IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff/Respondent,

v.

Valance Ray Smith, Sr.,

Defendant/Movant.

No. CV 16-08160-PCT-GMS (ESW)
CR 13-08043- PCT-GMS

REPORT AND RECOMMENDATION

TO THE HONORABLE G. MURRAY SNOW, UNITED STATES DISTRICT JUDGE:

Pending before the Court is Valance Ray Smith, Sr.'s ("Movant") "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" (the "Motion to Vacate") (Doc. 1).[1] The Government has responded (Doc. 8), and Movant has replied (Doc. 13). The matter is deemed ripe for consideration.

The Motion to Vacate contains seven grounds for relief. The undersigned finds that (i) the Court lacks subject matter jurisdiction over Grounds One, Two, and Three (ii) Grounds Four and Five are procedurally defaulted without excuse; and (iii) Grounds Six and Seven are without merit. It is therefore recommended that the Court deny and dismiss the Motion to Vacate with prejudice.

[1] Citations to "Doc." are to the docket in CV 16-8160-PCT-GMS (ESW). Citations to "CR Doc." are to the docket in the underlying criminal case, CR-13-8043-PCT-GMS.

I. BACKGROUND

On August 21, 2013, a federal grand jury indicted Movant on three counts. (CR Doc. 26). Counts One and Three charged Movant with assault with a dangerous weapon in violation of 18 U.S.C. §§ 1153 and 113(a)(3). Count Two charged Movant with assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 1153 and 113(a)(6). After a three-day trial, the jury found Movant guilty on all three offenses. (CR Doc. 95).

On May 5, 2014, the Court sentenced Movant to a total of 146 months in prison. (CR Doc. 106 at 1). The prison term consists of 101 months on Counts One and Two, to run concurrently with each other, and forty-five months on Count Three, to run consecutively to the prison terms on Counts One and Two. (*Id.*). The Court also ordered that the sentences on Counts One and Two run concurrently with Movant's sentence imposed in a 2012 Hualapai Tribal Court case.[2] (*Id.*).

Movant appealed his convictions and sentences, which the Ninth Circuit Court of Appeals affirmed in October 2015. (CR Doc. 131). On July 15, 2016, Movant timely filed the Motion to Vacate (Doc. 1).

II. DISCUSSION

A. Legal Standards

Under 28 U.S.C. § 2255(a), a prisoner "in custody under sentence of a court established by Act of Congress" may move the court that imposed his sentence to vacate, set aside, or correct the sentence on the grounds that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."

"A § 2255 movant procedurally defaults his claims by not raising them on direct appeal and not showing cause and prejudice or actual innocence in response to the default." *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)); *see also Massaro v. United States*, 538 U.S.

[2] The Hualapai Tribal Court case is detailed in Section II(B) below.

500, 504 (2003) ("[T]he general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice."). "The procedural-default rule is neither statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro*, 538 U.S. at 504.

B. Grounds One Through Three, Which Challenge the Legality of Movant's 2012 Tribal Court Convictions, Should Be Dismissed For Lack of Subject Matter Jurisdiction

Movant is a member of the Hualapai Tribe. On October 2, 2012, Movant entered a plea of no contest to the following tribal offenses: (i) aggravated battery (Count A); (ii) false imprisonment (Count B); and (iii) failure to obey a court order (Count C). (Doc. 8-1 at 2). The Hualapai Tribal Court sentenced Movant to a one year jail sentence for each offense. (*Id.* at 3-4). The sentences on Counts A and B run consecutively to one another, and the sentence on Count C runs concurrently to the sentences on Counts A and B. (*Id.*). In its "Clarifying and Amending Judgment of Guilt and Sentencing Order," the Tribal Court stated that "the jail sentence commences October 2, 2012 ending October 2, 2014." (*Id.* at 4).

In Grounds One, Two, and Three, Movant challenges the legality of his 2012 Hualapai Tribal Court convictions. (Doc. 1 at 4-7, 16). In Ground One, Movant asserts that the "Tribal court failed to comply with Tribal Law and Order Act of 2010 when sentenc[ing] [Movant] to immediate imprisonment of more than one year without the appointment of defense counsel . . . ." (*Id.* at 4). In Ground Two, Movant alleges that he "was arraigned and sentenced to immediate imprisonment by a Tribal Judge that did not meet the requirements established under 25 U.S.C. [§] 1302(C)(3)(A)(B)." (*Id.* at 5). Finally, in Ground Three, Movant contends that "[p]rior to being charged [in Tribal Court], [Movant's] procedural protections of making available the criminal laws, rules of evidence, and rules of criminal procedure, failed[] [a]s required under 25 U.S.C. [§] 1302(C)(4)." (*Id.* at 6).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . . subject to the superior and plenary control of Congress." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted)). In 1968, in response to perceived abuses in the administration of criminal justice to tribal members, Congress exercised its plenary authority and enacted the Indian Civil Rights Act ("ICRA"), codified at 25 U.S.C. §§ 1301-1304. *See Santa Clara Pueblo*, 436 U.S. at 71 (explaining that a Congressional "legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice"). ICRA requires Indian tribes to comply with a number of provisions contained in the United States Constitution. *See* 25 U.S.C. § 1302(a); *Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers, the Indian Civil Rights Act confers all the criminal protections on [a defendant] that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed counsel if he cannot afford an attorney.").

When a tribe issues an order detaining an individual, ICRA provides that the individual may test the legality of the detention order by filing a petition for writ of habeas corpus in federal district court. 25 U.S.C. § 1303 states that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." However, two prerequisites must be satisfied before a federal court may review a habeas petition filed under ICRA. First, the habeas petitioner must be in tribal custody at the time the habeas petition is filed. *See Tavares v. Whitehouse*, 851 F.3d 863, 866 (9th Cir. 2017) ("Because § 1303 provides the exclusive federal remedy for tribal violations of the ICRA, unless a petitioner is in 'detention by order of an Indian tribe,' the federal courts lack jurisdiction over an ICRA challenge and the complaint must be brought in tribal court.") (quoting *Santa Clara Pueblo*, 436 U.S. at 65, 67). Second, federal courts "may not exercise jurisdiction over a habeas petition presenting ICRA claims unless the petitioner has first exhausted

his tribal remedies." *Alvarez v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016) (citing *Grand Canyon Skywalk Dev., LLC v. 'SA' NYU WA Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013)). In order to satisfy the exhaustion requirement, a defendant must pursue a direct appeal in the tribal courts or show that such an appeal would have been futile. *See Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) ("[A] litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus."); *Alvarez*, 835 F.3d at 1027 (explaining that out of respect for tribal sovereignty, courts "are loath to second guess a tribe's handling of a criminal case unless and until the tribe has had a fair opportunity to review the matter in its own appellate courts.").

Movant's term of incarceration for the 2012 tribal court convictions commenced on October 2, 2012 and ended on October 2, 2014. (Doc. 8-1 at 3-4). Movant was released from tribal custody on October 2, 2014. (Doc. 8-2 at 2). Movant filed the Motion to Vacate on July 15, 2016—approximately twenty-two months after serving his tribal court sentences. In addition, Movant has indicated that he did not appeal his tribal court convictions in the tribal court. (Doc. 1 at 4-7). Movant has not shown that such an appeal would have been futile. Therefore, to the extent that the Motion to Vacate may be construed as a Petition for Writ of Habeas Corpus under 25 U.S.C. § 1303, the undersigned finds that the Court does not have subject matter jurisdiction to review the legality of Movant's 2012 tribal court convictions. It is recommended that the Court dismiss Grounds One, Two, and Three for lack of subject matter jurisdiction.

C. Grounds Four, Five, and Six are Procedurally Defaulted

1. Ground Four

In Ground Four, Movant asserts "Federal trial court 'unfairly and prejudicially' admitted an uncounseled conviction of tribal court that was used in a subsequent prosecution as evidence exhibits." (Doc. 1 at 8). As Movant could have, but did not raise this claim on direct appeal, the claim is procedurally defaulted.[3] The discussion below addresses whether the procedural default should be excused.

[3] Movant concedes that he did not present Grounds One through Seven in his

The Ninth Circuit has noted that "[c]onstitutionally ineffective assistance of counsel constitutes cause sufficient to excuse a procedural default." *Ratigan*, 351 F.3d at 964-65. While the procedural default rule is designed to "conserve judicial resources" and to "respect the law's important interest in the finality of judgments," the Supreme Court has held that "requiring a criminal defendant to bring ineffective assistance-of-counsel claims on direct appeal does not promote these objectives." *Massaro*, 538 U.S. at 504.

"Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective assistance of counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial." *Massaro*, 538 U.S. at 505. Under the first prong, a defendant must show that a counsel's representation falls "below an objective standard of reasonableness" as measured by "prevailing professional norms." *Strickland*, 466 U.S. at 687-88. There is a "strong presumption that counsel's performance falls within the wide range of professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). "A reasonable tactical choice based on adequate inquiry is immune from attack under *Strickland*." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997).

With respect to the second prong, "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011) (quoting *Strickland*, 466 U.S. at 696). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland'* s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* (quoting *Strickland*, 466 U.S. at 693, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* (citing *Strickland*, 466 U.S. at 693). An appellate attorney's failure to raise issues on direct appeal does not constitute ineffective assistance where the issues would not have provided grounds for reversal. *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir.

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direct appeal. (Doc. 1 at 9).

2001) (citing *Jones v. Smith*, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000)).

The Government correctly states that Movant's 2012 tribal court convictions were not admitted during trial. (Doc. 8 at 11; CR Docs. 121, 122, 123). The Government also correctly states that no criminal history points were attributed to the 2012 tribal court convictions. (Doc. 8 at 11; CR Doc. 10 at 17). The 2012 tribal court convictions did not impact Movant's federal sentence. (CR Doc. 124). As Movant's 2012 tribal court convictions did not impact Movant's federal convictions or sentences, the undersigned finds that Movant's appellate counsel was not ineffective for failing to raise the issue contained in Ground Four on direct appeal. The undersigned finds that Movant has failed to establish an exception to excuse the procedural default of Ground Four.[4] It is recommended that the Court dismiss Ground Four with prejudice.

2. Ground Five

Ground Five alleges that the grand jury considered "unconstitutionally obtained" evidence when "[t]he Grand Jury's indictment of petitioner in federal court was based upon the same conduct that comprised the tribal indictment and sentencing order." (Doc. 1 at 17). Because Movant could have, but did not raise this issue on direct appeal, Ground Five is procedurally defaulted. As discussed below, Movant cannot establish cause for the procedural default by asserting that his appellate counsel was ineffective for failing to raise the issue on appeal.

"It is the general rule that an indictment, not questioned at trial or on direct appeal, will not be held insufficient on a motion to vacate the judgment entered thereon unless it is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." *Palomino v. United States*, 318 F.2d 613, 616 (9th Cir. 1963). "The Supreme Court has indicated that an indictment tainted by incompetent evidence, or even by unconstitutionally obtained evidence, will not be dismissed on that basis." *Hunter v. United States*, 405 F.2d 1187, 1188 (9th Cir. 1969)

[4] Section II(C)(3) explains that Movant has failed to satisfy the actual innocence exception.

(citing *United States v. Blue*, 384 U.S. 251 (1966); *Costello v. United States*, 350 U.S. 359 (1956)). To reiterate, Movant's 2012 tribal court convictions were not admitted into evidence at his federal trial. Therefore, even if the grand jury improperly considered Movant's 2012 tribal court convictions in deciding whether to indict Movant, the consideration of such evidence is not a ground for reversal of Movant's federal convictions. *See Blue*, 384 U.S. at 255("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, (the defendant) would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial."); *Hunter*, 405 F.2d at 1188 ("[E]ven the grand jury's use of Hunter's allegedly illegally obtained incriminating statements is no basis for dismissal of the indictment."). Accordingly, Movant has not shown that his appellate counsel's decision not to challenge the grand jury's indictment was anything but "selecting the most promising issues for review." *Jones*, 463 U.S. at 753; *see also Wildman*, 261 F.3d at 840 (appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance where the issues would not have provided grounds for reversal).

Ground Five may be alternatively construed as raising a double jeopardy claim. The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "This constitutional guarantee provides three forms of protection: It prohibits a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *United States v. Enas*, 255 F.3d 662, 665 (9th Cir. 2001) (internal quotation marks and citation omitted). However, multiple prosecutions are permissible under the Double Jeopardy Clause when they are carried out by separate sovereigns. *Id.* at 665-66. This is because under traditional common law, a "crime" was defined as "an offense against the sovereignty of the government." *Id.* at 666. "Thus, a single act that violates the laws of two sovereigns constitutes two separate crimes. As a result, successive prosecutions by multiple sovereigns for that single act do not violate the Double Jeopardy Clause."

Id. When a tribe prosecutes a tribal member for violating tribal law, the tribe acts as a separate sovereign from the United States. *Id.* at 665-675; *United States v. Lara*, 541 U.S. 193, 197 (2004) ("[A]n Indian tribe acts as a separate sovereign when it prosecutes its own members.") (emphasis omitted); *cf. Shell Co. (P.R.), Ltd.*, 302 U.S. 253, 264 (1937) (Double Jeopardy Clause prohibits prosecutions based on same conduct by federal and territorial governments because they emanate from the same sovereignty).

When the Hualapai Tribe prosecuted and convicted Movant for violating tribal law, it was acting as a separate sovereign from the United States. Accordingly, the United States' prosecution of Movant for violation of federal law was permissible under the Double Jeopardy Clause regardless of whether the federal prosecution was based on the same facts as the tribal court prosecution. To the extent Ground Five raises a double jeopardy claim, Movant has failed to show that his appellate counsel was ineffective for failing to raise the claim on appeal. As the undersigned finds that Movant has failed to show cause to excuse the procedural default of Ground Five, it is recommended that the Court dismiss Ground Five with prejudice.

3. Actual Innocence Exception

Movant's Reply contains a section titled "Actual Innocence of Superseding Indictment." (Doc. 13 at 7). In that section, Movant states that he "raised the issue of why the alleged crime of July 8, 2011 was even being considered in federal court when tribal law enforcement only went as far as arresting defendant." (*Id.*). As mentioned, a Section 2255 movant may overcome a procedural default by showing actual innocence. "'Actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* (internal quotation marks and citation omitted). The undersigned finds that Movant has failed to satisfy his burden of showing that he is factually innocent of the federal crimes for which he was convicted. It is

therefore recommended that the Court not apply the actual innocence exception to excuse Movant's procedural defaults.

D. Grounds Six and Seven

In Grounds Six and Seven, Movant argues that his trial and appellate counsel were constitutionally ineffective for allegedly failing to investigate whether Movant's 2012 tribal court convictions complied with applicable law.[5] (Doc. 1 at 18-19). "[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not petitioner could have raised the claim on direct appeal." *Massaro*, 538 U.S. at 504. The undersigned does not find that Grounds Six and Seven are procedurally defaulted. As discussed, however, Movant's 2012 tribal court convictions were not admitted at trial and had no impact on the sentence imposed for his federal crimes. Movant thus has failed to establish the prejudice prong of the two-part *Strickland* test. *Strickland*, 466 U.S. at 697 ("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."); *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998) (a court need not look at both deficiency and prejudice if the habeas petitioner cannot establish one or the other).

The undersigned does not find that Movant's trial and appellate counsel were ineffective for allegedly failing to investigate the 2012 tribal court proceedings. It is recommended that the Court deny Grounds Six and Seven.

III. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Motion to Vacate (Doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE**;

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[5] In his Reply, Movant raises additional claims of ineffective assistance of trial counsel. (Doc. 13 at 9-10). It is improper to raise new claims in a reply brief. *Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008) ("Arguments raised for the first time in petitioner's reply brief are deemed waived.") (citing *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 n. 3 (9th Cir. 2007)). Moreover, the undersigned finds that claims are without merit.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* be **DENIED** because (i) the dismissal of a number of grounds in the Motion to Vacate is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable and (ii) Movant has not made a substantial showing of the denial of a constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated this 15th day of August, 2017.

Eileen S. Willett
United States Magistrate Judge