

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3583
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROMERO ROUSER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93-1050 (CR 90-292 H))

(April 13, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Romero Rouser appeals the denial of his § 2255 motion to vacate his sentence. We **AFFIRM**.

I.

Rouser was charged with conspiracy to launder drug proceeds and money laundering in five counts of a 16-count indictment. He pleaded guilty to one count of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and (2), and was sentenced to five years imprisonment. On direct appeal, our court rejected his contention

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

that the sentence was unconstitutionally disproportionate. **United States v. Smith and Rouser**, No. 91-3315 (5th Cir. Nov. 14, 1991) (unpublished).

Rouser moved under 28 U.S.C. § 2255 to vacate his sentence, asserting that (1) the seizure of both his Jaguar automobile and the contents of a safe in his residence violated the Fourth Amendment; (2) the seizure of his vehicle compelled him to incriminate himself in violation of the Fifth Amendment; (3) the prosecutor violated **Brady v. Maryland**, 373 U.S. 83 (1963), by failing to disclose to the grand jury the favorable evidence that the vehicle was illegally seized; (4) the use of the illegally seized vehicle in this prosecution constituted double jeopardy because it already had been forfeited; (5) he was improperly joined in the indictment with his co-defendants, Robert Smith and Shamine Bickham, because he was not a participant in their drug violations or conspiracy to defraud; (6) the district court violated Fed. R. Crim. P. 11 by failing to inform him that he could be subject to prosecution for perjury if he gave false answers and by failing to explain the charges to him; and (7) the presentence report erroneously held him accountable for quantities of cocaine attributable to co-defendant Smith, erroneously mentioned illegally seized weapons, and was merged with co-defendant Smith's, which created confusion and caused him to be denied parole. Rouser also asserted in his motion that his attorney rendered ineffective assistance by advising him to waive a conflict of interest arising out of counsel's also representing his two co-defendants; and by

failing to move to suppress, or sever, or dismiss the indictment, to object to inaccuracies in the PSR, and to raise issues on appeal.

The district court denied the motion, holding: (1) that Rouser was procedurally barred from raising all but one of his claims -- ineffective assistance of counsel; (2) that the claims were meritless, even if not procedurally barred; and (3) that he had not established that his counsel's performance was deficient.

II.

Section 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice". **United States v. Smith**, 844 F.2d 203, 205-06 (5th Cir. 1988) (footnote omitted) (quoting **United States v. Capua**, 656 F.2d 1033, 1037 (5th Cir. 1981)). A convicted defendant who has exhausted, or waived, his right to appeal is presumed to have been "fairly and finally convicted". **United States v. Shaid**, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc) (internal quotation marks and citation omitted), *cert. denied*, ___ U.S. ___, 112 S. Ct. 978 (1992). And, "a collateral challenge may not do service for an appeal." **Id.** at 231 (quoting **United States v. Frady**, 456 U.S. 152, 165 (1982)). Therefore, a defendant "may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the

error". *Id.* at 232 (quoting *Fraday*, 456 U.S. at 168).² The only exception to the cause and prejudice requirement is the "extraordinary case ... in which a constitutional violation has probably resulted in the conviction of one who is actually innocent". *Id.* at 232 (internal quotation marks and citation omitted).

A.

On direct appeal, Rouser did not raise any of the issues he raised in his § 2255 motion. All of them, except ineffective assistance of counsel, could have been so raised. Accordingly, Rouser is not entitled to § 2255 relief unless he can demonstrate both cause for his failure to raise them, and actual prejudice, or that he is actually innocent.

1.

Rouser attempts to show cause for failing to raise these claims on direct appeal by asserting that his counsel rendered ineffective assistance on appeal, because counsel had a conflict of interest arising out of his representing Rouser and his co-defendants. Constitutionally ineffective assistance of counsel, in the form of failure to raise issues on appeal, can constitute cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 488-92 (1986). But "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural

² The Government invoked the procedural bar in its response to Rouser's § 2255 motion. See *United States v. Drobny*, 955 F.2d 990, 995 (5th Cir. 1992).

default". *Id.* at 486. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)] ... we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default". *Id.* at 488. "A criminal defendant may waive his right to conflict-free defense counsel if his waiver is voluntary and intelligent". *United States v. Plewniak*, 947 F.2d 1284, 1287 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1239 (1992).

The Sixth Amendment does not require counsel to raise all nonfrivolous issues on appeal, even if the defendant specifically requests that a particular issue be raised. *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983); *Sharp v. Puckett*, 930 F.2d 450, 452 (5th Cir. 1991). Counsel's decision not to raise on direct appeal the issues requested by Rouser does not constitute deficient performance under *Strickland v. Washington*. And, Rouser voluntarily waived his right to conflict-free counsel at two *Garcia*³ hearings in the district court. Accordingly, he cannot rely on ineffective assistance of counsel to show cause for failing to raise the issues on direct appeal. Because Rouser cannot show cause for his procedural default, whether he has been prejudiced by

³ *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). *Garcia* hearings are conducted to "ensure that the defendant (1) is aware of the conflict of interest, (2) knows the potential consequences of continued representation under such a conflict, and (3) understands that he has a right to counsel unfettered by the conflict of interest". *Plewniak*, 947 F.2d at 1287.

his inability to raise these issues is irrelevant. See **Shaid**, 937 F.2d at 234.⁴

2.

Rouser also maintains that he is actually innocent. Those protestations of innocence relate to the charges in the indictment regarding violations of the drug laws; he does not assert that he is innocent of the money laundering charge to which he pleaded guilty. Accordingly, the actual innocence exception is not applicable.

B.

Rouser's ineffective assistance of counsel claims are not procedurally barred, because generally, such claims cannot be resolved on direct appeal. See **United States v. Pierce**, 959 F.2d 1297, 1301 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 621 (1992). To prevail on these claims, Rouser must show (1) that his counsel's performance was deficient, in that it fell below an objective standard of reasonableness; and (2) that he was prejudiced by the deficient performance. **Id.** at 1302. In the guilty plea context, prejudice requires the defendant to show that "there is a reasonable probability that, but for counsel's errors,

⁴ Rouser's Rule 11 claim involves neither a constitutional nor a jurisdictional deficiency. He did not allege that he has been prosecuted for perjury, did not explain what part of the charges he did not understand, and does not contend that he would not have pleaded guilty if he had understood. Accordingly, he has failed to show that the alleged Rule 11 violations resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure". **United States v. Timmreck**, 441 U.S. 780, 783-84 (1979); **United States v. Prince**, 868 F.2d 1379, 1385 (5th Cir.), *cert. denied*, 493 U.S. 932 (1989).

he would not have pleaded guilty and would have insisted on going to trial". *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

1.

Rouser contends that his attorney was ineffective in advising him to plead guilty, when the attorney knew that the prior seizure of Rouser's vehicle prevented his prosecution on double jeopardy grounds. This contention is meritless; double jeopardy concerns are not implicated by the civil forfeiture of the instrumentalities of crime. See *United States v. Baxter*, No. 92-8556 (5th Cir. Oct. 15, 1993) (unpublished).

2.

Rouser asserts that counsel should have filed a motion to sever, to avoid the spillover effect of his co-defendants' drug activities. Because Rouser pleaded guilty, there was no spillover effect to avoid.

3.

Next, Rouser maintains that his counsel was ineffective in failing to move to dismiss the indictment and in advising him to plead guilty, because the indictment was defective. Rouser seems to contend that the indictment was defective because: it was based on information which the Government seized in violation of his Fourth and Fifth Amendment rights; he was not a party to his co-defendants' drug activities, and should not have been charged in the same indictment with them; and he was under no duty to report banking transactions. Counsel did not render deficient performance by failing to move to dismiss the indictment on these grounds.

Rouser's Fourth and Fifth Amendment claims could be addressed by a motion to suppress. His denial of involvement in drug activities and his contention regarding the duty to report banking transactions are irrelevant to his conviction for money laundering.

4.

Rouser's contention that counsel was ineffective in failing to move to suppress the vehicle and documents seized from a safe in his residence is meritless; the record indicates that counsel moved to suppress.

5.

Rouser contends that his attorney was ineffective in advising him to waive the conflict of interest arising from counsel's also representing his co-defendants. In the district court, this contention was based on the spillover effect in a joint trial of evidence of his co-defendants' drug activities. Again, any potential spillover effect is irrelevant; Rouser pleaded guilty.

6.

For the first time on appeal, Rouser contends that his attorney coerced him into pleading guilty because counsel had entered into an agreement with the Government and one of the co-defendants, and because the Government had promised counsel some of his seized property. Rouser has waived these grounds by not raising them in the district court. See **United States v. Borders**, 992 F.2d 563, 567 n.1 (5th Cir. 1993).

7.

Finally, Rouser contends that his counsel was ineffective for failing to object to inaccuracies in the PSR, the PSR's mention of illegally seized weapons, and the merger of his PSR with co-defendant Smith's. He asserts that he has been denied parole and furloughs because of the allegedly inaccurate information. These contentions are meritless and not supported by the record; Rouser's PSR was not combined with Smith's.

In sum, because Rouser has not shown that his counsel's performance was deficient, the district court properly denied § 2255 relief on his ineffective assistance claims.

III.

For the foregoing reasons, the denial of Rouser's motion to vacate his sentence is

AFFIRMED.

KING, Circuit Judge, concurring.