

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Whitman v. United States

No. 15-2686-pr, United States Court of Appeals for the Second Circuit (October 25, 2018)

SUMMARY

Whitman's § 2255 motion challenging his insider trading conviction based on an erroneous jury instruction on "personal benefit" was procedurally defaulted because he failed to raise the issue on direct appeal. The Second Circuit held that cause to excuse the default was lacking because the claim was not novel—trial counsel had raised the same argument, making it available to appellate counsel. Appellate counsel's failure to raise the issue did not constitute ineffective assistance because the argument was not "significant and obvious" under then-existing law, and pursuing other grounds was not a clearly weaker strategy.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	JON O. NEWMAN; GERARD E. LYNCH; CHRISTOPHER F. DRONEY
JURISDICTION	Federal
DECIDED	October 25, 2018
DOCKET	15-2686-pr
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from denial of 28 U.S.C. § 2255 petition.
STANDARD OF REVIEW	We review conclusions of law in a district court's denial of habeas relief under 28 U.S.C. § 2255 de novo.
PRECEDENTIAL VALUE	unpublished
PARTIES	Doug Whitman v. United States of America

TOPICS

[criminal procedure](#)[habeas corpus](#)[securities fraud](#)[ineffective assistance](#)[preservation of error](#)

PRACTICE AREAS

[Criminal Law](#)[Habeas Corpus](#)[Appellate Procedure](#)

QUESTIONS PRESENTED

1. Whether Whitman's claim that the personal benefit instruction was erroneous under Newman is procedurally defaulted, and whether he can show cause to excuse the default.
2. Whether Whitman's appellate counsel's failure to raise the jury instruction challenge on direct appeal constituted ineffective assistance of counsel.

HOLDINGS

1. The claim is procedurally defaulted because Whitman failed to raise it on direct appeal, and he cannot show cause because the claim was not novel; the argument was available to his appellate counsel as evidenced by his trial counsel having raised the same argument before the district court.
2. Whitman's appellate counsel did not render ineffective assistance because the argument was not clearly significant and obvious given the prior definition of personal benefit, and the decision to pursue other appellate issues was not clearly weaker.

FACTUAL BACKGROUND

Whitman was convicted of conspiracy to commit securities fraud and securities fraud for his role as a tippee in an insider trading scheme. The district court instructed the jury on the definition of 'personal benefit' for tippee liability. After his conviction was affirmed on direct appeal, the Second Circuit in *United States v. Newman* narrowed the definition of personal benefit. Whitman filed a §2255 motion arguing the instruction was erroneous under Newman. The district court denied the motion, finding the claim procedurally defaulted because Whitman failed to raise it on direct appeal.

PROCEDURAL HISTORY

Whitman was convicted of insider trading in 2012. He appealed, challenging evidentiary rulings and jury instructions but not the personal benefit instruction. We affirmed. *United States v. Whitman*, 555 F. App'x 98 (2d Cir. 2014). After Newman and Martoma, he filed a §2255 motion claiming the instruction was erroneous. The district court denied, finding procedural default. We granted a certificate of appealability on three questions.

DISPOSITION

affirmed

CASES CITED

- *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014)
- *United States v. Martoma*, 894 F.3d 64 (2d Cir. 2018)
- *Salman v. United States*, 137 S. Ct. 420 (2016)
- *United States v. Whitman*, 555 F. App'x 98 (2d Cir. 2014)
- *United States v. Whitman*, 115 F. Supp. 3d 439 (S.D.N.Y. 2015)
- *Harrington v. United States*, 689 F.3d 124 (2d Cir. 2012)
- *Bloomer v. United States*, 162 F.3d 187 (2d Cir. 1998)

- Cox v. United States, 783 F.3d 145 (2d Cir. 2015)
- Schlup v. Delo, 513 U.S. 298 (1995)
- Murray v. Carrier, 477 U.S. 478 (1986)
- Reed v. Ross, 468 U.S. 1 (1984)
- Bousley v. United States, 523 U.S. 614 (1998)
- United States v. Thorn, 659 F.3d 227 (2d Cir. 2011)
- Smith v. Murray, 477 U.S. 527 (1986)
- Massaro v. United States, 538 U.S. 500 (2003)
- McCoy v. United States, 707 F.3d 184 (2d Cir. 2013)
- Strickland v. Washington, 466 U.S. 668 (1984)
- Lynch v. Dolce, 789 F.3d 303 (2d Cir. 2015)