FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JASON LESLIE JULIANO, *Defendant-Appellant.*	No. 20-35395 D.C. Nos. 2:19-cv-00325-SMJ 2:18-cr-00021-SMJ-1 OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Salvador Mendoza, Jr., District Judge, Presiding

Submitted August 10, 2021*
Seattle, Washington

Filed September 3, 2021

Before: Carlos T. Bea, Daniel A. Bress, and
Lawrence VanDyke, Circuit Judges.

Opinion by Judge VanDyke

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

SUMMARY[**]

28 U.S.C. § 2255

The panel affirmed the district court's denial of federal prisoner Jason Juliano's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence in a case in which Juliano claimed that his counsel rendered constitutionally deficient assistance by advising him to enter a guilty plea on a charge where the mandatory minimum penalty was later reduced by then-pending legislation—the First Step Act.

The panel affirmed based on the well-established rule that counsel does not render constitutionally deficient assistance by failing to anticipate changes in the law. The panel wrote that given the general uncertainty surrounding pending legislation, counsel's alleged failure to advise Juliano about the First Step Act or to seek a continuance based on this potential legislative change fails to meet the highly deferential test for deficient performance set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Applying the strong presumption that counsel's conduct was reasonable and sound trial strategy, the panel concluded that counsel's failure to anticipate the First Step Act was not objectively unreasonable.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Bryan P. Whitaker, Spokane, Washington, for Defendant-Appellant.

William D. Hyslop, United States Attorney; Earl A. Hicks, Assistant United States Attorney; United States Attorney's Office, Spokane, Washington; for Plaintiff-Appellee.

OPINION

VANDYKE, Circuit Judge:

I. Introduction

Federal prisoner Jason Juliano appeals the district court's denial of habeas relief under 28 U.S.C. § 2255. He claims that his counsel rendered constitutionally deficient assistance by advising him to enter a guilty plea on a charge where the mandatory minimum penalty was later reduced by then-pending federal legislation—the First Step Act.[1] Based on the well-established general rule that counsel does not render constitutionally deficient assistance by failing to anticipate changes in the law, we affirm.

II. Background

In January 2018, Juliano was indicted for being a felon in possession of a firearm and ammunition (Count 1), and for possession with intent to distribute fifty grams or more of actual (pure) methamphetamine (Count 2). Five months

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[1] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5194–249 (2018).

later, on June 7, 2018, Juliano entered a plea agreement with the government and agreed to plead guilty to both counts. A few months later, on October 9, 2018, the district court accepted the plea agreement and sentenced Juliano to 120 months for Count 1 and to 240 months for Count 2, to run concurrently.

Notably, in the plea agreement, the government agreed to recommend the minimum 240-month imprisonment and file only one sentence enhancement. At the time, for the offense charged in Count 2, 240 months was the minimum penalty permitted for a defendant who, like Juliano, had one prior felony drug offense conviction. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii) (2010) (amended 2018). For Juliano, that minimum penalty compared favorably with the 262- to 327-month guideline imprisonment range based on his total offense level and criminal history category.

Two and a half months after Juliano's sentencing, the First Step Act (Act) was signed into law on December 21, 2018. The Act reduced the mandatory minimum penalty for certain drug crimes, including those for which Juliano was convicted, from twenty years to fifteen years. 21 U.S.C. § 841(b)(1)(A). As is often the case with legislation, the Act did not enjoy easy passage. *See, e.g.*, Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 Yale L.J. F. 791, 794–95 (2019).

In September 2019, Juliano filed a *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence on the ground of ineffective assistance of counsel. Juliano argued, *inter alia*, that his attorneys provided ineffective assistance by failing to investigate or inform him about the First Step Act, which was pending in Congress when he was sentenced, or move for a continuance of his sentencing. In evaluating his petition, the district court reasoned that courts

"have uniformly concluded that a defense attorney is not deficient in failing to anticipate a change in the law." It also noted that "it is doubtful the Court would have been receptive to a request to delay sentencing by—at minimum—more than two months based solely on [Juliano]'s desire to be sentenced under a more favorable statutory scheme, the enactment of which was at that point only a possibility." The district court therefore denied Juliano's petition.

III. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. §§ 2253 and 2255(d), and "[w]e review de novo a district court's decision to deny a motion under 28 U.S.C. § 2255." *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158 (9th Cir. 2000). "A claim of ineffective assistance of counsel raises a mixed question of law and fact, which we review de novo." *Id.*

IV. Discussion

The Sixth Amendment guarantees "a defendant pleading guilty to a felony charge . . . . the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (citations omitted). To establish ineffective assistance of counsel, a defendant must show both that: (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Under *Strickland*, a criminal defendant's counsel may be deemed ineffective only if counsel's performance falls outside the wide range of reasonable professional assistance." *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100–01 (9th Cir. 2009) (citation and internal quotation marks omitted). "Our scrutiny of counsel's performance must be highly deferential, and the defendant must overcome the

presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 1101 (citation and internal quotation marks omitted).

"In particular, we must evaluate the conduct from counsel's perspective at the time, taking care not to view a lawyer's decisions in the distorting effects of hindsight . . . ." *Id.* (citation and internal quotation marks omitted). "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Id.* (citation omitted). The *Strickland* "test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

Given that the reasonableness of counsel's conduct must be evaluated based on the time it occurred, courts have articulated a rule that ineffective assistance of counsel claims generally cannot be predicated on counsel's failure to anticipate changes in the law.[2] For example, in *Lowry v. Lewis*, we determined that a "lawyer cannot be required to anticipate our decision" in a separate § 1983 suit raising

[2] *See, e.g.*, *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009) ("[W]e have repeatedly held that there is no general duty on the part of defense counsel to anticipate changes in the law." (citation and internal quotation marks omitted)); *Sistrunk v. Vaughn*, 96 F.3d 666, 670–71 (3d Cir. 1996) ("[I]n making litigation decisions, there is no general duty on the part of defense counsel to anticipate changes in the law." (citation and internal quotation marks omitted)); *Carter v. Hopkins*, 92 F.3d 666, 670 (8th Cir. 1996) ("We have stated previously that counsel need not anticipate a change in existing law to render constitutionally effective assistance of counsel." (citation and internal quotation marks omitted)); *Lilly v. Gilmore*, 988 F.2d 783, 786–88 (7th Cir. 1993) (observing that counsel is not required to forecast changes or advances in the law).

similar issues. 21 F.3d 344, 346 (9th Cir. 1994). In *Lowry*, the petitioner claimed ineffective assistance of counsel because his lawyer did not move to suppress contraband found from a search of the petitioner's body. *Id.* at 345. Although his lawyer knew of a § 1983 lawsuit challenging the search, the lawyer declined to move to suppress evidence from the search after learning that related motions to suppress had failed. *Id.* On habeas review, the petitioner argued that the evidence from the search would have been suppressed pursuant to one of our court's decisions rendered in the § 1983 lawsuit. *Id.* at 346. But that decision was issued *after* his lawyer declined to file a motion to suppress. *See id.* Reasoning that counsel's conduct "must be evaluated for purposes of the performance standard of *Strickland* as of the time of counsel's conduct," *id.* (citation and internal quotation marks omitted), we concluded that counsel's performance was not deficient when, among other things, he failed to anticipate a future decision. *See id.*

Although *Lowry* concerned developments in the law arising from a judicial opinion, a similar rationale applies to changes in the law from legislation. Whether a change in the law occurs from the issuance of an opinion or the enactment of a bill, the crux of the deficiency prong in an ineffective assistance of counsel claim centers on the reasonableness of counsel's conduct at the time it occurred. *See Strickland*, 466 U.S. at 690; *Lowry*, 21 F.3d at 346. Here, similar to *Lowry*, the law that Juliano argues his counsel allegedly failed to anticipate was not actually law at the time of his counsel's challenged conduct. Nor was it certain that it would become law. Only a fraction of proposed legislation

eventually becomes law.[3] And for this particular proposed legislation—despite its wide, bipartisan support (and reported assurances from the President that he would sign it into law if presented to him)—at the time of counsel's challenged conduct, it remained unclear if and when it would ever become law.[4] Given the general uncertainty surrounding pending legislation, Juliano's counsel's alleged failure to advise Juliano about the First Step Act or to seek a continuance based on this potential legislative change fails to meet *Strickland*'s highly deferential test. 466 U.S. at 689. Applying the strong presumption that counsel's conduct was reasonable and "sound trial strategy," *id.* (citation omitted), Juliano's counsel's failure to anticipate the First Step Act was not objectively unreasonable. *See id.* at 688.

Holding otherwise would pose serious hindsight problems. Juliano's counsel's alleged failure to predicate his sentencing strategy on potential legislative changes only begins to appear potentially deficient with the benefit of hindsight that the Act eventually became law. Prior to its enactment, the Act faced a possibility of failure in Congress. At the time of sentencing, the possibility that the First Step Act would be passed did not require Juliano's counsel to change his approach to Juliano's sentencing. Just as *Strickland* warned us against second-guessing counsel's trial strategy, it also admonished us to make "every effort . . . to eliminate the distorting effects of hindsight." *Id.* at 689. Requiring defense counsel to change their approach based

[3] *See Statistics and Historical Comparison*, GOVTRACK (last visited Aug. 25, 2021, 10:20 a.m.), https://www.govtrack.us/congress/bills/statistics.

[4] *See* Amy B. Cyphert, *Reprogramming Recidivism: The First Step Act and Algorithmic Prediction of Risk*, 51 Seton Hall L. Rev. 331, 333 (2020).

on legislative proposals that might become law would run counter to *Strickland*'s guidance.

This case in particular illustrates how permitting criminal defendants to claim ineffective assistance of counsel based on post-sentencing legislative changes invites speculation. As part of Juliano's pre-First Step Act plea deal, the government agreed to file only one prior conviction enhancement, even though the government could have filed multiple enhancements based on Juliano's criminal history. *See* 21 U.S.C. § 851. There is no guarantee that the government would have offered the same plea deal if Juliano had attempted to delay his sentencing. And while Juliano's mandatory minimum sentence under the First Step Act for his plea with only *one* prior conviction enhancement would have been fifteen years (instead of the twenty he received), 21 U.S.C. § 841(b)(1)(A), his mandatory minimum if the government had filed *two* prior conviction enhancements would have been *twenty-five* years under the First Step Act. *See id.* The uncertainty of a better deal for Juliano after the enactment of the First Step Act underscores the inability to show that his counsel acted unreasonably.[5]

[5] We further note that the ability of Juliano's counsel to have obtained a delay in sentencing is questionable at best. Counsel for defendants are not capable of delaying sentencing unilaterally; both district courts and prosecutors face institutional pressures to close cases and avoid dilatory tactics or delay.

V. Conclusion

Juliano has not shown that his counsel's conduct throughout his sentencing was objectively unreasonable. His ineffective assistance of counsel claim therefore fails.

AFFIRMED.