In The Supreme Court of the United States

Samuel Elliott,
Movant-Appellant,

v.

United States of America,
Respondent-Appellee.

On Petition for Writ of Certiorari
After Direct Appeal From
The United States District Court For
The District of New Mexico,
Honorable Matthew L. Garcia
Case Nos. 21-cv-226 MLG/GBW
& 14-cr-3822 MLG/GBW,
To the United States Court of Appeals For
The Tenth Circuit,
No. 25-2018

Petitioner Samuel Elliott's Petition for Writ of Certiorari

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Question Presented for Review

Petitioner sought relief under 28 U.S.C. § 2255 on grounds of ineffective assistance arising from errors and omissions by counsel pertaining to both custody and a restitution amount of $730,000.00. The courts below denied the restitution-related claim on grounds that relief under § 2255 is not available for ineffective assistance related to restitution. Would reasonable jurists find the denial of Petitioner's ineffective assistance claim on these grounds debatable or wrong?

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Petitioner Samuel Elliott respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit denying habeas relief under 28 U.S.C. § 2255.

Opinions Below

The Order Denying Certificate of Appealability of the United States Court of Appeals for the Tenth Circuit is attached in Appendix A. The Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, filed by the United States District Court for the District of New Mexico is attached in Appendix B. The District Court's Final Judgment is attached in Appendix C. The District Court's Order Denying Certificate of Appealability is attached in Appendix D.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its order denying certificate of appealability and denying relief under 28 U.S.C. § 2255 on November 13, 2025. *See* Appendix A. A petition for writ of certiorari is timely if filed on or before February 11, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portion of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This petition for writ of certiorari follows a direct appeal to the United States Court of Appeals for the Tenth Circuit from the United States District Court for the District of New Mexico's denial of Petitioner's petition under 28 U.S.C. § 2255 challenging the validity of his federal conviction and sentence, and the district court's order denying certificate of appealability.

Petitioner was represented by court-appointed counsel. He pled guilty to three counts of producing child pornography and four counts of possessing child pornography. The plea agreement required that any restitution

imposed on Petitioner be conditioned on two requirements: (1) that the victims be identified, and (2) that they request restitution prior to sentencing.

At the sentencing hearing, Petitioner was sentenced to 170 years of imprisonment, based on 360 months for each of the three production counts and 240 months for each of the four possession counts; all counts were run consecutively.

The district court entered a restitution award in the amount of $730,000.00.

In spite of the fact that the terms of the plea agreement required the victims to be identified and that they request restitution prior to sentencing, Petitioner's trial counsel made no effort to ensure that this requirement was met prior to the imposition of $730,000.00 in restitution at sentencing.

Without taking any steps to confirm that this requirement had been met, counsel took the prosecutor at his word that victims had said they wanted restitution. There is nothing in the record showing any claim of restitution by any of the victims. Petitioner was never made aware of any such claims of restitution, as required by the plea agreement.

Petitioner's trial counsel also made no effort to argue for a reduction in the amount of restitution.

The restitution award of $730,000.00 was imposed without the express requirements in the plea agreement having been met.

Petitioner sought relief under § 2255 in the United States District Court for the District of New Mexico. At the evidentiary hearing, trial counsel acknowledged that he did not discuss with Petitioner any plan to monitor whether the required requests were made prior to sentencing. Trial counsel never provided to Petitioner any confirmation that the required requests had been made. Trial counsel testified that he assumed that the amount of $730,000.00 was "based on a recommendation from probation."

There was no evidence produced at sentencing that any such requests were made. In the proceedings under § 2255, neither the government nor the district court produced or pointed to any portion of the record documenting that any of the victims had requested restitution, in spite of the express requirement in the plea agreement.

The District Court denied Petitioner's claim for relief. The Tenth Circuit on direct appeal affirmed the district court's decision on grounds that § 2255 provides relief only to prisoners claiming a right to be released from custody, and Petitioner "cannot challenge the restitution award by way of § 2255." The Tenth Circuit cited cases so holding from the Eighth, Ninth and Tenth Circuits. *See United States v. Bernard*, 351 F.3d 360, 361 (8th Cir.

2003); *Erlandson v. Northglenn Mut. Ct.*, 528 F.3d 785, 788 (10th Cir. 2008); *United States v. Thiele*, 314 F.3d 399, 402 (9th Cir. 2002). *See* Appendix A at 4. Petitioner now seeks a writ of certiorari to the Tenth Circuit.

Reasons for Granting the Writ

A writ of certiorari should be granted to Petitioner because the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. *See* Supreme Court Rule 10(a). There is a circuit split on the question whether an ineffective assistance of counsel claim arising from deficient representation that prejudiced the petitioner by the imposition of an unlawful $730,000.00 restitution award is cognizable under 28 U.S.C. § 2255. This is a question of national importance because prisoners such as Petitioner are at a constitutional disadvantage due to geographical differences on this legal question.

Argument

Petitioner has a fundamental constitutional right to counsel in all critical phases of this criminal prosecution. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The entry of the restitution order in the amount of $730,000.00 is a significant event in Petitioner's case. The amount is so large

that it qualifies as the sort of restitution award Second Circuit Judge Guido Calebresi must have had in mind when he wrote the following: "[W]e have not as yet foreclosed the possibility that a restitution order might entail a sufficiently severe restraint on liberty, not shared by the public at large, as to amount to a form of custody." *Kaminski v. United States*, 399 F.3d 84, 87 (2nd Cir. 2003). A restitution amount of $730,000.00 is a severe restraint on liberty not shared by the public at large and thus amounts to a form of custody, warranting cognizability under 28 U.S.C. § 2255.

There is a circuit split on the question whether a prisoner can challenge a restitution award under § 2255 via an ineffective assistance of counsel claim arising from counsel's deficient performance that resulted in prejudice to the prisoner. The majority of circuits have held that a prisoner may not bring such a challenge under § 2255, whether directly or through a claim of ineffective assistance of counsel. *See Smullen v. United States*, 94 F.3d 20, 25-26 (1st Cir. 1996); *Kaminski*, 339 F.3d at 89; *United States v. Trimble*, 12 F. Supp.3d 742, 745 (E.D. Pa. 2014); *Obado v. New Jersey*, 328 F.3d 716, 718 (3rd Cir. 2003) (similar holding in context of 28 U.S.C. § 2254); *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994); *Bernickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997); *Thiele*, 314 F.3d at 402; *Erlandson*, 528 F.3d at 788; *Blaik v. United States*, 161 F.3d 1341, 1343 (11th Cir. 1998). Other

jurisdictions allow such a claim to be brought under § 2255. *See United States v. Mayhew*, 995 F.3d 171, 184 (4th Cir. 2021).

Due to the split of authority among the circuits on this question, prisoners in some parts of the United States are afforded fewer rights under the Sixth Amendment than those in other parts of the Nation. If a prisoner brings a challenge to their restitution award due to ineffective assistance of counsel in one of the circuits that have refused to recognize the cognizability of this type of claim under § 2255, they cannot vindicate their Sixth Amendment right to counsel. Those in other geographical locations have more robust constitutional protections because their Sixth Amendment right to counsel extends to representation in relation to a restitution award.

The overwhelming magnitude of the restitution award in Petitioner's case—$730,000.00—sets this apart from the modest awards at issue in cases where courts have denied relief under § 2255. It is a gargantuan sum. It is an outlier.

It is inconceivable that Petitioner will be able to repay this amount in his natural life. He was sentenced to 170 years in prison—based on 360 months on each of three counts, and 240 months on each of four other counts, all of which were run consecutively.

Due to the unfathomable size of this restitution award, it imposes a restraint on liberty so severe that it amounts to a form of custody, just as Judge Calebresi envisioned in *Kaminski*. *See* 339 F.3d at 87. Although a modest fine might not be "a sufficient restraint on liberty to meet the 'in custody' requirement for § 2255 purposes," *United States v. Michaud*, 901 F.2d 5, 7 (1st Cir. 1990), Petitioner's $730,000.00 fine is certainly not modest and is so large that it is tantamount to a restraint on liberty, meeting the "in custody" requirement under § 2255.

In light of the objectively unreasonable performance by Petitioner's trial counsel regarding the restitution award, there is no doubt that Petitioner meets the deficient performance prong under *Strickland*. Trial counsel testified that he thought probation had recommended the $730,000.00 amount, so he did not challenge it. He made no inquiry and conducted no investigation to ascertain the basis for the calculation of this restitution amount. Trial counsel did not object to it. With respect to the basis for this extremely large restitution award, trial counsel unreasonably mounted no challenge at all.

With respect to the requirement that restitution be requested by identified victims, trial counsel did nothing to ensure that this requirement was met. The plea agreement expressly required that any restitution award

be predicated on two conditions prior to sentencing. The first is that the victims be identified. It appears that this may have been met, though the record is unclear as to whether the manner in which they were identified meets the requirement specified in the plea agreement. Even assuming the first requirement was met, the record is devoid of any indication that any victim ever came forth to request restitution. Yet this was a specific requirement of the plea agreement.

Petitioner's lawyer did nothing to ensure that this requirement was met. He testified that he took the prosecutor's word that the victims told the prosecutor they wanted restitution. There was no corroboration of this. Trial counsel did nothing to ensure that this requirement was met. Essentially, trial counsel just assumed that the victims would want restitution.

This is not what the plea agreement specified. It required that specific requests for restitution be made before a restitution award could be imposed at sentencing. No such requests appear anywhere in the record.

Trial counsel did nothing to ensure that the restitution amount was based on solid factual evidence that would warrant such a huge amount. And he did nothing to ensure that the victims requested restitution, as required by the plea agreement.

Under these circumstances, trial counsel's performance was objectively unreasonable.

Petitioner was prejudiced by the deficient performance of his attorney because in the absence of trial counsel's unprofessional errors, there is a reasonable likelihood that the amount of restitution would have been far less, or that no restitution award would have been imposed at all. For instance, had counsel conducted an investigation into the basis for the restitution award, it is likely that he would have discovered that it was devoid of any factual basis to warrant such huge sums. Second, if counsel had objected to restitution at sentencing on grounds that the conditions precedent had not been met, there is a reasonable likelihood that the district court would not have imposed restitution at all. The parties agreed that any restitution award was predicated on specific conditions being met prior to sentencing. The record is clear that those requirements were not met. Under these circumstances, Petitioner was prejudiced by his attorney's failure to point out to the sentencing judge that the government failed to meet this necessary condition for a restitution award.

The record supports a finding of ineffective assistance of counsel under *Strickland*, but the Tenth Circuit ruled that § 2255 cannot provide relief from the denial of the Sixth Amendment guarantee of counsel in a criminal

prosecution even where the deficient performance led to a restitution amount so large—$730,000.00—as to amount to a severe restraint on liberty and thus qualify as a form of custody for purposes of § 2255. *See* Appendix A at 4.

CONCLUSION

Reasonable jurists could find debatable or wrong the district court's denial of Petitioner Elliott's § 2255 petition. Where the Sixth Amendment guarantee of counsel in a criminal prosecution was denied due to ineffective assistance that resulted in the unwarranted imposition of a restitution award in the amount of $730,000.00—a restraint on liberty so severe as to amount to a form of custody—it is debatable or wrong to conclude that § 2255 can provide no relief. Petitioner respectfully requests that this Court grant this petition for writ of certiorari, and reverse the Tenth Circuit's denial of § 2255 relief.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 11th day of February 2026, I electronically filed the certiorari petition and appendices on behalf of Petitioner Elliott with the Clerk of the Court for the United States Supreme Court. I further certify that I have sent on this 11th day of February 2026 via FedEx to this Court the original and ten copies of the petition for writ of certiorari and appendices. In addition, I certify that I have sent on this 11th day of February 2026 via FedEx a copy of the petition for writ of certiorari and appendices to Counsel of Record for the Respondent.

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FILED
United States Court of Appeals
Tenth Circuit

November 13, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL ELLIOTT,

Defendant - Appellant.

No. 25-2018
(D.C. Nos. 2:14-CR-03822-MLG-GBW-1
& 2:21-CV-00226-MLG-GBW)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH**, **BALDOCK**, and **PHILLIPS**, Circuit Judges.

Petitioner Samuel Elliott, a federal prisoner, requests a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 petition to vacate, set aside, or correct his sentence. We deny a COA and dismiss this matter.

I. Background

Under the advice of court-appointed counsel, Mr. Elliott entered a conditional plea to three counts of producing child pornography and four counts of possessing child pornography. After the evidentiary hearing, the district court sentenced Mr. Elliott within the guidelines range to 170 years' imprisonment—360 months' imprisonment for each of

* 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.

Appendix A

the three production counts to run consecutively, and 240 months' imprisonment for each of the four possession counts, also to run consecutively. The district court also entered a restitution award against Mr. Elliot. Mr. Elliott appealed, and this court held that three of the four possession convictions violated the Double Jeopardy Clause and remanded to the district court with instructions to vacate three of the possession convictions and sentences. *See United States v. Elliott*, 937 F.3d 1310, 1312 (10th Cir. 2019). On remand, the district court sentenced Mr. Elliott to a within-guidelines sentence of 360 months' imprisonment for the production counts and 240 months' imprisonment for the remaining possession count, all to run consecutively, for a total of 110 years' imprisonment. The restitution award remained.

Mr. Elliott filed a pro se motion under 28 U.S.C. § 2255 asserting a violation of his Sixth Amendment right to counsel. The case was referred to a magistrate judge to conduct hearings and to issue proposed findings and recommendations for disposition (PFRD). The magistrate judge appointed Mr. Elliott new counsel, held an evidentiary hearing, and recommended denying Mr. Elliott's § 2255 petition on the merits and denying a COA. Mr. Elliott objected to the PFRD. After de novo review, the district court entered an order overruling Mr. Elliott's objections, adopting the PFRD in full, denying the § 2255 petition on the merits, and dismissing the case with prejudice. Following a limited remand from this court, the district court also denied Mr. Elliott a COA. Supp. R. at 13. Mr. Elliott now seeks a COA from this court.

II. Discussion

To appeal, Mr. Elliott must obtain a COA. 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, the petitioner must make a substantial showing of the denial of a constitution right. *Id.* § 2253(c)(2). When the district court rejects "the constitutional claims on the merits . . . [t]he petitioner 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).

Mr. Elliott asserts three grounds for relief under § 2255 based on ineffective assistance of counsel. To succeed on an ineffective assistance of counsel claim, he must demonstrate that (1) "counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A counsel's performance is deficient if "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* (internal quotation marks omitted). Specifically, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A deficient performance is prejudicial to the defendant, when the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Both prongs must be met, *id.* at 687, but the court may address them in any order, *id.* at 697. If the defendant fails to satisfy one, then the court need not address both. *Id.* Mr. Elliott asserts claims based on counsel's failure to challenge his restitution order, his failure to view the

evidence related to his sentencing, and his failure to advocate for him in plea negotiations.

Concerning the first claim, the plain language of § 2255 provides relief to prisoners claiming a right to be released from custody. 28 U.S.C. § 2255. Because § 2255 affords relief to a movant claiming a right to be released from custody, we conclude Mr. Elliott cannot challenge the restitution award by way of § 2255. *See, e.g.*, *United States v. Bernard*, 351 F.3d 360, 361 (8th Cir. 2003) (concluding § 2255 "affords relief only to prisoners claiming a right to be released from custody"); *cf. Erlandson v. Northglenn Mun. Ct.*, 528 F.3d 785, 788 (10th Cir. 2008) (observing that "the payment of restitution or a fine, absent more, is not the sort of significant restraint on liberty contemplated in the custody requirement of the federal habeas statutes" (internal quotation marks and brackets omitted)). And challenging the restitution award within an ineffective assistance claim, or together with other claims seeking release from custody, does not cure the custody requirement. *See United States v. Thiele*, 314 F.3d 399, 402 (9th Cir. 2002) (concluding relief from restitution is not a cognizable claim under § 2255 even when presented with a cognizable claim or as an ineffective-assistance claim).

As for Mr. Elliott's second and third claims, we conclude he has failed to demonstrate that reasonable jurists would find the district court's assessment of his ineffective assistance of counsel claim debatable or wrong. Mr. Elliott contends counsel was ineffective because he failed to view certain evidence when giving advice to Mr. Elliott concerning his objections at the sentencing hearing. Mr. Elliott contends the advice given "was objectively unreasonable because it was not based on an adequate

investigation of the relevant facts." Pet'r's Br. at 27. Mr. Elliott argues that had counsel viewed the video evidence and confirmed that the conduct in the video met the definition of penetration for purposes of determining a sentence enhancement, he would have withdrawn his objection. He also argues that counsel's failure to view the video precluded counsel from giving Mr. Elliott better advice on whether to testify about the video and planning a more effective cross-examination of the agent who testified about it. Finally, Mr. Elliott contends counsel—who admitted he would have withdrawn if asked—should have withdrawn if he did not want to conduct a reasonable investigation. In sum, Mr. Elliott asserts counsel's conduct was objectively unreasonable. We disagree. The record supports the district court's findings that counsel did not act objectively unreasonable under the circumstances. And Mr. Elliott has not established any prejudice based on counsel's alleged deficient performance. Thus, reasonable jurists would not find the district court's assessment of Mr. Elliott's constitutional claim debatable or wrong.

Mr. Elliott also argues that counsel "effectively abandoned" plea bargaining. Pet'r's Br. at 30. He claims counsel's failure to timely communicate plea offers and advocate for a plea agreement closer to the mandatory minimum—15 years' imprisonment—amounted to deficient performance. We need not consider whether counsel was deficient in his performance because in claiming ineffective assistance of counsel for a guilty plea "a defendant must establish prejudice by showing a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 566 U.S. 134, 147 (2012) (internal

quotation marks omitted). Mr. Elliott does not argue that he would have accepted any of the plea offers, or a plea closer to the mandatory minimum, if one had been successfully negotiated. Failure to do so is fatal to his claim. *See id.*

III. Conclusion

We deny Mr. Elliott a COA and dismiss this matter.

Entered for the Court

Bobby R. Baldock
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SAMUEL ELLIOTT,

Plaintiff,

v.

Civ. Case No. 2:21-cv-00226-MLG-GBW
Crim. Case No.: 14-cr-03822-MLG-GBW-1

UNITED STATES OF AMERICA,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Magistrate Judge Gregory B. Wormuth filed the Proposed Findings and Recommended Disposition ("PFRD") on April 9, 2024. Doc. 59. This PFRD recommends the Court deny Plaintiff Samuel Elliott's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, Doc. 1, and dismiss his civil case with prejudice.[1] Doc. 59 at 1, 27. Elliott raised three grounds for relief, all based on ineffective assistance of counsel, including: (1) defense counsel's failure to review the evidence against him and advise Elliott as to the accuracy of the presentence reports and potential objections, Doc. 1 at 4; Doc. 2 at 1-7; (2) poor assistance of counsel during plea bargaining, Doc. 1 at 5; Doc. 2 at 7-9; and (3) defense counsel's failure to correct two alleged errors in the Court's awardance of restitution, Doc. 1 at 7; Doc. 2 at 10-13. The PFRD recommends denying each of Elliot's arguments. Doc. 59 at 5-6; *id.* at 7-19 (addressing evidentiary review arguments); *id.* at 19-24 (analyzing plea arguments); *id.* at 25-26 (considering restitution arguments).

[1] Elliott also filed this motion in the related criminal case. *See* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, *United States v. Elliott*, 2:14-cr-03822-MLG-GBW-1 (Mar. 12, 2021), ECF. No. 170.

Appendix B

The PFRD notified the parties of their ability to file objections within fourteen days and that failure to do so waived appellate review. *Id.* at 27. After twice extending Elliott's time to file objections to the PFRD, Elliott filed his objections on June 14, 2024. Docs. 61, 63, 64. The United States also sought an extension and then responded on July 31, 2024. Doc. 69.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), the Court has conducted a *de novo* review of the record and of the PFRD and considered the relevant objections. The Court finds no reason either in law or fact to depart from Judge Wormuth's well-reasoned and extremely thorough PFRD and will adopt the conclusions memorialized therein in full. Doc. 59. The Court will enter a separate final judgment pursuant to Federal Rule of Civil Procedure 58.

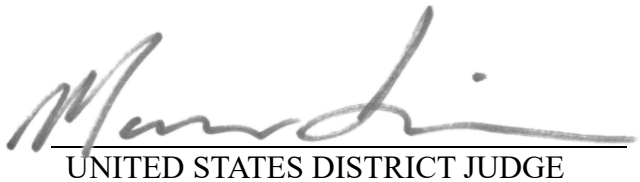
It is therefore ordered as follows:

1. Elliott's objections to the Proposed Findings and Recommended Disposition, Doc. 64, are overruled.

2. Judge Wormuth's Proposed Findings and Recommended Disposition, Doc. 59, is adopted in full.

3. Elliott's motion to vacate under 28 U.S.C. § 2255, Doc. 1, is denied and this civil case is hereby dismissed with prejudice.

4. The same motion to vacate filed in Elliott's criminal case, *Elliott*, 2:14-cr-03822-MLG-GBW-1, ECF No. 170, is similarly denied. That criminal case will remain closed.



UNITED STATES DISTRICT JUDGE
MATTHEW L. GARCIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SAMUEL ELLIOTT,

Plaintiff,

v. Civ. Case No. 2:21-cv-00226-MLG-GBW

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58(a), and consistent with the Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition filed contemporaneously herewith, the Court issues its separate judgment finally disposing of this civil case. It is ordered that this civil action is dismissed with prejudice.

UNITED STATES DISTRICT JUDGE
MATTHEW L. GARCIA

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SAMUEL ELLIOTT,

Plaintiff,

v.

Civ. Case No. 2:21-cv-00226-MLG-GBW
Crim. Case No.: 14-cr-03822-MLG-GBW-1

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING CERTIFICATE OF APPEALABILITY

This matter initially came before the Court on Plaintiff Samuel Elliott's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Doc. 1 ("Motion"). Elliott raised three grounds for relief, all based on ineffective assistance of counsel, including: (1) defense counsel's failure to review the evidence against him and advise Elliott as to the accuracy of the presentence reports and potential objections, Doc. 1 at 4; Doc. 2 at 1-7; (2) poor assistance of counsel during plea bargaining, Doc. 1 at 5; Doc. 2 at 7-9; and (3) defense counsel's failure to correct two alleged errors in the Court's awardance of restitution, Doc. 1 at 7; Doc. 2 at 10-13. The Court referred the matter to Magistrate Judge Gregory B. Wormuth to hold hearings and submit his analysis, findings of facts, and recommended disposition. Doc. 58.

Judge Wormuth then filed the Proposed Findings and Recommended Disposition ("PFRD") which addressed Elliott's Motion. Doc. 59. The PFRD recommended the Court deny Elliott's Motion, dismiss his civil case with prejudice, and deny a certificate of appealability ("COA"). *Id.* at 1, 5-6, 7-19 (addressing evidentiary review arguments), 19-24 (analyzing plea arguments); *id.* at 25-26 (considering restitution arguments), 27 (summarizing conclusions). The Court adopted the recommendation in full and overruled Elliott's objections to the PFRD, Doc.

Appendix D

64. Doc. 72 at 2. The Court neglected, however, to affirmatively state whether the Court would deny a COA. *See id.* at 1-2. Elliott then filed his Request for Certificate of Appealability, Doc. 73, and appealed this Court's dismissal of his Motion. Doc. 74.

On March 5, 2025, the Tenth Circuit Court of Appeals abated Elliott's appeal and directed this Court to consider whether to issue a COA in connection with the dismissal of Elliott's Motion. Doc. 79.

An appeal cannot be taken unless a circuit justice or judge issues a COA. 28 U.S.C. § 2253(c)(1). To merit issuance of a COA, the petitioner must have "made a substantial showing of the denial of a constitutional right," which includes a showing that reasonable jurists would find the ruling "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); 28 U.S.C. § 2253(c). Elliott argues he met that standard and his Motion should have been resolved in a different manner because he was denied his constitutional right to counsel due to his trial attorney's "objectively unreasonable failure" to (1) challenge the restitution order, (2) review critical evidence and give "solid advice" regarding objections to the presentence report, and (3) conduct plea negotiations. Doc. 73 at 1-2. For the reasons detailed in the PFRD, which the Court adopted in full, the Court disagrees. Elliott has failed to make the requisite substantial showing that he was denied a constitutional right.

The Court lacks subject matter jurisdiction to alter restitution orders under 28 U.S.C. § 2255, "even when coupled with a challenge to a sentence of imprisonment." *United States v. Satterfield*, 218 F. App'x 794, 795 (10th Cir. 2007); *see* Doc. 59 at 25-26. Elliott objected to this jurisdictional bar, arguing the PFRD erroneously ignored other circuit court precedent that allowed review of restitution orders under Section 2255. Doc. 64 at 9 (citing *United States v. Bernard*, 351 F.3d 360, 361 (8th Cir. 2003), and *Weinberger v. United States*, 268 F.3d 346, 351 n.1 (6th Cir.

2001)). The Tenth Circuit has followed the Eighth Circuit's approach (along with a majority of circuits) in concluding "a federal prisoner cannot challenge the restitution portion of his sentence using 28 U.S.C. § 2255, because the statute affords relief only to prisoners claiming a right to be released from custody." *United States v. Sorsby*, No. 20-3249, 2021 WL 4901655, at *3 (10th Cir. Oct. 21, 2021) (quoting *Bernard*, 351 F.3d 361, and citing cases).

As to Elliott's two other arguments, the PFRD carefully detailed and applied evidence and testimony from the evidentiary hearing and concluded that several of Elliott's arguments concerning the objections to the presentence report were "flawed" and "fatal" to his argument. Doc. 59 at 8-9. The PFRD also determined Elliott's counsel did communicate particular plea offers to him, Elliott did not show a reasonable probability that he would have accepted the at-issue plea offers, and he failed to present evidence of a formal plea offer of "20-45 years." *Id.* at 19-24. Elliott's objections rehashed many of the arguments he raised in his prior briefing and failed to show that his trial attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," or that he was prejudiced by his attorney's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see* Doc. 64 at 11-21.

Accordingly, for the reasons stated in the PFRD and the Court's order adopting those findings, the Court concludes Elliott has not made a substantial showing of a denial of his constitutional rights, nor is it reasonably debatable that he was afforded adequate effective counsel. The Court therefore denies a COA in connection with the dismissal of Elliott's petition.

The Clerk's Office shall supplement the preliminary record as requested and transmit a copy of this Order to the Tenth Circuit Court of Appeals in compliance with the Order issued March 5, 2025. It is so ordered.

UNITED STATES DISTRICT JUDGE
MATTHEW L. GARCIA