FILED
United States Court of Appeal
Tenth Circuit

January 25, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER DOMINGUEZ,

Defendant - Appellant.

No. 23-8016
(D.C. Nos. 2:22-CV-00246-NDF,
2:17-CR-00098-NDF-3 &
2:18-CR-00186-NDF-1)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Christopher Dominguez moves for a certificate of appealability (COA) so that he may appeal the district court's denial of his motion for relief under 28 U.S.C. § 2255. We deny a COA and dismiss this proceeding.

I. BACKGROUND & PROCEDURAL HISTORY

In October 2016, three men carjacked a vehicle and used it to attempt a robbery from a Cheyenne, Wyoming, pharmacy; a gun battle with the pharmacist ensued and the robbers fled. *See United States v. Dominguez*, 998 F.3d 1094, 1096–97 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2756 (2022). Two months later,

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

three men stole a vehicle and used it to successfully rob a pharmacy in Raton, New Mexico. *See id.* at 1096. Dominguez and two associates were arrested for that robbery the same day. *See id.* After their arrest they became the primary suspects in the Wyoming robbery as well. *See id.* at 1097.

Federal grand juries in Wyoming and New Mexico indicted Dominguez and his associates on various charges related to the robberies. *See id.* As relevant here, the charges against Dominguez included three instances of brandishing or discharging a firearm during and in relation to a crime of violence or a drug trafficking crime, in violation of 18 U.S.C. § 924(c): namely, one count of brandishing a firearm during the New Mexico robbery and two counts of discharging a firearm during the Wyoming attempted robbery. *See id.* at 1097–98.

Dominguez agreed to a plea deal that resolved both the Wyoming and New Mexico cases. Under the deal he pleaded guilty to four charges: (1) carjacking (Wyoming); (2) attempted robbery involving a controlled substance (Wyoming); (3) discharging a firearm during a crime of violence, *see* § 924(c)(1)(A)(iii) (Wyoming), for which the predicate crime was the attempted robbery involving a controlled substance; and (4) conspiracy to commit Hobbs Act robbery (New Mexico). *See id.* at 1099.

Under Federal Rule of Criminal Procedure 11(c)(1)(C), the parties agreed that Dominguez would be sentenced to 8 years for carjacking, a consecutive 10 years for attempted robbery, a further consecutive 10 years for the § 924(c) violation, and finally, running concurrently to all of the foregoing, 18 years for the Hobbs Act

violation. *See id.* Thus, Dominguez's total effective sentence would be 28 years. The district court accepted the plea agreement. *See id.* at 1100.

Not long after, Dominguez moved to withdraw his plea agreement because the First Step Act of 2018, signed into law the same day he pleaded guilty, significantly reduced the potential sentencing exposure created by the various charges (both the ones to which he pleaded guilty and the ones the government agreed to drop). *See id.* The district court denied the motion. *See id.* at 1101. It then sentenced Dominguez to 28 years, per the plea agreement.

Dominguez appealed. He argued that one reason the district court should have allowed him to withdraw his plea was his defense attorney had not known about the First Step Act and was therefore constitutionally ineffective. *See id.* at 1109–10. We held that even if the attorney's ignorance amounted to deficient performance, Dominguez had failed to show prejudice. *See id.* at 1111–21.

Following the appeal Dominguez filed his § 2255 motion in the district court. Although he asserted three grounds for relief, he seeks a COA only regarding the one based on *United States v. Taylor*, 142 S. Ct. 2015 (2022), a Supreme Court decision handed down after his direct appeal. *Taylor* held that attempted Hobbs Act robbery is not a crime of violence for purposes of § 924(c). *See id.* at 2020–22, 2025–26. Dominguez's § 2255 motion argued that *Taylor*'s reasoning applies equally to his conviction for attempted robbery involving a controlled substance.

In response, the government stated—incorrectly—that the crime of violence underlying Dominguez's § 924(c) conviction was attempted Hobbs Act robbery, and

it therefore conceded that *Taylor* applied.[1] The government argued, however, that Dominguez's *Taylor* claim was procedurally barred by: (i) his knowing and voluntary guilty plea to the § 924(c) charge; (ii) the collateral-attack waiver in his plea agreement;[2] and (iii) failure to raise the argument on direct appeal, coupled with a failure to demonstrate cause and prejudice or actual innocence (which could excuse the failure to raise the argument on direct appeal).

The district court agreed with the government's second and third arguments, and denied relief on those grounds. Dominguez then filed the COA application now before us.

II. COA STANDARD

To receive a COA, Dominguez must "ma[ke] a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And because the district court denied his motion on two procedural grounds (the collateral-attack waiver in his plea agreement and his failure to show cause and

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[1] Hobbs Act robbery, 18 U.S.C. § 1951, and robbery involving a controlled substance, 18 U.S.C. § 2118, are not the same crime. Dominguez's indictment and plea agreement make clear that his § 924(c) conviction rests on the latter. As explained below, however, the government's mistake is immaterial because Dominguez's *Taylor* argument is barred regardless.

[2] With exceptions not relevant here, that waiver reads: "The Defendant . . . waives any right to challenge his conviction or sentence in any collateral attack, including, but not limited to, a motion brought under 28 U.S.C. § 2255 . . . ." R. vol. 6 at 20, ¶ 15 (sealed).

prejudice or actual innocence), he must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling[s]." *Id.*

III. ANALYSIS

We address only the collateral-attack waiver because its validity precludes relief for Dominguez. We review the enforceability of such a waiver using the same factors we have established for reviewing appeal waivers. *See United States v. Viera*, 674 F.3d 1214, 1217 (10th Cir. 2012). Those factors are: "(1) whether the disputed appeal falls within the scope of the waiver of [collateral attack] rights; (2) whether the defendant knowingly and voluntarily waived his [collateral attack] rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc).

We assume that any factor not challenged by Dominguez has been satisfied. *See United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005). Dominguez says nothing about the first two factors, so we will proceed directly to the miscarriage-of-justice factor.

In this context, a miscarriage of justice occurs "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327 (bracketed numerals in original; internal quotation marks omitted). "[This] list is exclusive." *United States v. Shockey*, 538 F.3d 1355, 1357 (10th Cir. 2008).

In district court Dominguez relied on the ineffective-assistance part of this test. The district court rejected this possibility because the ineffective-assistance issue had already been decided against him in his direct appeal to this court.

In his COA application, Dominguez does not challenge this reasoning. He instead asserts a new argument under the third part of the miscarriage-of-justice test, contending that the sentence on his § 924(c) conviction exceeds the statutory maximum. "A person [cannot] be sentenced for something ruled unconstitutional," he says, so the sentence for the "underlying count is zero." COA Appl. at 3. In COA proceedings, just as in appeals, we generally do not consider arguments made for the first time in this court. *See Viera*, 674 F.3d at 1220. We therefore reject this argument.

The COA application also includes the words "impermissible factor." Opening Brief, part 2. This appears to be a reference to our statement that a miscarriage of justice occurs "where the district court relied on an impermissible factor such as race." *Hahn*, 359 F.3d at 1327. But Dominguez fails to elaborate, and nothing in the record suggests racism. The issue therefore has not been adequately raised to merit our review.

Although Dominguez feels unjustly treated because he thinks he could have obtained a more lenient sentence based on post-plea legal developments, a favorable change in the law after pleading guilty cannot unsettle the expectations established by a waiver of the right to appeal or to raise a collateral attack:

> [C]riminal defendants may waive both rights in existence and those that result from unanticipated later judicial determinations. . . . The essence of plea agreements . . . is that they represent a bargained-for understanding between the government and criminal defendants in which each side foregoes certain rights and assumes certain risks in exchange for a degree of certainty as to the outcome of criminal matters. One such risk is a favorable change in the law.

Porter, 405 F.3d at 1144, 1145 (holding that *United States v. Booker*, 543 U.S. 220, 226–27 (2005), which determined that the federal sentencing guidelines were unconstitutional to the extent they were mandatory, did not allow a defendant who pleaded guilty and was sentenced under the mandatory-guidelines regime to escape his appeal waiver).

We see no debatable question about the district court's decision to enforce Dominguez's collateral-attack waiver.[3]

IV. CONCLUSION

We deny a COA and dismiss this proceeding. We grant Dominguez's motion to proceed without prepayment of costs or fees.

Entered for the Court

Harris L Hartz
Circuit Judge

[3] We do not reach the district court's alternate ground that Dominguez failed to show cause and prejudice or actual innocence.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

CHRISTOPHER DOMINGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Case No. 22-CV-0246-NDF
Criminal No: 17-CR-98-F
18-CR-186-F[1]

ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO SUPPLEMENT AND AMEND HIS § 2255 MOTION AND DENYING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

This matter is before the Court on Defendant/Petitioner Christopher Dominguez's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody (Civil Case ECF 1), and his Motion for Leave to Supplement and Amend his § 2255 Motion Pursuant to Fed. R. Civ. P. 15 (ECF 4). The government opposes the motion to vacate but does not oppose the motion for leave to supplement and amend. ECF 3, 11. The matter is fully briefed and ready for disposition. ECF 10.

As to the motion for leave to amend and supplement the § 2255 motion, the government recognizes that this motion is timely and creates no prejudice. Consequently,

[1] This docket number reflects unrelated conduct charged by the District of New Mexico. That district's docket number for the New Mexico offense conduct is 16-CR-4697-MV.

the government does not oppose. For these same reasons, the Court GRANTS leave to amend and supplement (ECF 4) and will consider the additional basis advanced by Mr. Dominguez in support of his § 2255 motion.

Additionally, and for the reasons explained below, the Court concludes Dominguez's appellate counsel was not ineffective in arguing trial counsel failed to provide close assistance (as opposed to effective assistance) because appellate counsel in fact argued the standard applicable to effective assistance. Further, the effectiveness of trial counsel was fully and comprehensively considered by the Tenth Circuit so it may not now be raised on collateral attack. The Court additionally concludes Dominguez's challenge to the legality of his sentence is procedurally barred. Finally, the Court concludes that Mr. Dominguez's supplemental claim is also procedurally barred. Therefore, the motion to supplement and amend is GRANTED, (ECF 4) and Mr. Dominguez's § 2255 motion (ECF 1) is DENIED as to claim one and DISMISSED as to claim two and the supplemental claim.

Background

The Court takes the relevant history in large part from the government's opposition and the Tenth Circuit's opinion on Mr. Dominguez's appeal. *United States v. Dominguez*, 998 F.3d 1094, 1096-97 (10th Cir. 2021).

The underlying criminal charges arise from a series of armed robberies of pharmacies in New Mexico and Wyoming committed by Mr. Dominguez, Antoine Mitchell, and Moses D. Dickens III. The three were first arrested in Raton, New Mexico. The Raton Police Department posted information concerning the robbery, including

photos, on the Department's Facebook page, which ultimately came to the attention of a pharmacist who had been shot during the Wyoming pharmacy robbery. That pharmacist alerted law enforcement, which began investigating whether the suspects in the New Mexico robbery had also committed the Wyoming robbery. Ultimately, federal grand juries in both states returned multi-count indictments charging Mr. Dominguez and the other two men with various crimes related to these robberies. Among Mr. Dominguez's charges were three separate violations of 18 U.S.C. § 924(c)—one in relation to the New Mexico pharmacy robbery, and two in relation to the Wyoming pharmacy robbery.

Under § 924(c),

> any person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A). As to the New Mexico robbery, Mr. Dominguez's only § 924(c) charge alleged brandishing a firearm, and thus invoked the seven-year mandatory minimum sentence. As to the Wyoming robbery, Mr. Dominguez's two § 924(c) charges each alleged discharge, which invoked the ten-year mandatory minimum sentence.

Section 924(c) requires that each term of imprisonment for a violation of the statute run consecutively to each of a defendant's other terms of imprisonment. Additionally, when Mr. Dominguez was indicted, § 924(c) contained a "stacking provision," which mandated mandatory minimum sentences of twenty-five years for second or subsequent

§ 924(c) violations. *See id.* § 924(c)(1)(C) (2006). Consequently, when indicted, Mr. Dominguez faced a mandatory minimum sentence of sixty years if convicted on all three § 924(c) violations.

