

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 7, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OTIS RAY WHITEHEAD, JR.,

Defendant - Appellant.

No. 25-6192
(D.C. Nos. 5:25-CV-00809-J &
5:23-CR-00280-J-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Otis Ray Whitehead, Jr., a federal prisoner representing himself, moves for a certificate of appealability (COA) so he may challenge the district court's denial of his 28 U.S.C. § 2255 motion. We deny a COA and dismiss this proceeding.

I. BACKGROUND & PROCEDURAL HISTORY

In the early morning of March 4, 2023, police officers executed a search warrant at a home in Northwest Oklahoma City ("Home"). The warrant authorized the officers to search for documents related to distribution of illegal drugs. The officers entered through the front door, which led immediately into the living room.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

There, the officers encountered Mr. Whitehead and his brother, Tylin Childers. According to the later testimony of Officer Harmon (the lead officer for the search), Mr. Whitehead quickly ducked around a corner, but returned a few seconds later.

As police executed the search, they found that the corner around which Mr. Whitehead had briefly disappeared led to a bedroom. In that bedroom, hanging on the closet door, was a black jacket. And sticking out from the pocket of that black jacket was a handgun. The same closet also contained a blue jacket with an “Otis” name patch. On the floor of the bedroom, officers discovered a letter addressed to Mr. Whitehead at the Home. A “female occupant” was asleep there when officers entered, *United States v. Whitehead*, No. 24-6062, 2025 WL 903849, at *2 (10th Cir. Mar. 25, 2025) (internal quotation marks omitted), *cert. denied*, 146 S. Ct. 174 (2025), but the officers found only male clothing in the room. In addition, one of the officers asked Mr. Whitehead for his address and he responded with the Home’s address.

The officers arrested Mr. Whitehead and Mr. Childers, both of whom had felony convictions. The officers placed the brothers in the back of the same patrol car, and the patrol car’s backseat video recorder picked up their conversation. During that conversation, Mr. Childers asked about the location of the “[p]istol,” and Mr. Whitehead said it “was in the jacket in my room.” *Id.* at *3 (emphasis and internal quotation marks omitted).

A grand jury charged Mr. Whitehead with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He went to trial on the theory that the

government could not prove the gun was in his possession. The government's primary witness was Officer Harmon. The morning he was expected to testify, the government disclosed to the defense a police report written by another participant in the search, Officer Rivera. The government explained that the Oklahoma City police had failed to produce this report earlier because it had been filed under a different case number. The defense stated there was "one line in [Officer Rivera's] report that seems to contradict some of the other reports that we have," and "depending how the testimony comes out with [Officer] Harmon, we may be asking the Court for some additional time to get Officer Rivera." Trial Tr. at 7, *Whitehead*, No. 24-6062, 2025 WL 903849, Dkt. No. 23-3. The court responded, "We'll entertain it when and if it presents." *Id.*

As expected, Officer Harmon testified to what he saw and discovered during the search, essentially as described above. Counsel for Mr. Whitehead briefly cross-examined the officer about Officer Rivera's report, asking him if he "acknowledge[d] that there are likely differences between Officer Rivera's report and yours?" *Id.* at 42. He responded, "I would expect there to be minor differences." *Id.*

The government also called the police officer into whose car Mr. Whitehead and Mr. Childers were placed after their arrest. Through him, the government introduced the backseat video that captured the brothers' conversation about a pistol.

For his defense case, Mr. Whitehead called a forensic scientist who testified that DNA testing was inconclusive as to the gun and the jacket in which it was found. Mr. Whitehead also called Lesley Gill, the mother of a woman named Janishia

Shockley. Ms. Shockley was apparently the female occupant asleep in the bedroom when police found the gun. Ms. Gill said she bought the gun, but she had been planning on moving and she asked her daughter (Ms. Shockley) to hold onto some of her things, including the gun.

The defense never called Officer Rivera. Instead, its final witness was Mr. Whitehead himself. He denied Officer Harmon's claim that he ducked around a corner as the police entered the house. He admitted the blue jacket with the "Otis" patch belonged to him. During cross-examination, the prosecutor also asked about the black jacket, where police found the gun:

Q. So—and that black jacket, that was hanging in that room where your stuff was, right?

A. Uh-huh.

Q. Was that a "yes"?

A. Where my jacket was?

Q. Yes.

A. Yes.

Q. And there's a gun in that jacket, right?

A. Yes.

Trial Tr. at 122. During closing argument, the prosecutor referred back to this exchange as an admission by Mr. Whitehead that the black jacket belonged to him.

The jury found Mr. Whitehead guilty, and the district court imposed an 87-month prison sentence. Mr. Whitehead appealed to this court, challenging the

sufficiency of the evidence (among other things), but this court affirmed. *See Whitehead*, 2025 WL 903849, at *1–5, *8.

Mr. Whitehead, representing himself, then filed a § 2255 motion attacking his conviction. He claimed numerous grounds for relief, largely based on the following assertions:

- Three items of evidence were allegedly discovered after trial: (1) the lack of Mr. Whitehead’s DNA or fingerprints on the firearm, as shown by forensic testing; (2) additional verification that the firearm belonged to Ms. Gill; and (3) bodycam footage from Officer Rivera showing that Mr. Whitehead never ducked around the corner leading to the bedroom where the firearm was found, contrary to Officer Harmon’s testimony.
- No one called Officer Rivera to testify about his bodycam footage, nor about his written report (i.e., the report disclosed to the defense shortly before Officer Harmon’s testimony).
- During closing arguments, the prosecutor falsely stated that Mr. Whitehead had admitted the black jacket was his.

In light of these assertions, he claimed, for example: actual innocence; the prosecution violated his due process rights by holding back Officer Rivera’s bodycam footage, and by making false statements about jacket ownership; and his own trial counsel was constitutionally ineffective by failing to call Officer Rivera, and by failing to object to the prosecutor’s false statements. However, Mr. Whitehead did not disclose any of his allegedly new evidence, or explain how he obtained it.

The district court concluded that all claims—save for ineffective assistance of counsel—were procedurally barred because Mr. Whitehead did not raise them on direct appeal. *See United States v. Khan*, 835 F.2d 749, 753 (10th Cir. 1987) (“[Section] 2255 is not available to test the legality of matters which should have

been raised on appeal.”). The court further concluded that actual innocence could not excuse the procedural bar because there was no new evidence. Specifically, the jury already heard about the lack of forensic evidence conclusively tying Mr. Whitehead to the firearm; the jury already heard about Ms. Gill’s ownership of the firearm; and no bodycam footage existed. *Cf. Fontenot v. Crow*, 4 F.4th 982, 1033 (10th Cir. 2021) (in the § 2254 context, holding that an actual-innocence claim used to overcome a procedural bar must be based on “reliable evidence not presented to the jury”).

As for ineffective assistance, the district court concluded Mr. Whitehead could not show prejudice because the underlying claims (i.e., the arguments or objections counsel should have raised) were meritless. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that, to establish ineffective assistance, “the defendant must show that counsel’s performance was deficient” and “the deficient performance prejudiced [his] defense”). In particular, as to the failure to call Officer Rivera as a witness to testify about his police report, the court noted the report never said Mr. Whitehead did *not* leave the living room. Also, the district court noted Mr. Whitehead’s admission on cross-examination that the black jacket was his, so whether he ducked around the corner toward the bedroom was immaterial. For the same reason, his counsel’s failure to object to the prosecutor’s statements during oral argument raised no viable claim.

The district court therefore entered judgment against Mr. Whitehead and declined to issue a COA. Mr. Whitehead then filed a notice of appeal and moved for a COA from this court.

II. LEGAL STANDARD

To merit a COA, Mr. Whitehead must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This means he “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And to the extent the district court resolved his motion on a procedural basis, such as a procedural bar, he must also show that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

III. ANALYSIS

A. Procedural Bar and Actual Innocence¹

The district court ruled that all of Mr. Whitehead’s claims, other than ineffective assistance of counsel, are procedurally barred because he did not raise them on direct appeal. Mr. Whitehead does not explicitly challenge that ruling. He continues to claim actual innocence, however, which could be an exception to the procedural bar. Construing his COA motion liberally because he is pro se, *see Hall v.*

¹ Mr. Whitehead, under separate headings, claims actual innocence *and* that his conviction resulted from a fundamental miscarriage of justice. In this context, the terms “actual innocence” and “fundamental miscarriage of justice” are synonyms. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993). We have therefore evaluated these arguments together.

Scott, 292 F.3d 1264, 1266 (10th Cir. 2002), we read Mr. Whitehead’s actual-innocence arguments as an attack on the district court’s procedural ruling.²

We see no debatable question about the district court’s rejection of Mr. Whitehead’s actual-innocence argument. The district court explained that the jury already heard the allegedly new evidence—or, in the case of Officer Rivera’s bodycam footage, that no such evidence exists. As for Officer Rivera’s written report, the only statements possibly relevant to the corner-ducking episode are:

- Just after police breached the door, Officer Rivera saw Mr. Whitehead “walking away from the front door as officers were giving him verbal commands.” R. at 90.
- Mr. Whitehead “continued to not follow the verbal commands from Officers at which time the entry team entered the residence. [Mr. Whitehead] was taken into custody without incident.” *Id.*

None of this raises any colorable question about how the jury would have evaluated Officer Harmon’s testimony.

In short, Mr. Whitehead fails to raise a debatable question as to the district court’s procedural ruling. Thus, we may not grant a COA as to any of the procedurally barred claims.³

² If Mr. Whitehead means to assert a freestanding actual-innocence claim, the Supreme Court has never recognized such a claim. *See Dist. Attorney’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71 (2009). Nor would we consider recognizing such a claim in this case because Mr. Whitehead has not made a strong showing of actual innocence, as we explain. *See Herrera*, 506 U.S. at 417 (stating that “the threshold showing for [any freestanding actual-innocence claim] would necessarily be extraordinarily high”).

³ This includes his claims that: (i) the officers’ search lacked probable cause or exceeded the scope of their warrant; (ii) the prosecution misstated his testimony

B. Ineffective Assistance of Counsel

Mr. Whitehead's ineffective-assistance claim includes his attorney's failure to call Officer Rivera as a witness, so he could testify—supposedly consistent with his written report—that Mr. Whitehead never ducked out of the living room. We have already explained, however, that Officer Rivera's report says nothing to that effect.

As for failing to object to the prosecutor's statement that Mr. Whitehead admitted ownership of the black jacket where the gun was found, the relevant testimony, again, was as follows:

Q. So—and that black jacket, that was hanging in that room where your stuff was, right?

A. Uh-huh.

Q. Was that a “yes”?

A. Where my jacket was?

Q. Yes.

A. Yes.

Q. And there's a gun in that jacket, right?

about ownership of the black jacket; (iii) the prosecution's morning-of-trial disclosure of Officer Rivera's report, and its alleged failure to disclose Officer Rivera's bodycam footage, violated *Brady v. Maryland*, 373 U.S. 83 (1963); (iv) the prosecution's choice not to call Officer Rivera as a witness violated his Sixth Amendment confrontation rights; and (v) there was no victim and therefore no real party in interest to his prosecution. To the extent Mr. Whitehead frames his real-party-in-interest argument as a question of the government's Article III standing, we concur with the Seventh Circuit that “[s]ubject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231, and there can be no doubt that Article III permits Congress to assign federal criminal prosecutions to federal courts. That's the beginning and the end of the ‘jurisdictional’ inquiry.” *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999).

A. Yes.

Trial Tr. at 122. Mr. Whitehead seems to argue that when he said “my jacket,” he meant the blue jacket with the “Otis” name patch, not the black jacket with the gun. Even if true, we see no debatable issue because Mr. Whitehead does not tell us, nor can we find, where he presented this interpretation of “my jacket” to the district court. *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (in the COA context, stating that “as to issues that were not presented to the district court, we adhere to our general rule against considering issues for the first time on appeal”). We therefore see no debatable issue and may not grant a COA.

C. Denial of an Evidentiary Hearing

Mr. Whitehead asked the district court to hold an evidentiary hearing so it could evaluate the allegedly suppressed evidence and his claim of ineffective assistance of counsel. The district court denied this request because the record demonstrated Mr. Whitehead was not entitled to relief. *See* 28 U.S.C. § 2255(b) (stating that the district court should “grant a prompt hearing” on a § 2255 motion “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief”). Mr. Whitehead argues he deserves a COA on this issue in light of the strength of his evidence of actual innocence and ineffective assistance of counsel. We have already concluded, however, that his evidence raises no debatable issue on either score. We may not grant a COA on this argument.

IV. CONCLUSION

We deny Mr. Whitehead's motion for a COA and dismiss this proceeding.

Entered for the Court

Gregory A. Phillips
Circuit Judge