APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

July 31, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NANCY MARTIN,

Defendant - Appellant.

No. 23-3045
(D.C. No. 6:21-CR-10018-EFM-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on the government's motion to enforce the appeal waiver in Nancy Martin's plea agreement pursuant to *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam). Exercising jurisdiction under 28 U.S.C. § 1291, we grant the motion and dismiss the appeal.

BACKGROUND

Ms. Martin pleaded guilty to bank fraud, in violation of 18 U.S.C. § 1344(2), and aiding or assisting in filing a false tax document, in violation of 26 U.S.C. § 7206(2). As pertinent here, in exchange for her plea, the government agreed to

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

recommend that she receive a two-level reduction in the applicable offense level for acceptance of responsibility, and to move for an additional one-level reduction "if her offense level is 16 or greater, prior to any reduction for acceptance of responsibility, and the Court finds she qualifies for a two-level reduction." Mot. to Enforce, Attach. A at 3. The plea agreement included a broad waiver of Ms. Martin's appellate rights, including the right to appeal "any matter in connection with . . . her conviction, or the components of [her] sentence . . . , including restitution," unless either the court departed upwards from the applicable Guidelines range or the government appealed the sentence. *Id.* at 9. Both by signing the written agreement and in her responses to the court's questions at the change of plea hearing, Ms. Martin confirmed that she understood the consequences of her plea, including the appeal waiver, and acknowledged that her plea was knowing and voluntary.

The court determined that Ms. Martin's offense level was 26 and that the applicable Guidelines range was 63 to 78 months. *See id.*, Attach. C at 29. At the sentencing hearing, defense counsel noted that Ms. Martin's offense level "reflected [a] three-level reduction" for acceptance of responsibility—"the two that she [qualified for] plus the additional point that the Government has recommended." *Id.* at 63. Although the government had agreed to move at sentencing for the additional one-point reduction, it did not do so, presumably because the court had already granted the reduction. The district court then sentenced Ms. Martin to concurrent 48-month and 36-month prison terms, well below the bottom of the Guidelines range.

The court also imposed a period of supervised release and ordered Ms. Martin to pay restitution totaling almost $4 million.

Despite the appeal waiver Ms. Martin filed a notice of appeal. Her docketing statement indicates that she intends to argue that "[t]here is no factual basis for her conviction on either count," Aplt. Docketing Statement at 6, and to challenge "[t]he amount of loss and restitution figures," *id.* at 7.

DISCUSSION

Ms. Martin claims the appeal waiver is unenforceable because the government breached the plea agreement and because the *Hahn* requirements are not met.

1. Breach of Plea Agreement

Ms. Martin first asserts the government breached the plea agreement by not moving for the additional one-point reduction in her offense level at sentencing. She acknowledges that she did not object in the district court. We thus review her argument for plain error. *See Puckett v. United States*, 556 U.S. 129, 133-34 (2009); *United States v. Bullcoming*, 579 F.3d 1200, 1205 (10th Cir. 2009). The plain-error test requires the defendant to demonstrate (1) error, (2) that is plain, (3) that affects her substantial rights, and, if those first three prongs are met, (4) that "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732-36 (1993) (brackets and internal quotation marks omitted). To establish the third plain-error prong in a breach-of-plea-agreement case, the defendant must show that the error had a prejudicial effect on the sentence imposed. *See Puckett*, 556 U.S. at 142 n.4.

"[A]n appellate waiver is not enforceable if the Government breaches its obligations under the plea agreement." *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212 (10th Cir. 2008). "General principles of contract law define the content and scope of the government's obligations under a plea agreement." *United States v. VanDam*, 493 F.3d 1194, 1199 (10th Cir. 2007), *overruled on other grounds by Puckett*, 556 U.S. 129. "We thus look to the express language in the agreement to identify both the nature of the government's promise and the defendant's reasonable understanding of this promise at the time of the entry of the guilty plea." *Id.* "We evaluate the record as a whole to ascertain whether the government complied with its promise." *Id.*

Ms. Martin has not met these requirements. True, the government agreed to move for an additional offense-level reduction at sentencing and did not do so. But, according to defense counsel's statement at the hearing, the government had already recommended the reduction before the hearing,[1] and the offense level determined by the court reflected the additional reduction. Making the motion at the sentencing hearing was thus unnecessary. Ms. Martin has cited no authority, and we are not aware of any, suggesting that the government breaches a plea agreement in these circumstances. Moreover, even if the government's failure to move at the sentencing hearing for a reduction the court had already granted somehow breached the plea

[1] The district court docket does not suggest that the government filed a motion seeking the reduction. We presume the government's recommendation for the additional offense-level reduction is reflected in the presentence investigation report, which is not included in the materials before us.

agreement, she cannot show that the error affected her sentence—the court sentenced her below the range it had determined based on the reduced offense level.

Ms. Martin attempts to avoid the outcome of this plain-error analysis by arguing that her contention is not that the alleged breach constituted error but that it gives rise to an equitable defense to enforcement of the waiver grounded in "the general contract principle of first to breach." Resp. at 8 (internal quotation marks omitted). Specifically, she maintains that "the Government—as the party who originally breached the plea agreement—cannot now rely on that same agreement." *Id.* But whether she couched her breach-of-contract argument in terms of "error" is beside the point. The point is that to prevail on her unpreserved argument, *Puckett* requires her to show that the alleged breach constituted error that had a prejudicial effect on her sentence. *See* 556 U.S. at 133-34, 142 n.4. She has not made that showing.

In any event, her first-to-breach argument is a non-starter. It was Ms. Martin's responsibility to identify authority to support her argument. *See* Fed. R. App. P. 27(a)(2)(A), (3)(A) (a response to a motion "must state with particularity . . . the legal argument necessary to support" the grounds for the response). She cited no authority applying this first-to-breach principle in a plea bargaining context, much less to defeat enforcement of an appeal waiver when, as here, the government's alleged breach did not deprive the defendant of the benefit of her bargain. We will not "fill the void" by doing the necessary legal research to support her undeveloped and unsupported argument. *United States v. Moya*, 5 F.4th 1168, 1192 (10th Cir.)

(internal quotation marks omitted), *cert. denied*, 142 S. Ct. 385 (2021); *see also Valdez v. Macdonald*, 66 F.4th 796, 834 (10th Cir. 2023) (declining to consider inadequately briefed argument).

2. *Hahn* Factors

Having rejected Ms. Martin's contention that her appeal waiver is unenforceable based on the government's alleged breach, we turn to the government's motion to enforce. In ruling on the motion, we consider whether the appeal falls within the scope of the waiver, whether the waiver was knowing and voluntary, and whether enforcing it would result in a miscarriage of justice. *See Hahn*, 359 F.3d at 1325.

Ms. Martin first asserts that "[h]er waiver was involuntary because there was no factual basis for her plea." Resp. at 8-9. She appears to argue both that her factual-basis issues fall outside the scope of the appeal waiver,[2] and that the insufficient factual basis for her plea renders her waiver involuntary. We are not persuaded by either argument.

In support of what we construe as a scope-of-waiver argument, Ms. Martin relies on out-of-circuit authority holding that "even valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea." *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018) (collecting cases). But that is not the law

[2] Ms. Martin does not contend that her appeal of the restitution order falls outside the scope of the waiver, so we do not address that issue. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005) (court need not address uncontested *Hahn* factors).

in this circuit. In *United States v. Novosel*, 481 F.3d 1288, 1295 (10th Cir. 2007) (per curiam), we held that a defendant's waiver of his right to appeal "any matter in connection with his prosecution and conviction" encompassed "his claim that the district court failed to ensure there was a sufficient factual basis for his guilty plea," *Id.* at 1295. Under *Novosel*, Ms. Martin's challenges to the factual basis for her plea fall within the scope of her waiver of her right to appeal "any matter in connection with . . . her conviction," Mot. to Enforce, Attach. A at 9. *Novosel*, 481 F.3d at 1295. Ms. Martin next challenges the voluntariness of her appeal waiver. In determining whether she knowingly and voluntarily waived her appellate rights, we examine the language of the plea agreement and the adequacy of the plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure. *Hahn*, 359 F.3d at 1325. "[I]f the defendant did not voluntarily enter into the agreement, the appellate waiver subsumed in the agreement also cannot stand." *United States v. Rollings*, 751 F.3d 1183, 1189 (10th Cir. 2014). "A properly conducted plea colloquy, particularly one containing express findings, will, in most cases, be conclusive on the waiver issue, in spite of a defendant's post hoc assertions to the contrary." *United States v. Tanner*, 721 F.3d 1231, 1233 (10th Cir. 2013) (per curiam). To avoid enforcement of her appeal waiver, Ms. Martin must "present evidence establishing that [she] did not understand the waiver." *United States v. Cudjoe*, 634 F.3d 1163, 1166 (10th Cir. 2011).

Ms. Martin has failed to meet her burden of showing that her waiver was not knowing and voluntary. She does not claim she did not understand the appeal

waiver. Nor does she claim she did not understand any other aspect of the agreement or that her Rule 11 advisement was inadequate. She claims only that the allegedly insufficient factual basis for her plea renders her appeal waiver involuntary. But our review of the Rule 11 advisement confirms that the district court satisfied the requirement that it determine that there was a factual basis for the plea. *See* Fed. R. Crim. P. 11(b)(3). Ms. Martin did not move to withdraw her plea based on the adequacy of the factual basis, so our review of that issue is limited to plain-error review. *See United States v. Rollings*, 751 F.3d 1183, 1101 (10th Cir. 2014). And because she did not argue plain error in her response to the motion to enforce, we decline to address the validity of the plea agreement, which she argues was unknowing and involuntary because her plea lacked a sufficient factual basis. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (holding the failure to argue plain error on appeal precludes an argument not presented to the district court).

Finally, Ms. Martin contends that enforcing the waiver would be a miscarriage of justice because she received ineffective assistance of counsel. In *Hahn*, we held that enforcement of an appeal waiver does not result in a miscarriage of justice unless it would result in one of four enumerated situations. 359 F.3d at 1327. One of those four situations is when "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid." *Id.* (internal quotation marks omitted). But we generally "only consider ineffective assistance of counsel claims on collateral review," and *Hahn*'s miscarriage-of-justice holding "does not disturb this longstanding rule," *id.* at 1327 n.13. Consistent with these principles,

Ms. Martin's appeal-waiver provision expressly provides that she did not "waive[] any subsequent claims with regards to ineffective assistance of counsel." Mot. to Enforce, Attach. A at 9.

Despite our general rule and her appeal waiver, Ms. Martin urges us to consider her claim on direct appeal because counsel's alleged ineffectiveness affected the voluntariness of her plea. We decline to do so. We have "considered ineffective assistance of counsel claims on direct appeal in limited circumstances, but only where the issue was raised before and ruled upon by the district court *and* a sufficient factual record exists." *United States v. Flood*, 635 F.3d 1255, 1260 (10th Cir. 2011). "[E]ven if the record appears to need no further development, the claim [for ineffective assistance of counsel] should still be presented first to the district court in collateral proceedings . . . so the reviewing court can have the benefit of the district court's views." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). The circumstances here do not fall within the narrow exception to our general rule because the district court has not had an opportunity to rule on Ms. Martin's claim of ineffective assistance of counsel.[3]

[3] We deny Ms. Martin's request that we stay the appeal pending the district court's ruling on her 28 U.S.C. § 2255 motion to vacate her conviction based on ineffective assistance of counsel. *See Galloway*, 56 F.3d at 1241 (declining to remand the case during the direct appeal for the development of a factual record or a ruling by the district court on a claim of ineffective assistance of counsel).

CONCLUSION

Because the *Hahn* factors have been met and the government's failure to seek an additional offense-level reduction at the sentencing hearing does not constitute a breach of the plea agreement that precludes enforcement of the appeal waiver, we grant the government's motion to enforce and we dismiss this appeal.

Entered for the Court
Per Curiam

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

August 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NANCY MARTIN,

Defendant - Appellant.

No. 23-3045
(D.C. No. 6:21-CR-10018-EFM-1)
(D. Kan.)

ORDER

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on Appellant's motion for extension of time to file petition for rehearing in this appeal. The motion is granted. The petition for rehearing shall be filed and served on or before September 13, 2023.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit

November 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NANCY MARTIN,

Defendant - Appellant.

No. 23-3045
(D.C. No. 6:21-CR-10018-EFM-1)
(D. Kan.)

ORDER

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

Nancy Martin petitions for rehearing en banc. Upon consideration, the panel sua sponte withdraws its previous Order and Judgment and substitutes the attached Order and Judgment. The Clerk shall file the attached Order and Judgment nunc pro tunc to July 31, 2023, the date the original Order and Judgment issued.

The petition for rehearing en banc and the modified Order and Judgment were 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, the request for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

November 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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recommend that she receive a two-level reduction in the applicable offense level for acceptance of responsibility, and to move for an additional one-level reduction "if her offense level is 16 or greater, prior to any reduction for acceptance of responsibility, and the Court finds she qualifies for a two-level reduction." Mot. to Enforce, Attach. A at 3. The plea agreement included a broad waiver of Ms. Martin's appellate rights, including the right to appeal "any matter in connection with . . . her conviction, or the components of [her] sentence . . . , including restitution," unless either the court departed upwards from the applicable Guidelines range or the government appealed the sentence. *Id.* at 9. Both by signing the written agreement and in her responses to the court's questions at the change of plea hearing, Ms. Martin confirmed that she understood the consequences of her plea, including the appeal waiver, and acknowledged that her plea was knowing and voluntary.

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Ms. Martin has not met these requirements. True, the government agreed to move for an additional offense-level reduction at sentencing and did not do so. But, according to defense counsel's statement at the hearing, the government had already recommended the reduction before the hearing,[1] and the offense level determined by the court reflected the additional reduction. Making the motion at the sentencing hearing was thus unnecessary. Ms. Martin has cited no authority, and we are not aware of any, suggesting that the government breaches a plea agreement in these circumstances. Moreover, even if the government's failure to move at the sentencing hearing for a reduction the court had already granted somehow breached the plea

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agreement, she cannot show that the error affected her sentence—the court sentenced her below the range it had determined based on the reduced offense level.

Ms. Martin attempts to avoid the outcome of this plain-error analysis by arguing that her contention is not that the alleged breach constituted error but that it gives rise to an equitable defense to enforcement of the waiver grounded in "the general contract principle of first to breach." Resp. at 8 (internal quotation marks omitted). Specifically, she maintains that "the Government—as the party who originally breached the plea agreement—cannot now rely on that same agreement." *Id.* But whether she couched her breach-of-contract argument in terms of "error" is beside the point. The point is that to prevail on her unpreserved argument, *Puckett* requires her to show that the alleged breach constituted error that had a prejudicial effect on her sentence. *See* 556 U.S. at 133-34, 142 n.4. She has not made that showing.

In any event, her first-to-breach argument is a non-starter. It was Ms. Martin's responsibility to identify authority to support her argument. *See* Fed. R. App. P. 27(a)(2)(A), (3)(A) (a response to a motion "must state with particularity . . . the legal argument necessary to support" the grounds for the response). She cited no authority applying this first-to-breach principle in a plea bargaining context, much less to defeat enforcement of an appeal waiver when, as here, the government's alleged breach did not deprive the defendant of the benefit of her bargain. We will not "fill the void" by doing the necessary legal research to support her undeveloped and unsupported argument. *United States v. Moya*, 5 F.4th 1168, 1192 (10th Cir.)

(internal quotation marks omitted), *cert. denied*, 142 S. Ct. 385 (2021); *see also Valdez v. Macdonald*, 66 F.4th 796, 834 (10th Cir. 2023) (declining to consider inadequately briefed argument).

2. *Hahn* Factors

Having rejected Ms. Martin's contention that her appeal waiver is unenforceable based on the government's alleged breach, we turn to the government's motion to enforce. In ruling on the motion, we consider whether the appeal falls within the scope of the waiver, whether the waiver was knowing and voluntary, and whether enforcing it would result in a miscarriage of justice. *See Hahn*, 359 F.3d at 1325.

Ms. Martin first asserts that "[h]er waiver was involuntary because there was no factual basis for her plea." Resp. at 8-9. She appears to argue both that her factual-basis issues fall outside the scope of the appeal waiver,[2] and that the insufficient factual basis for her plea renders her waiver involuntary. We are not persuaded by Ms. Martin's first argument and we don't reach the second.

In support of what we construe as a scope-of-waiver argument, Ms. Martin relies on out-of-circuit authority holding that "even valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea." *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018) (collecting cases). But that is not the law

[2] Ms. Martin does not contend that her appeal of the restitution order falls outside the scope of the waiver, so we do not address that issue. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005) (court need not address uncontested *Hahn* factors).

in this circuit with regard to a scope-of-the-waiver argument. In *United States v. Novosel*, 481 F.3d 1288, 1295 (10th Cir. 2007) (per curiam), we held that a defendant's waiver of his right to appeal "any matter in connection with his prosecution and conviction" encompassed "his claim that the district court failed to ensure there was a sufficient factual basis for his guilty plea," *Id.* at 1295. Under *Novosel*, Ms. Martin's challenges to the factual basis for her plea fall within the scope of her waiver of her right to appeal "any matter in connection with . . . her conviction," Mot. to Enforce, Attach. A at 9. *Novosel*, 481 F.3d at 1295.

Ms. Martin next challenges the voluntariness of her appeal waiver. In determining whether she knowingly and voluntarily waived her appellate rights, we examine the language of the plea agreement and the adequacy of the plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure. *Hahn*, 359 F.3d at 1325. "[I]f the defendant did not voluntarily enter into the agreement, the appellate waiver subsumed in the agreement also cannot stand." *United States v. Rollings*, 751 F.3d 1183, 1189 (10th Cir. 2014). "A properly conducted plea colloquy, particularly one containing express findings, will, in most cases, be conclusive on the waiver issue, in spite of a defendant's post hoc assertions to the contrary." *United States v. Tanner*, 721 F.3d 1231, 1233 (10th Cir. 2013) (per curiam). To avoid enforcement of her appeal waiver, Ms. Martin must "present evidence establishing that [she] did not understand the waiver." *United States v. Cudjoe*, 634 F.3d 1163, 1166 (10th Cir. 2011).

Ms. Martin has failed to meet her burden of showing that her waiver was not knowing and voluntary. She does not claim she did not understand the appeal waiver. Nor does she claim she did not understand any other aspect of the agreement or that her Rule 11 advisement was inadequate. She claims only that the allegedly insufficient factual basis for her plea renders her appeal waiver involuntary. There is law supporting such a claim. *See McCarthy v. United States*, 394 U.S. 459, 466–67 (1969); *see also United States v. Balde*, 943 F.3d 73, 95 (2d Cir. 2019) ("Without being fully informed of the nature of the offense, and without an established factual basis for finding that one of its elements was satisfied, it is hard to imagine how a defendant's plea could be knowing and voluntary."). But our review of the Rule 11 advisement confirms that the district court satisfied the requirement that it determine that there was a factual basis for the plea. *See* Fed. R. Crim. P. 11(b)(3). Ms. Martin did not move to withdraw her plea based on the adequacy of the factual basis, so our review of that issue is limited to plain-error review. *See United States v. Rollings*, 751 F.3d 1183, 1101 (10th Cir. 2014). And because she did not argue plain error in her response to the motion to enforce, we decline to address the validity of the plea agreement, which she argues was unknowing and involuntary because her plea lacked a sufficient factual basis. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (holding the failure to argue plain error on appeal precludes an argument not presented to the district court).

Finally, Ms. Martin contends that enforcing the waiver would be a miscarriage of justice because she received ineffective assistance of counsel. In *Hahn*, we held

that enforcement of an appeal waiver does not result in a miscarriage of justice unless it would result in one of four enumerated situations. 359 F.3d at 1327. One of those four situations is when "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid." *Id.* (internal quotation marks omitted). But we generally "only consider ineffective assistance of counsel claims on collateral review," and *Hahn*'s miscarriage-of-justice holding "does not disturb this longstanding rule," *id.* at 1327 n.13. Consistent with these principles, Ms. Martin's appeal-waiver provision expressly provides that she did not "waive[] any subsequent claims with regards to ineffective assistance of counsel." Mot. to Enforce, Attach. A at 9.

Despite our general rule and her appeal waiver, Ms. Martin urges us to consider her claim on direct appeal because counsel's alleged ineffectiveness affected the voluntariness of her plea. We decline to do so. We have "considered ineffective assistance of counsel claims on direct appeal in limited circumstances, but only where the issue was raised before and ruled upon by the district court *and* a sufficient factual record exists." *United States v. Flood*, 635 F.3d 1255, 1260 (10th Cir. 2011). "[E]ven if the record appears to need no further development, the claim [for ineffective assistance of counsel] should still be presented first to the district court in collateral proceedings . . . so the reviewing court can have the benefit of the district court's views." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc). The circumstances here do not fall within the narrow exception to our

general rule because the district court has not had an opportunity to rule on Ms. Martin's claim of ineffective assistance of counsel.[3]

CONCLUSION

Because the *Hahn* factors have been met and the government's failure to seek an additional offense-level reduction at the sentencing hearing does not constitute a breach of the plea agreement that precludes enforcement of the appeal waiver, we grant the government's motion to enforce and we dismiss this appeal.

Entered for the Court
Per Curiam

[3] We deny Ms. Martin's request that we stay the appeal pending the district court's ruling on her 28 U.S.C. § 2255 motion to vacate her conviction based on ineffective assistance of counsel. *See Galloway*, 56 F.3d at 1241 (declining to remand the case during the direct appeal for the development of a factual record or a ruling by the district court on a claim of ineffective assistance of counsel).