The parties began global plea negotiations to resolve both the Wyoming and New Mexico cases, and Mr. Dominguez signed his Rule 11(c)(1)(C) plea agreement on December 20, 2018. ECF 146 (17-CR-98). The plea agreement provided that Mr. Dominguez would plead guilty to three counts from the Wyoming indictment—including one § 924(c) violation—and one count from the New Mexico indictment. Among other things, it provided that he would receive a sentence of 8 years' imprisonment for the Wyoming carjacking count (Count 2); 10 years' imprisonment for the Wyoming attempted robbery count (Count 5); and 10 years imprisonment for the Wyoming § 924 discharge of a firearm count, all to be served consecutively. Regarding the New Mexico indictment (which was ultimately transferred to Wyoming and became 18-CR-186), Mr. Dominguez agreed to receive 18 years' imprisonment for the New Mexico robbery conspiracy count, to be served concurrently with the 18-year sentence imposed for Counts 2 and 5 of the Wyoming indictment. In exchange, the government would dismiss the remaining charges against him, including the two additional § 924(c) violations with which he was charged. Finally, the government agreed not to charge Mr. Dominguez with any conduct under investigation related to a bank robbery that occurred in 2015 in Albuquerque, New Mexico. In short, by the plea agreement he signed on December 20, 2018, Mr. Dominguez agreed to a sentence of twenty-eight years' imprisonment as a global resolution of all charges.

On December 21, 2018, Mr. Dominguez appeared in district court for his change-of-plea hearing. At the conclusion of the Rule 11 colloquy conducted by the Court, Mr. Dominguez pled guilty to each of the four charges covered by the plea agreement, which pleas were conditionally accepted. However, that same day the President signed into law the First Step Act ("FSA") which altered the stacking provision of § 924(c) and significantly impacted Mr. Dominguez's penalty exposure. Before the FSA, Mr. Dominguez faced a sixty-year mandatory minimum sentence were he to be convicted on all three § 924(c) charges brought in the New Mexico and Wyoming indictments. After the FSA, conviction on all these charges would bring only a mandatory minimum sentence of twenty-seven years. *See id.* § 924(c)(1)(A), (D)(ii).

After learning of the FSA, Mr. Dominguez sought to withdraw his guilty plea. ECF 161 (17-CR-98). His attorney argued that "[t]he entire structure of the law changed for Mr. Dominguez on the same day he changed his plea" and that "almost for certain [Mr. Dominguez] wouldn't have changed his plea" had he known about the FSA. ECF 227 (17-CR-98), pp. 12-13. In an Order denying Mr. Dominguez's motion to withdraw his guilty plea, the Court concluded that he was engaged in plea negotiations for several weeks prior to the change of plea hearing, when the passage of the FSA was uncertain, and that the failure to fully consider the new law did not constitute the lack of close assistance of counsel, especially when Mr. Dominguez continually stated that he was satisfied with the advice of counsel. ECF 194 (17-CR-98), pp. 8-9. Further, the fact Mr. Dominguez was not aware of potential statutory changes did not provide a sufficient basis to find the guilty plea was not knowingly entered. *Id.*, p. 10.

Mr. Dominguez appealed the order denying the motion to withdraw his guilty plea on the basis that his plea was not knowing and intelligent, and that his plea was invalid because he did not receive "close assistance" of counsel during the plea-bargaining process. ECF 206 (17-CR-98). The Tenth Circuit rejected both arguments. As to the first, the Court held that "Mr. Dominguez [did] not demonstrate how any misunderstanding he may have had about the [FSA's] potential effects on mandatory minimum penalties for charges to which he did *not* plead guilty are of direct consequence with respect to the charges to which he *did* plead guilty, such that his purported misunderstanding regarding these effects would render his plea unknowing and unintelligent." *Dominguez*, 998 F.3d at 1109 (emphasis in original). Next, the Circuit viewed Mr. Dominguez's claim that he did not receive "close assistance" of counsel under the familiar, two-pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny, which was consistent with how the parties framed the issue. *Id.* at 1110. Following a comprehensive discussion of *Strickland's* prejudice prong in the context of Mr. Dominguez's two prejudice theories (e.g., the denial of his right to a trial and the denial of a potentially better plea agreement), the Court held that, "under either theory, Mr. Dominguez's prejudice showing is inadequate and, therefore, his ineffective-assistance claim fails." *Id.* at 1113.

The court of appeals' decision was on June 2, 2021. The Defendant sought a writ of *certiorari* from the Supreme Court, but his petition was denied on May 31, 2022. *Dominguez v. United States*, 142 S.Ct. 2756 (2022). Therefore, his current § 2255 motion, filed on November 28, 2022, is timely for purposes of § 2255(f)'s one year limitation period. *United States v. Prows*, 448 F.3d 1223, 1227-28 (10th Cir. 2006).

Applicable Law

Section 2255 entitles a prisoner to relief "[i]f the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). The standard applied to § 2255 motions is stringent. "Not every violation of federal law can be remedied under § 2255. Only if the violation constitutes a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure can § 2255 provide relief." *United States v. Gordon*, 172 F.3d 753, 755 (10th Cir. 1999) (internal quotations omitted). The Court presumes the proceedings which led to a defendant's conviction were correct. *See Parke v. Raley*, 506 U.S. 20, 29-30 (1992) ("presumption of regularity that attaches to final judgments, even when the question is waiver of constitutional rights," internal quotation marks omitted).

Further, special rules govern consideration of a motion to vacate under 28 U.S.C. § 2255. "Section 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." *United States v. Frady*, 456 U.S. 152 (1982); *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993); *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994). A defendant who fails to raise an issue before this court or on direct appeal may present it in a § 2255 motion only if he can demonstrate cause for his procedural default, and either actual prejudice from the alleged errors, or 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).

In order to establish "cause," a defendant must show that there existed some external impediment which prevented him from raising the claim during the original proceedings on his case, or on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). A defendant could show "cause" by demonstrating that his non-compliance was the product of some kind of governmental or official interference, or that his claim was so novel that its legal basis was not reasonably available to his counsel. *Id.*, 477 U.S. at 488; *see also Reed v. Ross*, 468 U.S. 1, 16 (1984). However, neither ignorance nor inadvertence is sufficient in this regard, nor is a failure to recognize the factual or the legal basis for the claim. *Id.*

Additionally, "[a]bsent an intervening change in the law of a circuit, issues disposed of on direct appeal generally will not be considered on a collateral attack by a motion pursuant to § 2255." *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989); *See also United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994) (same)

The procedural bar rules do not apply to a petitioner's claim of ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim under § 2255, a petitioner must meet the well-established two-prong test set forth in *Strickland*, 466 U.S. 668. That is, the petitioner must show: (1) "counsel's performance was deficient" ("fell below an objective standard of reasonableness"); and (2) "the deficient performance prejudiced the defense" ("there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). *Id.* at 687-88, 694. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice, which we expect will often be so, that course should be followed." *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000) (quoting *Strickland*, 466 U.S. at 697).

The Court's review is "highly deferential," based on "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *United States v. Taylor*, 454 F.3d 1075, 1079 (10th Cir. 2006) (quoting *Strickland*, 466 U.S. at 689). Where "the basis for the ineffective assistance claim is the failure to raise an issue, [the Court] must look to the merits of the omitted issue." *United States v. Orange*, 447 F.3d 792, 797 (10th Cir. 2006). "If the omitted issue is without merit, then counsel's failure to raise it is not prejudicial, and thus is not ineffective assistance." *Id.*

> In analyzing whether counsel's alleged errors prejudiced petitioner, [the Court] must keep in mind the standard to be applied in assessing whether petitioner is entitled to an evidentiary hearing in federal court on his ineffectiveness claim. First, the petitioner bears the burden of alleging facts which, if proved, would entitle him to relief. Moreover, his allegations must be specific and particularized; conclusory allegations will not suffice to warrant a hearing.

Hatch v. Oklahoma, 58 F.3d 1447, 1457 (10th Cir. 1995) (overruled on other grounds by *Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001)) (citations and quotations omitted).

Discussion

Mr. Dominguez identifies two claims of error which he argues warrant § 2255 relief, along with a supplemental claim by way of his motion to amend. In his initial § 2255 petition, Mr. Dominguez first argues appellate counsel rendered ineffective assistance on

his direct appeal by arguing trial counsel failed to provide "close assistance" of counsel, rather than arguing trial counsel rendered ineffective assistance under *Strickland*. ECF 1, pp. 14-23. Second, Mr. Dominguez argues this Court abused its discretion by erroneously concluding that the law did not change (by way of the FSA) until after his change of plea hearing (which Dominguez views as a claim that he was sentenced under the pre-FSA law which would constitute an abuse of discretion and render the proceedings fundamentally unfair). *Id.*, pp. 24-28. Finally, as a supplemental § 2255 claim, Mr. Dominguez argues an intervening change in the law – *Taylor v. United States*, 142 S.Ct. 2015 (2022) – mandates that the § 924 conviction and sentence be vacated because the predicate conviction of Attempted Robbery Involving Controlled Substances and Aiding and Abetting under 18 U.S.C. § 2118(a)(1)(3)(c)(1) and (2) no longer qualifies as a crime of violence under § 924(c)(3)(A)'s element clause.

A. Claim 1 – Ineffective Assistance of Appellate Counsel

As to this claim, Mr. Dominguez essentially argues all the same points which were unsuccessfully advanced in support of his motion to withdraw his guilty plea, and which were also unsuccessfully advanced to the Tenth Circuit in support of his direct appeal of this Court's order denying the motion. The government opposes, pointing out that Mr. Dominguez's appellate counsel in fact argued that trial counsel was constitutionally ineffective under *Strickland*. Because Mr. Dominguez's factual basis for his claim is false, the government argues that this claim should be rejected. The government also argues that this claim was fully addressed and rejected by the Tenth Circuit, and Mr. Dominguez fails to identify any intervening change in the law of the circuit. Based on this, the government

argues this issue may not be considered on a collateral attack by a motion pursuant to § 2255.

In considering this claim, the Court agrees with the government. While Mr. Dominguez attempts to bring this argument under the guise of ineffective assistance of appellate counsel, such a claim is baseless. Appellate counsel argued the *Strickland* test in advancing Mr. Dominguez's contention that trial counsel failed to provide "close assistance," and the Tenth Circuit considered the "close assistance" argument through that same *Strickland* lens. The effectiveness of trial counsel was fully and comprehensively considered by the Tenth Circuit, and it may not be now raised on collateral attack simply by dressing it up as an argument of ineffective assistance of appellate counsel. Contrary to Mr. Dominguez's statements, appellate counsel advanced the *Strickland* test to assess the assistance of trial counsel, and the Tenth Circuit considered that test. Additionally, there is no intervening change in the law of the circuit for consideration of Mr. Dominguez's argument in a § 2255 petition, and this claim of error is denied.

B. Claim 2 – Abuse of Discretion at Sentencing

Mr. Dominguez argues that this Court was wrong in concluding that the law did not change until after his change of plea hearing which ultimately led to a sentencing proceeding which was fundamentally unfair. The government opposes, arguing that Mr. Dominguez's challenge to the legality of his sentence is procedurally barred with no showing of "cause" under *Frady*. The government also argues that this claim lacks merit because Mr. Dominguez was sentenced on only one § 924(c) count, and the mandatory ten-year consecutive sentence for that offense was not affected by anything in the FSA.

Because the government raises the procedural bar issue in response to this claim of error, the Court is obliged to address the issue and, if appropriate, dispose of the case on that basis. *Allen,* 16 F.3d at 379. The Court agrees with the government that Mr. Dominguez's second claim of error, that his sentencing proceeding was fundamentally unfair, is barred. Mr. Dominguez provides no reason why this claim could not have been raised with this Court in connection with his sentencing, or why it was not raised on direct appeal. Consequently, this claim of error is dismissed.

C. Supplemental Claim – An Intervening Change in the Law

As a supplemental § 2255 claim, Mr. Dominguez argues an intervening change in the law – *Taylor v. United States*, 142 S.Ct. 2015 (2022) – mandates that his conviction and sentence under § 924(c)(1)(A) be vacated because the predicate conviction of Attempted Robbery Involving Controlled Substances and Aiding and Abetting under 18 U.S.C. § 2118(a)(1)(3)(c)(1) and (2) no longer qualifies as a crime of violence under § 924(c)(3)(A)'s element clause.

As noted above, 18 U.S.C. § 924(c)(1)(A) mandates a ten-year consecutive sentence for anyone convicted of "us[ing] or carr[ying] a firearm" "during and in relation to any crime of violence ... (iii) if the firearm is discharged." The statute defines "crime of violence" in two ways: the term "means an offense that is a felony" and that either (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or (B) "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3).

In *United States v. Davis*, the Supreme Court held that clause (B)—the "residual clause"—is unconstitutionally vague. 139 S. Ct. at 2336. After *Davis*, then, a criminal conviction qualifies as a predicate "crime of violence" under § 924(c) only if it meets the terms of clause (A)—the "elements clause"—that is, only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* at 2324 (quoting § 924(c)(3)).

In response, the government argues that Mr. Dominguez's supplemental claim was effectively and specifically waived by the terms of his plea agreement, and this claim is procedurally barred absence a showing of the necessary cause and prejudice under *Frady*. The government argues this has not been shown, and actual innocence of this or other equally or more serious charges cannot be shown by Dominguez.

Again, because the government raises the procedural bar issue, this will be addressed first. The Court agrees with the government that Mr. Dominguez's supplemental claim of error – the *Taylor*-based challenge to the attempted robbery conviction – is barred. Mr. Dominguez provides no reason why this claim was not raised before this Court or on direct appeal. He makes no argument that the claim would surely have been futile and doomed to fail based on binding precedent in this circuit, or even persuasive precedent from other circuits. The legal basis was available to him during the time the charges were pending against him, as well as during his appeal. Thus, cause for a procedural default based on "futility" does not exist. *Engle v. Isaac*, 456 U.S. 107, 134 (1982).

Further, the government anticipates that Dominguez will argue actual innocence to survive the procedural bar. *Bousley v. U.S.*, 523 U.S. 614, 623-24 (1998). In response, the

government points out that Mr. Dominguez has not and cannot demonstrate actual innocence on all charges the government bargained away in the course of plea negotiations. *Taylor v. Powell*, 7 F.4th 920, 937 (10th Cir. 2021). The government points out that it dismissed two charges, each alleging aggravated violations of § 924(c) with legally sufficient predicates, which involved cumulatively mandatory minimum penalties greater than what Mr. Dominguez received for the conviction at issue.[2] Mr. Dominguez makes no argument as to actual innocence as to any charge, let alone the bargained-away charges, nor does he argue that Count Two of the New Mexico indictment lacks proper predicates. Consequently, this supplemental claim of error is procedurally barred and is dismissed.

Conclusion

As to all claims and arguments, the files and record in this case conclusively establish that Mr. Dominguez is not entitled to any additional relief. Accordingly, no evidentiary hearing is required. *United States v. Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988) (no hearing required where § 2255 motion may be resolved on review of record before the Court).

THEREFORE, IT IS ORDERED that Mr. Dominguez's Motion to Supplement and Amend his Motion under 28 U.S.C. § 2255 (ECF 4) is **GRANTED**; and

[2] Notably, Count Two in the New Mexico indictment charged brandishing, using and carrying a firearm during and in relation to crimes of violence and drug trafficking. The crimes of violence predicates for Count Two include (Count Three) robbery involving controlled substances in violation of 18 U.S.C. § 2118(a)(1) and (c)(1), and (Count Four) theft of medical products, in violation of 18 U.S.C. § 670(a)(1) and (b)(2)(A) and (B). ECF 25 (16cr4697). The drug trafficking predicate for Count Two is Count Five, possession with intent to distribute oxycodone, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). *Id.*

IT IS FURTHER ORDERED THAT claim one of Mr. Dominguez's Motion Under 28 U.S.C. § 2255 (ECF 1) is **DENIED**; and

IT IS FURTHER ORDERED that claim two of Mr. Dominguez's Motion Under 28 U.S.C. § 2255 (ECF 1) is **DISMISSED**; and

IT IS FURTHER ORDERED that Mr. Dominguez's supplemental claim added to his Motion Under 28 U.S.C. § 2255 (ECF 4) is **DISMISSED**; and

IT IS FINALLY ORDERED that pursuant to 22 U.S.C. § 2253(c), this Court declines to issue a certificate of appealability based on the conclusion that petitioner has not made a substantial showing of the denial of a constitutional right. *See also, Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong).

Dated this 17th day of February, 2023.

Nancy D Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES SENIOR DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

March 25, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER DOMINGUEZ,

Defendant - Appellant.

No. 23-8016
(D.C. Nos. 2:22-CV-00246-NDF, 2:17-CR-00098-NDF-3 & 2:18-CR-00186-NDF-1)
(D. Wyo.)

ORDER

Before **HARTZ**, **PHILLIPS**, and **McHUGH**, 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

Additional material from this filing is available in the Clerk's Office.