

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 1, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DESMOND S. GAINES,

Defendant - Appellant.

No. 26-3024
(D.C. Nos. 2:19-CV-02491-JAR,
2:22-CV-02469-JAR, &
2:15-CR-20078-JAR-1)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **MATHESON**, and **ROSSMAN**, Circuit Judges.

Desmond Gaines seeks a certificate of appealability (“COA”) to challenge the district court’s denial of his motion for habeas relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal “the final order in a proceeding under section 2255”).¹ His counsel filed a brief under *Anders v. California*, 386 U.S. 738 (1967), and a motion to withdraw, stating that there are no nonfrivolous grounds on which to appeal the district court’s order. After careful review of the record, we agree.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Although Mr. Gaines did not file a formal request for a COA, his notice of appeal constitutes such a request under Federal Rule of Appellate Procedure 22(b)(2).

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we grant counsel's motion to withdraw, deny a COA, and dismiss this matter.

I. BACKGROUND

In September 2017, a jury convicted Mr. Gaines of possessing a controlled substance with intent to distribute, possessing a firearm in furtherance of a drug-trafficking offense, and possessing a firearm after a felony conviction. The district court sentenced Mr. Gaines to 180 months in prison followed by eight years of supervised release.²

In August 2016, the district court discovered that the United States Attorney's Office for the District of Kansas ("USAO") had obtained soundless recordings from the attorney-client meeting rooms at the Corrections Corporation of America ("CCA") Leavenworth facility. ROA at 50; *see also United States v. Black*, No. 16-20032-JAR, 2017 WL 2151861 (D. Kan. May 17, 2017). Mr. Gaines was detained at CCA pending trial, and the recordings included two meetings between Mr. Gaines and his attorneys. The government produced the soundless video recordings to the court in the *Black* case.

In August 2019, the district court "issued the *Black* Order," which addressed whether the USAO's possession of the recordings violated the Sixth Amendment right to confidential attorney-client communications. ROA at 50-51. The *Black*

² The district court later granted Mr. Gaines's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) and reduced Mr. Gaines's sentence to 106 months in prison and four years of supervised release.

Order outlined “the elements required to prove a per se violation of the Sixth Amendment under the Tenth Circuit’s then-governing decision in *Shillinger v. Haworth*.” *Id.* at 51 (citing *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995)). It explained, “Under *Shillinger*, a per se Sixth Amendment violation occurs when: (1) there is a protected attorney-client communication; (2) the government purposefully intruded into the attorney-client relationship; (3) the government becomes ‘privy to’ the attorney-client communication because of its intrusion; and (4) the intrusion was not justified by any legitimate law enforcement interest.” Mem. & Order at 162, *United States v. Black*, No. 16-20032-JAR (D. Kan. Aug. 13, 2019) (quoting *Shillinger*, 70 F.3d at 1142). It further noted that, under *Shillinger*, once a plaintiff establishes these four elements, prejudice is presumed. The *Black* Order reassigned all § 2255 motions predicated on the recordings for a determination on the merits.

In November 2022, Mr. Gaines moved for habeas relief under § 2255 based on the two soundless video recordings, arguing a Sixth Amendment violation under *Shillinger*. In response, the Government argued the *Shillinger* prejudice presumption was dicta and contrary to Supreme Court precedent. The district court held Mr. Gaines’s motion in abeyance pending our decision in *United States v. Hohn*, 123 F.4th 1084 (10th Cir. 2024), in which the government raised similar challenges to *Shillinger*.

Hohn overruled *Shillinger*, holding that “a Sixth Amendment violation of the right to confidential communication with an attorney requires the defendant to show

prejudice.” *United States v. Hohn*, 123 F.4th 1084, 1088 (10th Cir. 2024) (en banc), *cert. denied*, 146 S. Ct. 293 (Oct. 14, 2025).

The district court in this case ordered the parties to submit supplemental briefs addressing the impact of *Hohn* on Mr. Gaines’s motion. In their briefs, the parties agreed that *Hohn* controlled. Further, Mr. Gaines conceded that his motion was entirely premised on *Shillinger*’s prejudice presumption and that *Hohn* was “the death-knell for [his] motion.” ROA at 270-72.

Based on *Hohn* and this concession, the district court concluded that Mr. Gaines failed to demonstrate prejudice.³ It noted that *Hohn* requires a defendant to “tether governmental intrusion to a realistic possibility of injury from the *use* of confidential communications at trial.” *Id.* at 53 (quoting *Hohn*, 123 F.4th at 1112). Thus, to satisfy *Hohn*, Mr. Gaines needed to connect the soundless recordings “to anything used during the criminal proceedings that either disadvantaged him or advantaged the prosecution.” *Id.* at 53-54 (quoting *Hohn*, 123 F.4th at 1110). The court concluded Mr. Gaines failed to make this showing: “There is no evidence in the record that suggests or allows the Court to infer that the government used the

³ Although Mr. Gaines conceded he could not show prejudice, the district court seemingly construed his presentation of the facts as an argument that the “temporal proximity” between Mr. Gaines’s change of plea and the USAO’s obtaining the recordings of his attorney-client meetings was sufficient to meet *Hohn*’s prejudice requirement. *See* ROA at 53. The court concluded it was not, noting that Mr. Gaines failed to “explain how this temporal proximity alone creates an inference of prejudice.” *Id.* We agree that Mr. Gaines failed to develop such an argument and see no nonfrivolous grounds for appealing the district court’s conclusion.

soundless video recordings at his trial or gleaned something from the recordings that gave it an advantage or that gave Petitioner a disadvantage.” *Id.* at 54.

After filing a notice of appeal on behalf of Mr. Gaines, his counsel moved to withdraw and filed an *Anders* brief. This court sent copies of the *Anders* brief and motion to withdraw to Mr. Gaines, but he did not respond.⁴

II. DISCUSSION

A. Legal Background

1. Certificate of Appealability

A federal prisoner must obtain a COA to appeal the denial of § 2255 habeas relief. 28 U.S.C. § 2253(c)(1)(B). We will issue a COA only if the movant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). He must demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). We review the district court’s factual findings for clear error and its legal conclusions de novo. *English v. Cody*, 241 F.3d 1279, 1282 (10th Cir. 2001).

⁴ The Clerk’s Office sent several letters to Mr. Gaines enclosing the *Anders* brief and motion to withdraw and inviting him to respond, but they were all returned to sender. This court then ordered counsel to provide Mr. Gaines’s updated mailing address. After counsel provided the requested information, the Clerk’s Office re-sent the *Anders* brief and motion to withdraw to Mr. Gaines and ordered him to respond by August 13, 2026. This time there was no return to sender, and Mr. Gaines did not respond.

2. *Anders*

Anders allows counsel to “request permission to withdraw where counsel conscientiously examines a case and determines that any appeal would be wholly frivolous.” *United States v. Calderon*, 428 F.3d 928, 930 (10th Cir. 2005).

[C]ounsel must submit a brief to the client and the appellate court indicating any potential appealable issues based on the record. The client may then choose to submit arguments to the court. The [c]ourt must then conduct a full examination of the record to determine whether defendant’s claims are wholly frivolous. If the court concludes after such an examination that the appeal is frivolous, it may grant counsel’s motion to withdraw and may dismiss the appeal.

Id. (citing *Anders*, 386 U.S. at 744).

We “must then conduct a full examination of the record to determine whether defendant’s claims are wholly frivolous.” *Id.* (citing *Anders*, 386 U.S. at 744). If there are no nonfrivolous issues, we may grant counsel’s motion to withdraw and dismiss the appeal. *Id.*

B. *Analysis*

The *Anders* brief concludes there are no nonfrivolous grounds on which to appeal the district court’s decision. *Anders* Br. at 2. We agree.

Mr. Gaines’s § 2255 motion relied on *Shillinger*, under which a court presumed prejudice once a defendant established the four elements of an intentional government intrusion. But *Hohn* overruled *Shillinger*. *Hohn*, 123 F.4th at 1088. To state a Sixth Amendment claim under *Hohn*, a defendant must demonstrate that the government’s intrusion resulted in prejudice. *Id.* In district court, Mr. Gaines

conceded, both in his original § 2255 motion and his supplemental brief, that he could not make this showing. ROA at 74 (“Like most defendants, Mr. Gaines cannot point to a specific trial advantage the United States gained by obtaining the recordings of his meetings with his attorneys.”); *id.* at 272 (“*Hohn* is the death-knell for Mr. Gaines’s Motion As Mr. Gaines acknowledged, he cannot point to a trial advantage that the Government gained by obtaining his confidential communications.”). In light of these concessions, we agree with the *Anders* brief that there are no nonfrivolous grounds to argue on appeal. We also conclude that reasonable jurists could not debate the district court’s conclusion that Mr. Gaines failed to show prejudice.

III. CONCLUSION

Our independent review of the record reveals that there are no nonfrivolous grounds for appeal and no basis on which to grant a COA. We therefore grant counsel’s motion to withdraw, deny a COA, and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge