

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60313
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TERESIA MURRAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA 94-17 (CR-4:92-17))

(November 18, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Teresa Murray appeals, *pro se* and *in forma pauperis*, the denial of her motion to vacate, set aside, or correct her sentence. We **AFFIRM**.

I.

Murray and others were charged in a three-count indictment with conspiracy, aiding and abetting, and theft of money and government property from the Naval Exchange at the Naval Air Station in Meridian, Mississippi. A jury convicted Murray on all

¹ 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

counts, and the district court imposed a sentence of 24-months imprisonment, to be followed by three years of supervised release. Her conviction and sentence were affirmed on direct appeal. **United States v. Murray**, 8 F.3d 20 (5th Cir. 1993) (TABLE), **cert. denied**, 114 S. Ct. 1410 (1994).

Murray then moved to have her sentence vacated, set aside, or corrected pursuant to 28 U.S.C. § 2255. The district court denied her § 2255 motion.

II.

Murray raises three issues: the district court erred in increasing the sentence based on her abuse of a position of trust; ineffective assistance of counsel; and sufficiency of the evidence. We review the denial of a § 2255 motion under an abuse of discretion standard. *E.g.*, **United States v. Flores**, 981 F.2d 231, 234 (5th Cir. 1993).

A.

Murray contends that her base offense level should not have been increased two levels pursuant to U.S.S.G. § 3B1.3 because she did not hold a "position of trust".² Relief under § 2255 "is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of

² In addressing adjustments to offense levels, U.S.S.G. § 3B1.3 provides, in part:

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels.

justice". **United States v. Vaughn**, 955 F.2d 367, 368 (5th Cir. 1992). Needless to say, even assuming that this issue was raised in the district court, it does not fall within the narrow ambit of § 2255 review.

B.

Murray claims next that she received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, Murray must show (1) that her counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced her defense. **Strickland v. Washington**, 466 U.S. 668, 687-94 (1984). In evaluating such claims, the court indulges in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence". **Bridge v. Lynaugh**, 838 F.2d 770, 773 (5th Cir. 1988). A failure to establish either deficient performance or prejudice defeats the claim. **Strickland**, 466 U.S. at 697.

1.

Murray contends that her trial counsel was ineffective when he failed to object to the court's disallowance of additional time to respond following the discovery that a witness was also a government informant. The record, however, indicates that Murray's counsel did, in fact, object to this witness' testimony. In response to the objection, the testimony was delayed and Murray's counsel was given additional time to review prior statements made by the informant. In an affidavit, Murray's counsel stated that he

was afforded an adequate opportunity to review the informant's prior statements. Counsel's performance at trial was neither deficient nor prejudicial. Accordingly, Murray's contention is without merit.

2.

Murray contends next that her counsel "failed to subject [the] prosecution's case to meaningful adversarial testing". The gravamen is that her counsel failed to conduct sufficient discovery. In a § 2255 motion, the petitioner must affirmatively plead prejudice, **Bridge**, 838 F.2d at 773; without assessing the adequacy of counsel's performance, an ineffective assistance of counsel claim may be rejected because of an insufficient showing of prejudice. *E.g.*, **United States v. Pierce**, 959 F.2d 1297, 1302 (5th Cir.), *cert. denied*, 113 S. Ct. 621 (1992). To show **Strickland** prejudice, Murray must demonstrate that counsel's errors were so serious as to "render[] the result of the trial unreliable or the proceeding fundamentally unfair". **Lockhart v. Fretwell**, ___ U.S. ___, 113 S. Ct. 838, 844 (1993). She has not shown that "the decision reached would reasonably likely have been different" absent the alleged errors, and, thus, she has not demonstrated that the proceedings were unfair or unreliable. **Strickland**, 466 U.S. at 696.

3.

Murray also contends that her attorney failed to preserve for appeal the issue of sufficiency of the evidence by not moving for a judgment of acquittal. In presenting her ineffective assistance

of counsel challenge in the district court, Murray failed to raise this contention. In habeas proceedings, issues raised for the first time on appeal will not be considered. **United States v. Smith**, 915 F.2d 959, 964 (5th Cir. 1990); **McKlemurry v. United States**, 478 F.2d 1185, 1188 (5th Cir. 1973); **United States v. Grene**, 455 F.2d 376, 378 (5th Cir.), *cert. denied*, 409 U.S. 856 (1972). Accordingly, we do not address Murray's contention that her counsel was ineffective by failing to preserve a sufficiency of the evidence challenge.

C.

Finally, Murray contends that sufficient evidence is lacking to convict her for conspiracy. She did not raise this issue on her direct appeal. As noted *supra*, relief under § 2255 is reserved for violations of constitutional rights and for a narrow range of injuries. **Vaughn**, 955 F.2d at 368. A sufficiency of the evidence challenge does raise a constitutional question. **Jackson v. Virginia**, 443 U.S. 307, 314 (1979). When a defendant alleges a fundamental constitutional error, however, she "may not raise an issue for the first time on collateral review without showing both 'cause' for [her] procedural default and 'actual prejudice' resulting from the error". **United States v. Shaïd**, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 978 (1992). The only exception to the cause-and-prejudice test is the "extraordinary case ... in which a constitutional violation has probably resulted in the conviction of one who is actually

innocent". See *id.* at 232 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

The Government raised the issue of procedural bar in the district court and on appeal. See *United States v. Drobny*, 955 F.2d 990, 995 (5th Cir. 1992) (the Government must plead the procedural bar in district court in order to assert it on appeal). Murray has not shown that this issue could not have been raised on direct appeal, nor does she present any extraordinary circumstances or new evidence sufficient to suggest that she is "actually innocent".³

III.

For the foregoing reasons, we

AFFIRM.

³ In her reply brief, Murray seeks to challenge the testimony of the government informant, contending that it was inadmissible hearsay. Although Murray raised this issue in the district court, she did not do so in her opening brief. This court will not review issues which are initially raised in a reply brief. *United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989). In any event, it is not cognizable in § 2255 proceedings. See *Shaid*, 937 F.2d at 232.