FILED
United States Court of Appeals
Tenth Circuit

September 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HAROLD CREIGHTON, a/k/a Creature,

Defendant - Appellant.

No. 18-8094
(D.C. Nos. 1:18-CV-00050-SWS &
2:15-CR-00101-SWS-5)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **PHILLIPS**, and **CARSON**, Circuit Judges.

Pro se federal prisoner Harold Creighton seeks a certificate of appealability ("COA") to challenge the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal denial of relief under § 2255). Exercising jurisdiction under 28 U.S.C. § 1291, we deny his request and dismiss this matter.[1]

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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] We liberally construe Mr. Creighton's pro se filings, but we do not act as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Moreover, "pro se parties [must] follow the same rules of procedure that govern other litigants." *Id.* (internal quotation marks omitted).

I. **BACKGROUND**

A jury convicted Mr. Creighton of conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) & 846. Based on his prior felony drug convictions, he was sentenced to a mandatory term of life in prison under 21 U.S.C. §§ 841(b)(1)(A) and 851. He appealed his sentence on the ground of prosecutorial vindictiveness. This court affirmed. *United States v. Creighton*, 853 F.3d 1160, 1161, 1165 (10th Cir. 2017).

Mr. Creighton then filed the underlying § 2255 motion, asserting that (1) trial and appellate counsel were ineffective, (2) the prosecutor engaged in misconduct, and (3) the government's wiretapping and cellphone tracking violated his constitutional rights.

The district court denied the ineffective assistance of counsel claims, holding that Mr. Creighton failed to demonstrate his trial or appellate counsel's performance was deficient or that he was prejudiced by any deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). It ruled the remaining claims were procedurally defaulted and that Mr. Creighton failed to establish cause and prejudice for his procedural default. The court denied a COA.

II. **DISCUSSION**

Mr. Creighton may not appeal the district court's denial of his § 2255 application without a COA. 28 U.S.C. § 2253(c)(1)(B); *see United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010). To obtain a COA, he must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or

that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

When, as happened here on two of Mr. Creighton's § 2255 claims, a district court dismissed a claim in a § 2255 motion on procedural grounds, we will issue a COA only if the movant shows it is "debatable whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling." *Id*. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id*.

A. ***Ineffective Assistance Claims***

Ineffective assistance of counsel requires the movant to show: (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To establish deficient performance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. We assess the reasonableness of counsel's performance in light of "the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690. Our review is "highly deferential" because "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 689-90.

"Next, a movant must show prejudice, meaning there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Barrett*, 797 F.3d at 1214 (internal quotation marks omitted). The reasonable probability standard "requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (internal quotation marks omitted). "Courts are free to address these two prongs in any order, and failure under either is dispositive." *Barrett*, 797 F.3d at 1214 (internal quotation marks omitted).

1. **Trial Counsel**

In his § 2255 motion, Mr. Creighton alleged 14 instances of trial counsel's ineffectiveness. The district court addressed each allegation and held that none established such a claim. In his brief to this court, Mr. Creighton lists the same allegations but fails to analyze or cite authority for eight of them. We address only the six claims that are adequately briefed. *See DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 967 (10th Cir. 2017) (declining to consider argument "unsupported by legal authority or record evidence" (internal quotation marks omitted)).[2]

[2] We therefore do not address the following ineffective assistance claims that are listed but not argued in the COA application: (1) trial counsel told Mr. Creighton to invoke ineffective assistance of counsel as a ground for post-conviction relief "[b]ecause he [knew] he didn't do a good job," R. Vol. 2, at 60; (2) trial counsel would not let him see his discovery or listen to the recorded phone calls that were played at trial, *id.* at 61; (3) trial counsel fell asleep during jury selection, and "nodded out periodically" during some trial testimony, *id.* at 60; (4) trial counsel "never allowed [him] . . . any paperwork pertaining to [his] case," except his indictment, *id.* at 61; (5) trial counsel was 74 years old, "well past retirement age," *id.* at 62; (6) trial counsel wore hearing aids "[d]ue to extremely bad hearing [and] [d]uring trial, [the attorney] was asked questions from the judge only to have an answer that was totally off subject," *id.*; (7) trial counsel did not allow Mr. Creighton to see the entire presentence report, but showed him only part of the report, *id.*; and (8) trial counsel failed to inform him of the potential offense reductions based on the sentencing guidelines, *id.* at 61-62.

a. *Failure to interview prospective defense witnesses and call witnesses at trial (one claim)*

In the district court, Mr. Creighton alleged that his trial attorney failed to interview prospective witnesses and refused his request "to call numerous individuals to come and testify," *id.* at 60. He also contended his attorney had no trial strategy except to cross-examine the government's witnesses. Mr. Creighton wanted his attorney to call all of his co-defendants, certain unidentified witnesses, and Sarah L. He claimed Sarah L. would have exculpated him because she admitted that her initial statement to investigators inculpating him was false.

In denying relief, the district court noted that Mr. Creighton failed to identify whom counsel should have interviewed or how any additional testimony would have helped his defense. The court said that Mr. Creighton also had not explained how his attorney could have required his co-defendants to testify, given their Fifth Amendment privilege against self-incrimination. The court also determined that, because his co-defendants who did testify inculpated Mr. Creighton in the drug conspiracy, his counsel's decision not to call additional co-defendants was a reasonable tactical choice. Finally, the court said Mr. Creighton failed to explain what Sarah L. and the unidentified witnesses would have said or how their testimony would have helped his defense.

The court observed that counsel had called six defense witnesses at trial and had adequately cross-examined the prosecution witnesses. It concluded that Mr. Creighton had failed to demonstrate that counsel's performance was deficient or that any deficiency prejudiced his defense.

In his COA application, Mr. Creighton again claims that trial counsel failed to interview and call witnesses. He does not address how his attorney could have required his co-defendants to testify or why not attempting to call them was an unreasonable tactical decision. He also does not identify any additional witnesses, explain what their testimony would have been, or how they would have assisted his defense.

Mr. Creighton asserts that Sarah L. would have testified that her statement to the investigators inculpating him was false, and if the jury had heard this testimony, he "likely would not have been convicted on the weak evidence." Def's COA Appl. at 13 (internal quotation marks omitted). In addition, he contends Sarah L's testimony would have corroborated Cassandra C.'s testimony that Mr. Creighton was not involved with drugs. Cassandra C. was indicted along with Mr. Creighton and others in the drug conspiracy. She testified at Mr. Creighton's trial that she had sold drugs one time, that Mr. Creighton never sold her methamphetamines, and that he had won several thousand dollars at bingo.

Mr. Creighton does not explain how Sarah L. was involved in this case or how her testimony recanting her initial statement to investigators would have rendered the trial evidence so weak as to possibly produce an acquittal. He does not demonstrate that her testimony would have outweighed the testimony of the several other trial witnesses, including his co-conspirators who inculpated him.

"[T]he decision of which witnesses to call is quintessentially a matter of strategy." *Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008); *see also Strickland*, 466 U.S. at 689, 699. We do not second guess defense counsel's decision and cannot say his

performance was deficient under the performance prong of *Strickland*. Mr. Creighton also fails to demonstrate that counsel's failure to call Sarah L. prejudiced him. Thus, he does not establish a claim of ineffective assistance of counsel.

Mr. Creighton has submitted affidavits from Sarah L. and Cassandra C. that were not filed in district court. We do not consider evidence that was not presented to the district court. *See Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 814 n.22 (10th Cir. 1995) (on appeal from order denying post-conviction relief, declining to consider defendant's proffered newly discovered evidence because it was not presented to the district court). Even so, neither affidavit helps him. Sarah L.'s affidavit says only that she is "willing to fill out a statement . . . in behalf of Harold Craton [sic]." Def.'s Appl. for COA, Attach. 1. Cassandra C.'s affidavit repeats her trial testimony. *Id.*, Attach. 2, at 2 (stating that she "never got any drugs from [Mr. Creighton], and [she] never saw him with any drugs. . . . [She] was with [him] on multiple occasions when he won several thousand dollars gambling.").

Mr. Creighton has not shown that reasonable jurists could debate the district court's conclusion that he failed to establish deficient performance or prejudice.

b. *Trial preparation time (two claims)*

In two of his ineffective assistance claims, Mr. Creighton asserted his trial counsel was unprepared for trial because they met only two times before trial for a total of two hours and fifteen minutes. The district court found that Mr. Creighton did not show how these alleged deficiencies prejudiced him because he did not explain why the amount of

meeting time with his attorney was inadequate or how additional time would have affected the trial result.

In his COA application, Mr. Creighton again asserts that he met with his attorney only two times before trial and that "[t]here was not any reasonable communication from the beginning of his case" to permit him to "effectively participate in his legal representation." Def.'s Appl. for COA at 11. He still has not explained how he was prejudiced. His deficient communication claim is conclusory and unsupported. *See United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994) (summarily rejecting ineffective assistance of counsel arguments which were conclusory and without factual support).

We conclude that reasonable jurists could not debate the district court's conclusion that Mr. Creighton failed to establish that counsel's performance prejudiced him.

c. *Plea negotiations (two claims)*

In his § 2255 motion, Mr. Creighton based two claims on his assertion that his attorney had told him cooperation with the government was the only way he would be offered a plea agreement and that he would receive a life sentence unless he cooperated. The district court found, and Mr. Creighton does not refute, that "the Government asked Mr. Creighton to cooperate by proffering, then extended a plea offer that omitted cooperation when he declined to proffer." R. Vol. 2, at 94; *see also Creighton*, 853 F.3d at 1162 (stating "[t]he prosecutor also indicated she would tender a plea offer that would not account for Defendant's requested cooperation"). In this context, "proffer" meant "to cooperate with the government." R. Vol. 2, at 82-83. The district court noted that

Mr. Creighton did not allege his attorney failed to convey plea offers to him. His "real complaint" was that his attorney "failed to negotiate a palatable plea agreement with the government." *Id.* at 95 (internal quotation marks omitted). The court concluded that Mr. Creighton had failed to establish either deficient performance or prejudice.

In his COA application, Mr. Creighton asserts that his attorney's deficient advice influenced his decision to proceed to trial rather than plead guilty. He contends his attorney "never really discussed a plea or the benefits of pleading," but simply told him he would be sentenced to life in prison because of his criminal history "no matter what." Def's. COA Appl. at 11. But Mr. Creighton does not refute the district court's finding that defense counsel conveyed plea offers to him. And he makes no showing that if he had accepted the government's plea offer, his sentence would have been different, so he does not demonstrate prejudice. *See United States v. Boone*, 62 F.3d 323, 327 (10th Cir. 1995) (holding prejudice is not established where there is no showing that the prosecutor was willing to negotiate a plea, "or that such plea would have been acceptable to the court," *or that the sentence would have been different* (emphasis added)). He speculates that the outcome would have been different, which is inadequate to establish prejudice. *See id.*

Reasonable jurists could not debate the district court's conclusion that Mr. Creighton failed to establish deficient performance or prejudice.

d. *Sentencing challenges to prior felony convictions (one claim)*

Mr. Creighton complained in his § 2255 motion that his attorney never challenged his prior Wyoming drug felonies used to enhance his sentence under 21 U.S.C. § 851,

even though "they might not be considered serious drug felonies." R. Vol. 2, at 63. He also complained that his counsel failed to object to the court's failure to conduct the colloquy required under § 851(b) before imposing an enhanced sentence. The district court recognized that defense counsel did not argue that the prior felony convictions failed to qualify under § 851. Instead, the attorney challenged the § 851 enhancement as an improper attempt to coerce Mr. Creighton to plead guilty.[3]

The district court determined that Mr. Creighton "did not come close to showing any of his prior drug felonies were improperly used to enhance his current sentence under § 851," thus failing to demonstrate deficient performance or prejudice under *Strickland*. *Id.* at 98. The court explained why the prior felony convictions qualified for enhancement under § 851, so defense counsel "was not ineffective for refusing to undertake an unwinnable challenge." *Id.* at 99. The court ruled the omission of the § 851(b) colloquy was harmless.

In his COA application, Mr. Creighton asserts that his attorney was ineffective for failing to challenge the use of his prior convictions. He contends it was "clear error" to use two of his prior drug convictions to enhance his sentence. Def.'s Appl. for COA at 19. He does not, however, explain the asserted "clear error," nor does he attempt to explain why the district court's contrary conclusion was incorrect. He also renews his

[3] As the district court observed, this argument was rejected in Mr. Creighton's direct appeal. *See Creighton*, 853 F.3d at 1163, 1165 (holding that Mr. Creighton was unable to establish actual vindictiveness or a presumption of vindictiveness based on the prosecutor's decision to file a § 851 information).

claim that his attorney was ineffective for failing to challenge the sentencing court's omission of the § 851(b) colloquy. But he does not attempt to show how this omission "had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect," *United States v. Bagby*, 696 F.3d 1074, 1088 (10th Cir. 2012) (internal quotation marks omitted) (holding that challenge to compliance "with § 851(b)'s colloquy requirements is subject to harmless-error review").

We conclude that reasonable jurists could not debate the district court's conclusion that Mr. Creighton failed to establish deficient performance or prejudice.

2. **Appellate Counsel**

A different attorney represented Mr. Creighton on appeal. In his § 2255 motion, Mr. Creighton alleged three ineffective assistance claims against her. First, he alleged his appellate counsel refused to raise a claim of ineffective assistance of trial counsel. The district court rejected this argument because this circuit generally does not consider such a claim on direct appeal. *See United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc) ("Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed.").

Second, Mr. Creighton claimed his appellate attorney refused his request to file a petition for a writ of certiorari to the United States Supreme Court after the Tenth Circuit affirmed his sentence. The district court found no deficient performance or prejudice because Mr. Creighton had no constitutional right to counsel to pursue this discretionary review. *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (per curiam) (holding a

criminal defendant does not have a constitutional right to counsel to file a petition for discretionary review, so cannot be deprived of the effective assistance of counsel if counsel does not file petition); Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

Third, Mr. Creighton complained that his appellate attorney "did little research on his trial and 'other transcripts,'" Def.'s Appl. for COA at 15, and failed to communicate with him. The district court ruled that Mr. Creighton did not show that any deficiency prejudiced his appeal. *See Barrett*, 797 F.3d at 1214.

In his COA application, Mr. Creighton restates these claims, but does not say why the district court was wrong. He has failed to show that reasonable jurists could debate any of these three rulings.

Mr. Creighton also argues his attorney's failure to raise stronger arguments prevented a successful appeal. Apart from the vague and conclusory nature of this argument, he did not raise it in the district court and has not requested plain error review on appeal. We therefore do not consider it. *See United States v. Deiter*, 890 F.3d 1203, 1211 n.5 (10th Cir.) (refusing to consider argument not presented to the district court for which plaintiff did not argue for plain error review on appeal), *cert. denied*, 139 S. Ct. 647 (2018).

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Reasonable jurists could not debate the district court's denial of Mr. Creighton's § 2255 claims alleging ineffective assistance of trial and appellate counsel. We therefore deny a COA on all of them.

B. ***Prosecutorial Misconduct and Warrantless Interception Claims***

For the first time in his § 2255 motion, Mr. Creighton alleged (1) the prosecutor engaged in misconduct because she had a grudge against him for causing a motorcycle accident involving her sister and relied on it to withhold Jencks Act material and to deny him a copy of his discovery;[4] and (2) law-enforcement authorities intercepted his electronic wire communications via his cellphones to triangulate his location without a warrant, in violation of his Fourth and Fifth Amendment rights.[5] The district court held these claims were procedurally barred because they could have been raised on direct appeal but were not. The court further held that Mr. Creighton had not shown cause or prejudice to overcome his procedural default.

A movant is procedurally barred from raising issues in a § 2255 motion that were raised on direct appeal or, absent a showing of cause and prejudice, should have been

[4] Mr. Creighton does not explain why the release of the witnesses' statements immediately before they testified violated the Jencks Act. "Under the Jencks Act, *after a witness called by the United States has testified on direct examination*, the court shall, on motion of the defendant, order the United States to produce any statement of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." *United States v. Chanthadara*, 230 F.3d 1237, 1254 (10th Cir. 2000) (emphasis added) (brackets, ellipsis, and internal quotation marks omitted).

[5] Mr. Creighton also alleged: (1) due to the prosecutor's grudge, he was not offered a plea agreement that did not require his cooperation with the government, (2) he sat in jail for 13 days after state charges were dismissed and before federal charges were filed, (3) he did not have counsel for his initial court appearance, and (4) the district court declared the case complex before he could object. Mr. Creighton did not include these claims in his COA application, so they are deemed abandoned or waived. *See Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997) ("Issues not raised in the opening brief are deemed abandoned or waived.").

raised on direct appeal. *See United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994). *But see Galloway*, 56 F.3d at 1242 (holding that this procedural bar rule does not apply to claims of ineffective assistance of counsel). "When a defendant fails to raise an issue on direct appeal, he is barred from raising it in a § 2255 motion unless he can show cause excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed." *United States v. McGaughy*, 670 F.3d 1149, 1159 (10th Cir. 2012) (internal quotation marks omitted). "A meritorious claim of ineffective assistance of counsel constitutes cause and prejudice for purposes of surmounting the procedural bar. Consequently, if Mr. [Creighton] can demonstrate that he received ineffective assistance of counsel, he will have established the requisite cause and prejudice to overcome application of the procedural bar." *United States v. Harms*, 371 F.3d 1208, 1211 (10th Cir. 2004) (citation omitted).[6]

[6] The district court held in the alternative that these claims were untimely and that Mr. Creighton could not attempt to demonstrate cause for the procedural default in his reply to the government's opposition to his § 2255 motion. But Mr. Creighton was not precluded from attempting to establish cause and prejudice in his reply. *See United States v. Challoner*, 583 F.3d 745, 748 (10th Cir. 2009) (noting that § 2255 movant first raised claim of ineffective assistance of counsel in response to district court's order to show cause for procedural default, thus indicating that a § 2255 movant may attempt to show cause and prejudice after the motion is filed); *United States v. Harfst*, 168 F.3d 398, 401 (10th Cir. 1999) (allowing § 2255 movant to argue for the first time in his objections to the magistrate judge's recommendation that counsel's failure to raise issues before the district court or on direct appeal constituted ineffective assistance of counsel); *cf. United States v. Wiseman*, 297 F.3d 975, 979-80 (10th Cir. 2002) (recognizing that appellate court may raise procedural default sua sponte, and if it does so, must afford the § 2255 movant a reasonable opportunity to respond).

1. **Prosecutorial Misconduct**

In district court, Mr. Creighton asserted that his attorney's failure to raise the prosecutorial misconduct claim caused his procedural default.[7] The district court held that Mr. Creighton did not show his counsel was ineffective. First, he did not show bias. Although "personal animosity—*if shown to exist*—may . . . be probative of an improper motive, . . . in and of itself, such evidence cannot meet the burden of demonstrating that the prosecution was commenced in bad faith or to harass." *Phelps v. Hamilton*, 59 F.3d 1058, 1067 (10th Cir. 1995) (emphasis added). The district court also noted that Mr. Creighton provided no facts to support this claim, which he does not challenge.

Second, the district court said that Mr. Creighton's allegations concerning the Jencks Act and discovery materials were wrong. All Jencks Act materials had been timely provided. It was the court, not the prosecutor, who ordered the discovery materials not to be copied or distributed. Again, Mr. Creighton does not challenge these observations.

We agree with the district court that, because Mr. Creighton's claim of prosecutorial misconduct lacked merit, neither trial nor appellate counsel was ineffective for not raising it. So Mr. Creighton has not shown cause for his procedural default and cannot overcome the procedural bar. Reasonable jurists could not debate the district court's rejection of this claim.

[7] As noted above, Mr. Creighton's appellate attorney asserted a claim of prosecutorial vindictiveness based on the prosecutor's filing of a § 851 information. *Creighton*, 853 F.3d at 1162-63, 1165. Mr. Creighton later asserted these different claims of prosecutorial misconduct.

2. **Warrantless Interception of Cell Phones**

Mr. Creighton next tried to show cause and prejudice on his warrantless interception claim by arguing his trial attorney was ineffective for failing to object to law enforcement's use of cellular towers to triangulate his location without a warrant. The district court said that "[t]he trial testimony established that law enforcement cannot obtain a cellphone's cellular tower use (and thereby the cellphone's location) unless the cellphone is wiretapped. And the trial testimony expressly established Mr. Creighton's several cellphones were never wiretapped." R. Vol. 2, at 109-10 (citation omitted). Thus, the court concluded that "law enforcement never used cellular towers to triangulate Mr. Creighton's location." *Id.* at 110. Mr. Creighton does not challenge these observations. He thus has not demonstrated that his trial attorney's performance was deficient for failing to object to wiretapping or triangulation that did not occur. It follows that he has not shown cause for his procedural default.

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Reasonable jurists could not debate the district court's rejection of Mr. Creighton's prosecutorial misconduct and warrantless interception claims as procedurally barred. We deny a COA on both.

C. ***Evidentiary Hearing***

Mr. Creighton asserts the district court should have held an evidentiary hearing. "We review the district court's refusal to hold an evidentiary hearing for an abuse of discretion." *United States v. Moya*, 676 F.3d 1211, 1214 (10th Cir. 2012) (internal quotation marks omitted). The district court found Mr. Creighton's claims could be

resolved on the existing record without a hearing. It also said Mr. Creighton did not explain what evidence he expected to adduce at a hearing or how it would support his claims.

In his COA application, Mr. Creighton argues he "was entitled to a hearing because the record does not show his inability to establish facts warranting relief." Def.'s Appl. for COA at 14 (internal quotation marks omitted). He further contends that Sarah L. and Cassandra C. "could have expanded" on their affidavits at a hearing. *Id.* at 13. Notwithstanding Mr. Creighton's failure to submit the affidavits to the district court, he has failed to explain what evidence he would present, including the "expanded" statements of Sarah L. and Cassandra C., and how it would support his claims. *See Moya*, 676 F.3d at 1214 (stating that "district courts are not required to hold evidentiary hearings in collateral attacks without a firm idea of what the testimony will encompass and how it will support a movant's claim" (brackets and internal quotation marks omitted)). "Given the conclusory nature of [Mr. Creighton's] allegations, the district court's denial of an evidentiary hearing was not an abuse of discretion." *Id.*

III. **CONCLUSION**

We deny a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge