UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3283

Matthew Davis

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-01035-GAF)

JUDGMENT

Before COLLOTON, WOLLMAN, and BENTON, Circuit Judges.

The appellant's motion for leave to amend his application for a certificate of appealability is granted. The appellant's application for a certificate of appealability is denied. The appeal is dismissed. The appellant's motion for leave to proceed on appeal in forma pauperis is denied as moot.

March 08, 2019

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3283

Matthew Davis

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-01035-GAF)

ORDER

The petition for rehearing is denied.

June 17, 2019

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3283

Matthew Davis

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-01035-GAF)

ORDER

This case is remanded to the district court for consideration in light of Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997), with directions that if granted, the certificate of appealability specify the issue or issues that are to be considered on appeal.

October 25, 2018

A true copy.

ATTEST:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

/s/ Michael E. Gans

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

MATTHEW DAVIS,	)	
	)	
Movant,	)	
	)	
vs.	)	**Case No. 17-01035-CV-W-GAF**
	)	**Crim. No. 12-00063-09-CR-W-GAF**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Now before the Court is Movant Matthew Davis's ("Movant" or "Davis") Motion to Vacate, Set Aside, or Correct a Sentence filed pursuant to 28 U.S.C. § 2255. (Doc. # 1). Respondent the United State of America ("Respondent" or the "Government") opposes. (Doc. # 3). For the reasons set forth below, Davis's Motion is DENIED.

DISCUSSION

I. FACTS[1]

On October 16, 2013, the Government returned a nine-count third superseding indictment, charging Davis and a conspirator of distributing more than 1000 grams of heroin and some amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, as well as counts for actions taken in furtherance of that conspiracy. (*See* Docket Sheet, Crim. No. 12-00063-09-CR-W-GAF ("Crim. Case")). Davis was only named in Count One, the conspiracy charge. A jury trial commenced March 24, 2014. On April 1, 2014, the jury returned a guilty verdict against

[1] The factual background of the case, both stated in this section and throughout this Order, are taken from the common matters briefed by Davis and the Government. Where the briefings disagree, the Court defers to and cites from the record.

Davis on Count One of the indictment. Then, on November 24, 2014, the Court sentenced Davis to 360 months' imprisonment.

Davis appealed, arguing that the evidence was insufficient to support the conviction, and that the district court erred in refusing his proposed jury instruction. *United States v. Davis*, 826 F.3d 1078, 1081-82 (8th Cir. 2016). The Eighth Circuit affirmed the conviction. *Id.*

Davis now files this habeas action under 28 U.S.C. § 2255 seeking to vacate his conviction. Davis bases his motion on two grounds: 1) that the Court erred in instructing the jury; and 2) that he received ineffective assistance of counsel.

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a movant may collaterally attack his sentence on four grounds: "(1) 'that the sentence was imposed in violation of the Constitution or laws of the United States,' (2) 'that the court was without jurisdiction to impose such sentence,' (3) 'that the sentence was in excess of the maximum authorized by law,' and (4) that the sentence 'is otherwise subject to collateral attack.'" *Hill v. United States*, 368 U.S. 424, 426-427 (1962) (quoting 28 U.S.C. § 2255). Arguments that might warrant reversal on direct appeal do not necessarily support collateral attack. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994).

III. ANALYSIS

a. Ineffective Assistance of Counsel

Claims alleging ineffective assistance of counsel related to the underlying conviction and sentence are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "This standard requires [the applicant] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient

performance prejudiced his defense.'" *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Assuming the performance was deficient, the prejudice prong "requires proof that there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different."

Lawrence, 961 F.2d at 115 (quoting *Strickland*, 466 U.S. at 689-90, 694). Failure to satisfy either prong is fatal to the claim. *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997) (no need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness"); *see also DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000).

In evaluating counsel's conduct, the court should avoid "the distorting effects of hindsight," *Strickland*, 466 U.S. at 689, and "try to evaluate counsel's conduct by looking at the circumstances as they must have appeared to counsel at the time." *Rodela-Aguilar v. United States*, 596 F.3d 457, 461 (8th Cir. 2010) (quotation omitted). "A court 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689).

Davis allege his counsel was ineffective in three different aspects of his representation. The Court takes up two here, and addresses the third in the section that follows.

i. Failing to Object to statements the Government made during Trial

Davis first contends that his counsel was ineffective for failing to object to repeated characterizations the Government made during trial. He quotes the following statement from the Government's opening statement:

> We are not charging Mr. Davis with sale of anything. We are charging him with distribution of drugs, and that's what the law requires. No profit is required and we are not alleging any. We are alleging that he distributed drugs to Amber McGathey and others and in this instance caused the death of Ms. McGathey.

Mr. Davis contends that this statement, as well as other similar statements made to the jury, resulted in a blurring of the distinction between conspiracy and substantive distribution. However, Davis fails to elaborate on how the Government's accomplished that end. Davis was charged with conspiracy to distribute, and the quoted-statement accurate reflects the charge. Davis's first claim for ineffective assistance of counsel is denied.

ii. Counsel's Trial Strategy and Defense Theory

Davis next contends that his trial counsel provided constitutionally ineffective assistance when he pursued an argument at trial that differed from Davis's direction. Davis argues that, but for counsel's choice to argue his "rogue theory," that an alternative conspiracy existed between the Kansas City Police Department and Boyd McGathey,[2] the jury would have properly understood the relevant criminal elements, and would have understood that Davis was merely a buyer that had not engaged with the broader criminal conspiracy.

Here, Davis advances two discrete arguments: 1) that his counsel chose the wrong strategy; and 2) that counsel's choice went against his instructions. Regarding Davis's first argument, "'[d]eference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage.'" *Guzman-Ortiz v. United States*, 849 F.3d 708, 714 (8th Cir. 2017) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003)). "Accordingly, review of closing argument is 'highly deferential' to counsel's chosen trial strategy." *Id.* "Generally, an ineffective assistance of counsel claim cannot be based on a decision

[2] Boyd McGathey is the father of Andrea McGathey, a woman that died from a drug overdose and who was linked to the conspiracy that was the subject of Davis's criminal proceedings.

relating to a reasoned choice of trial strategy, even when proved improvident." *Nave*, 62 F.3d 103 (quotation omitted).

Review of the transcript[3] shows that Davis's counsel's cross-examination employed an approach that touched on multiple defenses beyond the "rogue theory" Davis takes issue with. (Tr. at 1265-91). Further, Davis proposes no alternative theory that counsel should have employed, other than arguing that counsel should have omitted the "rogue theory," nor does Davis cite any case in which a court has granted a habeas motion based on defects in a chosen closing argument. In fact, Davis's argument is simply a short recitation that his counsel chose the wrong strategy, and that the strategy prejudiced his defense. Such bare allegations are insufficient to vacate a sentence under 28 U.S.C. § 2255. *See, e.g., Johnson v. Norris*, 207 F.3d 515, 520-21 (8th Cir. 2000) (stating that, without evidentiary support, there is no way to assess the value of petitioner's ineffective assistance of counsel claim); *Aldridge v. United States*, No. 06-1025-CV-W-NKL-P, 2007 WL 1289684, at *4 (W.D. Mo. May 1, 2007) (find that petitioner did not present requisite evidence to demonstrate prejudice, for the purpose of *Strickland* analysis); *United States v. McGruder*, No. 05–CV–1406(JMR/JSM), 2006 WL 1506874, at *3 (D. Minn. May 30, 2006) (stating that claims only supported by "[b]ald assertions . . . are insufficient even to warrant an evidentiary hearing").

iii. Miscellaneous Claims

Davis briefly offers additional claims in the course of his larger arguments regarding ineffective assistance of counsel, including contentions that: his attorney had never tried a federal drug conspiracy case; his attorney was unprepared; and Davis's own medical conditions resulted

[3] The trial transcript spans documents 537 to 543 in the criminal case docket, and are consecutively paginated. (*See* Crim. Case, Docket Sheet). The Court cites generally to the transcript as "Tr." and pin-cites using those page numbers.

in repeated absences from the courtroom and prejudiced his representation. (Doc. # 1, pp. 14-15). However, Davis fails to elaborate on any of these claims, and thus fails to reach the relevant evidentiary burden. *See McGruder*, 2006 WL 1506874, at *3.

b. Jury Instructions

The Court next analyzes Davis's jury instruction claim. After the presentation of evidence, Davis requested that the following buyer-seller instruction be delivered to the jury:

> A conspiracy to distribute drugs or possess drugs with intent to distribute requires more than simply an agreement to exchange money for drugs which the seller knows will be consumed, resold, or given away.
>
> In order to establish that a defendant knowingly conspired to distribute drugs or possess drugs with intent to distribute with a person from whom the defendant bought drugs, the government must first prove that, in addition to agreeing to buy drugs, the defendant further agreed to participate with the seller in an arrangement involving mutual dependence, cooperation or assistance in distributing drugs. Such an agreement may be proved by evidence showing sales for cash or on credit, where the buyer is permitted to pay for all or part of the drugs with the intent and knowledge the drugs will be resold coupled with other evidence showing mutual cooperation and an ongoing arrangement between the defendant and the seller.

The Court then had the following exchange with Davis's attorney regarding the submitted instruction:

> [Davis's Attorney, Mr. Osgood]: [W]e didn't have any problem with most of the government's instructions. I only submitted three. Obviously I don't see in here an instruction on the defense of -- or is it in here -- user -- buyer-seller defense.
>
> [The Court]: The instruction you submitted is not in there. It's denied.
>
> [Osgood]: I guess my answer is, obviously is there an instruction more neutral the Court would consider some kind -- that the Court would write? I know the instruction I gave you, Your Honor, is one the judge in the Seventh Circuit wrote himself using a submitted government instruction and a submitted defense instruction.
>
> [The Court]: Yeah, I would consider submitting something along the lines that merely buying for personal use is not sufficient to establish joinder in the conspiracy, and there's some Eighth Circuit language that tracks on some of that.

[Osgood]: Then I would request that as an alternative.

(Tr. at 1219-20). After considering Davis's request, the Court instructed the jury as follows:

> To assist you in determining whether there was an agreement or understanding to distribute the controlled substances alleged in Count One, you are advised that the elements of the crime of distribution of a controlled substance are:
>
> One, the Defendant intentionally transferred a controlled substance to another person; and
>
> Two, at the time of the transfer, the Defendant knew that the substance transferred was a controlled substance.
>
> There need only be an agreement to distribute a controlled substance, that is, to transfer a controlled substance to another person. There is no requirement that a defendant intend to sell a controlled substance, or even to entertain a profit motive, in order to join a conspiracy to distribute a controlled substance. A person may join such a conspiracy if he joins in an agreement to transfer a controlled substance to another person. No sale of a controlled substance is required. However, proof of a buy-seller relationship, without more, is not sufficient to establish an agreement to distribute a controlled substance on the part of the buyer.

(Crim Case, Doc. # 447, p. 29). Davis's attorney did not object to the instruction as given. (Tr. at 1221). Davis contends that the Court's instruction blurred the distinction between conspiracy and substantive distribution, and resulted in the jury misunderstanding the relevant elements of a criminal conspiracy.

As the Eighth Circuit noted, Davis's counsel did not object to the Court's instruction during the trial. *Davis*, 826 F.3d at 1082. "When a party expressly agrees to an instruction, the doctrine of invited error applies, and any objection to the instruction is waived." *Id.* (citing *United States v. Mariano*, 729 F.3d 874, 881-82 (8th Cir. 2013); *United States v. Binday*, 804 F.3d 558, 582-83 (2nd Cir. 2015); *United States v. Frank*, 599 F.3d 1221, 1240 (11th Cir. 2010)). "'[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, [Davis] must show both (1) "cause" excusing his procedural default, and (2) "actual prejudice" resulting from the errors of which he complains.'" *Roundtree v. United States*, 885 F.3d 1095, 1097-98 (8th

Cir. 2018) (quoting *United States v. Frady*, 456 U.S. 152, 166 (1982)); *see also United States v. Ramos*, 187 F.3d 644 (Table), 1999 WL 627570, at *1 (8th Cir. 1999); *Bush v. Smith*, No. 17-cv-3129 (WMW/SER), 2018 WL 542693, at *1 (D. Minn. Jan. 24, 2018).

Davis advances two bases to demonstrate cause to overcome his procedural default:[4] 1) that the instruction violated his right to due process of law and a fair trial; and 2) that his counsel was ineffective for failing to preserve his objection to the jury instructions at trial. Regarding the first issue, "[a] criminal defendant is entitled to have the jury instructed on a defense theory if a timely submission is made of an instruction that correctly states the law and is supported by the evidence." *United States v. Johnson*, 767 F.2d 1259, 1267 (8th Cir. 1985). However, this entitlement is not absolute; for instance, proposed instructions that incorrectly state the law are correctly refused. *See id.* at 1269. Further, "[i]nstructions that are long and verbose and contain detailed descriptions of the purported evidence and inferences drawn therefrom by defense counsel have been properly refused." 8th Cir. Model Crim. Instr. § 9.05 cmt. (2017) (citing *United States v. Skyres*, 898 F.2d 647, 658 (8th Cir. 1990)). Here, Davis's proposed instruction included language beyond the elements of the offense and attempted to enumerate examples under which the Government would be able to prove the case; both of which would have had the effect of raising the Government's burden of proof. Accordingly, the Court's decision to modify Davis's proposed instruction was proper.

Davis's remaining argument attempts to show cause for his procedural default by pointing to his attorney's failure to preserve his objections to the jury instructions. However, "[t]o establish a claim of ineffective assistance of counsel for failure to object, such objection must be

[4] Davis contends that he did not procedurally default the issue. The Court construes his arguments regarding reversible error under the procedural default framework.

meritorious." *Griffith v. Larkins*, No. 4:09CV1092 JCH, 2012 WL 1192189, at *12 (E.D. Mo. Apr. 10, 2012) (reviewing state court decision to see if it constituted a reasonable application of federal law, under 28 U.S.C. § 2254). As the given jury instruction was proper, counsel was not ineffective for failing to preserve an objection.

IV. EVIDENTIARY HEARING AND CERTIFICATE OF APPEALABILITY

A movant is not entitled to an evidentiary hearing on a § 2255 motion if the motion and the files and record of the case conclusively show he is entitled to no relief. *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008). No hearing is required "where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007). It is clear, from the above discussion, an evidentiary hearing is not necessary to resolve Movant's claims. Movant's claims fail as a matter of law.

Additionally, a movant can appeal a decision to the Eighth Circuit only if a court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability should be issued only if a movant can make a substantial showing of a denial of a constitutional right. *Id.* § 2253(c)(2). To meet this standard, a movant must show reasonable jurists could debate whether the issues should have been resolved in a different manner or the issues deserve further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). As discussed above, Movant's claims fail as a matter of law, and the merits of his claims are not debatable among jurists or deserving of further proceedings.

CONCLUSION

Movant fails to demonstrate that his defense counsel provided constitutionally ineffective assistance, as contemplated by the Sixth Amendment. Further, the Court properly instructed the

jury on Davis's buyer-seller defense theory. For these reasons, and the ones stated above, Movant's habeas petition is DENIED.

IT IS SO ORDERED.

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

DATED: August 28, 2018

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

MATTHEW DAVIS,	)	
	)	
Movant,	)	
	)	
v.	)	Case No. 17-01035-CV-W-GAF
	)	Crim. No. 12-00063-09-CR-W-GAF
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT IN A CIVIL ACTION

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision of the Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED that: Movant fails to demonstrate that his defense counsel provided constitutionally ineffective assistance, as contemplated by the Sixth Amendment. Further, the Court properly instructed the jury on Davis's buyer-seller defense theory. For these reasons, and the ones stated above, Movant's habeas petition is DENIED.

Dated: August 28, 2018

PAIGE WYMORE-WYNN
Clerk of Court

Entered: : August 28, 2018

/s/ Lisa Mitchell
(By) Deputy Clerk

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

MATTHEW DAVIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 17-01035-CV-W-GAF**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Now before the Court is defendant's *pro se* Motion for Leave to Appeal In Forma Pauperis (Doc. #13). The Court having considered defendant's motion, it is

ORDERED that defendant's *pro se* Motion for Leave to Appeal In Forma Pauperis (Doc. #13) is DENIED.

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

DATED: October 25, 2018

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3283

Matthew Davis

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-01035-GAF)

MANDATE

In accordance with the judgment of 03/08/2019, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

June 26, 2019

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX - A