FILED
United States Court of Appeals
Tenth Circuit

June 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAYMOND ALCORTA,

Defendant - Appellant.

No. 20-3198
(D.C. Nos. 5:19-CV-04018-DDC &
5:13-CR-40065-DDC-3)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ** and **BACHARACH**, Circuit Judges.

Defendant-Appellant Raymond Alcorta, a federal prisoner, appeals from the United States District Court for the District of Kansas's denial of his motion to vacate his sentence under 28 U.S.C. § 2255. In 2014, Mr. Alcorta was convicted of conspiracy to distribute over 500 grams of methamphetamine and sentenced to 240 months in prison. He now argues that his sentence should be vacated due to the unconstitutional deprivation of his choice of counsel and because of the constitutionally deficient representation in his trial and appellate counsel.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1(a) and Tenth Circuit Rule 32.1(A).

Mr. Alcorta specifically argues that his Sixth Amendment rights were violated in two salient ways. First, Mr. Alcorta asserts that he was deprived of his Sixth Amendment right to counsel of choice because his trial counsel failed to disclose counsel's personally acrimonious history with the prosecutor in Mr. Alcorta's case—which included the prosecutor previously seeking to investigate Mr. Alcorta's trial counsel. Mr. Alcorta asserts that if he had been informed of this history before trial—which he contends evinced a potential conflict of interest—he would have chosen to proceed to trial with a different attorney. Second, Mr. Alcorta contends that both his trial counsel and his appellate counsel provided ineffective assistance of counsel—resulting in a deprivation of his Sixth Amendment right to effective assistance of counsel—by failing to challenge jury instructions and a jury verdict form that allowed the jury to find the drug quantity supporting a mandatory-minimum sentence without applying the beyond-a-reasonable-doubt proof standard. Mr. Alcorta contends that his trial counsel's failure to object to the instructions and verdict form—and his appellate counsel's subsequent failure to challenge the instructions and verdict form on direct appeal—warrant relief for ineffective assistance of counsel under the Supreme Court's seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984).

Exercising jurisdiction under 28 U.S.C. § 1291 and § 2253(c)(1)(B), we **affirm** the district court's denial of Mr. Alcorta's § 2255 motion. As we explain below, Mr. Alcorta's choice-of-counsel claim must fail because he cannot demonstrate a cognizable Sixth Amendment violation: specifically, insofar as he was deprived of

his choice of counsel, it was through the private action of his trial lawyer in not disclosing his personally acrimonious relationship with the prosecutor and not the action of the court (or, for that matter, any other governmental actor). Mr. Alcorta never informed the court of his concern regarding his counsel's potential conflict—much less sought and obtained a ruling from the court about the matter. As for his second contention of error, we conclude that Mr. Alcorta's ineffective-assistance claims fall short on the issue of prejudice. Specifically, Mr. Alcorta has failed to demonstrate that there is a reasonable probability that the outcome of his proceeding would have been different, but for the failure of his trial and appellate counsel to challenge as error the jury instructions and verdict form on the ground that they permitted the jury to make a drug-quantity finding elevating his mandatory-minimum sentence *without* applying a beyond-a-reasonable-doubt standard. In sum, we conclude that the district court correctly denied Mr. Alcorta's § 2255 motion.

I

Mr. Alcorta, a resident of California, was charged in the District of Kansas with conspiracy to distribute controlled substances, including but not limited to more than 500 grams of methamphetamine under 21 U.S.C. § 841(b)(1)(A) and § 846. *See United States v. Alcorta*, 853 F.3d 1123, 1128 (10th Cir. 2017). The government indicted him based on evidence stemming from two 2013 traffic stops in Kansas, which yielded approximately four pounds of methamphetamine in each stop (i.e., considerably more than triple 500 grams in each stop). *See id.* at 1129. Police arrested four suspected drug

couriers—two for each stop—all of whom were charged as coconspirators along with Mr. Alcorta. *See id.* at 1128–29.

Mr. Alcorta proceeded to a joint trial with two of his alleged coconspirators, Adrienne and Angela Lopez.[1] At trial, the government presented evidence that the couriers had actually made three trips through Kansas transporting drugs: the two trips that had led to arrests, along with another successful trip by Adrienne and Angela that had preceded their arrests. *See id.* at 1129. Although Mr. Alcorta had not personally taken part in any of the trips, the government offered "recorded jailhouse conversations and physical evidence (including cell phones) gathered from the vehicles of the arrested couriers" to link Mr. Alcorta with the drug-trafficking conspiracy. *Id.* On direct appeal, we summarized the evidence that the government presented at trial to connect Mr. Alcorta to the conspiracy:

> Evidence tying Defendant [i.e., Mr. Alcorta] to the failed first delivery included the documents bearing his name found in the car; a text from Salazar to Defendant one month before she was arrested indicating that she would soon be ready to work for him; Defendant's text to Vega a few days before Vega was arrested stating, "I need to know if you're going"; Vega's lament to Adrienne that Defendant sent Salazar on the trip instead of Adrienne; Vega's complaints that Defendant sent him on trips with a foolish companion who threw napkins out the window; Vega's statement to Defendant that he erased all the data on his two phones before he was arrested and his advice to Defendant to get rid of his phone; Vega's statement to Defendant that he should take Vega's contacts, which were the people that he was "dealing with" and "making money from"; Vega's expectation that Defendant would provide money to him and Salazar while they were in jail, and Defendant's fulfillment of that expectation; and Defendant's

[1] The other two coconspirators, Javier Vega and Karmin Salazar, pleaded guilty. *Alcorta*, 853 F.3d at 1128.

> vagueness and circumspection when speaking with Vega on the jailhouse phone.
>
> Evidence tying Defendant to the successful second delivery included his conversation with Vega stating that Adrienne was responsible to do "it" just as she was driving to Kansas City to deliver drugs; his turnaround flight to Kansas City at the same time that Adrienne and Angela were there; his statement to Vega that Adrienne came back safely from the trip; and Adrienne's report back to Vega that Defendant was "home sweet home" and that "everything is cool."
>
> Evidence tying Defendant to the failed third delivery included Adrienne's statement to Vega on the day before her arrest that she missed a call from Defendant; Vega's questions about whether Defendant provided gas money for Adrienne's drive; Vega's advice to Adrienne that she solicit Defendant for help obtaining a car for the drive to Kansas City; Defendant's 25 phone calls to Adrienne on the day that she was arrested; his conversation with Vega about there being no reason for Adrienne to "make mistakes" on her drive; Adrienne's using a fake name for Defendant in her phone contact list; and Defendant's driving to Kansas to bail Adrienne out of jail after her arrest.

Id. at 1136.

Following the presentation of the trial evidence, the district court instructed the jury that Mr. Alcorta had been "charged with conspiracy to distribute controlled substances, including but not limited to more than 500 grams of methamphetamine." R., Vol. I, at 190 (Instr. 18) (Jury Instrs., dated Oct. 23, 2014). The court further instructed the jury that to find Mr. Alcorta guilty, the jury had to "be convinced that the government has proved each of the following beyond a reasonable doubt":

> *First*, two or more persons agreed to violate the federal drug laws;
>
> *Second*, the defendants knew the essential objective of the conspiracy;

> *Third*, the defendants knowingly and voluntarily involved themselves in the conspiracy; and
>
> *Fourth*, there was interdependence among the members of the conspiracy.

Id.

As relevant to Mr. Alcorta, the jury verdict form included two special interrogatories. The first addressed the question of whether the jury found Mr. Alcorta guilty "of conspiring to distribute controlled substances," as charged in the indictment. *Id.* at 215. If the jury answered this first question in the affirmative—by placing a mark next to the word "Guilty"—it was asked to answer the second special interrogatory, which addressed the drug quantity for which Mr. Alcorta should be held criminally responsible. That interrogatory provided as follows:

> **Question 2:** We find that the defendant Raymond Alcorta's conduct as a member of the narcotics conspiracy charged, including the reasonably foreseeable conduct of other members of the conspiracy, involved:
>
> _____ More than 500 grams of methamphetamine
>
> _____ Less than 500 grams of methamphetamine.

Id. at 216 (handwritten checkmark omitted). After a brief colloquy with the court, Mr. Alcorta's trial counsel—Paul Cramm—accepted the final version of the instructions and the verdict form without objection. *See id.* at 1820 (Trial Tr. Vol. 6, dated Oct. 22, 2014) (Mr. Alcorta's counsel stating, "we have no objections to the instructions or to the verdict form").

In closing arguments, the government argued that Mr. Alcorta was responsible for more than 500 grams of methamphetamine based on the lab reports of the methamphetamine quantities discovered in each car. In his closing, Mr. Alcorta's trial counsel argued that the government had failed to establish any connection between Mr. Alcorta "and the methamphetamine recovered from the jeep," contending that any communications between Mr. Alcorta and the other accused coconspirators stemmed from non-criminal relationships. *Id.* at 1852.

The jury found Mr. Alcorta guilty on Count 1 and, in response to Question 2, checked the first line indicating that Mr. Alcorta's conduct involved "[m]ore than 500 grams of methamphetamine." *Id.* at 216. Following his conviction, the United States Probation Office prepared a Presentence Investigation Report ("PSR") indicating that Mr. Alcorta was responsible for 3,626.53 grams of methamphetamine based on the drugs found in the two car stops. Based on the jury's finding that he was responsible for more than 500 grams of methamphetamine, Mr. Alcorta was subject to a mandatory-minimum term of imprisonment of 10 years, and the PSR specified that the recommended Guidelines imprisonment range was 292 to 365 months. Mr. Alcorta objected to the PSR's designation that he was a "leader" of the conspiracy and asked the district judge to vary downward from the Guidelines sentencing range to impose a sentence of 120 months' imprisonment. However, Mr. Alcorta did not object in any way to the foundation for the jury's drug-quantity finding or the resulting mandatory-minimum prison term.

At the sentencing hearing, the trial court sentenced Mr. Alcorta to 240 months in prison, followed by 5 years of supervised release. The court first found that Mr. Alcorta qualified only for a two-level enhancement as a "manager" or "supervisor" of the conspiracy under United States Sentencing Guidelines § 3B1.1(c), instead of a three-or-four-level enhancement contemplated in §§ 3B1.1(a) and (b) for those who exercise heightened levels of authority. R., Vol. I, 1981–82 (Sentencing Tr., dated May 11, 2015). Recalculating the PSR's recommended Guideline range to 235 to 293 months, the court then determined that it was "willing to go to the very near bottom of the guidelines," but that there was not "good reason to go below those guidelines." *Id.* at 1986.

Represented by new counsel, Mr. Alcorta appealed from the district court's judgment, challenging the sufficiency of the evidence for his conviction along with the admission of the recorded jailhouse conversations of his coconspirators. *See Alcorta*, 853 F.3d at 1128. We affirmed, holding "[f]rom this evidence, the jury could reasonably infer that [Mr. Alcorta] conspired to traffic drugs with Vega, Salazar, Adrienne, and Angela." *Id.* at 1136. We further reasoned that "[b]ased on the circumstantial evidence in this case, a reasonable juror could be convinced beyond a reasonable doubt that [Mr. Alcorta] was an integral part, probably the leader, of a conspiracy to distribute methamphetamine."[2] *Id.* at 1136–37. Mr. Alcorta filed a petition for a writ of certiorari, which the Supreme Court denied.

[2] We also held that the coconspirators' recorded conversations were admissible. *Alcorta*, 853 F.3d at 1128.

B

Following his direct-appeal proceedings, Mr. Alcorta filed the § 2255 Motion to Vacate at issue here in the District of Kansas. Relevant to this appeal, he asserted that he had been denied his Sixth Amendment right to assistance of counsel for the following reasons: first, that his trial counsel "was ineffective and deprived [Mr.] Alcorta of his Sixth Amendment right to counsel of choice by withholding material information at the time counsel undertook representation . . . until mid-trial," R., Vol. I, at 2032–33 (Section 2255 Motion, filed Mar. 19, 2019); second, that his *trial* counsel was "ineffective by failing to object to [a] jury instruction which did not require [a] finding of drug quantity increasing [the] minimum penalty range beyond a reasonable doubt," *id.* at 2036; and third, that his *appellate* counsel was also "ineffective by failing to appeal [the] erroneous jury instruction which did not require [a] finding on drug quantity beyond a reasonable doubt," *id.* at 2041.[3]

The first issue raised in the motion involved trial counsel's failure to disclose to Mr. Alcorta his personally acrimonious relationship with the lead prosecutor before and during the trial. Mr. Alcorta described the nature of the purported violation:

> At one point during [Mr.] Alcorta's trial, [Mr.] Cramm and the lead prosecutor approached the judge while the jury was excused to discuss an issue. [Mr.] Cramm and [the] lead prosecutor both

[3] Mr. Alcorta also claimed that his trial counsel deprived him of due process of law by interfering with his right to select his counsel of choice and was ineffective for failing to object to the prosecutor's request for a longer prison sentence based on Mr. Alcorta's failure to cooperate. But Mr. Alcorta does not renew either issue on appeal.

> seemed to be angry with one another at the time. This seemed different than the previous interactions [Mr.] Alcorta saw during the trial. While [Mr.] Cramm and the lead prosecutor were arguing [Mr.] Alcorta stayed seated at the counsel's table near [Mr.] Cramm's paralegal who was also [Mr.] Cramm's wife.
>
> It was at this point that [Mr.] Cramm's paralegal told [Mr.] Alcorta that [Mr.] Cramm and the lead prosecutor could not stand each other. According to [Mr.] Cramm's paralegal, the personal issues between [Mr.] Cramm and the lead prosecutor were not a new development. [Mr.] Cramm's wife told [Mr.] Alcorta that the lead prosecutor had previously tried to "investigate" or "go after" [Mr.] Cramm but that he was unsuccessful.

R., Vol. I, at 2045–46 (Mem. In Support of § 2255 Mot., filed Apr. 19, 2019).

Mr. Alcorta asserted that he was "shell-shocked" upon hearing this news, because he "would not have hired [Mr.] Cramm as his attorney," or would have fired him and sought new counsel if he had learned about the personal conflicts at any point before trial. *Id.* at 2043. But "[b]y the time [Mr.] Alcorta learned about these facts he thought it was too late to fire [Mr.] Cramm," so he "decided not to bring up this issue with [Mr.] Cramm during the trial because he wanted [Mr.] Cramm to put in his best effort for the rest of the case." *Id.* at 2046.

Mr. Alcorta asserted that trial counsel's failure to disclose his potential personal conflict "deprived Alcorta of the ability to exercise his right to *fire* his retained counsel of choice." *Id.* at 2052, 2056. He clarified that "he [wa]s not asserting that attorney Cramm was operating under an actual conflict of interest in his representation." *Id.* at 2054 n.3. Rather, Mr. Alcorta reasoned that "[d]eprivation of [his] right [to choice of counsel] was 'complete' at the time of denial[,] and this is true without regard to the quality of any representation he later received." *Id.* at 2055

(quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006)). That is, Mr. Alcorta reasoned that he "was prejudiced by [Mr.] Cramm's conduct [in that it] improperly deprived [Mr.] Alcorta of his right to knowingly and voluntarily hire his counsel of choice." *Id.* at 2055.

Mr. Alcorta's second and third arguments centered on the jury instructions and verdict form which, read together, purportedly did not require the jury to find beyond a reasonable doubt that Mr. Alcorta was criminally responsible for conspiring to traffic more than 500 grams of methamphetamine. Because the jury's drug-quantity finding on the verdict form increased his mandatory-minimum sentence, Mr. Alcorta asserted that it was settled Supreme Court law that the jury's finding needed to be made beyond a reasonable doubt. *See Alleyne v. United States* 570 U.S. 99, 103 (2013) (holding that "[a]ny fact" that "increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt"). He argued that his trial counsel had provided constitutionally deficient representation in violation of his Sixth Amendment rights by failing to object to both the jury instructions and the verdict form. Furthermore, he argued that his appellate counsel also had been ineffective by failing to raise the *Alleyne* drug-quantity issue.

The district court denied Mr. Alcorta's § 2255 motion. *See United States v. Alcorta*, No. 12-40065-03-DDC, 2020 WL 4673225, at *12 (D. Kan. Aug. 12, 2020) (unpublished). Although the court deemed Mr. Alcorta's choice-of-counsel claim to allege a structural error—meaning that Mr. Alcorta would not have to show that his trial attorney's failure to disclose his potential conflict actually prejudiced Mr.

Alcorta in the sense that it adversely affected the outcome of his trial—it held that his trial attorney's actions did not deprive him of his Sixth Amendment right to his counsel of choice. *See id.* at *4–6. In particular, the court highlighted the absence of authority to support Mr. Alcorta's position: "The court has identified no case where a defendant has argued—successfully or otherwise—that his chosen counsel's alleged omissions support a Sixth Amendment choice of counsel violation." *Id.* at *5. And the court elaborated on the novelty of Mr. Alcorta asserting trial error based on the deprivation of choice of counsel when the court did not take any action to interfere with his representation by counsel:

> Mr. Alcorta can blame no one other than himself for the decision that he—and he alone—made. Mr. Alcorta decided not to articulate his concern. Mr. Alcorta chose to continue trial with his retained counsel.
>
> Mr. Alcorta retained an attorney he believed was qualified to represent him at trial. Consistent with his Sixth Amendment right to retain counsel of his choice, he chose Mr. Cramm. The court did not select Mr. Cramm. And, the court did not interfere with this choice. And now, Mr. Alcorta complains that the court failed to free him from his choice of counsel because of a request Mr. Alcorta never made. No caselaw supports the proposition that Mr. Alcorta would have the court adopt. And the ramifications of such a ruling could be significant. The court declines to find that Mr. Alcorta was deprived of his Sixth Amendment right to counsel of choice.

Id. at *5–6 (footnote and citation omitted).

Then, considering Mr. Alcorta's ineffective-assistance claims based on the *Alleyne* drug-quantity issue, the court noted that, based on the government's concessions of error, all that remained was the question of prejudice: specifically,

"[t]he government concede[d] that the verdict form's Question 2 should have asked the jury to find the drug quantity" by applying a beyond-a-reasonable-doubt standard; that the failure of Mr. Alcorta's trial counsel, Mr. Cramm, to object to the absence of the beyond-a-reasonable-doubt standard amounted to constitutionally deficient performance; and that the similar failure of Mr. Alcorta's appellate counsel to present this *Alleyne* error on appeal also constituted constitutionally deficient performance. *Id.* at *7, *9. Thus, all that remained was the question of whether the outcome at trial or on appeal was prejudiced by the representation of Mr. Alcorta's lawyers. And the court answered that question in the negative. It held that the deficient performances of the two lawyers—i.e., his trial and appellate lawyers—had not prejudiced Mr. Alcorta because their errors did not engender a reasonable probability of a different outcome at either the trial or appellate level. *Id.* at *8, *10.

The district court, however, granted Mr. Alcorta a certificate of appealability ("COA") on the issues raised in his § 2255 motion. *See United States v. Alcorta*, No. 13-40065-03-DDC, 2020 WL 5408140, at *3 (D. Kan. Sept. 9, 2020) (unpublished). This appeal followed.

II

A prisoner in federal custody may move to vacate his sentence under 28 U.S.C. § 2255, if he alleges that the "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). "In reviewing [the] denial of a § 2255 motion for post-conviction relief where a COA has been granted, 'we review the district court's findings of fact for clear error and its conclusions of

law de novo.'" *United States v. Viera*, 674 F.3d 1214, 1217 (10th Cir. 2012) (quoting *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011)). But if the district court "denies the motion as a matter of law upon an uncontested trial record" without an evidentiary hearing, "our review is strictly de novo." *Rushin*, 642 F.3d at; *see also United States v. Flood*, 713 F.3d 1281, 1286 (10th Cir. 2013). Where, as here, a § 2255 motion is predicated on claims of ineffective assistance of counsel, it "presents a mixed question of fact and law, which we review de novo." *United States v. Gonzalez*, 596 F.3d 1228, 1233 (10th Cir. 2010) (quoting *United States v. Orange*, 447 F.3d 792, 796 (10th Cir. 2006)).

On appeal, Mr. Alcorta raises two core issues, each of which he contends independently requires that his sentence be vacated. First, Mr. Alcorta argues that his trial counsel's failure to disclose his personally acrimonious history with the prosecutor—which included the prosecutor previously seeking to investigate Mr. Alcorta's trial counsel—"materially impaired [Mr.] Alcorta's right to hire counsel and thus violated [his] Sixth Amendment rights." Aplt.'s Opening Br. at 15. Second, he asserts that the failure of his trial and appellate counsel to challenge "the lack of instruction to the jury that its finding of drug quantity must be beyond a reasonable doubt was ineffective assistance of counsel." *Id.* at 23.

Though they both rely on the Sixth Amendment, Mr. Alcorta's claims require different showings. "If a defendant is wrongly denied his counsel of choice, no showing of prejudice is necessary to establish constitutional error." *United States v. McKeighan*, 685 F.3d 956, 966 (10th Cir. 2012). On the other hand, under the

Supreme Court's seminal decision in *Strickland v. Washington*, "[t]o succeed on an ineffective assistance of counsel claim under § 2255, a defendant has the twofold burden of establishing that (1) defense counsel's performance was deficient, *i.e.*, counsel's 'representation fell below an objective standard of reasonableness' as measured by 'prevailing professional norms,' and (2) the defendant was prejudiced thereby, *i.e.*, 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Rushin*, 642 F.3d at 1302 (quoting *Strickland*, 466 U.S. at 688, 694).

Addressing each issue in turn, we first hold that the absence of any action by the *court* (or any other governmental actor, for that matter) that prevented Mr. Alcorta from hiring or removing counsel dooms his choice-of-counsel claim. Specifically, Mr. Alcorta cannot demonstrate that any denial of his choice of counsel is cognizable under the Sixth Amendment because it was the product of private conduct by his attorney. We further hold that Mr. Alcorta cannot show he was prejudiced by any potential ineffective assistance of trial or appellate counsel because he has failed to demonstrate a reasonable probability of a different outcome at either the trial or appellate level.

A

Mr. Alcorta first argues that his trial counsel's failure to disclose a potential conflict arising from his personally acrimonious relationship with the prosecutor effectively deprived Mr. Alcorta of his right to choose his counsel—an error that he contends is structural and necessitates reversal. He elaborates that "[a] meaningful

right to select and hire counsel requires the concomitant right to be fully informed about material facts which impact the exercise of that right," Aplt.'s Opening Br. at 19; so, as Mr. Alcorta reasons, his trial counsel's failure to disclose his personally acrimonious relationship with the prosecutor "deprived" Mr. Alcorta of his right to counsel of choice because he was "erroneously prevented from being represented by the lawyer he want[ed], regardless of the quality of the representation he received." *Id.* at 17 (quoting *Gonzalez-Lopez*, 548 U.S. at 148).

However, we conclude that, by failing to allege or show any action by the *court* that (directly or indirectly) denied him his counsel of choice, Mr. Alcorta has not demonstrated circumstances that give rise to a cognizable Sixth Amendment choice-of-counsel violation. To be sure, Mr. Alcorta does assert that "[w]hile a court may deprive a defendant of his right to choice of counsel, defense counsel's conduct may also deprive a defendant of that right." *Id.* at 21. Yet Mr. Alcorta admits that he has "found no cases" that conclude "defense counsel's failure to disclose a personal conflict deprives a defendant of the right and ability to make a meaningful choice of counsel." Aplt.'s Reply Br. at 4. And, like the district court, we are not aware of any caselaw that supports Mr. Alcorta's choice-of-counsel claim.

In *Cuyler v. Sullivan*, the Supreme Court explained that the Sixth Amendment—which applies to governmental action—allows a defendant to challenge a private counsel's ineffective assistance because, by obtaining a criminal conviction through an unfair trial, the government "unconstitutionally deprives the defendant of his liberty." 446 U.S. 335, 343 (1980). Claims of ineffective assistance

prevent the government from unconstitutionally ratifying a counsel's ineffective assistance through an unfair trial. *See id.* at 344 ("[T]he right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.").

In contrast, choice-of-counsel claims have a separate aim, which does not turn on the quality of counsel's representation or the ultimate fairness of the proceeding. Such claims are grounded in the principle that a defendant has the "right to *decide* what type of defense [he] will present." *United States v. Nichols*, 841 F.2d 1485, 1502 (10th Cir. 1988). However, we have no reason to question the seemingly obvious point that the requirement of governmental action is fully applicable in this Sixth Amendment context. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 152 (holding Sixth Amendment right to counsel of choice was violated when the court improperly disqualified counsel from representing the defendant). Ordinarily, then, for the right to choice of counsel to be violated, a court—or some other governmental actor, typically with a court's acquiescence or endorsement—must interfere with the defendant's choice of counsel. *See United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990) ("When *a court unreasonably or arbitrarily interferes* with an accused['s] right to retain counsel of his choice, a conviction attained under such circumstances cannot stand, irrespective of whether the defendant has been prejudiced."), *superseded by statute on other grounds as stated in Lewis v. Comm'r of Internal Revenue*, 523 F.3d 1272, 1276–77 (10th Cir. 2008); *cf. Powell v. Alabama*, 287 U.S.

45, 53 (1932) (holding a defendant should be "*afforded* a fair opportunity to secure counsel of his own choice").

Consequently, it seems clear to us that, devoid of governmental action, claims that a private actor "deprived" a defendant of choice of counsel are fundamentally flawed because they effectively untether choice-of-counsel claims from their constitutional underpinnings. *Compare Luis v. United States*, 578 U.S. 5, 18 (2016) (holding Sixth Amendment right to counsel of choice was violated when the government seized under the authority of a court order a defendant's assets used to pay for counsel), *with Wheat v. United States*, 486 U.S. 153, 159 (1989) (holding Sixth Amendment right to counsel of choice is *not* violated when a defendant "insist[s] on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant").

Our decision in *United States v. Henson*, 9 F.4th 1258 (10th Cir. 2021), illustrates the necessary role of governmental—and, more specifically, court—action in a choice-of-counsel claim. There, we held that a defendant waived his choice-of-counsel claim when his lawyer voluntarily withdrew after a hearing in which a court required the attorney to rectify an apparent conflict of interest. *See Henson*, 9 F.4th at 1269–72, *overruled on other grounds by Henson v. United States*, 142 S. Ct. 2902 (2022). We reasoned that the attorney's "voluntary withdrawal took the matter 'out of the court's hands' and 'short-circuited' the court's decisionmaking process." *Id.* at 1271. Calling the lack of court action a "fatal flaw," we determined that it was Mr. Henson's attorney, "of his own accord[,] that deprived Mr. Henson of his original

counsel, *not* the district court. And it is beyond peradventure that Mr. Henson must accept the consequences of [his attorney's] action." *Id.* at 1274, 1277–78. Thus, under our reasoning in *Henson*, a private attorney's independent actions—without more—cannot deprive a defendant of his choice-of-counsel right under the Sixth Amendment.

And the *Henson* reasoning applies with full force here.[4] Specifically, Mr. Alcorta chose his counsel—and was able to fire his counsel—without any impediment from any governmental actor. Although Mr. Alcorta admits that he discovered his counsel's potential conflict during the trial, he never raised the issue with the court and, more to the point, never sought a ruling from the court regarding the matter. Furthermore, Mr. Alcorta's argument—seemingly in the nature of an excuse for his inaction—that the court could have denied his request to switch attorneys in the middle of a trial, *see* Aplt.'s Reply Br. at 4 (noting that Mr. Alcorta had no "unfettered right to fire defense counsel mid-trial"), is beside the point. By failing to contest any potential conflict of interest of his attorney and seek a ruling from the court regarding such a conflict, Mr. Alcorta "took the matter 'out of the court's hands.'" *Henson*, 9 F.4th at 1269–70.

Consequently, there is no governmental—and, more specifically, court—action that Mr. Alcorta can point to that deprived him of his Sixth Amendment right to

[4] Indeed, even without the benefit of that decision, the district court's prior handling of this issue is entirely congruent with *Henson*. *See Alcorta*, 2020 WL 4673225, at *5–6.

choice of counsel; he therefore cannot establish a viable claim for denial of this Sixth Amendment right.[5] Having determined that Mr. Alcorta has failed to make out a choice-of-counsel claim based on his trial counsel's failure to disclose a potential conflict of interest, we turn to his ineffective-assistance arguments.

B

Mr. Alcorta's ineffective-assistance challenge relies on his assertion that his trial counsel and appellate counsel failed to object to or raise as an issue on appeal, respectively, the *Alleyne* error evinced by the jury instructions and jury form in his case. To establish an ineffective-assistance claim, a movant must "show both that his counsel's performance 'fell below an objective standard of reasonableness' and that 'the deficient performance prejudiced the defense.'" *Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011) (quoting *Strickland*, 466 U.S. at 687–88); *see also id.* (explaining that the court may address the two *Strickland* prongs in any order). In

[5] Conceivably, Mr. Alcorta could have argued that his counsel's purported conflict of interest deprived him of his separate and distinct Sixth Amendment right to effective assistance of counsel. *See Sullivan*, 446 U.S. at 348 (applying ineffective-assistance framework to a conflict of interest). But Mr. Alcorta has failed to raise this issue on appeal. *See* Aplt.'s Opening Br. at 18 (arguing only that defense counsel's failure to disclose his potential conflict constituted a choice-of-counsel violation that did not require him to show prejudice). More specifically, he has expressly disclaimed the argument that his trial counsel had an "actual conflict" that "adversely affected his counsel's performance." *Mikens v. Taylor*, 535 U.S. 162, 171, 174 (2002); *see also* R., Vol. I, at 2054 n.3 ("[Mr.] Alcorta is not asserting that attorney Cramm was operating under an actual conflict of interest in his representation."). Accordingly, Mr. Alcorta has waived any such ineffective-assistance argument based on his trial counsel's purported conflict of interest. *See United States v. Black*, 369 F.3d 1171, 1176 (10th Cir. 2004) ("Failure to raise an issue in the opening appellate brief waives that issue.").

assessing whether the defendant was prejudiced, we evaluate whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rushin*, 642 F.3d at 1302 (quoting *Strickland*, 466 U.S. at 694); *see also United States v. Hollis*, 552 F.3d 1191, 1194 (10th Cir. 2009) ("A demonstration of prejudice requires a showing of a reasonable probability that, but for counsel's deficient performance, defendant would have received a different sentence.").

The government concedes that the jury instructions and the verdict form—which allowed the jury to find Mr. Alcorta criminally responsible for conspiring to traffic more than 500 grams of methamphetamine without applying the beyond-a-reasonable-doubt standard—violated *Alleyne* because the drug-quantity finding triggered an elevated mandatory-minimum sentence. Aplee.'s Resp. Br. at 24; *see also Alleyne*, 570 U.S. at 103 ("Any fact that, by law, increases the penalty from a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."). And the government also acknowledges that trial and appellate counsel deficiently failed to contest the *Alleyne* error. *Id.* at 23. Accordingly, the only issue that the parties dispute is whether the failure of trial and appellate counsel to challenge the *Alleyne* error prejudiced Mr. Alcorta's defense.[6] *See Strickland*, 466 U.S. at 697.

[6] Though we are not bound by the government's concessions on these legal issues—relating to the existence of an *Alleyne* error and constitutionally deficient performance by Mr. Alcorta's trial and appellate counsel, *see, e.g.*, *United States v. Furman*, 112 F.3d 435, 438 n.2 (10th Cir. 1997)—we are content to rely on

Mr. Alcorta challenges the district court's conclusion that he was not prejudiced at trial and on appeal because he failed to show a reasonable probability that the jury would have come to a different finding if properly instructed on the beyond-a-reasonable-doubt standard. *See* Aplt.'s Opening Br. at 26–32; *see also id.* at 33 (asserting that "even under the strict plain error standard," there was "a reasonable probability that the outcome of [Mr. Alcorta's] appeal would have been different"). We conclude that Mr. Alcorta's position lacks merit.

A jury's finding of the drug quantity without applying the beyond-a-reasonable-doubt proof standard is not prejudicial where there is "overwhelming" evidence to support the jury's drug-quantity finding. *See United States v. Cotton*, 535 U.S. 625, 633 (2002); *cf. United States v. Mann*, 786 F.3d 1244, 1252 (10th Cir. 2015) (holding *Alleyne* error was harmless where there was "overwhelming evidence that [the defendant] did discharge a firearm"). Mr. Alcorta maintains that the evidence was not "overwhelming" enough to preclude a reasonable probability that the jury could have found differently if properly instructed. *See* Aplt.'s Opening Br. at 30. And he also contends that, "even under the strict plain error standard"—which would have been applicable on appeal because trial counsel did not object to the *Alleyne* error—there was "a reasonable probability that the outcome of his appeal would have been different" because the lack of overwhelming evidence would have

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them without revisiting the merits of the legal issues thus conceded and instead, like the district court, turn our attention to the question of prejudice.

resulted in the error affecting his substantial rights under the third prong of the plain-error standard. *Id.* at 33–34. We disagree.

The cases on which Mr. Alcorta relies to assert that there was no "overwhelming" evidence of drug quantity are distinguishable in important ways. In arguing that his case lacked "overwhelming" evidence of drug quantity, Mr. Alcorta relies primarily on *United States v. Johnson*, in which we reversed a district court's imposition of a mandatory-minimum sentence. 878 F.3d 925, 930 (10th Cir. 2017). The defendant there had been held criminally responsible for conspiring to traffic cocaine base. *See id.* at 928.

Reviewing under a plain-error standard, we determined that the jury's finding of the drug quantity on a verdict form that did not specify that the finding was controlled by the beyond-a-reasonable-doubt standard was not harmless error because "the evidence as to drug quantity was heavily contested at trial and far from overwhelming." *Id.* at 930. The government had argued that "the evidence admitted at trial allowed the jury to 'reasonably infer'" from the following three facts that the defendant was criminally responsible for the drug quantity at issue: (1) the defendant "was working with [the] co-defendants . . . during the critical period when [they] were selling cocaine base to the confidential informant"; (2) the defendant "was aware of [the co-defendants'] drug dealings during this time period"; and (3) the defendant "was buying cocaine base from [the codefendants] during this period." *Id.* at 929. But we reasoned as follows: "This court certainly agrees the evidence presented would allow the jury to reasonably infer these three facts. That the jury

could do so, however, does *not* mean it would have been unreasonable for the jury to reach a contrary conclusion." *Id.* (emphases added). "Notwithstanding the government's assertions, this court conclude[d] [the defendant] ha[d] demonstrated the jury's drug quantity determination [was] not supported by overwhelming evidence." *Id.*

Although Mr. Alcorta attempts to use *Johnson* to argue that the evidence of drug quantity is not "overwhelming" here, there are two important distinctions between *Johnson* and his case. First, the defendant in *Johnson* raised questions about the overall quantity and type of drugs possessed by her coconspirators. *See id.* (indicating that "the government's quantity assertion was undermined by evidence that (a) [the coconspirators] sold both cocaine base and powder cocaine, (b) quantity amounts discussed in wiretapped phone calls were often inflated as [the coconspirators] cheated drug buyers by inflating drug weights, and (c) coded language used in wiretapped phone calls was possibly subject to wildly different interpretations"). In contrast, Mr. Alcorta did not—and could not—dispute the overall drug quantities that the police seized from his coconspirators' possession during the two car trips, and the drug quantity from either of the trips would have easily satisfied the more-than-500-gram requirement.

Therefore, unlike *Johnson*, there was no dispute at trial—put before the jury—about the scope of the drug quantity involved in the conspiracy. As the district court correctly observed, "the evidence against Mr. Alcorta on the drug quantity issue was

markedly different than the evidence in *Johnson*." *Alcorta*, 2020 WL 4673225, at *10.

Second, Mr. Alcorta's role in the conspiracy was different than that of the *Johnson* defendant. In the sentencing context, "[a] defendant can be held 'accountable for that drug quantity which was within the scope of the agreement and reasonably foreseeable' to him." *United States v. Ellis*, 868 F.3d 1155, 1170 (10th Cir. 2017) (quoting *United States v. Dewberry*, 790 F.3d 1022, 1030 (10th Cir. 2015)). Because of her seemingly tangential role in the drug trafficking of her codefendants and, more specifically, the absence of signs of her coordination or control of their activity, the *Johnson* defendant could cogently argue that she could not *reasonably foresee* that her coconspirators' conduct would involve the requisite drug quantities to meet the mandatory-minimum sentence. Among other things, the evidence showed that "despite the confidential informant having successfully embedded himself in the conspiracy, he never saw [the defendant] selling cocaine base, cooking drugs, or handling large sums of money"; that the defendant "did not drive [the codefendants] to any of the drug transactions with the confidential informant, the very transactions that made up the bulk of the government's quantity assertion"; and that "upon execution of the search warrants, no drugs, drug-dealing paraphernalia, or large sums of money were found in [the defendant's] car or home." 878 F.3d at 929–30.

Here, in contrast, though Mr. Alcorta was not present when the drugs were being transported, the evidence of his involvement in the conspiracy directly

connects him to the two cars transporting the drugs—more specifically, evidence painted a picture of Mr. Alcorta as a key coordinator of the criminal activities of his coconspirators. In this regard, we held in Mr. Alcorta's direct appeal the following: "Based on the circumstantial evidence in this case, a reasonable juror could be convinced *beyond a reasonable doubt* that Defendant was an integral part, probably the leader, of a conspiracy to distribute methamphetamine." 853 F.3d at 1136–37 (emphasis added).

Specifically, unlike the more uncertain circumstances in *Johnson*, we concluded that there was sufficient evidence for the jury to find that Mr. Alcorta was involved in the conspiracy based on evidence of his linchpin role in three specific car trips, two of which involved uncontested amounts of methamphetamine that easily exceeded 500 grams.[7] In fact, even if the jury could have only found—beyond a reasonable doubt—that Mr. Alcorta reasonably foresaw the quantity of methamphetamine that would be transported by his coconspirators on only one of the two trips resulting in arrests, the jury would have had an ample basis in the evidence

[7] Mr. Alcorta's post-conviction arguments—rather than disputing the drug quantities in each car—appear to be in part a fruitless effort to relitigate the jury finding that he was connected to the car trips in the first place. *See* Aplts.' Opening Br. at 29 ("The evidence against Alcorta at trial was mostly recorded jailhouse phone conversations between coconspirators, some jailhouse phone conversations involving [Mr.] Alcorta, and some limited physical evidence obtained from the arrested couriers' vehicles."). But the jury already concluded—under the beyond-a-reasonable-doubt standard and after Mr. Alcorta had a full opportunity to present his arguments—that the evidence was sufficient to connect him to the car trips and, in turn, that this evidence was sufficient to connect him to the conspiracy to distribute methamphetamine.

for checking the box on the verdict form triggering the mandatory-minimum sentence (i.e., more than 500 grams). However, given the record evidence pointing to Mr. Alcorta's role as the key coordinator of the on-the-ground drug-trafficking of his codefendants—which led the trial court to conclude that he was a "manager[/]supervisor," *see* R., Vol. I, at 1982, and led us to conclude on appeal that "a reasonable juror could be convinced *beyond a reasonable doubt* that [Mr. Alcorta] was an integral part, probably the leader, of a conspiracy to distribute methamphetamine," *Alcorta*, 853 F.3d at 1136–37 (emphasis added)—it is very unlikely that a reasonable jury would have concluded that Mr. Alcorta could not reasonably have foreseen the quantity of drugs in *both* of the cars. And that quantity in the two cars was over seven times the minimum amount needed to trigger the 10-year mandatory-minimum sentence.

Mr. Alcorta's reliance on our decision in *Ellis* is unavailing for like reasons. In *Ellis*, "the government charged [the defendant] . . . in a broad cocaine-distribution conspiracy stretching from a Kansas City street corner to a drug cartel in Mexico." 868 F.3d at 1167. However, critically, "[i]n its jury instructions, the district court did not tell the jury to determine what cocaine amounts were individually attributable to [the defendant], by his own acts and the reasonably foreseeable acts of his coconspirators." *Id.* As to the powder-cocaine conviction, we concluded that "the government cannot show that the *Alleyne* error was harmless beyond a reasonable doubt. [The defendant] contested his liability for at least five kilograms of powder cocaine, and the government didn't introduce overwhelming evidence to prove that

this amount was individually attributable to him." *Id.* at 1172–73. As to the crack-cocaine conviction, we noted that the government could "rely on evidence more particular to [the defendant]"—such as the crack cocaine cooked by the defendant and his coconspirators and controlled buys from the defendant. *Id.* at 1173. But, viewed in totality, the government's evidence was insufficient "for us to find the *Alleyne* error harmless beyond a reasonable doubt." *Id.* Here, the character of the evidence—which painted a picture for the jury of Mr. Alcorta as a key coordinator of the criminal activities of his coconspirators—stands in stark contrast to the evidence in *Ellis*. Consequently, *Ellis* is readily distinguishable and unhelpful to Mr. Alcorta.

Finally, Mr. Alcorta also cannot show his appellate counsel's failure to raise the *Alleyne* error prejudiced him. Because his trial counsel failed to object to the issue, *see Alcorta*, 2020 WL 4673225, at *9–10 (concluding that a plain-error standard applied due to Mr. Alcorta's failure to object at trial); Aplt.'s Opening Br. at 33 (appearing to acknowledge plain-error review applies), on appeal, we would have reviewed his *Alleyne* claim under our rigorous plain-error standard. *See, e.g.*, *United States v. McGehee*, 672 F.3d 860, 876 (10th Cir. 2012). That standard requires "(1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings," *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012).

Because, as we have determined, there is no reasonable probability that the jury would have declined to find the drug quantity triggering the elevated, 10-year mandatory-minimum sentence if properly instructed, Mr. Alcorta's appellate counsel

would not have been able to show that any *Alleyne* error by Mr. Alcorta's trial counsel affected Mr. Alcorta's substantial rights. *See United States v. Wright*, 848 F.3d 1274, 1278 (10th Cir. 2017) ("Plain error affects a defendant's substantial rights if 'there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.'" (quoting *United States v. Hale*, 762 F.3d 1214, 1221 (10th Cir. 2014))).

Thus, Mr. Alcorta's appellate counsel would not have been able to satisfy the requirements of the plain-error standard and, accordingly, would not have prevailed on the *Alleyne* issue on appeal. It ineluctably follows that Mr. Alcorta cannot establish that, but for appellate counsel's failure to raise the *Alleyne* error, there is a reasonable probability that the outcome of his appeal would have been different. Stated otherwise, Mr. Alcorta cannot show prejudice from any constitutionally deficient performance of his appellate counsel in omitting the *Alleyne* issue because his appellate counsel could not demonstrate—regarding the *Alleyne* issue—plain, reversible error.

In sum, based on the foregoing analysis, we conclude that Mr. Alcorta was not prejudiced, within the meaning of *Strickland*, by the failure of his trial and appellate counsel to challenge any *Alleyne* error stemming from the district court's jury instructions and verdict form. Accordingly, Mr. Alcorta's Sixth Amendment right to effective assistance of counsel was not violated by this failure of counsel to challenge any *Alleyne* error.

III

For the foregoing reasons, we **AFFIRM** the district court's judgment denying Mr. Alcorta's § 2255 motion.

Entered for the Court

Jerome A. Holmes
Chief Judge