FILED
United States Court of Appeals
Tenth Circuit

April 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DUSTIN FIGUEROA-ESPINOZA,

Defendant - Appellant.

No. 21-4140
(D.C. No. 2:21-CV-00383-DBB & 2:20-CR-00172-DS-1)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, Chief Judge, **KELLY**, and **ROSSMAN**, Circuit Judges.

Proceeding pro se,[1] Dustin Figueroa-Espinoza requests a certificate of appealability ("COA") to challenge the district court's order dismissing his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mr. Figueroa-Espinoza contends that the district court erred in denying his ineffective-assistance-of-counsel claims stemming from the district court's proceedings in which he pleaded guilty to one count of unlawful reentry by a previously removed alien and was sentenced to

---

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Because Mr. Figueroa-Espinoza litigates this matter pro se, we construe his filings liberally but do not act as his advocate. *See United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013).

37 months' imprisonment. Mr. Figueroa-Espinoza further asserts that the district court erred in construing his motion to reconsider the denial of his initial § 2255 motion as an unauthorized second or successive § 2255 motion and dismissing it for lack of jurisdiction. To pursue this latter contention of error, Mr. Figueroa-Espinoza also requires a COA. As to both of these—his challenge to the district court's denial of his initial § 2255 motion and his challenge to the court's dismissal of his motion to reconsider—we **deny** Mr. Figueroa-Espinoza a COA. Accordingly, we **dismiss** this matter.

I

Mr. Figueroa-Espinoza is a Peruvian national who unlawfully entered the United States in 2002. In 2010, U.S. Immigration and Customs Enforcement ("ICE") detained him in Salt Lake City, Utah, after local authorities arrested and charged him with a misdemeanor offense of attempted aggravated assault with a deadly weapon. A Salt Lake City immigration judge ordered Mr. Figueroa-Espinoza removed, and ICE deported him to Peru.

Sometime later, Mr. Figueroa-Espinoza returned to the United States. In 2016, he was again arrested, this time for forgery. But he was ultimately convicted in federal court for unlawfully reentering the United States. The district judge sentenced him to time served, and ICE again deported Mr. Figueroa-Espinoza.

Mr. Figueroa-Espinoza returned to the United States once more. Relevant to this case, the Sandy City, Utah police department arrested Mr. Figueroa-Espinoza in 2019 for possession of drug paraphernalia. After learning of his immigration status and previous

deportation history, the federal government charged Mr. Figueroa-Espinoza with one count of illegal reentry. The government initially offered him a plea agreement as part of the District of Utah's Fast Track program,[2] with a recommended sentence of 24 to 30 months in prison. At the plea hearing, Mr. Figueroa-Espinoza, who was represented by counsel, rejected the Fast Track agreement; instead, he entered a guilty plea while requesting a downward variance to a sentence of time served.

Both the district court and Mr. Figueroa-Espinoza's counsel calculated his range under the U.S. Sentencing Guidelines Manual ("Guidelines" or "U.S.S.G.") to be 37 to 47 months' imprisonment in the absence of a Fast Track agreement. After hearing argument on his request for a downward variance, the district court rejected the request and sentenced Mr. Figueroa-Espinoza to 37 months' imprisonment with credit for time served in federal custody. Mr. Figueroa-Espinoza filed a notice of appeal from the court's judgment imposing this sentence but then voluntarily dismissed it.

---

[2] As we have previously explained:

> Fast [] [T]rack sentencing programs originated with federal prosecutors in states bordering Mexico, who were faced with increasing numbers of illegal reentry and other immigration cases. They accordingly designed programs whereby defendants accused of certain immigration offenses would plead guilty early in the process and waive their rights to file certain motions and to appeal, in exchange for a shorter sentence. The shorter sentence was accomplished either by charge-bargaining or by promising to recommend a downward departure at sentencing.

United States v. Morales-Chaires, 430 F.3d 1124, 1127 (10th Cir. 2005).

On June 21, 2021, Mr. Figueroa-Espinoza filed the motion at issue here, requesting relief under 28 U.S.C. § 2255. Proceeding pro se, he asserted the following:

> I was incorrectly represented by my federal public defender. He misrepresented my previous history and left out important information that should have been brought to the court[']s attention. My lawyer also gave me the wrong information [regarding] my offense level and about [the] Fast Track program.
>
> . . . .
>
> One week before my sentence when my lawyer talked to me, he told me that I didn[']t have a choice and I had to choose [the] guilty plea. Because of the fact that English is not my native language, when the lawyer told me "I had no choice" I thought that was literal and legally I had no choice but to choose guilty.
>
> And he told me my offense level [] was 20, facing 2 or 3 years in federal custody[.] [T]hat [was] wrong information because my rig[ht] offense level is . . . 17. . . . That [was] the r[eason] I didn't use[] the [Fast Track program]. I need a correct sentence.

R., Vol. I, at 7–8 (Section 2255 Motion, filed June 21, 2021) (bullet points omitted).

Construing his motion liberally, we understand Mr. Figueroa-Espinoza to have asserted before the district court that he was deprived of effective assistance of counsel because (1) his attorney's alleged misrepresentations regarding his offense level led him to reject the Fast Track agreement and (2) his attorney's statements left him with the erroneous belief that he had no choice but to plead guilty and forgo a trial. *See id.*

The district court denied Mr. Figueroa-Espinoza's § 2255 motion. Regarding Mr. Figueroa-Espinoza's first ineffective-assistance claim, the district court held that he failed to show that his counsel's performance—i.e., allegedly telling him that his offense level

was 20, instead of 17—was constitutionally deficient. The court reasoned that "an attorney's simple miscalculations, mistakes, or misstatements in estimating sentences" generally "are not objectively unreasonable," and it further found that any error would have been corrected when his counsel argued—and the district court correctly determined—the offense level was 17 at his sentencing hearing. *Id.* at 23 (Dist. Ct. Order, filed Sept. 27, 2021). The court also ruled that Mr. Figueroa-Espinoza failed to show prejudice, because he offered "no explanation as to why being told that his offense level was higher than it actually was, and thus that he faced a longer sentence th[a]n what he ultimately received, made him reject a [F]ast [] [T]rack agreement that would have reduced his sentence regardless of his offense level." *Id.* at 23–24. And the court further determined that the record belied Mr. Figueroa-Espinoza's argument: specifically, the record demonstrated that Mr. Figueroa-Espinoza rejected the Fast Track agreement because he wanted the court to give him a time-served sentence. Consequently, the district court dismissed, purportedly without prejudice, his § 2255 motion on September 27, 2021. *See id.* at 25 (Dist. Ct. J., filed Sept. 27, 2021) (dismissing the § 2255 motion "without prejudice.").

As to Mr. Figueroa-Espinoza's argument that he was misinformed about having "no choice" whether to plead guilty, the district court held that his ineffective-assistance claim would fail because he had neither shown that his attorney's performance was objectively unreasonable nor that it prejudiced his defense. R., Vol. I, at 22.

Mr. Figueroa-Espinoza then filed the notice of appeal at issue here on November 17, 2021. In his notice of appeal, he specifies that he seeks to appeal from the

district court's "order denying [his] motion to vacate, set aside, or correct [his] sentence under 28 U.S.C. § 2255 entered in this action on the twenty seventh day of September, 2021." R., Vol. I, at 26 (Notice of Appeal, filed Nov. 17, 2021).

While this appeal was pending, Mr. Figueroa-Espinoza filed a "motion to reconsider" in the district court asking the district court to reconsider its prior ruling on his § 2255 motion. *See id.* at 29 (Mot. to Reconsider, filed Nov. 29, 2021). In this motion, Mr. Figueroa-Espinoza raised two "issue[s]":

> I. Whether counsel was ineffective for fail[ing] to investigate and challenge [the] original removal proceedings where Petitioner's previous convictions were neither [an] aggravated felony nor [a] crime of violence to form [the] predicate offense for deportation?
>
> II. Whether counsel was ineffective for fail[ing] to investigate and making Petitioner believe that the time served sentence was [a] real possibility despite his criminal histories?

Id. at 29–30.

Regarding the second issue, Mr. Figueroa-Espinoza alleged that counsel told him that he had three options: (1) go to trial, (2) plead guilty through the Fast Track program, or (3) plead guilty and request a sentence of time served. His main grievance was that "counsel represented . . . that [a sentence of] time serve[d] was [a] realistic option." *Id.* at 34. Yet had counsel "adequately investigated the case laws and [his] criminal history," Mr. Figueroa-Espinoza avers that "he would have known that [the] time served sentence would not be an option." *Id.*

The district court dismissed this motion to reconsider on December 16, 2021, holding that because it "does no more than assert grounds for relief under § 2255 that

[Mr. Figueroa-Espinoza] did not include in his original motion, . . . it is, therefore, a second or successive § 2255 motion." R., Vol. I, at 37–38 (Dist. Ct. Order Dismissing Mot. to Reconsider, filed Dec. 16, 2021). The district court concluded that it lacked jurisdiction to consider what, in effect, was Mr. Figueroa-Espinoza's second or successive § 2255 motion because he "did not receive authorization from the court of appeals to file a second or successive § 2255 motion." *Id.* at 38.

II

A

The granting of a COA is a jurisdictional prerequisite to an appeal from the denial of a § 2255 motion. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To receive a COA, Mr. Figueroa-Espinoza must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make the requisite showing, he must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (quotations omitted).

"The COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. 100, 115 (2017). In evaluating whether Mr. Figueroa-Espinoza has satisfied his burden to secure a COA, we undertake "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each of his claims. *Miller-El*, 537 U.S. at 338; *see also Buck*, 580 U.S. at 115 (noting that "[t]his threshold question [of whether the COA standard is satisfied] should be decided without 'full consideration of

the factual or legal bases adduced in support of the claims'" (quoting *Miller-El*, 537 U.S. at 336)). Though Mr. Figueroa-Espinoza need not demonstrate his appeal will succeed on the merits to be entitled to a COA, he still must "prove 'something more than the absence of frivolity' or the existence of mere 'good faith.'" *Miller-El*, 537 U.S. at 338 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

Importantly, Mr. Figueroa-Espinoza must make this COA showing as to both the district court's merits-based *and* procedural decisions—here, the court's merits dismissal of the ineffective-assistance claims he raised in his initial § 2255 motion, *see* 28 U.S.C. § 2253(c)(2), *and* its procedural dismissal of his motion to reconsider as an unauthorized second or successive § 2255 motion. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (noting that courts will grant a COA only if a petitioner "shows, at least, that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its *procedural* ruling" (emphases added)); *Spitznas v. Boone*, 464 F.3d 1213, 1225 (10th Cir. 2006) (applying the COA requirement to an appeal from an order denying a Rule 60(b) motion); *see also United States v. Tatum*, 613 F. App'x 770, 770 (10th Cir. 2015) (unpublished) ("We retain jurisdiction . . . to consider whether [the petitioner] is entitled to a COA permitting review of the district court's denial of his Rule 59(e) motion."); *United States v. Jack*, 692 F. App'x 505, 508 (10th Cir. 2017) (unpublished) ("Because the district court dismissed [the petitioner's] petition on procedural grounds, we will grant a COA only if he 'shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" (quoting *McDaniel*, 529 U.S. at 484)); *United States v. Cobb*, 307 F. App'x 143, 145 (10th Cir. 2009) (unpublished) (observing, in a § 2255 proceeding, that *Spitznas*'s reasoning underlying the COA requirement for an appeal of a Rule 60(b) ruling "applies equally to motions under Rule 59(e)"). [3]

B

We first address Mr. Figueroa-Espinoza's challenge to the district court's dismissal of his motion to reconsider. In particular, we construe Mr. Figueroa-Espinoza's Combined Opening Brief and Application for a Certificate of Appealabilty ("Opening Brief") as seeking in part to appeal from the district court's denial of his motion to reconsider. And we conclude that we have jurisdiction to consider that appeal. However,

[3] Although *Spitznas* implicated the interplay between 28 U.S.C. § 2254 and Rule 60(b), we have extended its analysis to second or successive motions filed under § 2255. *See United States v. Nelson*, 465 F.3d 1145, 1147 (10th Cir. 2006); *see also United States v. Vazquez*, 615 F. App'x 900, 902 n.3 (10th Cir. 2015) (unpublished) (recognizing our extension of *Spitznas* to successive § 2255 motions). We have similarly applied *Slack*'s two-step framework in reviewing procedural rulings by district courts dismissing prisoner filings for lack of jurisdiction on the ground that they are, in effect, second or successive § 2255 motions—even though *Slack*, itself, concerned a post-conviction challenge brought under § 2254. *See Slack*, 529 U.S. at 478 ("Slack filed a petition for writ of habeas corpus in federal court under 28 U.S.C. § 2254."); *see also United States v. Springer*, 875 F.3d 968, 981 (10th Cir. 2017) (noting that an "unauthorized second or successive petition" brought under § 2255 is subject to "the two-part test for procedural rulings set forth by the Supreme Court in *Slack*"); *United States v. McKenzie*, 803 F.3d 1164, 1164–65 (10th Cir. 2015) (applying the *Slack* standard to the denial of a § 2255 motion); *United States v. Robinson*, 762 F. App'x 571, 575 (10th Cir. 2019) (unpublished) (same). Therefore—because the underlying frameworks applicable to the COA requirement are the same for post-conviction challenges brought under both § 2255 and § 2254—we rely on caselaw decided under both statutes.

that determination does not avail Mr. Figueroa-Espinoza because reasonable jurists could not debate the correctness of the district court's procedural ruling that Mr. Figueroa-Espinoza's motion to reconsider was actually a second or successive § 2255 motion over which the court lacked jurisdiction. Consequently, reasonable jurists also could not debate the court's decision to dismiss that motion. Therefore, we deny a COA to Mr. Figueroa-Espinoza as to the motion-to-reconsider portion of his appeal.

1

Before we may evaluate the district court's ruling on Mr. Figueroa-Espinoza's motion to reconsider, we must first determine whether this ruling is within the scope of Mr. Figueroa-Espinoza's appeal; we conclude that it is.

Ordinarily, to give us jurisdiction, Mr. Figueroa-Espinoza had to "designate [in his notice of appeal] the judgment—or the appealable order—from which the appeal [wa]s taken." FED. R. APP. P. 3(c)(1)(B) (effective Dec. 1, 2021); *see Williams v. Akers*, 837 F.3d 1075, 1078 (10th Cir. 2016) ("[Federal Rule of Appellate Procedure] 3(c)(1)(B)'s designation requirement is jurisdictional.").[4] Under Federal Rule of Appellate Procedure 4(a)(1)(B), Mr. Figueroa-Espinoza had sixty days after the district court dismissed the motion to reconsider to notice his appeal. *See* FED. R. APP. P. 4(a)(1)(B). Though Mr.

[4] The Supreme Court's 2021 amendments to the Federal Rules of Appellate Procedure, including Rule 3, became effective on December 1, 2021. *See* S. Ct. Order Amending Fed. R. App. P. at 2 (Apr. 14, 2021), https://www.supremecourt.gov/orders/courtorders/frap21_9p6b.pdf (last visited Apr. 10, 2023). However, the amendment to Rule 3 did not purport to alter the jurisdictional nature of the designation requirement. *See generally* FED. R. APP. P. 3, advisory committee's notes to the 2021 amendment.

Figueroa-Espinoza failed to file a second notice of appeal—after noticing his appeal from the district court's denial of his initial § 2255 motion—"a document filed within the time specified by Rule 4 [that] gives the notice required by Rule 3" can be "effective as a notice of appeal." *Smith v. Barry*, 502 U.S. 244, 248–49 (1992).

The district court dismissed Mr. Figueroa-Espinoza's motion to reconsider on December 17, 2021. Mr. Figueroa-Espinoza filed his Opening Brief on January 28, 2022, well within the sixty-day period prescribed by Rule 4. Moreover, Mr. Figueroa-Espinoza's Opening Brief meets all of Rule 3(c)(1)'s designation requirements. *See* FED. R. APP. P. 3(c)(1) (providing that a notice of appeal must "specify the party or parties taking the appeal . . . ; designate the judgment—or the appealable order—from which the appeal is taken; and . . . name the court to which the appeal is taken"). Accordingly, we conclude that Mr. Figueroa-Espinoza's Opening Brief constitutes, in effect, a notice of appeal from the district court's denial of his motion to reconsider and that appeal is properly before us. *See, e.g.*, *Lawrence v. Oliver*, 602 F. App'x 684, 685 (10th Cir. 2015) (unpublished) (concluding that the appellant's opening brief had the effect of a notice of appeal as to the district court's denial of appellant's Rule 59(e) motion).

2

Though we conclude that Mr. Figueroa-Espinoza's Opening Brief notices his appeal from the district court's denial of his motion to reconsider, there is another significant hurdle that he must overcome: Mr. Figueroa-Espinoza must secure a COA to have his appellate arguments as to the motion to reconsider determined on the merits. This he cannot do.

Mr. Figueroa-Espinoza asserts that the court erred by construing his motion to reconsider as a second or successive § 2255 motion because the district court dismissed the initial § 2255 motion *without* prejudice. Due to this disposition, Mr. Figueroa-Espinoza contends that he "could bring [a] [§] 2255 motion without any restriction." Aplt.'s Opening Br., Continuation at 1. Accordingly, as he reasons, the court "should have addressed the merits" of the claims in his motion to reconsider. *Id*. In turn, Mr. Figueroa-Espinoza advances on appeal additional ineffective-assistance arguments that he added to his motion to reconsider but omitted from his initial § 2255 motion. *See id.*, Continuation at 2–8.

At the outset, like the district court, we identify Federal Rule of Civil Procedure 60(b) as the basis for Mr. Figueroa-Espinoza's motion to reconsider because he filed his motion more than 28 days after the district court entered judgment on September 27, 2021. *See* FED. R. CIV. P. 59(e) (limiting motions to alter or amend a judgment to 28 days after judgment); FED. R. CIV. P. 60(c) (allowing for a Rule 60(b) motion to "be made within a reasonable time" but, in certain instances, "no more than a year" after judgment); Aplt.'s Opening Br., Continuation at 1 (claiming that the motion to reconsider was mailed on November 29, 2021); *see also Warren v. Am. Bankers Ins. of Fla.*, 507 F.3d 1239, 1243–44 (10th Cir. 2007) (explaining that we construe a "motion to reconsider" filed after the deadline to alter or amend a judgment as arising "under [Rule] 60 as a motion for relief from judgment"); *Williams*, 837 F.3d at 1077 n.1 ("Here, the defendants concede we must construe their motion to reconsider as a Rule 60(b) motion because they filed it outside of Rule 59(e)'s 28-day time limit.").

Though Rule 60(b) might constitute the nominal basis for Mr. Figueroa-Espinoza's motion, we must still consider whether it is a "true" Rule 60(b) motion or whether it is, in substance, a second or successive § 2255 motion. *Spitznas* 464 F.3d at 1217–19 (outlining the procedures to follow on appeal from the denial of a nominal Rule 60(b) motion in a habeas case); *see also In re Lindsey*, 582 F.3d 1173, 1175 (10th Cir. 2009) (per curiam) (noting that we treat the motion as a habeas petition if it "in substance or effect asserts or reasserts a federal basis for relief from the [] underlying conviction" (quoting *Spitznas*, 464 F.3d at 1215)); *cf. United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) ("It is the relief sought, not [the] pleading's title, that determines whether the pleading is a § 2255 motion.").

The distinction between a "true" 60(b) motion and a second or successive § 2255 motion is important. That is because, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), prisoners must first obtain an order from the appropriate court of appeals authorizing the district court to consider a second or successive motion under § 2255. *See* 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). That is, unlike a "true" 60(b) motion, district courts do not have jurisdiction to consider second or successive § 2255 motions absent authorization from the court of appeals. Accordingly, if Mr. Figueroa-Espinoza's motion is in substance a second or successive § 2255 motion, the district court lacked "jurisdiction to deny the relief sought in the pleading" because "a second or successive § 2255 motion cannot be filed in district court without approval by a panel of this court." *Nelson*, 465 F.3d at 1148.

Before determining whether Mr. Figueroa-Espinoza's motion to reconsider functions as a "true" Rule 60(b) motion or a second or successive § 2255 motion, we address his threshold argument that his motion, as a categorical matter, cannot be deemed a second or successive § 2255 motion because the district court denied his initial § 2255 motion *without* prejudice. *See* Aplt.'s Opening Br. at 1. Construing his briefing liberally, we understand Mr. Figueroa-Espinoza to argue that his initial § 2255 motion did not "count" for purposes of § 2255(h)'s limitations regarding second or successive motions because it was dismissed without prejudice.

When it comes to assessing whether a motion is second or successive, however, we do not elevate form over substance. Though dismissals without prejudice ordinarily mean that parties are left in the same position as if no complaint had been filed, *see Dismissed Without Prejudice*, BLACK'S LAW DICTIONARY (11th ed. 2019), judicial decisions make clear that a merits adjudication of a movant's initial § 2255 motion results in that motion counting as the "first" motion under the statute. *See In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (concluding that once a petitioner's first habeas petition is adjudicated "on the merits, . . . any later habeas petition challenging the same conviction is second or successive and is subject to the AEDPA requirements"); *see also Thai v. United States*, 391 F.3d 494, 494 (2d Cir. 2004) (concluding that "an initial petition will 'count' where it has been adjudicated on the merits *or* dismissed with prejudice" (emphasis added)); *cf. Haro-Arteaga v. United States*, 199 F.3d 1195, 1197 (10th Cir. 1999) (per curiam) (declining to construe a movant's second § 2255 motion as a second or successive motion where the movant voluntarily withdrew his initial motion without

"conced[ing] any claim" and where the district court did not "decide[] [the claim] on the merits or . . . engage[] in [a] substantive review" of the motion).

Guided by this caselaw, we conclude that Mr. Figueroa-Espinoza cannot use the district court's dismissal of his initial § 2255 motion *without* prejudice to justify sidestepping AEDPA's limitations concerning second or successive § 2255 motions—where, as here, the court rejected that motion on the merits. Thus, the district court's merits adjudication of Mr. Figueroa-Espinoza's initial § 2255 motion means that § 2255(h)'s provisions regarding second or successive § 2255 motions apply in Mr. Figueroa-Espinoza's case.

We now turn to consider whether Mr. Figueroa-Espinoza's motion to reconsider functions as a "true" Rule 60(b) motion or a second or successive § 2255 motion. Mr. Figueroa-Espinoza's motion would be classified as a "true" Rule 60(b) motion if it "(1) challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application; or (2) challenges a defect in the integrity of the federal habeas proceeding." *Spitznas*, 464 F.3d at 1215–16 (citation omitted). In contrast, the Supreme Court has straightforwardly held that a motion that "present[s] new claims for relief" reflects an attempt to "circumvent[] AEDPA's requirement[s]," and is the stuff of second or successive motions. *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005).

Reasonable jurists could not debate that the district court correctly concluded that Mr. Figueroa-Espinoza's motion to reconsider was actually a second or successive § 2255 motion falling beyond the district court's jurisdiction. And, therefore, such jurists naturally could not debate the correctness of the district court's dismissal of his motion.

In his initial § 2255 motion, Mr. Figueroa-Espinoza complained that his counsel misrepresented his criminal history, incorrectly calculated his offense level, gave him incorrect information about the Fast Track program, omitted important information from the court's consideration, and misled him as to his right to plead guilty or not guilty. *See* R., Vol. I, at 7–8.

In his motion to reconsider, Mr. Figueroa-Espinoza presented the following issues: (1) whether his counsel rendered ineffective assistance in failing "to investigate and challenge [his] original removal proceedings where [Mr. Figueroa-Espinoza's] previous convictions . . . neither [constituted an] aggravated felony nor [a] crime of violence to form [the] predicate offense for deportation?" and (2) whether his counsel rendered ineffective assistance in failing "to investigate" and misleading "[Mr. Figueroa-Espinoza] [to] believe that the time served sentence was [a] real possibility despite his criminal histories?" R., Vol. I, at 29–30.

This first issue of the motion to reconsider is nothing more than "a claim of constitutional error omitted from [his] initial habeas petition"—the very kind of nominal Rule 60(b) matter that we have said "should be treated as [a] second or successive habeas petition[]." *Spitznas*, 464 F.3d at 1216. Mr. Figueroa-Espinoza's second issue fares no better. Though Mr. Figueroa-Espinoza's assertions regarding counsel's assurances as to the availability of a non-Fast Track, time-served sentence may help to explain his decision to reject the Fast Track agreement, "a Rule 60(b) motion is not an appropriate vehicle to advance new arguments or supporting facts that were available but not raised at the time of the original argument." *Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir.

2016). By offering a more fulsome account of his counsel's alleged deficient performance and the prejudice he allegedly suffered as a result, Mr. Figueroa-Espinoza has effectively "c[o]me up with a new way to present [an] old argument[]." *United States v. Johnson*, 762 F. App'x 457, 461 (10th Cir. 2019) (unpublished).

In sum, by adding these new, merits-based arguments, Mr. Figueroa-Espinoza has "attack[ed] the federal court's previous resolution of [his initial § 2255 motion] on the merits." *Gonzalez*, 545 U.S. at 532 (emphasis removed). We have said that such efforts to "vindicat[e]" a rejected § 2255 claim are properly characterized as second or successive § 2255 motions. *Spitznas*, 464 F.3d at 1216.

Reasonable jurists could not debate that the district court correctly concluded that, in raising these issues in his motion to reconsider, Mr. Figueroa-Espinoza did "no more than assert grounds for relief under § 2255 that he did not include in his original motion." R. Vol. I, at 37–38. As such, he presented the district court with a second or successive § 2255 motion that the court did not have jurisdiction to consider; consequently, reasonable jurists could not debate the court's decision to dismiss the motion for lack of jurisdiction.

C

We now turn to the arguments advanced in Mr. Figueroa-Espinoza's initial § 2255 motion. Finding those arguments unavailing, we deny his request for a COA. Recall that, where the district court denies a § 2255 motion's constitutional claims on the merits, as here, to secure a COA, the prisoner must make a substantial showing of the denial of a constitutional right. *See, e.g.*, *Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004).

Because Mr. Figueroa-Espinoza's § 2255 claims are based on ineffective assistance of counsel, he therefore must make a substantial showing "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

1

We first evaluate Mr. Figueroa-Espinoza's assertion that his counsel was ineffective for failing to advise him of the proper Sentencing Guidelines range. Mr. Figueroa-Espinoza contends that his counsel informed him that his offense level was 20—indicating that he faced 2 to 3 years in federal custody—when his offense level was actually 17. In turn, he claims that this led him to believe that he "faced [an] almost identical [G]uidelines range of 2 or 3 years (24–36 months) as [the] [F]ast [T]rack guilty plea range of 24–30 months." Aplt.'s Opening Br., Continuation at 2.

Critically, Mr. Figueroa-Espinoza additionally argues that he rejected the Fast Track agreement because his counsel had "assured" him "that [a] sentence of time served was [a] very realistic option." *Id.* In other words, "[i]f counsel . . . told [him] that his [G]uidelines range without [F]ast [T]rack was 37–46 months, with [F]ast [T]rack 24–30 months, and *time served would not be possible due to his criminal histories*, [he] obviously would have pleaded guilty pursuant to a [F]ast [T]rack plea agreement, and[] would have received [a] lower sentence." *Id.* at 2–3 (emphasis added).

However, it cannot be disputed that Mr. Figueroa-Espinoza failed to raise any argument—or allege any facts—as to counsel's discussions with him regarding the availability of a time-served sentence *until his motion to reconsider*. Accordingly, he has

failed to preserve this particular line of argument for our review of the district court's denial of his initial § 2255 motion. [5]

Because Mr. Figueroa-Espinoza cannot attribute his choices to counsel's alleged misrepresentations regarding the availability of a time-served sentence, Mr. Figueroa-Espinoza's § 2255 claim here boils down to the following propositions: (1) counsel rendered deficient performance by incorrectly advising him that his Guidelines range under the Fast Track and non-Fast Track options were roughly the same when they actually were not and (2) he received a lengthier sentence by rejecting the Fast Track agreement. Under this framing, reasonable jurists could not debate the correctness of the district court's rejection of Mr. Figueroa-Espinoza's ineffective-assistance claim. Suffice

[5] It is notable that Mr. Figueroa-Espinoza's inability to raise this line of argument regarding counsel's alleged constitutionally deficient advice as to a time-served sentence especially undermines his ineffective-assistance claim on the question of prejudice. The record shows that, for him, the central appeal of the non-Fast Track plea was the availability of a time-served sentence. In particular, the sentencing transcript suggests that Mr. Figueroa-Espinoza would likely have rejected the Fast Track agreement because he wanted a sentence of time served. *See, e.g.*, Dist. Ct. Sentencing Tr. at 17 ("[T]he reason that Mr. Figueroa-Espinoza chose to forego [sic] the [F]ast [T]rack agreement is because he wants to ask of the Court a credit-for-time-served sentence . . . ."). Accordingly, that means, for purposes of showing prejudice, Mr. Figueroa-Espinoza would need to demonstrate a reasonable probability that, but for counsel's deficient performance in advising him as to the realistic possibility of a time-served sentence, he would have accepted the Fast Track agreement instead. *See Missouri v. Frye*, 566 U.S. 134, 147 (2012). And Mr. Figueroa-Espinoza does make arguments to this effect. *See* Aplt.'s Opening Br., Continuation at 2–3 ("If counsel would ha[ve] told Appellant that . . . [a] time served [sentence] would not be possible due to his criminal histories, Appellant obviously would have pleaded guilty pursuant to [the] [F]ast [T]rack plea agreement."). However, because he did not advance these arguments about counsel's alleged ineffectiveness concerning a time-served sentence until his motion to reconsider, they are unpreserved and unavailable to him here on the question of prejudice.

it to say that this is so because—even under a "preliminary" consideration of the applicable legal principles, *Miller-El*, 537 U.S. at 338 —Mr. Figueroa-Espinoza's showing as to the first prong of *Strickland*'s standard is inadequate, *viz.*, he does not come close to demonstrating that his counsel's performance was constitutionally deficient.

As the district court noted, we have repeatedly held that "[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993); *see, e.g., United States v. Ruiz*, 854 F. App'x 259, 262 (10th Cir. 2021) (unpublished) (rejecting ineffective-assistance claim based on unexpected increase in Guidelines range); *United States v. Garcia*, 630 F. App'x 755, 758 (10th Cir. 2015) (unpublished) (rejecting ineffective-assistance claim based on counsel's incorrect estimate of mandatory maximum and minimum sentences); *United States v. Harrison*, 375 F. App'x 830, 835 (10th Cir. 2010) (unpublished) (rejecting ineffective-assistance claim based on counsel's misrepresentation of the length of a prison sentence the defendant would serve for a guilty plea).

Mr. Figueroa-Espinoza cites to the Fifth Circuit's decision in *United States v. Grammas* to assert that, by "grossly" underestimating a defendant's sentencing exposure, counsel may "breach[] his duty to advise his client fully of whether a particular plea to a charge appears desirable." Aplt.'s Opening Br., Continuation at 3 (quoting *United States v. Grammas*, 376 F.3d 433, 436–37 (5th Cir. 2004)). But this out-of-circuit authority does not bind us.

Moreover, we have adopted a different approach, holding a counsel's performance is constitutionally deficient only if the defendant can "establish that counsel failed to understand the basic structure and mechanics of the sentencing guidelines and was therefore incapable of helping the defendant to make reasonably informed decisions throughout the criminal process." *United States v. Washington*, 619 F.3d 1252, 1260 (10th Cir. 2010); *see also United States v. Parker*, 720 F.3d 781, 787 n.9 (10th Cir. 2013) (distinguishing a "miscalculation or erroneous sentence estimation by defense counsel"—which is not a constitutional violation—from a "failure 'to understand the basic structure and mechanics of the sentencing guidelines'" (first quoting *Gordon*, 4 F.3d at 1570; and then quoting *Washington*, 619 F.3d at 1260)). Mr. Figueroa-Espinoza neither cites *Washington* nor contends that miscalculating a Guidelines range by 13 months (that is, confusing 24–36 months with 37–46 months) rises to the level of failing to understand the structure and mechanics of the Guidelines. In other words, he has not carried his burden under our precedent of demonstrating that counsel's alleged Guidelines miscalculation amounted to constitutionally deficient performance.

In any event, the record belies Mr. Figueroa-Espinoza's claim that his counsel rendered deficient performance by incorrectly advising him that his Guidelines range under the Fast Track and non-Fast Track options were roughly the same when they actually were not. During the sentencing hearing, Mr. Figueroa-Espinoza's counsel correctly calculated the Guidelines range and reported that he had advised his client of the respective ranges under the Fast Track and non-Fast Track plea options. *See* Dist. Ct. Sentencing Tr. at 16–17, *United States v. Figueroa-Espinoza*, No. 2:20-cr-172-DS

(D. Utah Nov. 9, 2020), ECF No. 26 (Defense Counsel: "Your Honor, under the no-[F]ast-[T]rack agreement, we're looking, I believe, at an offense level of 17 and a criminal history category of IV, which gives us a [G]uideline[s] range of 37 to 46 months . . . . I believe that . . . Mr. Figueroa-Espinoza has in fact been advised of the fact that the [G]uideline[s] from which the Court would be operating would be a possible 37-to-46-month sentence, as opposed to what the [F]ast [T]rack was, which was 24 to 30 months.").

In light of the foregoing, we conclude that, even "without 'full consideration of the factual or legal bases adduced in support of the claims,'" *Buck*, 580 U.S. at 115 (quoting *Miller-El*, 537 U.S. at 336), Mr. Figueroa-Espinoza's showing regarding *Strickland*'s performance prong is inadequate. And because he must make an adequate showing as to *both* prongs of *Strickland* (i.e., performance and prejudice) to make a substantial showing of the denial of the constitutional right at issue—that is, to effective assistance of counsel—reasonable jurists necessarily could not debate the district court's rejection of this ineffective-assistance claim.

2

We next evaluate Mr. Figueroa-Espinoza's assertion that he was misinformed about his right to plead not guilty because his counsel told him that he "had no choice" but to plead guilty, which Mr. Figueroa-Espinoza allegedly took literally because of his limited English language comprehension. R., Vol. I, at 8. Mr. Figueroa-Espinoza argues that this constituted ineffective assistance. *See* Aplt.'s Opening Br. at 4 (stating as an issue on appeal whether "counsel was ineffective because [Mr. Figueroa-Espinoza] did

not understand his advice and right to plead not guilty"). He asserts that the district court applied the wrong standard in evaluating whether he was prejudiced because the court considered whether he had sufficiently alleged "what he would have done had he not misunderstood . . . counsel regarding his right to plead guilty or not guilty." *Id.*, Continuation at 4 (quoting R., Vol. I, at 22). Instead, Mr. Figueroa-Espinoza argues that the district court "should have applied a rational person standard to determine whether a rational person in [his] position would have elected to go to trial or pleaded differently such as [a] conditional plea or binding plea." *Id*.

Had it considered his ineffective-assistance claim under the correct standard, reasons Mr. Figueroa-Espinoza, the district court would have found that "[a] rational person in [Mr. Figueroa-Espinoza's] situation"—who feared for his life in his home country and knew that his prior deportation was unlawful—"would have elected to proceed to trial." *Id*. Accordingly, Mr. Figueroa-Espinoza asserts that all of these factors indicate he would have proceeded to trial had he been properly informed of his right to reject the guilty plea. [6]

[6] Mr. Figueroa-Espinoza asserts that "[i]f counsel would have explained to [him] that there was a defense to the charge, he could have challenge[d] his previous deportation on the ground that his prior deportation was unlawful" through 8 U.S.C. § 1326(d). Aplt.'s Opening Br., Continuation at 4. However, Mr. Figueroa-Espinoza failed to raise this argument in his initial § 2255 motion. Accordingly, he has failed to preserve it for our review. *See, e.g., Heard v. Addison*, 728 F.3d 1170, 1175 (10th Cir. 2013) ("We do not reach [petitioner's argument] in this case, however, because . . . we conclude that [petitioner] never raised such a claim, in his petition or otherwise, before the federal district court."); *Parker v. Scott*, 394 F.3d 1302, 1327 (10th Cir. 2005) (deeming "waived" certain ineffective-assistance claims where petitioner "fail[ed] to assert them in his district court habeas petition"); *Jones v. Gibson*, 206 F.3d 946, 958

Mr. Figueroa-Espinoza's arguments are unavailing.[7] First, reasonable jurists could not debate the correctness of the district court's ruling that Mr. Figueroa-Espinoza failed to show his attorney's performance was objectively deficient. Here, the district court directly held that "the record indicates that [his attorney] communicated with [Mr. Figueroa-Espinoza] in Spanish, or at least that he was able to do so effectively" and that Mr. Figueroa-Espinoza "failed to otherwise explain why these circumstances establish that his attorney's performance was deficient." R., Vol. I, at 22. Indeed, our independent review of the record reveals that, not only did Mr. Figueroa-Espinoza's attorney communicate with him, but an interpreter was present at the hearing, and Mr. Figueroa-Espinoza confirmed that he understood everything that the court said to him in reviewing the plea agreement. *See* Dist. Ct. Sentencing Tr. at 14.

(10th Cir. 2000) (explaining that "[p]etitioner did not make [an] argument in his revised habeas petition," and so "this court need not consider it").

[7] We note that, as to Mr. Figueroa-Espinoza's argument that he was misinformed by his counsel about having "no choice" whether to plead guilty, the district court said that it was unclear whether Mr. Figueroa-Espinoza was raising a substantive error or an ineffective-assistance claim. *See* R., Vol. I, at 21. But it determined that Mr. Figueroa-Espinoza's claims would fail under either framework. We discuss its treatment of the argument as an ineffective-assistance claim *infra*. Construed as a substantive error, the district court reasoned that the claim would be procedurally barred due to his failure to raise it first on direct appeal. Mr. Figueroa-Espinoza briefly challenges that holding here, claiming that the court erred because it "failed to consider the ineffective assistance of prior appellate counsel who advised Appellant to withdraw his direct appeal." Aplt.'s Opening Br., Continuation at 3. But the district court did not consider this argument because Mr. Figueroa-Espinoza entirely failed to raise it in his initial § 2255 motion before the district court. Accordingly, he failed to preserve it for the court's consideration. *See supra* note 5. And we need not consider it further here.

Thus, reasonable jurists could not debate the district court's ruling on the performance prong of the *Strickland* standard. And, thus, they also could not debate the court's rejection of Mr. Figueroa-Espinoza's ineffective-assistance claim because he must satisfy both prongs of that standard (i.e., performance and prejudice). *See Cooks v. Ward*, 165 F.3d 1283, 1292–93 (10th Cir. 1998) ("This court may address the performance and prejudice components in any order, but need not address both if Mr. Cooks fails to make a sufficient showing of one."); *see also Gravitt v. Bear*, No. 20-6156, 2021 WL 3440668, at *8 (10th Cir. Aug. 6, 2021) (unpublished) ("Because we conclude jurists of reason could not debate the district court's denial of Mr. Gravitt's ineffective assistance of counsel claim based on *Strickland*'s performance prong, we need not reach the prejudice prong.").[8]

Even if we were to reach the prejudice prong of *Strickland*, reasonable jurists could not debate the district court's denial of the ineffective-assistance claim because Mr. Figueroa-Espinoza failed to show that the district court applied the wrong standard. Mr. Figueroa-Espinoza contends that the "court should have applied a rational person standard." Aplt.'s Opening Br., Continuation at 4. But the district court applied the proper standard—stemming from the Supreme Court's seminal *Strickland* decision and

[8] We note that quite apart from the soundness of the district court's reasoning, this result would be inevitable. That is because Mr. Figueroa-Espinoza only challenges on appeal the district court's prejudice holding. Accordingly, it follows ineluctably that reasonable jurists could not debate the district court's rejection of Mr. Figueroa-Espinoza's ineffective-assistance claim because—though he must carry his burden as to each of the two prongs of the *Strickland* standard—he leaves the court's ruling concerning the first *Strickland* prong, counsel's performance, without any challenge at all.

more recently expressed in *Lee v. United States*—that Mr. Figueroa-Espinoza "must 'show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."'" R., Vol. I, at 22 (quoting *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017)). Mr. Figueroa-Espinoza, however, did not assert in his initial § 2255 motion whether he would have proceeded to trial had he been fully informed that he was not obliged to plead guilty. Accordingly, reasonable jurists could not debate the district court's conclusion that Mr. Figueroa-Espinoza failed to show prejudice.

III

For the foregoing reasons, we **DENY** Mr. Figueroa-Espinoza a COA and **DISMISS** this matter.[9]

Entered for the Court

Jerome A. Holmes
Chief Circuit Judge

[9] We summarily **GRANT** Mr. Figueroa-Espinoza's motion for leave to proceed *in forma pauperis*, concluding that such relief is appropriate.