Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2108

Harvey L. Shoate

Petitioner - Appellant

v.

Jason Lewis, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-00968-GAF)

JUDGMENT

Before WOLLMAN, BOWMAN and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. Appellant's pending motions are denied as moot. The appeal is dismissed.

September 05, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

HARVEY L. SHOATE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 17-00968-CV-W-GAF-P
	)	
JASON LEWIS,	)	
	)	
Respondent.	)	

ORDER

Petitioner is a convicted state prisoner and filed this *pro se* matter pursuant to 28 U.S.C. § 2254. Petitioner brings one ground. For the reasons set forth below, this petition is DENIED, a certificate of appealability is DENIED, and the case is DISMISSED.

I. Background

In his state motion for post-conviction relief, Petitioner argued that trial counsel was ineffective for failing to inform the sentencing court that Petitioner would be required to serve eighty percent of his sentence before being eligible for parole, and that there was a reasonable probability that Petitioner would have received a lesser sentence had trial counsel informed the sentencing court of the eighty percent requirement. Doc. 11-6 at 33. As to that claim, the motion court found that trial counsel performed deficiently, but Petitioner had not demonstrated prejudice. *Id.* at 152–53. However, the motion court granted Petitioner post-conviction relief on a different claim and remanded Petitioner's case for resentencing. *Id.* at 158.

Petitioner appealed the ruling related to the eighty percent requirement, but the Missouri Court of Appeals dismissed the appeal, determining that it did not have jurisdiction because Petitioner was not aggrieved inasmuch as he had received relief in the form of resentencing. Doc. 11-4.

Petitioner brings one ground for relief. He alleges that the state post-conviction motion court erred when it found that Petitioner was not prejudiced by trial counsel's failure to inform the sentencing court that Petitioner would be required to serve eighty percent of his sentence before being eligible for parole. Doc. 1 at 6. He further alleges that, had trial counsel informed the sentencing court, there is a reasonable probability that Petitioner would have received a lesser sentence. *Id.*

Although Petitioner has been granted resentencing, he seeks an order from this Court directing "the state court to resentence Shoate to a limited resentencing tailored to the injury he suffered from counsel's ineffectiveness." Doc. 17 at 20.

II. Standard

State prisoners who believe that they are incarcerated in violation of the Constitution or laws of the United States may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before doing so, petitioners must exhaust their state remedies. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

"[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). This Court's review of the petition for habeas corpus is limited by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. *Id.* at 97. AEDPA "bars relitigation [in federal court] of any claim adjudicated on the merits in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Harrington*, 562 U.S. at 98. Accordingly, a state habeas petitioner is not entitled to relief unless the state court proceedings:

> (1) resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme

Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d).

As to § 2254(d)(1), a state court violates the "contrary to" clause if it "applies a rule that contradicts the governing law set forth" by the Supreme Court or if the state court "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a [different] result." *Williams v. Taylor*, 529 U.S. 362, 406 (2000). A state court violates the "unreasonable application" clause of § 2254(d)(1) if it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407. "It is not enough for us to conclude that, in our independent judgment, we would have applied federal law differently from the state court; the state court's application must have been objectively unreasonable." *Flowers v. Norris,* 585 F.3d 413, 417 (8th Cir. 2009) (citation omitted).

As to § 2254(d)(2), "a petitioner must show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Perry v. Kemna*, 356 F.3d 880, 889 (8th Cir. 2004) (internal quotation omitted). A state court's factual determinations are presumed correct and will stand unless the petitioner rebuts this presumption with clear and convincing contrary evidence. 28 U.S.C. § 2254(e)(1); *Grass v. Reitz*, 749 F.3d 738, 743 (8th Cir. 2014). Additionally, federal courts afford great deference to a state court's credibility findings. *Smulls v. Roper*, 535 F.3d 853, 864 (8th Cir. 2008) (en banc).

III. Discussion

The crux of Petitioner's claims is that he is entitled to relief because the post-conviction court did not find prejudice. As Respondent notes, if Petitioner's claim is taken literally, he is challenging a decision of the state post-conviction motion court. Such a claim is not cognizable in a federal habeas petition. As noted above, "federal courts are limited to deciding whether a state conviction violated the federal Constitution or laws." *Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994). Errors in state post-conviction proceedings do not raise constitutional issues cognizable in federal habeas. *Gee v. Groose*, 110 F.3d 1346, 1351–52 (8th Cir. 1997) citing *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir. 1990) ("Section 2254 only authorizes federal courts to review the constitutionality of a state criminal conviction, not infirmities in a state post-conviction relief proceeding."); *see also Carter v. Armontrout*, 929 F.2d 1294, 1296 (8th Cir. 1991) (claims that do not reach constitutional magnitude cannot be addressed in a petition for habeas corpus). Thus, Petitioner's claim of state post-conviction court error is denied.

Additionally, as Respondent notes, if instead Petitioner is simply alleging the same claim that he raised in his state post-conviction relief motion, then his claim is moot. Petitioner's claim was denied by the state post-conviction motion court because Petitioner had not shown prejudice, but the post-conviction motion court granted Petitioner relief on a separate claim and ordered his case remanded for resentencing. Doc. 11-6 at 158. As a result, Petitioner has already received relief.[1] This claim is moot.

IV. Conclusion and Certificate of Appealability

For the reasons set forth above, Petitioner's petition for relief under 28 U.S.C. § 2254 is DENIED. Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only "where a petitioner has made a substantial showing of the denial of a constitutional right." To

[1] To the extent Petitioner broadly seeks a certain result on resentencing, his claim is not cognizable here.

satisfy this standard, Petitioner must show that "reasonable jurists" would find the district court ruling on the constitutional claim(s) "debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability is DENIED.

Accordingly, it is **ORDERED** that:

(1) the petition for writ of habeas corpus is denied;

(2) the issuance of a certificate of appealability is denied; and

(3) this case is dismissed.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

DATED: March 15, 2018

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HARVEY L. SHOATE,

Petitioner,

v.

JASON LEWIS,

Respondent.

Case No. 17-00968-CV-W-GAF-P

ORDER

This is prisoner *pro se* matter was filed pursuant to 28 U.S.C. § 2254. On March 15, 2018, this Court entered its Order dismissing the case and denying a certificate of appealability. Docs. 18, 19. On March 29, 2018, Petitioner filed a motion for reconsideration and a motion for a certificate of appealability (Docs. 20, 21), which the Court denied on May 5, 2018. Doc. 22. On May 16, 2018, Petitioner a motion for a certificate of appealability in the United States Court of Appeals for the Eighth Circuit, stating in part that he "desires to appeal this judgment." Doc. 23 at 1. The document has been construed as a possible notice of appeal. Doc. 23-2. Although Petitioner did not also file a request for leave to proceed *in forma pauperis* on appeal, this Court assumes he intended to do so.

Discussion

Under 28 U.S.C. § 1915, an appeal *in forma pauperis* may be permitted if an affidavit, including a statement of all assets possessed, and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken in good faith. *See* Fed. R. App. P. 24(a). Good faith requires that Petitioner's argument on appeal not be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Because Petitioner has presented no non-

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frivolous issues deserving of appellate review, Petitioner is denied leave to proceed *in forma pauperis* on appeal.

Accordingly, it is ORDERED that: (1) Plaintiff's motion for a certificate of appealability (Doc. 23) is denied for reasons stated in Doc. 18; (2) Petitioner must pay any applicable appellate fees or apply for leave to proceed *in forma pauperis* with the United States Court of Appeals for the Eighth Circuit; and (3) the Clerk of the Court shall electronically forward this case to the United States Court of Appeals for the Eighth Circuit for further processing of Petitioner's appeal.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

DATED: May 22, 2018