APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 22-3947

[Filed May 12, 2023]

JERRY J. DAVIS, JR.,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent-Appellee.	)
	)

O R D E R

Before: McKEAGUE, Circuit Judge.

Jerry J. Davis, Jr., a federal prisoner proceeding through counsel, appeals a district court judgment denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 and moves this court for a certificate of appealability (COA).

In 2017, a jury found Davis guilty of two counts of possession with intent to distribute cocaine, in violation 21 U.S.C. § 841(a)(1) and (b)(1)(A)(ii) (Counts 1 and 3); two counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Counts 2 and 4); and being a felon in

possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 5). After trial, Count 4 was vacated as duplicative of Count 2. Davis was sentenced to a total term of 248 months in prison. This court affirmed. *United States v. Davis*, 751 F. App'x 889 (6th Cir. 2018).

Davis then filed a § 2255 motion to vacate, raising three ineffective-assistance-of-appellate-counsel (IAAC) claims and two ineffective-assistance-of-trial-counsel (IATC) claims. After an evidentiary hearing on the IATC claims, the district court denied the motion and declined to issue a COA.

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). That standard is met when the movant demonstrates "that jurists of reason could disagree with district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered deficient when it "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Id.* at 694. In the appellate context, the petitioner must demonstrate that the issue omitted by counsel "was clearly stronger than the issues that counsel did present[,]" *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)), and a reasonable probability that he would have prevailed but for counsel's failure to raise the issue, *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013).

Ground One – IAAC – Denial of Motion to Suppress

Davis's first claim is that appellate counsel failed to challenge the district court's denial of his motion to suppress a statement that he made to law enforcement related to 11 kilograms of cocaine discovered in his vehicle, initially thought to be fentanyl. While Davis was in the hospital, having been arrested after crashing his vehicle as he fled from police, *see Davis*, 751 F. App'x at 890-91, two officers in Davis's presence were discussing the "11 kilos" that they found in a duffel bag in the car. Officer Brent Heller asked the other officer loudly, "Damn, 11 kilos of fentanyl?" and Davis, who overheard the officers, stated: "I can tell you that ain't fentanyl." In denying Davis's motion to suppress the statement, the district court concluded that "Officer Heller was not speaking with Davis and his conversation with the other officers involved in the case was not designed to elicit an incriminating response from [Davis]."

In rejecting this IAAC claim, the district court reasoned that Davis failed to demonstrate that appellate counsel could have successfully challenged the denial of his suppression motion. No reasonable

jurist could disagree. As explained by the district court, Davis's statement that there was no fentanyl in the duffel bag was voluntary, and voluntary statements that are not made during an interrogation are admissible even when no warning is given under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Rhode Island v. Innis*, 446 U.S. 291, 299-300 (1980). At no point did the officers direct any of their statements—much less any questions—at Davis. Instead, Davis simply overheard the officers talking and chose to inject himself into their conversation by voluntarily stating that what was found in his car was not fentanyl. A challenge to the district court's denial of Davis's motion to suppress his statement to the officers therefore likely would have been unsuccessful. *See id.* Given that Davis has not shown that the unraised issue was "clearly stronger than the issues that counsel did present" on appeal, *Webb*, 586 F.3d at 399 (quoting *Smith*, 528 U.S. at 288), jurists of reason could not debate the district court's rejection of this IAAC claim.

Grounds Two and Three – IAAC – Challenges Related to Search Warrant Affidavit

Grounds Two and Three involve arguments relating to a search warrant affidavit that, according to Davis, appellate counsel failed to raise on appeal. Following Davis's arrest after his failed attempt to flee police, a detective submitted an affidavit in support of a search warrant for 435 Center Road; the detective averred, as is pertinent here, that he "knows through surveillance over the past year that [Davis] resides at 435 Center Road" in New Franklin, Ohio and that, at one point, Davis had called the New Franklin fire department to

his home "because his juvenile child was unresponsive." Before trial, Davis's trial counsel moved to suppress 25 kilograms of cocaine, a firearm, and other drug-trafficking evidence that was seized from 435 Center Road, arguing that the search warrant affidavit did not show that 435 Center Road was Davis's primary residence and, even if it did, it did not show a nexus between that residence and drug dealing activity; instead, it contained only "conclusory allegations . . . that drug traffickers keep evidence in their homes." The district court denied Davis's request to hold a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), and denied the motion to suppress. On appeal, as to the search warrant affidavit, appellate counsel argued only that there was no nexus between the residence and drug dealing. We affirmed, reasoning that it was proper to infer a nexus between the residence and drug-trafficking activity in light of evidence that "a large quantity of drugs" was seized from Davis's vehicle, that a confidential informant identified Davis as a "large scale [h]eroin dealer" in the community, and that federal agents had recently "seized large sums of money from Davis as drug proceeds." *Davis*, 751 F. App'x at 891-92 (alteration in original).

In Ground Two, Davis claims that appellate counsel failed to argue that the detective's two statements linking Davis to and as a primary occupant of the residence, identified above, are "conclusory" and "failed to establish probable cause." In Ground Three, Davis claims that appellate counsel should have challenged the district court's denial of his request for a *Franks* hearing to determine whether the search warrant

affidavit falsely represented that Davis resided at 435 Center Road when his driver's license—which was in the possession of law enforcement—listed a different address.

Reasonable jurists could not debate the district court's rejection of these IAAC claims. To be entitled to a *Franks* hearing, a defendant must "make[] a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and [ ] the allegedly false statement is necessary to the finding of probable cause." *United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008) (second alteration in original) (quoting *Franks*, 438 U.S. at 155-56). Davis alleged no facts to indicate that the search warrant affidavit contained a statement that the detective knew was false or was made with a reckless disregard for its truth. The affidavit merely omitted the fact that Davis's driver's license listed a different address; it did, however, link Davis to 435 Center Road, in particular by relaying that another officer knew through surveillance that Davis resided there. And, as to Ground Two, the statements linking Davis to drug-trafficking activity and the home were sufficient to establish a nexus between the two and thus probable cause to search the home, as we concluded on direct appeal. *See Davis*, 751 F. App'x at 891-92. Indeed, Davis's IAAC claims as they relate to the search warrant affidavit are at least in part a repurposed challenge to the sufficiency of the search warrant affidavit that has already been considered and rejected on direct appeal. *See Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999) ("[A] §

2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law.").

Davis has not shown that, had appellate counsel challenged the affidavit in the manner that Davis wished, there is a reasonable probability that his appeal would have turned out favorably for him. *See Moore*, 708 F.3d at 776. No reasonable jurist therefore could debate the district court's rejection of Davis's second and third IAAC claims.

Grounds Four and Five – IATC

In Ground Four, Davis claims that trial counsel, Steven L. Bradley and Mark B. Marein, conceded his guilt without his consent. Relatedly, in Ground Five, Davis faults trial counsel for challenging only the § 924(c) charge that ended up being vacated (Count 4). In support, Davis points to (1) opening statements, where Bradley told the jury that "most of the evidence that you're going to hear is largely going to be uncontested by the defense," that "the real dispute is going to center around that unloaded firearm that was found in that detached garage," and that "we will ask that you return a verdict of not guilty as to that single count," and (2) closing argument, where Bradley told the jury that "Davis accepts responsibility for his participation in there offenses," that "based on the evidence that the government has presented here and with that acknowledgement, . . . your verdicts will so reflect his participation in these offenses," and that he "want[s] to focus [his] remarks on really the only count

in the indictment that is disputed, and that would be Count 4."

The district court found that the foregoing statements did not amount to a "true concession of guilt" because Davis did not stipulate to any facts and the government still "bore the burden of proving [his] guilt beyond a reasonable doubt at trial for all counts." Reasonable jurists could debate this finding insofar as Bradley explicitly told the jury that "most of the evidence" that the government would present was "uncontested" and that Davis "participat[ed] in these offenses" and asked the jury to find Davis not guilty only as to one of the five counts. *Cf. Valenzuela v. United States*, 217 F. App'x 486, 489-90 (6th Cir. 2007) (concluding that trial counsel did not concede guilt but rather admitted minor facts while arguing that those facts were not probative of the defendant's guilt in view of the government's entrapment).

But reasonable jurists could not debate the district court's finding that Davis suffered no prejudice, which is fatal to his IATC claims. Davis maintains that prejudice is presumed in view of *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505, 1511 (2018), which held that, in the capital context, "a defendant has the right to insist that counsel refrain from admitting guilt" and that the denial of this right constitutes a structural error that is not subject to harmless-error review. But for structural-error analysis to apply under *McCoy*, a defendant must expressly object to counsel's strategy to concede guilt in open court. *See* 138 S. Ct. at 1507-09. Here, Davis never voiced any opposition to trial counsels' concessions. So *McCoy* is inapplicable, and

Davis's IATC claims are governed by *Strickland* and its prejudice prong. *See Florida v. Nixon*, 543 U.S. 175, 178-79, 191-92 (2004) (holding that trial counsel's concessions did not constitute presumptively prejudicial structural error because the defendant was merely indifferent about trial strategy).

And reasonable jurists would agree that Davis has not shown that, but for Bradley's statements, the result of his trial would likely have been different, given the overwhelming evidence of his guilt. *See Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985) (stating that "a defendant must make more than merely speculative assertions" to show a reasonable probability that, but for counsel's unprofessional errors, the result of proceeding would have been different). After Davis crashed his vehicle during a police chase and fled the scene—all of which was captured on dash cam video—officers recovered a pistol, ammunition, and 11 kilograms of cocaine from his vehicle. Officers then obtained a warrant to search Davis's residence and recovered, in the garage, a .45 caliber handgun, 25 kilograms of cocaine wrapped in individual "bricks" in a duffel bag, and additional evidence (e.g., documents issued to Davis or bearing his name) that tied Davis to the property and the garage specifically. In addition, as noted above, there was evidence that Davis was a "large scale" drug dealer in the community and previously had drug money seized from him by federal agents. *Davis*, 751 F. App'x at 891-92. So even if counsel performed deficiently by conceding Davis's guilt, no reasonable jurist, in light of all of the evidence, could debate the district court's conclusion that Davis failed to show prejudice and thus that he

was not entitled to relief on his IATC claims. *See United States v. Schneider*, 852 F. App'x 690, 696 (3d Cir. 2021) (concluding that counsel's single remark, which the defendant interpreted as a concession of guilt, did not prejudice the defendant in view of his proclaimed innocence and "substantial testimony" against him); *Ashley v. Koehler*, No. 87-1482, 1988 WL 12146, at *5 (6th Cir. Feb. 18, 1988) (per curiam) (holding that even if counsel did not obtain consent to concede guilt, the defendant could not satisfy the prejudice prong of *Strickland* in light of the evidence of his guilt).

The court therefore **DENIES** the motion for a COA.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:20CV414
(5:16CR374)

JUDGE BENITA Y. PEARSON

[Filed October 20, 2022]

JERRY J. DAVIS, JR.,	)
	)
Petitioner,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

ORDER
[Resolving ECF No. 107]

Pending before the Court is Petitioner Jerry J. Davis, Jr.'s Motion to Vacate, Set-Aside, or Correct Sentence Under 28 U.S.C. § 2255.[1] ECF No. 107. The matter has been fully briefed and an evidentiary

[1] Unless otherwise indicated, the docket references will be to the criminal case, 5:16CR374, not the related civil case, 5:20CV414.

hearing was held. Having reviewed the parties' evidence, testimony, and the record, the Court denies Petitioner's Motion.

I. Background

The Court repeats the following facts as they were presented in the Court's ruling on the Motion to Suppress (ECF No. 45)[2]:

> On November 1, 2016, at approximately 12:47 p.m., Ohio State Highway Patrol Trooper Michael McCarthy was on patrol in a marked police cruiser when he observed a white Ford Explorer bearing Massachusetts state plate 7CYV90 driving northbound on Lake Shore Boulevard in Akron, Ohio. He also observed that the vehicle was traveling at 35 miles per hour in a 25 mile-per-hour speed zone in a residential area. Trooper McCarthy initiated a traffic stop of the vehicle by activating his overhead blue lights. Trooper McCarthy's cruiser was equipped with a video camera and it captured the traffic violation, the entire traffic stop, and noted the rate speed the cruiser traveled. *See* Government Exhibit 4. The driver of the vehicle made a right turn onto Lake Street and stopped. At approximately 12:49:33 p.m., Trooper McCarthy approached the vehicle on the driver's side and made contact with the male driver. Trooper

[2] The Court's ruling on Defendant's motion to suppress was affirmed by the Sixth Circuit Court of Appeals. *See* ECF No. 100 (declining to review Defendant's claim of ineffective assistance of counsel); *United States v. Davis*, 751 F. App'x 889 (6th Cir. 2018).

McCarthy told the driver why he stopped him and asked the driver for his driver's license, registration and proof of insurance. Trooper McCarthy noted that the driver appeared very concerned about the Akron Police officers that were on the passenger side of the vehicle. The driver attempted to hand Trooper McCarthy his American Express card. Trooper McCarthy informed the driver that he did not accept American Express and told the driver that he would appreciate it if he gave him his driver's license. The driver then pulled his driver's license out of his wallet and handed it to Trooper McCarthy. The driver's license had a picture of the driver and identified him as Defendant Jerry Davis, Jr. Davis stated that he was heading to his home in Manchester, Ohio and the vehicle was a rental that his girlfriend rented five days earlier on October 27, 2016. Trooper McCarthy informed Davis that if he was heading to Manchester he was going in the wrong direction. Davis said that he was coming from Kenmore and was heading to Manchester and he had just chosen to drive that way. Trooper McCarthy observed that Davis seemed distracted by the Akron police officers who were on the passenger side of Davis' vehicle. Trooper McCarthy told Davis to keep his hands on the steering wheel and told Davis that he would be right back.

At approximately 12:51:47 p.m., Trooper McCarthy walked back to his patrol car to check Davis' license information and he asked Ohio State Highway Patrol Trooper Baker to walk his

K-9 around Davis' vehicle. At approximately 12:52:38 p.m., Trooper Baker approached Davis' driver side window. Trooper Baker started to talk to Davis and, at approximately 12:53:08 p.m., Trooper McCarthy observed the brake lights on Davis' vehicle light up and then watched as Davis drove away at a very high rate of speed traveling east on Lake Street. This was captured by the video camera. Trooper McCarthy pursued Davis in his cruiser. Trooper McCarthy observed Davis driving at a very high rate of speed and watched Davis drive through a stop sign at the intersection of Lake Street and Edison Street and then drive through another stop sign at the intersection of Lake Street and S. Old Main Street. Davis turned north onto S. Old Main Street the wrong way (against traffic), and nearly collided with a vehicle on that busy street. Trooper McCarthy watched Davis lose control of his vehicle, hitting a telephone pole and then hitting a parked car. Davis exited his vehicle from the driver's side door and ran to the back of his vehicle and attempted to open the hatch, but the hatch would not open. Still on foot, Davis then ran north on S. Old Main Street. Trooper McCarthy and Akron Police Officer Hill chased after Davis on foot. Davis ran east on S. Old Main Street and then jumped off a bridge, falling approximately 30 feet to the ground below. Trooper McCarthy observed Davis on the ground moaning. Concerned that Davis had seriously injured himself, Trooper McCarthy advised Canton, Ohio State Highway Patrol dispatch that Davis had jumped off a bridge and

requested that they notify emergency medical support. Officers eventually arrested Davis after he walked south down some railroad tracks.

Akron Police Officer Brent Heller assisted in the arrest of Defendant. Officer Heller rode in the ambulance with Davis and also stayed with Defendant while Davis was being treated at Akron General Medical Center. Officer Heller drafted a police report outlining what occurred while he was at the hospital with Davis. Officer Heller wrote that Davis was trying to engage him in conversation. Officer Heller then wrote that Davis overheard Officer Heller talking with Sergeant Malick of the Akron Police Department about the kilos they found in Davis' car. The officers mentioned to each other that the kilos may be fentanyl. According to Officer Heller's testimony, when Davis heard the officers mention fentanyl, Davis chimed in "I can tell ya that ain't no fentanyl."

Akron Police Narcotics officers had also arrived to assist with the investigation. Trooper McCarthy returned to Davis' vehicle to secure it. Trooper McCarthy observed a loaded Glock .40 caliber pistol with an extended magazine on the driver's floor area, a black duffle bag in the rear cargo area containing 11 one-kilogram packages of suspected drugs, and several cellular telephones. *See* Government Exhibits 2 and 3. A field test of one of the packages tested positive for the presence of fentanyl. ECF No. 41-1 at

PageID #: 200. The vehicle was subsequently towed away and impounded.

Shortly after Davis' arrest, investigators from the Akron-Summit County High-Intensity Drug Trafficking Area decided to obtain a search warrant for drugs, records of drug trafficking, and firearms at Davis' known residence at 435 Center Road, New Franklin, an Akron suburb located in Summit County, Ohio. Detective Jimmy Fields from the Summit County Sheriff's Office Drug Unit drafted the Affidavit in support of the search warrant (ECF No. 41-1 at PageID #: 194–204). He is an experienced law enforcement officer. ECF No. 41-1 at PageID #: 201.

In the sworn Affidavit, Detective Fields stated that he was aware that Detective Shawn Brown of the Akron Narcotics Unit conducted an interview with a credible Confidential Human Source ("CHS") in September 2016. The CHS advised Detective Brown that they were aware that one Jerry Davis aka "JD" was a large-scale heroin dealer in the Akron area. The CHS stated that they did not have a current telephone number or address for Davis, but that they were aware that Davis was currently living in an Akron suburb. Agents from the Drug Enforcement Administration (the "DEA") identified Davis as a significant, large-scale drug dealer operating in the Akron area. The Agents seized and subsequently forfeited as drug proceeds, large amounts of U.S. currency from

Davis on several occasions, including $10,429 on September 6, 2006, $7,230 on March 12, 2008, $7,542 on July 16, 2008, $18,000 on August 26, 2008, and $27,000 on May 7, 2013. ECF No. 41-1 at PageID #: 200. "Over the past couple [months]," Detective Fields had personally participated in the investigation of Davis' drug trafficking activities.[3] Detective Fields noted that he worked on the investigation into Davis' drug trafficking activities along with other investigators from the Summit County Drug Unit ("SCDU"), the Akron Police Narcotics Unit, and the Ohio State Highway Patrol. Through various investigative techniques, Detective Fields and other investigators from the SCDU learned that Davis and others had been involved in heroin distributions in the Akron, Ohio area over the past several months. ECF No. 41-1 at PageID #: 197.

In addition, Detective Fields performed a criminal records check for Davis that showed that Davis has a history of weapon and drug related convictions. Specifically, in 2001 Davis was convicted of carrying a concealed weapon, in 2012 Davis was convicted of having a weapon while under disability in Akron, Ohio, and was

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[3] According to the Government, a typographical error appears on page four of the Affidavit in support of the search warrant (ECF No. 41-1 at PageID #: 194–204). Detective Fields intended that the sentence read: "Over the past couple months" in lieu of "Over the past couple years" which was previously inadvertently specified in the Affidavit. Supplemental Response, ECF No. 42 at PageID #: 205–206.

also convicted in 2012 of carrying a concealed weapon in Boston Heights, Ohio. ECF No. 41-1 at PageID #: 198–99. In 2006, Davis was convicted of possession of cocaine in Akron, Ohio, and was convicted of possession of heroin in 2012 in Akron, Ohio. Based upon all of the information presented in the Affidavit, law enforcement had identified Davis as a drug dealer as far back as 2006. Davis' recent contacts with the DEA and the criminal justice system only further cemented the fact that law enforcement identified Davis as a drug dealer.

Detective Fields also noted in the Affidavit that a search of the duffle bag located in the rear cargo area of the Ford Explorer "revealed eleven (11) rectangular shaped objects wrapped in green cellophane. A field test of one of the packages tested positive for the presence of Fentanyl." Detective Fields stated that "Det. Jon Heimbaugh of New Franklin Police Department . . . knows through surveillance over the past year Jerry DAVIS resides at 435 Center Road." ECF No. 41-1 at PageID #: 200. Affiant attested that he knew that drug traffickers very often place assets in the names of other people rather than in their own names to avoid detection from government agencies. Detective Fields also declared that he knows that, even though these assets are in other persons' names, the drug dealers actually own and continue to use these assets and exercise dominion and control over them. ECF No. 41-1 at PageID #: 201. Detective Fields stated he knows that drug traffickers

> commonly have firearms in their possession, on their person and/or at their residence. He also stated that drug traffickers possess firearms to protect and secure their property, including their narcotics and other valuables. ECF No. 41-1 at PageID #: 203. In the Affidavit, Detective Fields indicated that he had good cause to believe that firearms may have been concealed at Davis' residence. ECF No. 41-1 at PageID #: 194–95.
>
> At approximately 4:18 p.m. on November 1, 2016, Judge Lynne S. Callahan of the Summit County, Ohio Court of Common Pleas authorized and signed a search warrant for Davis' residence. ECF No. 41-1. The search warrant was executed on November 1, 2016. The list of 19 items seized (ECF No. 41-1 at PageID #: 192–93) includes 25 kilogram "bricks" marked with a "C," $67,658 in U.S. currency, 18K gold Rolex watch, 18K gold diamond ring, 14K white gold diamond ring, Springfield .45 caliber handgun and ammunition, Glock .45 caliber model 30 handgun and ammunition, and 22 rounds of .45 caliber ammunition.

ECF No. 45 at PageID #: 215–21.

Following the arrest of Petitioner, a federal jury indicted Petitioner in a five-count indictment. ECF No. 13. Petitioner was indicted on two counts of possession of cocaine in violation 21 U.S.C. § 841(a)(1) and (b)(1)(A)(ii) (Counts 1 and 3); two counts of possession of a firearm in violation of 18 U.S.C. § 924(c)(1)(A)(i) and (c)(1)(C)(i) (Counts 2 and 4); and

one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count 5). ECF No. 13 at PageID #: 28–29. Counts 1 and 2 stemmed from the contraband found in Petitioner's vehicle and Counts 3 and 4 were in relation to the contraband found at 435 Center Road. ECF No. 13 at PageID #: 28–29.

Petitioner was found guilty at trial on Counts 1, 2, 3, and 5 and sentenced to 248-months of incarceration. ECF No. 82. Following the Sixth Circuit's guidance, which provides that multiple § 924(c) convictions violate the double jeopardy clause, the Court vacated Count 4 because it was a duplicitous 18 U.S.C. § 924(c) conviction. *See, e.g.*, *United States v. Whitson*, 664 F. App'x 503, 507 (6th Cir. 2016) (instructing district court on remand to dismiss one of the two 924(c) counts to avoid a violation of the double jeopardy clause). Afterwards, Petitioner directly appealed his convictions, and all were affirmed. *Davis*, 751 F. App'x at 892. Petitioner then filed the underlying petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. ECF No. 107.

Petitioner presents five claims for relief, all in the vein of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The first three claims argue ineffective assistance of appellate counsel and the last two argue ineffective assistance of trial counsel. The Court held an evidentiary hearing on the limited questions of fact at issue in relation to trial counsel's performance. Subsequently, the Court allowed the parties to submit supplemental briefing on the issue of ineffective assistance of trial counsel. The Court now addresses

the issues of ineffective assistance of appellate counsel and trial counsel.

II. Standard of Review

Section 2255 of Title 28 of the United States Code provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

To prevail on a motion to vacate under Section 2255, the movant must allege "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003) (quoting *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001)).

Ineffective assistance of counsel may be a proper basis for relief under 28 U.S.C. § 2255, provided Petitioner can demonstrate counsel's ineffectiveness. To establish ineffective assistance of counsel, Petitioner must first demonstrate that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This is a two-part test that requires a

demonstration of error and prejudice. The error prong requires a showing, based on an "objective standard of reasonableness," that counsel made errors so serious that he was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment. *Id.* at 687–88. To satisfy the error prong, Petitioner must overcome the strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance," and that "the challenged action 'might be considered sound trial strategy.' " *Id.* at 689. The judicial scrutiny of a possible error is highly deferential to counsel. *Id*. The prejudice prong requires showing that counsel's deficient performance prejudiced the defense. *Id.* at 687. To satisfy the prejudice requirement of *Strickland*, Petitioner must show "that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Failure to satisfy either requirement is fatal to an ineffective assistance claim. *Id.* at 697. While Petitioner must prove each element of the two-part *Strickland* test to establish an ineffective assistance of counsel claim, the Court is not required to conduct an analysis under both *Strickland* prongs. *Id.* at 697. If the Court finds that Petitioner cannot meet one of the two *Strickland* prongs, it need not address the other. *Id*.

III. Discussion

Petitioner's motion presents two separate grounds on which he claims that he is being held in violation of the Constitution, laws, or treaties of the United States.

For the reasons set forth below, neither of the grounds merit an evidentiary hearing or relief under 28 U.S.C. § 2255.

A. Assistance of Appellate Counsel

First, Petitioner argues that his appellate counsel was ineffective for failing to raise certain arguments on appeal. Counsel's failure to raise an issue on appeal is only considered ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001). Appellate counsel's failure to raise an issue that lacks merit cannot constitute ineffective assistance of appellate counsel. *Willis v. Smith*, 351 F. 3d 741, 744-45 (6th Cir. 2003). To evaluate a claim of ineffective assistance of appellate counsel, the Court must assess the strength of the claim that counsel failed to raise. *Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008).

i. Statements Made at the Hospital

Petitioner first argues that his appellate counsel failed to challenge the District Court's denial of Petitioner's "motion to suppress statements made to law enforcement." ECF No. 107-1 at PageID #:1718. Specifically, Petitioner refers to the statement he made while at the hospital: "I can tell you that ain't no fentanyl." ECF No. 107-1 at PageID #:1713. The statement was made directly after Sergeant Malick and Officer Heller remarked to each other that the seized drugs may have been fentanyl. ECF No. 107-1 at PageID #:1713. In resolving Petitioner's Motion to Suppress, the Court concluded that Petitioner was not

being interrogated and that his statements were voluntary. ECF No. 45 at PageID #: 225. Petitioner does not cite contrary authority to demonstrate the merit of this claim.

Voluntary statements are not protected by *Miranda* or the Fifth Amendment. *United States v. Collins*, 683 F.3d 697, 703 (6th Cir. 2012) (discussing that volunteered statements are not barred by the Fifth Amendment and their admissibility is not affected by the holding in *Miranda*). To determine if a statement is voluntary, the Court must assess whether a reasonable person, using all of the facts and circumstances available, would view the police's actions as attempts to obtain responses to use at trial. *Bachynski v. Stewart*, 813 F.3d 241, 246 (6th Cir. 2015).

A reasonable person would not view an off-hand statement regarding the theory of the case as an attempt to obtain incriminating statements. In this instance, the officers' statements about fentanyl were not directed at Petitioner. The officers were neither conversing with Petitioner, nor were they prying into Petitioner's reasons for committing the offense, but rather they were just discussing amongst themselves a possible theory of the case based on the facts. Petitioner chose to interrupt the officers' conversation on his own accord, demonstrating that his statement was voluntary. He has not made an argument with merit alleging that this claim would have been sufficient or had any reasonable probability of success.

ii. Search Warrant Affidavit

Petitioner also argues that his appellate counsel was ineffective because he failed to "argue that the search warrant affidavit's representation that Mr. Davis resided at 435 Center Road was conclusory in nature and therefore failed to establish probable cause." ECF No. 107-1 at PageID #:1721. The Court need not, however, analyze this claim in detail because Petitioner is improperly trying to relitigate this issue, which is not permitted in a § 2255 proceeding.

Not only did Petitioner's appellate counsel address the search warrant affidavit on appeal, but the Sixth Circuit also directly reviewed the sufficiency of the search warrant affidavit. *Davis*, 751 F. App'x at 891–92 ("Davis next contends that the district court should have suppressed the evidence found in his house because, he says, the affidavit in support of the warrant application failed to establish probable cause."). Absent exceptional circumstances or an intervening change in the law, Petitioner may not use his § 2255 petition to relitigate issues decided on direct appeal. *See Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999). Petitioner argues that appellate counsel failed to contest the sufficiency of information in the search warrant affidavit. ECF No. 110 at PageID #1754. The decision of Petitioner's appellate counsel to present an argument on the affidavit issue that is different from the one raised in the habeas petition is neither indicative of ineffective assistance nor evidence of exceptional circumstances that would permit Petitioner to relitigate whether there was probable cause for the search warrant. *See Pitts v. United States*,

No. 17-6116, 2018 WL 4566275, at *2 (6th Cir. Apr. 3, 2018) (finding that Petitioner's repackaging of a claim which was essentially one of the same arguments he made on appeal is not permitted in a § 2255 motion).

iii. Franks Hearing

Third, Petitioner claims that his appellate counsel was ineffective because he failed "to raise the District Court's denial of Trial Counsel's request for a *Franks* hearing." ECF No. 107-1 at PageID #:1724. This claim also falls under the umbrella of the search warrant's validity, which was previously litigated on direct appeal. Therefore, counsel's alleged failure to raise this meritless claim does not constitute ineffective assistance.

Under *Franks*, there is "a presumption of validity with respect to the affidavit supporting the search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). A defendant can only request a hearing if he raises a substantial question as to whether the affidavit supporting the search warrant contained materially false information. This standard requires making a "substantial preliminary showing" of knowing or reckless inclusion of a false statement or material omission in the affidavit and that the statement was necessary to make a finding of probable cause. *United States v. Bateman*, 945 F.3d 997 (6th Cir. 2019). To obtain a hearing for an omission in the affidavit, Petitioner must show that the facts were omitted with the intention of misleading the magistrate judge. *United States v. Hampton*, 760 F. App'x 399 (6th Cir 2019). This particular issue regarding a *Franks*

hearing was raised at the trial level, and the Court held that the initial showing was not met. ECF No. 45 at PageID #: 229. Petitioner pleads no facts that indicate that materially false information was included in the warrant. He argues that the warrant application affidavit included a false statement because it failed to mention that Petitioner's driver's license listed a residential address other than 435 Center Road. ECF No. 107-1 at PageID #: 1715. Such an omission was not a "knowing or reckless falsity," especially considering that the affidavit mentioned that drug traffickers placed assets in the names of other people. ECF No. 41-1 at PageID #: 201. Accordingly, Petitioner has not shown that his appellate counsel committed an error that leads to prejudice, because raising the *Franks* issue on direct appeal would have been meritless.

Overall, the three arguments Petitioner claims his appellate counsel should have raised are all meritless. Petitioner's appellate counsel's decision to limit his arguments to those with merit is a constitutionally sufficient strategy. *See Jones v. Barnes*, 463 U.S. 745, 754 (1983) (explaining "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy.").

B. Assistance of Trial Counsel

Petitioner's argument about the ineffectiveness of his trial counsel is twofold. First, he argues he did not give his attorneys permission to engage in a strategy that would *de facto* concede his guilt. Second, he argues that even if he consented to such a strategy, the

strategy was constitutionally ineffective. The Court held an evidentiary hearing to address the first question, because it was not clear from the record whether Petitioner gave his trial attorney such permission.

If a defense counsel admits his client's guilt without first obtaining his client's consent, such an action has been found to be *per se* unreasonable under *Strickland*, and the Court may assume both error and prejudice. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). At the outset, the Court is not convinced that Petitioner's counsel conceded his guilt at all. Petitioner claims that his attorney conceded his guilt when his attorney stated in opening statements and closing arguments that he was not going to challenge any count but Count 4.

> "[M]ost of the evidence that you're going to hear is largely going to be uncontested by the defense. And the real dispute is going to center around that unloaded firearm that was found in that detached garage... [W]e will ask that you return a verdict of not guilty as to that single count." (Doc. 96, p. 20) (Doc. 97, p. 58).

> "... Jerry Davis accepts responsibility for his participation in these offenses. And based on the evidence that the government has presented here and with that acknowledgement, you know, your verdicts will so reflect his participation in these offenses... I want to focus my remarks on really the only count in the indictment that is disputed, and that would be Count 4."

ECF No. 121 at PageID #: 1914–15.

These statements are not concessions of guilt because the Government bore the burden of proving Petitioner's guilt beyond a reasonable doubt at trial for all counts. In this case, Petitioner did not attempt to enter stipulations conceding the facts or his guilt regarding any of the charged counts. Without fact stipulations, there was no true concession of guilt because declarations made in opening statements and closing arguments are not evidence. The Government still had to present sufficient evidence for the jury to find Petitioner guilty beyond a reasonable doubt of the counts, regardless of what his counsel stated during argument.

If there were a concession, however, Petitioner's current argument is likely made in bad faith. Petitioner sought to take advantage of his "concession of guilt" at sentencing to obtain an adjustment for acceptance of responsibility. His attempt to use his attorney's strategy as a sword to attack his conviction now, but as a shield from a longer sentence at sentencing, demonstrates that Petitioner's current argument is made in bad faith. If Petitioner truly did not wish to concede his guilt or accept responsibility, he had the opportunity to make that clear during his allocution at sentencing.[4] He could have stated that he did not want to accept responsibility because he never planned to do so or that he disagreed with his counsel's

[4] At trial, Petitioner could have complained that his counsel's "concession" was made without his consent. Petitioner made no such contemporaneous complaint.

trial strategy. Additionally, he could have mentioned this in letters he sent to the Court after sentencing. The fact that Petitioner had multiple opportunities to raise his concerns about his trial counsel's representation, but failed to do so, indicates that his current argument lacks credibility.

To shed light on whether Petitioner conceded his guilt, the Court held an evidentiary hearing about this issue. During the evidentiary hearing, Petitioner's counsel candidly stated that he had no specific memory of this case, specifically regarding whether he discussed with Petitioner the trial strategy of conceding guilt to certain counts. Transcript of Evidentiary Hearing, ECF No. 120 at PageID #: 1835–36. However, Petitioner's counsel offered that in his experience, he would definitely discuss concession of guilt with his client prior to trial. ECF No. 120 at PageID #: 1834. The Court finds that Petitioner's counsel's testimony was more credible than that of Petitioner.

The second argument that Petitioner makes is that even if he agreed to concede his guilt, the strategy itself was not professionally reasonable. There is nothing in the record to support that this strategy was unreasonable. Petitioner claims his trial counsel provided ineffective assistance when his counsel only challenged Count 4, one of the two 924(c) convictions. Petitioner contends that it is unreasonable for trial counsel to only "challenge a single count in a multiple-count indictment where Trial Counsel" can anticipate that the challenged count will likely be merged or vacated. ECF No. 107-1 at PageID #: 1729. The fact that Count 4 was dismissed rather than Count

2 is insignificant. Furthermore, contrary to Petitioner's arguments, trial counsel's failure to contest Count 3 was not an unreasonable trial tactic, under the circumstances then existing. Consequently, trial counsel's decision to only contest Count 4 was not so prejudicial as to have impacted the trial outcome.[5]

IV. Conclusion

Accordingly, the Court finds that Petitioner failed to demonstrate any grounds on which he is entitled to relief under § 2255. Petitioner Jerry J. Davis, Jr.'s Motion to Vacate Sentence Under 28 U.S.C. § 2255 (ECF No. 107) is denied.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. §2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

October 20, 2022
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

[5] The evidence of Petitioner's guilt was overwhelming. Even the Sixth Circuit's brief decision mentioned that the affidavit "showed precisely" evidence of Petitioner's role as "a 'major player[] in a large, ongoing drug trafficking operation.'" ECF No. 100 at Page ID #: 1630.

APPENDIX C

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:20CV414
(5:16CR374)

JUDGE BENITA Y. PEARSON

[Filed October 21, 2022]

JERRY J. DAVIS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER OF DISMISSAL

The Court, having filed its Order, hereby denies Petitioner Jerry J. Davis, Jr.'s Motion to Vacate, Set-Aside, or Correct Sentence Under 28 U.S.C. § 2255. ECF No. 107.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon

which to issue a certificate of appealability. 28 U.S.C. §2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

October 21, 2022
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge