IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-CR-237-D-1
No. 5:15-CV-671-D

BEVERLY ALLEN BAKER, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	**ORDER**

On December 28, 2015, Beverly Allen Baker ("Baker") moved under 28 U.S.C. § 2255 to vacate, set aside, or correct her 360-month sentence [D.E. 209]. On January 19, 2016, Baker filed a memorandum in support of her motion [D.E. 212] and a motion to amend [D.E. 211]. On February 29, 2016, Baker filed a corrected motion to amend [D.E. 214]. On September 14, 2016, the government moved to dismiss Baker's section 2255 motion for failure to state a claim [D.E. 222] and filed a memorandum in support [D.E. 223]. On October 4, 2016, Baker responded in opposition [D.E. 225]. As explained below, the court grants Baker's motion to amend, grants the government's motion to dismiss, and dismisses Baker's section 2255 motion.

I.

On June 27, 2012, Baker "was convicted by a jury of conspiracy to distribute 280 grams or more of cocaine base (crack) in violation of 21 U.S.C. § 846 (2006), and nine counts of crack distribution, 21 U.S.C. § 841 (2006)." United States v. Baker (Baker I), 539 F. App'x 299, 301 (4th Cir. 2013) (per curiam) (unpublished); see [D.E. 106]. On September 3, 2014, this court sentenced Baker to concurrent sentences of 360 months' imprisonment on the conspiracy count and 240 months' imprisonment on each of the distribution counts. [D.E. 189]. The Fourth Circuit affirmed Baker's conviction and sentence. See Baker I, 539 F. App'x at 301–06; United States v. Baker (Baker II), 601 F. App'x 231, 232–33 (4th Cir. 2015) (per curiam) (unpublished).

On December 28, 2015, Baker filed her section 2255 motion [D.E. 209]. In her motion, Baker makes more than a dozen claims attacking the legality of her indictment, trial, sentencing, and legal representation. Generally, these claims include: (1) improper constructive amendment of her indictment; (2) failure to instruct the jury on the statute of limitations; (3) failure to give the jury "a specific unanimity instruction"; (4) failure to give "an informant instruction"; (5) providing a verdict form that did not "include essential elements of 'knowingly' or 'intentionally'"; (6) actual innocence; (7) several instances of ineffective assistance of counsel; (8) violations of Napue v. Illinois, 360 U.S. 264 (1959), Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972); (9) deprivation of Baker's Sixth Amendment right to a jury trial; (10) erroneous grouping of counts for sentencing purposes; and (11) impermissible joinder in violation of Rule 8(b) of the Federal Rules of Criminal Procedure.

II.

The government may challenge the legal sufficiency of a section 2255 petition through a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Rule 12, Rules Governing Section 2255 Proceedings; United States v. Frady, 456 U.S. 152, 166–68 n.15 (1982); United States v. Reckmeyer, 900 F.2d 257, at *4 (4th Cir. 1990) (unpublished table decision). A motion to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted" tests the claims' legal and factual sufficiency. See Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–63, 570 (2007); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008); accord Erickson v. Pardus, 551 U.S. 89, 93–94 (2007) (per curiam). In considering a motion to dismiss, a court need not accept a petition's legal conclusions. See, e.g., Iqbal, 556 U.S. at 678. Similarly, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 677–79. The court, however, "accepts all well-pled facts as true and construes these

facts in the light most favorable to the plaintiff in weighing the legal sufficiency" of the petition. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009). Construing the facts in this manner, the petition must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quotation omitted).

A court may take judicial notice of public records without converting a motion to dismiss into a motion for summary judgment. See, e.g., Fed. R. Evid. 201; Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). In reviewing a section 2255 motion, the court is not limited to the motion itself. The court also may consider "the files and records of the case." 28 U.S.C. § 2255(b); see United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993). Likewise, a court may rely on its own familiarity with the case. See, e.g., Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977); United States v. Dyess, 730 F.3d 354, 359–60 (4th Cir. 2013).

A.

As for Baker's claims that the court constructively amended her indictment, improperly failed to give a statute of limitations instruction, a specific unanimity instruction, and an informant instruction, used a defective verdict form, violated her right to a jury trial, improperly permitted joinder under Rule 8(b), and improperly tolerated Brady and Giglio violations, Baker failed to raise these claims on direct appeal. Thus, the general rule of procedural default bars Baker from presenting such claims under section 2255. See, e.g., Massaro v. United States, 538 U.S. 500, 504 (2003); Bousley v. United States, 523 U.S. 614, 621 (1998); United States v. Fugit, 703 F.3d 248, 253 (4th Cir. 2012); United States v. Sanders, 247 F.3d 139, 144 (4th Cir. 2001). Furthermore, Baker has not plausibly alleged "actual innocence" or "cause and prejudice" resulting from these alleged errors. See Bousley, 523 U.S. at 622–24; United States v. Frady, 456 U.S. 152, 170 (1982); United States v. Pettiford, 612 F.3d 270, 280–85 (4th Cir. 2010); United States v. Mikalajunas, 186 F.3d 490, 493–95 (4th Cir. 1999). Accordingly, these claims fail.

As for Baker's claims concerning her sentence that she raised and lost on direct appeal, Baker cannot use section 2255 to recharacterize and relitigate claims that she lost on direct appeal. See, e.g., Frady, 456 U.S. at 164–65; Dyess, 730 F.3d at 360; United States v. Roane, 378 F.3d 382, 296 & n.7 (4th Cir. 2004); Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976) (per curiam). Thus, those claims fail.

B.

Alternatively, Baker's claims fail on the merits. First, Baker claims that the jury convicted her based on evidence that she engaged in multiple conspiracies but that her indictment alleged only a single conspiracy, resulting in a constructive amendment of her indictment. See [D.E. 212] 2. A "constructive amendment" of an indictment occurs "[w]hen the government, through its presentation of evidence or its argument, or the district court, through its instructions to the jury, or both, broadens the bases for conviction beyond those charged in the indictment." United States v. Ashley, 606 F.3d 135, 141 (4th Cir. 2010) (quotation omitted). "A constructive amendment is a fatal variance because the indictment is altered to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999) (quotation omitted). "In a conspiracy prosecution, a defendant may establish the existence of a material variance by showing that the indictment alleged a single conspiracy but that the government's proof at trial established the existence of multiple, separate conspiracies." United States v. Kennedy, 32 F.3d 876, 883 (4th Cir. 1994). A single conspiracy can exist in cases, such as this, involving multiple transactions where there is an overlap of key actors, methods, and goals, indicating one overall general business venture extending over a long period of time. See United States v. Strickland, 245 F.3d 368, 385 (4th Cir. 2001); United States v. Johnson, 54 F.3d 1150, 1154 (4th Cir.1995); United States v. Barsanti, 943 F.2d 428, 439 (4th Cir. 1991); United States v. Leavis, 853 F.2d 215, 218 (4th Cir. 1988) A variance in this context occurs only when the evidence at trial demonstrates that a defendant engaged in

"separate conspiracies unrelated to the overall conspiracy charged in the indictment." Kennedy, 32 F.3d at 884 (quotation omitted).

There was no variance between the single conspiracy charged in the indictment and the evidence presented at trial. The evidence supported the existence of one large conspiracy to distribute and possess with intent to distribute cocaine base, precisely what the superseding indictment alleged. See [D.E. 39] 1. The evidence at trial demonstrated that Baker led a large crack-distribution conspiracy featuring overlapping associates, methods, and goals. See [D.E. 151] 10–12; [D.E. 113] 105–08, 111–12, 157, 163, 177, 231–32. The government proved that the charged conspiracy embodied interrelated agreements to deal drugs in furtherance of a common business venture operating over a roughly eight-year period. See [D.E. 151] 10–12, 15–20; [D.E. 113] 157, 159, 165, 177, 179. The government argued in closing that Baker led a single conspiracy: "So the defendant has been engaged in a successful business of selling crack cocaine to various members affiliated with that business who are connected by agreements and understanding. That is the evidence in this case." [D.E. 151] 12. Baker's vague, threadbare references to "multiple conspiracies" do not establish that the interrelated agreements were "separate conspiracies unrelated to the overall conspiracy charged in the indictment." Kennedy, 32 F.3d at 884 (quotation omitted). Thus, no constructive amendment, and no variance, occurred.

Even if the evidence supported finding multiple conspiracies rather than the single conspiracy underlying Baker's indictment, Baker's claim still fails. A variance supports reversal only if the defendant shows that the variance infringed her "substantial rights, and thereby resulted in actual prejudice." Id. at 883. "In order to show actual prejudice stemming from a multiple conspiracy variance, [a defendant] must prove that there are so many defendants and so many separate conspiracies before the jury that the jury was likely to transfer evidence from one conspiracy to a defendant involved in an unrelated conspiracy." Id. (quotation omitted); see United States v. Ford, 88 F.3d 1350, 1360 (4th Cir. 1996). There was no chance any spillover resulted in actual prejudice

to Baker. The evidence showed Baker's involvement in each of the alleged "multiple conspiracies." Baker "ultimately stood trial alone," and the evidence "focused on [her] role in the conspiracy and the direct consequences of [her] actions in furthering the conspiracy." Kennedy, 32 F.3d at 884. Direct evidence supported Baker's conviction. See Ford, 88 F.3d at 1360–361. Thus, Baker fails to demonstrate that she suffered actual prejudice from any variance, and the claim fails.

Several of Baker's other claims fail because they are predicated on the existence of multiple conspiracies. These claims include Baker's arguments that the court erred by not instructing that the jury must "agree on which conspiracy formed the basis of the conviction" [D.E. 212] 4, that she is actually innocent of the conspiracy charge because the evidence demonstrated only four independent conspiracies, id. at 7, and that her trial counsel was ineffective for not objecting to the government's closing argument concerning the charged conspiracy. Thus, the claims fail.

C.

Baker alleges that the court erred by not instructing the jury that Baker could not, as a matter of law, conspire with government agents. See [D.E. 212] 6. Baker correctly states that the jury could not have convicted her of conspiring only with a government agent. See United States v. Lewis, 53 F.3d 29, 32–33 (4th Cir. 1995). A court must instruct the jury in this respect where the evidence supports a conclusion that the defendant conspired only with a government agent. See United States v. Cousar, 539 F. App'x 83, 86 (4th Cir. 2013) (per curiam) (unpublished). Yet "[h]ere, the evidence adduced at trial simply did not support a finding that [Baker] conspired only with a government agent." Id. Baker conspired with others who were not government agents, including her own family members. No jury instruction on this point was necessary, and the claim fails. See id.; United States v. Frias-Guevara, 529 F. App'x 361, 362 (4th Cir. 2013) (per curiam) (unpublished); United States v. Cardenas, 9 F. App'x 127, 131 (4th Cir. 2001) (per curiam) (unpublished); United States v. Plummer, 178 F.3d 1288, at *1 (4th Cir. 1999) (per curiam)

(unpublished table decision); United States v. Bell, 36 F.3d 1094, at *4 (4th Cir. 1994) (per curiam) (unpublished table decision).

D.

Baker asserts that the court improperly failed to instruct the jury concerning the statute of limitations under 18 U.S.C. § 3282(a). See [D.E. 212] 4–5. Section 3282 provides for a five-year statute of limitations for noncapital offenses. 18 U.S.C. § 3282(a). For conspiracy offenses, "[t]he statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy." Fiswick v. United States, 329 U.S. 211, 216 (1946) (footnote omitted); see United States v. Izegwire, 371 F. App'x 369, 371 (4th Cir. 2010) (per curiam) (unpublished). The charged drug conspiracy, however, required no overt act for the conspiracy to exist. See United States v. Shabani, 513 U.S. 10, 15 (1994). "In such instances, the statute of limitations is satisfied if the government 'alleges and proves that the conspiracy continued into the limitations period.'" United States v. Campbell, 347 F. App'x 923, 927 (4th Cir. 2009) (per curiam) (unpublished) (quoting United States v. Seher, 562 F.3d 1344, 1364 (11th Cir. 2009)). "A conspiracy continues 'as long as its purposes have been neither abandoned nor accomplished, and no affirmative showing has been made that it has been terminated.'" Id. (quoting Seher, 562 F.3d at 1364).

On August 10, 2011, the grand jury issued Baker's original indictment. See [D.E. 1]. Satisfying the statute of limitations therefore required the government to show that the conspiracy continued at least into August 2006. The other counts of conviction demonstrate that the government satisfied its burden: the jury convicted Baker of distributing cocaine base on multiple acts in 2011 that were done in furtherance of the conspiracy. See [D.E. 106-1] 2–5. Trial testimony demonstrates the same, with witnesses testifying to Baker's involvement in the conspiracy from 2007 through 2009 and beyond. See [D.E. 113] 111–12, 160; see also Baker I, 539 F. App'x at 301 ("Testimony at Baker's trial established that she sold crack from her home between 2002 and 2011. At times, her boyfriend, her brother, and her sister also sold crack there. Government witnesses

included two of her regular customers and several of her suppliers."). The evidence did not support instructing the jury on the statute of limitations. Thus, the claim fails.

E.

Baker contends that the verdict form failed to include the words "knowingly" and "intentionally" as used in the statute of conviction. See [D.E. 209] 8. "The purpose of the verdict form is not to repeat the elements of the offense." United States v. Overholt, 307 F.3d 1231, 1248 (10th Cir. 2002). "The language on the form serves only to identify where the jury should indicate its verdict on each count or, in the case of the special verdicts," the jury's decision as to the relevant finding. Id. The question is whether the verdict form, "along with the instructions read to the jury, as a whole adequately stated the applicable law." United States v. Bey, 414 F. App'x 570, 573 (4th Cir. 2011) (per curiam) (unpublished) (quotation omitted).

In light of the jury instructions, Baker's claim concerning the verdict form fails. When charging the jury as to the third element of the conspiracy, the court stated that the government must prove "that with the knowledge of the purpose of the conspiracy, agreement, or understanding, the defendant, Beverly Allen Baker, then deliberately joined the conspiracy, agreement or understanding." [D.E. 151] 69; see also id. at 72–73. "The instructions submitted to the jury contained the language [Baker] argues should have been in the verdict form. The fact that the question on the verdict form does not contain the language the instructions contain is immaterial." Overholt, 307 F.3d at 1248 (quotation omitted). In addition to reading the instructions aloud to the jury, the court provided the jurors a copy to consult while deliberating. See [D.E. 151] 45–46, 86–87, 89. The jurors had available to them detailed instructions that adequately and correctly stated the law concerning the knowledge and intentionality requires. Courts "presume that juries follow such instructions." United States v. Johnson, 587 F.3d 625, 631 (4th Cir. 2009). Thus, the claim fails.

F.

Baker contends that the government impermissibly joined her with co-conspirator Ronnell Perry in violation of Rule 8(b) of the Federal Rules of Criminal Procedure. See [D.E. 209] 13. Rule 8(b), which governs joinder of defendants in indictments, provides:

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

The government properly joined Baker and Perry in the superseding indictment. The superseding indictment named Baker and Perry together in count 4, which alleged that the pair, aiding and abetting each other, distributed cocaine base on March 14, 2011. See [D.E. 39] 2. Perry's trial testimony substantiated that he and Baker indeed distributed cocaine base together that day. See [D.E. 113] 139–40. The superseding indictment thus alleged, and the evidence showed, that Baker and Perry "participated in the same act or transaction." The pair was properly joined under Rule 8(b), and Baker's claim fails.

G.

Baker claims that one of the government's witnesses, Malcolm Dowdy, perjured himself on cross examination by testifying that "nobody guaranteed him anything for his cooperation." [D.E. 212] 14. She similarly asserts that the government failed to disclose that Dowdy stood to potentially benefit from testifying and to correct the alleged perjury, in violation of Napue v. Illinois, 360 U.S. 264 (1959), Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). See [D.E. 212] 14. Brady and Giglio prohibit the government from withholding favorable and material evidence from the defense, including impeachment evidence. See Giglio, 405 U.S. at 154–155; Brady, 373 U.S. at 87. Napue addresses similar concerns by prohibiting the government from soliciting false testimony or allowing false testimony to stand uncorrected. See Napue, 360 U.S. at 269.

The record contradicts Baker's claim. Dowdy testified he was aware he could benefit from cooperating and was familiar with the mechanisms by which he could benefit (i.e., possibly receiving a motion under U.S.S.G. § 5K1.1 or Rule 35 of the Federal Rules of Criminal Procedure), but that he had not been guaranteed a reduction in his sentence in exchange for his testimony. See [D.E. 113] 183–89. He testified, correctly, to his understanding that the ultimate decision regarding any reduction rested with the judge. Id. at 190. The government also entered Dowdy's plea agreement into evidence, and Dowdy testified that in the agreement he "had promised to cooperate whenever they needed [him]." Id. at 179–80. This evidence shows not only that Dowdy did not perjure himself, but also that Baker was on notice that Dowdy could potentially benefit from his cooperation. Thus, Baker's claim fails. See e.g., Strickler v. Greene, 527 U.S. 263, 281–82 (1999); Giglio, 405 U.S. at 154; United States v. Bartko, 728 F.3d 327, 339 (4th Cir. 2013); United States v. Higgs, 663 F.3d 726, 735 (4th Cir. 2011); Elmore v. Ozmint, 661 F.3d 783, 829–30 (4th Cir. 2011), as amended (Dec. 12, 2012)

H.

Baker asserts three claims relating to her advisory Guidelines calculation: (1) the court violated the Sixth Amendment by finding the fact of her drug weight at sentencing, [D.E. 212] 15–16; (2) the court violated the Sixth Amendment by not having the jury decide whether enhancements under U.S.S.G. §§ 2D1.1(b)(1) and 3C1.1 applied, [D.E. 212] 17; and (3) the court impermissibly grouped counts under U.S.S.G. § 3D1.2(d). [D.E. 212] 18.

Baker cannot use section 2255 to attack retroactively her advisory guideline range. See, e.g., United States v. Foote, 784 F.3d 931, 935–36 (4th Cir. 2015); United States v. Pregent, 190 F.3d 279, 283–84 (4th Cir. 1999); see also Whiteside v. United States, 775 F.3d 180, 183–87 (4th Cir. 2014) (en banc); United States v. Mikalajunas, 186 F.3d 490, 495–96 (4th Cir. 1999). Thus, the claims fail.

Alternatively, Baker's claims fail on the merits. The Sixth Amendment does not require that the jury determine either the applicable drug weight for purposes of calculating the base offense level or the applicability of enhancements under U.S.S.G. §§ 2D1.1(b)(1) and 3C1.1. See Rita v. United States, 551 U.S. 338, 356–60 (2007); United States v. Booker, 543 U.S. 220, 267–68 (2005). "Sentencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized by the jury's verdict." United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008); see United States v. Blauvelt, 638 F.3d 281, 293 (4th Cir. 2011). The court treated the Guidelines as advisory, see [D.E. 199] 3, 20, 22, and the findings Baker challenges affected only the advisory Guidelines calculation, not any statutory minimums or maximums. Thus, these claims fail.

Baker's contention concerning grouping of certain counts similarly lacks merit. The Guidelines require grouping of drug offenses, including conspiracies. See U.S.S.G. §§ 2D1.1, 3D1.2(d). Thus, the claim fails.

III.

Baker's remaining claims allege ineffective assistance of counsel. See [D.E. 212] 8–13. Baker bases her ineffective-assistance claims on: (1) trial counsel's failure to object to leading questions, id. at 8; (2) trial counsel's failure to request "a multiple conspiracies instruction," id. at 9; (3) trial counsel's failure to object to comments during closing argument that constructively amended the indictment by focusing on multiple conspiracies, id. at 9–10; (4) trial counsel's failure to request an instruction that Baker could not conspire with a government agent, id. at 10; (5) trial counsel's failure to object to the verdict form, id. at 11–12; (6) trial counsel's failure to request a "buyer-seller instruction," id. at 12; (7) appellate counsels' failure to argue that the evidence showed multiple conspiracies, id. at 13; and (8) appellate counsels' failure to argue that Baker's sentence

violated her Sixth Amendment rights because the jury did not determine the drug weight for purposes of calculating the advisory Guidelines range. Id.

"The Sixth Amendment entitles criminal defendants to the effective assistance of counsel—that is, representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms." Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam) (quotations omitted). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding, including plea negotiations, trial, sentencing, and appeal. See, e.g., Missouri v. Frye, 132 S. Ct. 1399, 1405 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012); Glover v. United States, 531 U.S. 198, 203–04 (2001). "[S]entencing is a critical stage of trial at which a defendant is entitled to effective assistance of counsel, and a sentence imposed without effective assistance must be vacated and reimposed to permit facts in mitigation of punishment to be fully and freely developed." United States v. Breckenridge, 93 F.3d 132, 135 (4th Cir. 1996); see Glover, 531 U.S. at 203–04. To state a claim of ineffective assistance of counsel in violation of the Sixth Amendment, Baker must show that her attorney's performance fell below an objective standard of reasonableness and that she suffered prejudice as a result. See Strickland v. Washington, 466 U.S. 668, 687–91 (1984).

When determining whether counsel's representation was objectively unreasonable, a court must be "highly deferential" to counsel's performance and must attempt to "eliminate the distorting effects of hindsight." Id. at 689. Therefore, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. A party also must show that counsel's deficient performance prejudiced the party. See id. at 691–96. A party does so by showing that there is a "reasonable probability" that, but for the deficiency, "the result of the proceeding would have been different." Id. at 694. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Id. at 695.

When analyzing an ineffectiveness claim, a court may rule on its own familiarity with the case. See Blackledge, 431 U.S. at 74 n.4; Dyess, 730 F.3d at 359–60.

Baker's claims concerning the jury instructions fail because the court properly instructed the jury. As discussed, trial counsel was not ineffective for not requesting a jury instruction on multiple conspiracies because "[a] multiple conspiracy instruction is not required unless the proof at trial demonstrates that appellants were involved only in separate conspiracies unrelated to the overall conspiracy charged in the indictment." Kennedy, 32 F.3d at 884 (emphasis and quotation omitted). Nor was counsel ineffective for not requesting an informant instruction. The evidence did not support concluding that Baker conspired only with government agents or informants. Likewise, a buyer-seller instruction would have been improper. "A buyer-seller instruction informs the jury that the mere purchase and sale of narcotics is standing alone insufficient evidence upon which to establish a conspiracy to distribute narcotics." United States v. Grover, 85 F.3d 617, at *10 n.12 (4th Cir. 1996) (per curiam) (unpublished table decision); see United States v. Mills, 995 F.2d 480, 485 & n. 1 (4th Cir. 1993). Baker's conspiracy rested on evidence of a large, cooperative drug operation—the relationship between the conspirators went beyond a merely buyer–seller relationship. Thus, as to Baker's claims concerning the jury instructions, there was no deficient performance. See Bobby, 558 U.S. at 11–12; Knowles v. Mirazayance, 556 U.S. 111, 127–28 (2009); Strickland, 466 U.S. at 689–90; Morva v. Zook, 821 F.3d 517, 528–32 (4th Cir. 2016); Powell v. Kelly, 562 F.3d 656, 670 (4th Cir. 2009).

The same conclusion holds true for Baker's claim concerning the verdict form. Baker contends that the verdict form erroneously omitted the words "knowingly" and "intentionally." As discussed, the verdict form need not repeat the elements of the offense. The verdict form, along with the jury instructions, adequately stated the law. Baker also argues that the verdict form's question of whether the conspiracy involved 280 grams or more of cocaine base calls into question the jury's findings because the form did not properly identify the conspiracy. The verdict form was proper, and

evidence showed one conspiracy, not multiple. Finally, Baker claims that the verdict form "did not ask the jury to determine the drug quantities in counts two-twelve," resulting in the court applying the wrong base offense level during sentencing. As discussed, this argument fails. The jury was not required to calculate the drug weight for purposes of establishing Baker's base offense level. Because the verdict form was proper, there was no deficient performance. See Bobby, 558 U.S. at 11–12; Knowles, 556 U.S. at 127–28; Strickland, 466 U.S. at 689–90; Morva, 821 F.3d at 528–32; Powell, 562 F.3d at 670.

Baker's claims concerning trial counsel's failure to object to the prosecutor's leading questions and closing argument also fail. Baker has not "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689; see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005). As for the closing argument, Baker asserts that counsel should have objected to the government constructively amending the indictment by arguing that multiple conspiracies existed. During closing argument, however, the government's counsel accurately characterized the single conspiracy alleged in the indictment. Thus, there was no deficient performance. See Bobby, 558 U.S. at 11–12; Knowles, 556 U.S. at 127–28; Strickland, 466 U.S. at 689–90; Morva, 821 F.3d at 528–32; Powell, 562 F.3d at 670.

Finally, Baker contends that her appellate attorneys were ineffective for not making the multiple-conspiracies arguments and for not arguing that the Sixth Amendment prevented the court from determining the drug weight at sentencing. Appellate counsel "need not (and should not) raise every nonfrivolous claim." Smith v. Robbins, 528 U.S. 259, 288 (2000). By definition, they need not (and should not) raise mertiless ones. Appellate counsel properly focused on what counsel believed were the strongest appellate issues and did not provide deficient performance. See, e.g., United States v. Mason, 774 F.3d 824, 828–29 (4th Cir. 2014); Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (en banc). As for prejudice, Baker has not plausibly alleged "a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue."

United States v. Rangel, 781 F.3d 736, 745 (4th Cir. 2015) (quotation and alteration omitted); see Robbins, 528 U.S. at 285–86.

After reviewing the claims presented in Baker's motion, the court finds that reasonable jurists would not find the court's treatment of Baker's claims debatable or wrong and that the claims deserve no encouragement to proceed any further. Accordingly, the court denies a certificate of appealability. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

IV.

In sum, the court GRANTS Baker's motion to amend [D.E. 214], GRANTS the government's motion to dismiss [D.E. 222], DISMISSES Baker's section 2255 motion [D.E. 209], and DENIES a certificate of appealability.

SO ORDERED. This 19 day of July 2017.

JAMES C. DEVER III
Chief United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6981

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BEVERLY ALLEN BAKER,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, Chief District Judge. (5:11-cr-00237-D-1; 5:15-cv-00671-D)

Submitted: November 21, 2017 Decided: November 28, 2017

Before WYNN and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Beverly Allen Baker, Appellant Pro Se. Jennifer P. May-Parker, Phillip Anthony Rubin, Seth Morgan Wood, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

PER CURIAM:

Beverly Allen Baker seeks to appeal the district court's order denying relief on her 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Baker has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: February 5, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6981
(5:11-cr-00237-D-1)
(5:15-cv-00671-D)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BEVERLY ALLEN BAKER

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk