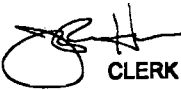


FILED

DEC 28 2011


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

WESLEY CHUCK JACOBS,

Petitioner,

CIV 11-5084-JLV
CR 09-50095

vs.

UNITED STATES OF AMERICA,

Respondent.

GOVERNMENT'S RESPONSE TO
PETITIONER'S MOTION FOR
RELIEF PURSUANT TO 28 U.S.C.
§ 2255

Comes now the United States of America, through its attorneys, Brendan V. Johnson, United States Attorney, and Gregg S. Peterman, Assistant United States Attorney, to respond to the petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (hereinafter Motion to Vacate). For the reasons set forth below, the motion should be denied in its entirety.

PROCEDURAL HISTORY

A two-count indictment charging Wesley Chuck Jacobs with assaulting his wife was filed on October 20, 2009. DKT 1.¹ On April 27, 2010, Jacobs entered a guilty plea to Count II of the Indictment charging Assault With a Dangerous Weapon in violation of 18 U.S.C. §§ 113(a)(3) and 1153. DKT 55. On July 19,

¹ "DKT" is a reference to the official docket report maintained in the Office of the Federal Clerk of Court.

2010, Jacobs was sentenced to 36 months' incarceration and three years of supervised release. DKT 58. He was also ordered to pay \$100.00 to the Victim's Assistance Fund. *Id.* A Judgment and Commitment was filed on July 20, 2010. DKT 60.

Jacobs appealed his conviction claiming his prosecution ran counter to the so-called Bad Man provisions of the 1868 Treaty between the United States and different Tribes of Sioux Indians (the "Fort Laramie Treaty") and, therefore, deprived the district court of subject matter jurisdiction over his prosecution. The Eighth Circuit Court of Appeals disagreed and affirmed Jacobs' conviction on May 2, 2011. *United States v. Jacobs*, 638 F.3d 567, 568 (8th Cir. 2011). There is no record Jacobs sought either *en banc* or Supreme Court review.

TIMELINESS

Pursuant to 28 U.S.C. § 2255, "[a] 1-year period of limitation shall apply to a motion under this section." 28 U.S.C. § 2255. Under the terms of the statute, the one-year period commences from the latest of four distinctive events, one of which is the date on which the judgement of conviction became final. 28 U.S.C. § 2255.

When a defendant appeals his conviction to the court of appeals but does not thereafter seek Supreme Court review, his conviction is final 90 days after the appeals court enters its judgement. *United States v. Hernandez*, 436 F.3d 851,

856 (8th Cir. 2006).² Ninety days from May 2, 2011 was July 31, 2011 and Jacobs' conviction became final on that day. He filed his Motion to Vacate on October 31, 2011, well within the 1-year period allowable. The Motion to Vacate is, therefore, timely.

THE PETITION

Jacobs' sole claim is that appellate counsel, the Federal Public Defender for the District of South Dakota, was ineffective for failing to challenge his conviction on appeal on the grounds it is barred under 18 U.S.C. § 1152 as well as the Fifth Amendment to the United States Constitution. Jacobs sets forth no legal support for this proposition. While pro se motions are construed liberally, *see Papantony v. Hedrick*, 215 F.2d 863, 865 (8th Cir. 2000), Rule 2(b) of the Rules Governing Section 2255 Proceedings nonetheless requires that a Motion to Vacate set forth, among other things, a statement of those facts supporting each ground for relief.

Here, Jacobs has simply stated the prosecution is barred by § 1152 and the Fifth Amendment. His earlier procedural history section provides a clue, however, to the thrust of the motion. In that section, Jacobs reports he was prosecuted in tribal court for the same offense for which he now stands convicted under federal law. With that information, it is safe to assume Jacobs is citing the Fifth

² Because finality depends upon the expiration of a defendant's ability to obtain review, the date of the court of appeals' judgement is the correct date to begin calculating the 90-day period, not the date of the mandate which follows the filing of the appeal decision. *See Clay v. United States*, 537 U.S. 522, 524-25, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003).

Amendment and § 1152 for the proposition his federal prosecution violates the Double Jeopardy clause. U.S. Const., Amdt. 5. Jacobs, however, provides no explanation of how, precisely, prosecution violated either of these two provisions. For this reason alone, the Motion should be denied as insufficient to raise the claim.

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court reaffirmed that the Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the “effective” assistance of counsel. The Court wrote “an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland*, 466 at U.S. 685. The Court explained that in giving meaning to that requirement, “we must take its purpose - to ensure a fair trial - as the guide.” *Strickland*, 466 U.S. at 686. Thus, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. The guarantee of effective assistance of counsel also applies to appellate counsel. *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003).

In *Strickland*, the Supreme Court held that a claim of ineffective assistance of counsel has two components. The first is inadequate performance by counsel

and the second is prejudice resulting from that inadequate performance. In order to establish the first component, a petitioner must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687.

Even if the petitioner establishes inadequate performance by his attorney he must also satisfy the second prong of the test, that is, by showing the errors "prejudiced the defense." *Strickland*, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The Court held it is:

not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (citation omitted). Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.*

I. Failure to Raise a Jurisdictional Bar to Prosecution

Any decision by Jacobs' appellate counsel not to raise an argument on direct appeal that his prosecution was barred by 18 U.S.C. § 1152 and the Fifth

Amendment was sound and cannot serve as a basis to satisfy either prong of the *Strickland* test. Simply put, any such claim would have lacked merit and failed.

First, in his plea agreement, Jacobs waived his right to appeal all non-jurisdictional claims to his prosecution. The operative paragraph (P) read, in part, "The Defendant hereby waives all defenses and his right to appeal any non-jurisdictional issues." At his change of plea hearing on April 27, 2010, this Court reviewed this paragraph with Jacobs to ensure he understood the significance of the appeal waiver. Change of Plea Hearing Transcript at 14. Jacobs' claim, that the government was without power to prosecute him under § 1152 and/or the Fifth Amendment, is a non-jurisdictional claim which was waived when he pleaded guilty. See *United States v. Antelope*, 548 F.3d 1155 (8th Cir. 2008)(enforcing a plea appeal waiver provision in the face of a Fifth Amendment challenge to federal prosecution following tribal prosecution for the same offense); see also, *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003)("[s]ubject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231 . . . That's the beginning and the end of the 'jurisdictional' inquiry."). Given the *Antelope* decision, it is reasonable to assume the Court of Appeals would have upheld Jacobs' appeal waiver and denied the claim on that basis. For this reason, appellate counsel acted with prudence in not raising the instant claim on direct appeal.

Second, Jacobs was prosecuted, not under 18 U.S.C. § 1152, which statute Jacobs claims bars his federal prosecution, and is sometimes known as the Indian General Crimes Act, but, instead, under 18 U.S.C. § 1153, the Major Crimes Act.³ By its plain terms, § 1153, unlike § 1152, provides no bar to the prosecution of an Indian person in a United States court notwithstanding the fact he may also have been prosecuted in tribal court for an offense arising from the same facts. *See, United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005)(providing an instructive and succinct review of the various historical bases for federal and tribal exercises of jurisdiction and comparison of these two statutes). Thus, appellate counsel's failure to raise the instant claim on appeal was sound.

Third, the Supreme Court has held that successive tribal and federal prosecutions of Indians for crimes stemming from the same conduct does not violate the Double Jeopardy clause of the Fifth Amendment. *United States v. Wheeler*, 435 U.S. 313, 318, 322-323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)(tribal prosecution of member Indians), *superseded in other respects by statute*, 25 U.S.C. § 1301-1303; *United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004)(tribal prosecution of non-member Indians); *United*

³ Title 18 U.S.C. § 1152 reads, in part,

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, *nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . .*” (Emphasis added)

States v. Antelope, 548 F.3d at 1157.

Appellate counsel's failure to raise on appeal as a bar to federal prosecution either § 1152 or the Double Jeopardy clause was not conduct rising to the level of ineffective assistance for such appeal would have been summarily denied based upon the appeal waiver and the *Lara*, *Wheeler*, and *Antelope* decisions. Because the appeal on this ground would have been denied, one cannot conclude appellate counsel's performance was deficient, let alone so deficient as to have prejudiced Jacobs. Under the circumstances, the Motion to Vacate should be denied in all respects.

II. Request for Evidentiary Hearing

The defendant requests an evidentiary hearing on his claim. The Court need not schedule a hearing. "A district court does not err in dismissing a movant's section 2255 motion without a hearing if (1) the movant's allegations, accepted as true, would not entitle the movant to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Buster v. United States*, 447 F.3d 1130, 1132 (8th Cir. 2006)(quoting *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003)(internal quotation marks omitted)). Put another way, "[a] defendant is entitled to a hearing on a § 2255 motion unless the motion, files, and record conclusively show that the defendant is not entitled to relief." *United States v. Regenos*, 405 F.3d 691, 694 (8th Cir. 2005)(quoting

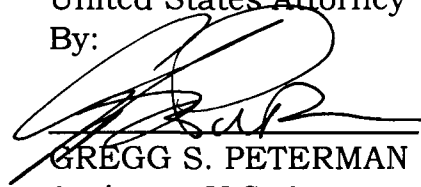
Koskela v. United States, 235 F.3d 1148, 1149 (8th Cir. 2001)(internal quotation marks omitted)).

Here, the record conclusively establishes Jacobs was indicted under the Major Crimes Act of 18 U.S.C. § 1153. His federal prosecution is not barred under either this statute or the Double Jeopardy clause of the Fifth Amendment and a direct appeal on these grounds would have been dismissed as barred by the appeal waiver. There is no merit to the defendant's claim and, therefore, the Court may deny the defendant's Motion to Vacate without an evidentiary hearing.

Dated this 28th day of December, 2011.

BRENDAN V. JOHNSON
United States Attorney

By:


A handwritten signature in black ink, appearing to read 'Gregg S. Peterman', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Gregg S. Peterman, hereby certify that I served a true and correct copy of the above and foregoing Government's Response to Defendant's Motion for Relief Pursuant to 28 U.S.C. § 2255, by first class mail, postage prepaid, this 28th day of December, 2011 upon:

Wesley Chuck Jacobs
Reg. No. 10873-073
Federal Correctional Institution
P.O. Box 15330
Fort Worth, TX 76119



Gregg S. Peterman