

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 30, 2017

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

VICKI DILLARD CROWE,

Defendant - Appellant.

No. 16-1253
(D.C. Nos. 1:15-CV-00655-MSK and
1:10-CR-00170-MSK-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ, O'BRIEN, and PHILLIPS**, Circuit Judges.

Vicki Dillard Crowe, a former federal prisoner now out of prison on supervised release, appeals the denial of her 28 U.S.C. § 2255 habeas corpus petition.¹ The district court also denied her a certificate of appealability (COA), as do we.

In December 2011, a jury in the District of Colorado convicted Crowe of eight counts of mail fraud in violation of 18 U.S.C. § 1341 and eight counts of wire fraud in violation of 18 U.S.C. § 3143. In June 2012, Crowe made a Motion for Judgment

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Crowe is proceeding pro se, so we construe her pleadings liberally, though we do not act as her advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

of Acquittal and an alternative Motion for New Trial, which the district court denied on the merits. The motions included ineffective-assistance-of-counsel claims. In September 2012, the district court sentenced her to 60 months in prison, with three years of supervised release to follow. Crowe appealed her conviction and sentence and we affirmed on the merits, including the merits of her ineffective-assistance claims.

On the last possible day—March 24, 2015—Crowe submitted a § 2255 petition to the legal-mail system of the prison in which she was incarcerated, thereby fulfilling the prison mailbox rule, *see United States v. Gray*, 182 F.3d 762, 765 n.4 (10th Cir. 1999), and making her petition timely even though it was not filed with the court until six days later. The petition consisted of eighteen ineffective-assistance claims, relating either to Crowe’s trial counsel, counsel at sentencing, or appellate counsel. The claims had only barebones arguments and facts to back them up, but included with the petition was a statement by Crowe notifying the court that she intended to file a follow-up memorandum of law to better support her claims. Crowe stated that she would submit the memorandum at a time determined by the district court, or on or before April 30, 2015. As the petition was submitted on the last day allowed by § 2255’s time limits, this follow-up memorandum would of course have come a month past the deadline.

But because of what appears to be a mutual misunderstanding, the memorandum never came at all. One week after the district court received Crowe’s petition, it ordered the government to address, within 21 days, the timeliness of

Crowe's petition. The order also allowed Crowe to reply to the government's response. On April 28, 2015, the government responded as directed, stating that it found Crowe's petition to be timely. In June 2015, Crowe also filed a reply, acknowledging the government's concession on timeliness, affirming that her petition was indeed timely, and stating that she now trusted "that this matter is able to proceed since the Court's inquiry regarding timing has been addressed." R. at 86.

These pleadings, while seeming to have cleared the deck for the case to proceed, instead induced an 11-month paralysis. Crowe claims that she interpreted the district court's timeliness order to mean that the normal course of the § 2255 proceedings were on pause until the timeliness matter was resolved. And because the district court never issued an order formally resolving timeliness, Crowe says she believed the matter to be unresolved and so held off on submitting further court documents. Meanwhile, the district court shared no such perception—it evidently believed that the government's concession had resolved the timeliness question and so awaited the arrival of Crowe's follow-up memorandum (even though it had never formally approved the past-the-deadline submission of the memorandum). In this standoff, Crowe and the district court sat for the next 11 months, each waiting for the other to act.

Finally, in May 2016, the district court decided that no follow-up memorandum was forthcoming, and so proceeded to evaluate the barebones arguments and facts that Crowe had already submitted. Unsurprisingly, it found them severely lacking—the ineffective-assistance claims that were not duplicative of her

prior claims were merely conclusory assertions lacking in specific citations to evidence. The district court found that the failure to file the follow-up memorandum, which might have bolstered Crowe's claims with more in-depth discussion of specific counsel errors, "requires that her § 2255 motion be denied as insufficient." *Id.* at 93. The court also denied her a COA. Crowe moved for the district court to reconsider, but the district court declined to do so, and also certified that Crowe's appeal was not taken in good faith and denied her *in forma pauperis (ifp)* status on appeal. *See* 28 U.S.C. § 1915(a)(3).

Crowe, emphasizing her pro se status and the misunderstanding, urges us to rewind the clock and finally allow her to fully brief her § 2255 petition. The misunderstanding and the delay in this case seem to have been both regrettable and avoidable. But they do not alter the fact that Crowe submitted her § 2255 petition on the last possible day. That last-minute filing still made her petition timely—and had she submitted her memorandum of law at the same time as the petition, it too would have been timely. But of course, a last-minute filing means that anything filed later is untimely. Crowe might have hoped that the district court would consider her memorandum anyway, but the district court never gave any formal indication that it would, and Crowe had no right to expect such a result. At any time, the district court could have denied Crowe the opportunity to file the follow-up memorandum. The

fact that the district court did not, though partly responsible for the confusion, does not mean that it or we must accept the memorandum now.²

Therefore, we, like the district court, consider only the materials that Crowe has already submitted. To obtain a COA, Crowe must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Crowe’s petition does not do so. Her claims either repeat claims she made earlier or set out only impermissibly vague assertions of the ineffective assistance of her counsel.

We also deny Crowe *ifp* status on appeal. Even a party who has been certified as not appealing in good faith, such as Crowe, can request *ifp* status on appeal so long as she shows both a financial inability to pay and a reasoned, nonfrivolous argument, and follows the procedure mandated by Fed. R. App. P. 24(a)(5). *Rolland v. Primesource Staffing, L.L.C.*, 497 F.3d 1077, 1078-79 (10th Cir. 2007).³ But Crowe has not shown the existence of a reasoned, nonfrivolous argument and so must be denied *ifp* status.

² Crowe’s brief also contains few, if any, hints about what arguments a potential follow-up memorandum would make to satisfy the required showings for a successful ineffective-assistance claim. See *Strickland v. Washington*, 466 U.S. 668 (1984).

³ “Upon its face, § 1915(a)(3) would appear to foreclose our consideration of [a motion to proceed IFP]; its mandatory language denies the availability of an appeal in forma pauperis upon the district court’s certification of a lack of good faith, and it provides no escape hatch of appellate review or reconsideration. Federal Rule of Appellate Procedure 24(a)(5), on the other hand, purports to expressly permit our consideration of [such] a motion The palpable conflict between these provisions is resolved in favor of the procedures dictated by Rule 24(a)(5), by virtue of the fact that its most recent reenactment postdates that of § 1915(a)(3).” *Rolland*, 497 F.3d at 1078.

CONCLUSION

For the reasons stated, we deny Crowe a COA, deny her *ifp* status, and dismiss the appeal.

Entered for the Court

Gregory A. Phillips
Circuit Judge

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 30, 2017 ✓

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 16-1253

VICKI DILLARD CROWE,

Defendant - Appellant.

ORDER

Before **HARTZ, O'BRIEN**, and **PHILLIPS**, 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



ELISABETH A. SHUMAKER, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger**

Criminal Action No. 10-cr-00170-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

**VICKI DILLARD CROWE,
a/k/a Vicki R. Dillard,**

Defendant.

OPINION AND ORDER DENYING MOTION TO VACATE

THIS MATTER comes before the Court pursuant to Ms. Dillard's *pro se* Motion to Vacate (# 218, 219) under 28 U.S.C. § 2255, the Government's preliminary response (# 222), and Ms. Dillard's reply (# 224).

On December 16, 2011, a jury convicted Ms. Dillard of eight counts of mail fraud for violation of 18 U.S.C. § 1341, and eight counts of wire fraud for violation of 18 U.S.C. § 3143, all stemming from a scheme in which Ms. Dillard obtained mortgage loans based on false representations in loan applications. On September 27, 2012, the Court sentenced Ms. Dillard to a term of 60 months' imprisonment, and upon the Government's request, immediately remanded her to the Bureau of Prisons.

In the period between her conviction and sentence, Ms. Dillard filed a *pro se* Motion for Judgment of Acquittal (# 164). That motion, filed shortly after the Court granted Ms. Dillard's

trial counsel's request to withdraw from continued representation, contended that her trial counsel had provided her ineffective assistance, in violation of the 6th Amendment, in several respects. The Court denied (# 176) that motion on its merits, making certain specific findings as to her ineffective assistance claims.

Ms. Dillard appealed her conviction and sentence and the Court's ruling on her Motion for Judgment of Acquittal to the 10th Circuit Court of Appeals. On November 18, 2013, the 10th Circuit affirmed (# 213) all of the rulings of this Court on the merits, including its rulings regarding Ms. Dillard's post-trial ineffective assistance claims. *U.S. v. Crowe*, 745 F.3d 1229, 1244 (10th Cir. 2013).

Ms. Dillard then timely filed the instant *pro se* Motion to Vacate (# 218) pursuant to 28 U.S.C. § 2255. Ms. Dillard asserts 18 separate grounds for relief (some of which contain numerous subparts), all predicated on claims that she received ineffective assistance from her trial counsel, counsel who represented her for sentencing purposes, or counsel who represented her during her direct appeal. Each claim is presented in entirely conclusory terms, offering only a stated theory or claim for relief, but without any factual elaboration, identification of pertinent evidence, or reference to specific trial or pre-trial proceedings. For purposes of reference, the Court recites these allegations, often verbatim and in their substantive entirety, in the note below.¹

¹ Claim 1: "Trial counsel was ineffective for failing to call upon, interview & subpoena fact/character/exculpatory witnesses who could have supported a potentially effective defense that was unsuccessfully advanced at trial"; Claim 2: "Trial counsel was ineffective for failing to locate, interview, subpoena, or have testify during trial any expert witness (real estate appraiser, handwriting, underwriter, mortgage broker) as promised . . ."; Claim 3: "Trial counsel was ineffective for failing to present (exculpatory) evidence at trial"; Claim 4: "Unprepared trial

Simultaneously with her motion, Ms. Dillard filed a "Statement" (# 219) that explained that she "intends to file a Memorandum of Law in support of the referenced motion . . . on or before Thursday, April 30, 2015" -- essentially, 30 additional days after she filed the motion and Statement. That delay, she explained, would "allow [her] sufficient time to prepare and perfect her arguments." But Ms. Dillard never filed a Memorandum of Law, and although she filed a

counsel was ineffective for failing to cross-examine key government witnesses and failing to destroy credibility of witnesses with conflicting testimony and/or prior inconsistent statements"; Claim 5: "Trial counsel was ineffective for failing to investigate government and defense witnesses, thus unprepared, resulting in improper impeachment of witnesses, thereby working against the defense. Such was done with full knowledge."; Claim 6: "Trial counsel intentionally failed to subject the prosecution's case to meaningful adversarial testing, primarily due to ignorance & neglect; counsel failed to learn enough about [Dillard's] case and the [real estate]/mortgage industry to adequately defend her"; Claim 7: "Trial counsel was ineffective for failing to properly advise [Dillard] regarding her request for a speedy trial, pros and cons of testifying on her own behalf, *inter alia*"; Claim 8: a claim that trial counsel was ineffective for signing a stipulation on Ms. Dillard's behalf and over her objection, conceding the "use of interstate wires" element of the wire fraud counts; Claim 9: "Trial counsel was ineffective in failing to properly object to erroneous and inaccurate statements made by the prosecution (such as [Dillard] breaking into (her own) houses and failing to make payments while the properties were being foreclosed) that were prejudicial to her defense"; Claim 10: "Trial counsel was ineffective for failing to object, either before, during, or after trial [to] variances between the indictment and the evidence presented at trial or a shift in the government's theory from the one set out in the indictment to that presented at trial"; Claim 11: "Trial counsel was ineffective for failing to properly and timely [file] correct motions (*i.e.* motion to dismiss for selective prosecution, motion for acquittal, motion for withdrawal)"; Claim 12: "Trial counsel was ineffective for failing to provide conflict-free counsel, contributing to a hostile environment and forcing [Dillard] into duress, thus prejudicing her and compromising her rights and liberty"; Claim 13: "Trial counsel was ineffective in introducing harmful statements and evidence during trial and failing to mount a strategic, informed defense"; Claim 14: "Trial counsel was ineffective for failing to pursue and properly advance a motion/ruling on prosecutorial misconduct"; Claim 15: a compound claim listing 29 separate grounds upon which Ms. Dillard's sentencing counsel rendered ineffective assistance, each of which are as conclusory as the other claims quoted herein; Claim 16: a compound claim listing 11 separate grounds upon which Ms. Dillard's appellate counsel was ineffective, each of which are as conclusory as the other claims quoted herein; Claim 17: "Sentencing counsel was ineffective for exhibiting doubt and hostility during sentencing"; and Claim 18: "Trial counsel failed to object to the jury pool and the trial jury, for it was not one of my peers; appellate counsel failed to raise this argument, thus ineffective as well."

reply (# 224) in support of her motion in June 2015, her reply addressed only the timeliness of her motion which was the only issue raised in the Government's response (# 222).

Mindful of Ms. Dillard's *pro se* status, the Court has construed her pleadings liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, the Court cannot substantiate Ms. Dillard's arguments with evidence or references to the record since she has not done so.

The Court denies Ms. Dillard's motion on two, independent grounds. First, most of her claims of ineffective assistance are identical to the claims of ineffective assistance that she raised in her earlier Motion for Judgment of Acquittal. Claim 8 in the instant motion, relating to the stipulation, is identical to the issue raised at pages 4-9 of her prior motion. Claim 12 here, which makes reference to her trial counsel's superiors at the Federal Public Defender's Office, appears to duplicate the issue raised at pages 9-11 of her prior motion. Claim 2 of the instant motion appears to assert the same issue as that found at page 13 of her earlier motion. Claim 1 of the instant motion appears to raise the same issues as those addressed at pages 13-15 of her prior motion. Ms. Dillard's earlier motion also raised additional contentions that, arguably, bear on some of the other claims she asserts here. Having raised those issues unsuccessfully via her Motion for Judgment of Acquittal, and this Court's denial of that motion having been affirmed by the 10th Circuit on direct appeal,² Ms. Crowe is barred from re-raising those issues again via a motion under § 2255. *See U.S. v. Herget*, 585 Fed.Appx. 948, 951 (10th Cir. 2014)

² As did this Court, the 10th Circuit expressed some reservations about reaching ineffective assistance claims in a direct, rather than collateral, attack, but ultimately decided to reach the merits. *Crowe*, 735 F.3d at 1244. The 10th Circuit affirmed this Court's finding that trial counsel's entry into the stipulation did not constitute ineffective assistance. *Id.* As to the remaining claims of ineffective assistance that this Court addressed, the 10th Circuit noted that Ms. Dillard had not asserted errors relating to those findings in her appeal. *Id.* at 1243 n. 6.

(unpublished), citing *U.S. v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989) (“Absent 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”).

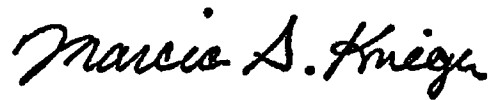
Even if the Court would assume that all of her claims of ineffective assistance were properly before this Court in the first instance on this § 2255 motion, the Court would nevertheless deny the motion in its entirety because Ms. Dillard has not set forth her claims with sufficient specificity. It is not sufficient for a *habeas* movant, even a *pro se* one, to offer only generalized and conclusory assertions that counsel failed to present an appropriate defense theory or failed to discover and locate additional (but unspecified) witnesses or evidence. *U.S. v. Moser*, 570 Fed.Appx. 800, 802 (10th Cir. 2014), citing *Snyder v. Addison*, 89 Fed.Appx. 675, 681 (10th Cir. 2004). Ultimately, it is Ms. Dillard’s burden to show that, but for her counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Conclusory assertions of ineffectiveness, without specific identification of the erroneous act or the colorable evidence that should have been obtained, will not carry this burden. *Snyder*, 89 Fed.Appx at 681; *see also U.S. v. Rollow*, 357 Fed.Appx. 966, 968 (10th Cir. 2009). Indeed, Ms. Dillard seems to have recognized that her motion was inadequate, as her Statement promised that she would subsequently file a memorandum that would set forth her arguments in more detail. The failure to file such a memorandum – one that would specifically identify the particular acts taken by her counsel that were inadequate, or identify the particular witnesses or items of evidence that counsel should have produced (or challenged), along with an explanation as to how the production (or challenge) to that evidence would have likely changed the outcome of her trial, sentence, or

appeal – requires that her § 2255 motion be denied as insufficient.

Accordingly, Ms. Dillard's Motion to Vacate (# 261) is **DENIED**. To the extent that Ms. Dillard is required to obtain a Certificate of Appealability to seek review of this ruling under 28 U.S.C. § 2253(c)(1)(B), the Court has *sua sponte* considered the standards of 28 U.S.C. § 2253(c)(2). For the same reasons set forth above, the Court finds that Ms. Dillard has not made a substantial showing of the denial of a constitutional right, and thus, the Court **DENIES** a Certificate of Appealability.

Dated this 8th day of May, 2016.

BY THE COURT:

A handwritten signature in black ink, reading "Marcia S. Krieger", is written over a horizontal line.

Marcia S. Krieger
United States District Judge