistance during the plea bargaining process and during trial. In his first Rule 35(c) motion, Defendant asserted that his trial counsel was ineffective by challenging counsel's performance during trial and by alleging that counsel did not aggressively pursue an adequate plea agreement. The Court conducted an evidentiary hearing on Defendant's motion and found that he was not prejudiced by trial counsel's performance because (1) there was abundant evidence presented at trial to support the guilty verdicts; and (2) Defendant

would not have accepted a plea agreement even if he had been offered one because he consistently maintained his innocence. *Order re: Defendant's Postconviction Motions*, at 4-5 (Apr. 6, 2007). The Court's order denying postconviction relief was affirmed on direct appeal. Therefore, Defendant's current claim is denied as successive because the Court has already addressed and rejected his ineffective assistance claim regarding trial counsel's performance. *People v. Tolbert*, 216 P.3d 1, 4 (Colo. App. 2007) (Rule 35(c) expressly bars relief on claims that were "raised and resolved in a prior... postconviction proceeding").

Defendant has also raised an ineffective assistance claim regarding the performance of his postconviction counsel relating to the litigation of his first Rule 35(c) motion. After the denial of his first postconviction motion, Defendant filed another postconviction motion challenging the legality of his sentence. The Court granted this motion in part by amending the mittimus to reflect that Defendant is subject to discretionary parole instead of mandatory parole. Nevertheless, Defendant did not raise any issues regarding the ineffective assistance of postconviction counsel even though the issue could have been raised at that time. As such, this claim is also denied as successive because it could have been raised in the preceding postconviction motion. *See People v. Wilson*, --- P.3d ---, 2011 WL 2474295 at *10 (Colo. App. 2011) 2011 Colo. App. LEXIS 1172 (declining to address issues under Rule 35(c) that could have been raised and resolved on direct appeal). Rule 35(c) does not provide for perpetual review of a

final judgment of conviction. *People v. McDowell*, 219 P.3d 332, 335 (Colo. App. 2009).

Contrary to Defendant's assertion, the holding in *Leyva v. People*, 184 P.3d 48 (Colo. 2008), does not exempt the present motion from the rule against successive postconviction petitions. In *Leyva*, the supreme court held that when a court corrects an illegal sentence under Rule 35(a), the three-year statute of limitations for attacking the original judgment is renewed. 184 P.3d at 50. However, this statement of law in *Leyva* is inapposite because whether a postconviction motion is time barred is a separate issue from whether it is successive. In no way does the holding in *Leyva* require a court to consider repetitive claims that were either litigated, or could have been litigated, in a prior postconviction proceeding.[1]

Accordingly, the Court will summarily deny Defendant's motion without a hearing or appointment of counsel because the claims asserted are deemed successive.

Based on the foregoing, IT IS ORDERED that Defendant's Rule 35(c) motion is denied.

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[1] The Court also rejects Defendant's assertion that his claims must be considered under the holding in *Martinez v. Ryan*, --- U.S. ---, 132 S. Ct. 1309, 1320 (2012), which simply held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." The limited holding in *Martinez* does not require a court to address successive claims for postconviction relief.

DATED this 18th day of August, 2016.

BY THE COURT:

Brian J. Flynn
District Court Judge

APPENDIX F

FILED
United States Court of Appeals
Tenth Circuit

June 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK LEE WILKINSON,

Petitioner - Appellant,

v.

SHIOBAN BURTLOW, et al.,

Respondents - Appellees.

No. 20-1452
(D.C. No. 1:20-CV-01328-LTB-GPG)
(D. Colo.)

ORDER

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the 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

CHRISTOPHER M. WOLPERT, Clerk