IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-50577
Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

GEORGE JOSEPH TROUTMAN, Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(W-90-CA-58 (W-89-CR-108))

March 15, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM[*]:

George Joseph Troutman ("Troutman"), a federal prisoner filing *pro se*, appeals the district court's denial of his § 2255 *habeas corpus* petition. We affirm in part, reverse in part and remand.

I.

Troutman was found guilty of being a felon in possession of a firearm. Based on his extensive criminal history[1], he was

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[*] Local Rule 47.5 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Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The Presentence Report ("PSR") established that Troutman had prior convictions for second-degree burglary in Oklahoma in

sentenced to fifteen years' imprisonment as an armed career offender pursuant to 18 U.S.C. § 924(e)(1). This Court affirmed Troutman's conviction and sentence. *United States v. Troutman*, No. 90-8237 (5th Cir. Aug. 14, 1991) (unpublished).

Troutman filed a *pro se* § 2255 motion prior to sentencing, in which he sought a new trial. Troutman's appointed counsel also filed a motion for new trial. The district court denied his motion for new trial. While his direct appeal was pending, Troutman filed a second, supplemental § 2255 motion. After his direct appeal was complete, the court consolidated the pending motions and denied § 2255 relief. Troutman appealed.

On appeal, this Court remanded the case to the district court for a determination of the validity of Troutman's allegation that he advised his attorneys that his prior Oklahoma burglary convictions were uncounseled. If valid, Troutman would have established at least a facial claim of ineffective assistance of counsel. *United States v. Troutman*, No. 93-8174 (5th Cir. Feb. 14, 1994) (unpublished). On remand, the district court again denied Troutman's § 2255 motion, determining that his counsel was not ineffective.

II.

Troutman argues that the district court erred when it denied

1957 and 1960, a conviction for escape in Oklahoma in 1960, a conviction for possession of burglary tools after a former conviction in 1964, a conviction for bank robbery in Kansas in 1971, a conviction for burglary in Torrance, California in 1971 and a conviction for first-degree armed robbery in Orange County, California in 1976.

his § 2255 motion without holding a hearing. The court may deny a § 2255 motion "without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992). When the court cannot resolve a claim of ineffective assistance of counsel without resort to evidence outside the record, the court must hold a hearing. *United States v. Smith*, 915 F.2d 959, 964 (5th Cir. 1990).

To prevail on a claim of ineffective assistance of counsel, Troutman must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A failure to establish either deficient performance or prejudice defeats the claim. *Strickland*, 466 U.S. at 697. In order to show prejudice under *Strickland*, Troutman must show that there is a reasonable probability that but for counsel's error, his sentence would have been significantly different. *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993). A significant difference includes an error by counsel that results "in a specific, demonstrable enhancement in sentencing" such as that presented here. *See id.* at n.4.

Rather than determine whether Troutman advised his attorney that his prior Oklahoma burglary convictions were uncounseled, the district court merely concluded that Troutman's counsel was not ineffective in failing to object to the Oklahoma convictions

because Troutman would have received the same sentence without consideration of the Oklahoma convictions. The court reasoned that it could have relied upon the 1976 armed robbery conviction in California, the 1971 bank robbery in Kansas, and the 1971 burglary of a business in California to enhance Troutman's sentence. Thus, his counsel's failure to object was not error and Troutman was not prejudiced because the Oklahoma convictions would have had no effect in his sentencing.

The district court's conclusion, however, presumes that the three convictions relied on by the court are "violent felonies" under § 924(e). Troutman stipulated at trial that the 1976 armed robbery conviction was a felony, and he does not now dispute that it constitutes a "violent felony" under § 924(e). Troutman raised no objection to the 1971 bank robbery at sentencing, and he offers none now.[2] More problematic, however, is the district court's reliance upon the 1971 California burglary conviction.

Troutman argued at sentencing, apparently on appeal, and again argues here that his 1971 California burglary conviction was not proven to be a "generic" burglary as required under § 924(e) and *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).[3] A "generic ... burglary contains at least the

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[2] Troutman apparently argued on direct appeal that the offense was not a violent felony, but the Court decided the appeal on other grounds.

[3] The Supreme Court's decision in *Taylor* was rendered after Troutman was sentenced but before his appeal was decided. *Taylor* nevertheless guided the Court in its resolution of Troutman's appeal.

following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598 (footnote omitted). This Court did not determine on his direct appeal whether Troutman's California burglary conviction was a "generic" burglary under *Taylor* and § 924(e). The Court concluded only that the Oklahoma convictions were "generic" burglaries.

The district court may not determine, as a matter of law, that the burglary conviction constitutes a "generic" burglary. The California burglary statute in effect in 1971 defined burglary more broadly than "generic" burglary by eliminating the requirement that the entry be unlawful and by including places other buildings.[4] The Supreme Court held in *Taylor* that, in these "narrow" cases, the sentencing court may consider the "indictment or information and jury instructions" to determine whether the conviction may be used for enhancement purposes. *Taylor*, 495 U.S. at 602. There are neither charging papers nor jury instructions in the record. The only evidence is an entry in the PSR, which states that Troutman "was apprehended by police outside a Food Fair Market" and that "[r]eportedly, entrance had been attained into the building through

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[4] In 1971, the California burglary statute provided, in relevant part, that

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, or any tent, vessel, or railroad car, trailer coach ..., vehicle ..., aircraft ..., or mine ..., with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (historical note).

a hole in the manager's office building."

This Court recently held that a PSR entry alone is legally insufficient to prove that a burglary is "generic." *United States v. Martinez-Cortez*, 988 F.2d 1408, 1411-15 (5th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 605, 126 L.Ed.2d 570 (1993). In that opinion, *Taylor* was strictly construed to require the presentation of either proper copies of the statutes under which the defendant was previously convicted, or the indictment and jury instructions under which the defendant was convicted. *Id.* at 1412. "[T]he *Taylor* decision dictates in scrupulous detail the exact kind of proof the government is required to introduce when one or more of the prior convictions being used for enhancement is burglary." *Id.* at 1413. A case such as the one presented here is problematic because the applicable burglary statute reached beyond "generic" burglary and the defendant avoided trial by pleading guilty because there was no record of the underlying facts. *Id.* at 1414 n.27 (quoting *Taylor*, 495 U.S. at 601-02)).

Because the district court could not determine from the record that the California burglary qualifies as a violent felony under § 924(e), it could not properly conclude that Troutman would have received the enhanced sentence and, thus, that he suffered no prejudice. Therefore, we will remand this case to the district court again for it to determine, if possible in light of *Martinez-Cortez*, whether the California burglary was a "generic" burglary

under § 924(e),[5] or alternatively, the validity of Troutman's alleged conversation with his attorney.[6]

Troutman asserts two additional errors regarding the district court's denial of his § 2255 motion. Troutman first argues that he was not given an opportunity to defend himself against the California burglary offense or given notice that it would be used to enhance his sentence. Although we need not address this question because Troutman failed to raise this issue before the district court, the argument is frivolous. Section 924(e) is a sentence-enhancement provision rather than a separate offense, and the prior convictions on which the enhancement is based need not be alleged in the indictment. *United States v. Quintero*, 872 F.2d 107, 110-11 (5th Cir. 1989), *cert. denied*, 496 U.S. 905, 110 S.Ct. 2586, 110 L.Ed.2d 267 (1990). The citation of the conviction in the PSR put Troutman on notice that it could be used to support a § 924(e) enhancement. *United States v. Fields*, 923 F.2d 358, 360-61 (5th Cir.), *cert. denied*, 500 U.S. 937, 111 S.Ct. 2066, 114 L.Ed.2d 470 (1991); *see also United States v. Thomas*, No. 92-7050 (5th Cir.

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[5] Troutman also disputes the use of the California burglary conviction on the basis of the criminal history provisions within the Sentencing Guidelines. Although the Court need not address issues raised in the reply brief, the argument is without merit because his sentence was enhanced pursuant to 18 U.S.C. § 924(e), rather than the Sentencing Guidelines.

[6] The Government contends that Troutman failed to prove that his Oklahoma convictions were uncounseled, dismissing his statements as "conclusory." We find, however, that as a participant in the alleged conversation and as the defendant in the Oklahoma proceedings, Troutman's first-hand knowledge is particularly relevant in this inquiry. Moreover, an evidentiary hearing would be necessary before the district court could properly find Troutman's allegation not credible.

Nov. 23, 1992) (unpublished).

Troutman next argues that the district court's order seeking a response to this Court's remand from the Government was erroneous because the Government had previous opportunities to respond. Troutman confuses his broad claims of ineffective assistance of counsel, which he has long asserted, with the narrow ground at issue here regarding his alleged conversation with his counsel. This narrow claim was first raised in his rebuttal to the Government's reply to his § 2255 motion, and thus, it was not erroneous for the district court to afford the Government an opportunity to respond.

III.

Troutman argues that the district court erred when it denied his motion for recusal filed pursuant to 28 U.S.C. §§ 455(b)(1) and 144. To show the necessary prejudice under § 144 or 455(a), Troutman must demonstrate that the alleged bias or partiality stems from an extrajudicial source. *See Liteky v. United States*, ___U.S.___, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). We review a district court's denial of a motion for recusal for an abuse of discretion. *United States v. MMR Corp.*, 954 F.2d 1040, 1044 (5th Cir. 1992).

Troutman argues that Judge Smith showed his bias through his comments and demeanor during trial, by delaying his rulings and by ultimately denying his various motions. Troutman also contends that Judge Smith summarily dismissed his § 2255 motion after Troutman filed a complaint with this Court. A district court's

administration of its docket will not provide justification for recusal. *Liteky*, 114 S. Ct. at 1157. Adverse rulings against a litigant and acknowledgement of evidence adduced at trial are neither grounds for recusal nor support for allegations of bias. *Id.* at 1155, 1157. Because Troutman's allegations of bias do not stem from an extrajudicial source, this claim is without merit and should be dismissed.

IV.

For the reasons articulated above, we REVERSE the district court's denial of Troutman's § 2255 motion, and REMAND for a determination, in light of *Martinez-Cortez*, of whether the California burglary was a "generic" burglary under § 924(e), or alternatively, the validity of Troutman's alleged conversation with his attorney. The district court's denial of Troutman's motion for recusal is AFFIRMED.