No.

In the
Supreme Court of the United States

JERRY J. DAVIS, JR.,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

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To The Honorable Justices of the Supreme Court of the United States

Pursuant to Rule 30.3 of this Court, Petitioner respectfully requests a 45-day extension of time, to and including September 24, 2023, within which to file a petition for writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals. Absent an extension, Petitioner's petition would be due 90-days from the Final Judgment from the Sixth Circuit Court of Appeals, which is August 10, 2023.

Basis for Jurisdiction in the Supreme Court

This Court has jurisdiction to grant an application for a writ of certiorari in this case pursuant to Art. III, Sec. 2, Clause 2, as Petitioner seeks review of a judgment of the United States Sixth Circuit Court of Appeals.

Opinion and Order

On May 12, 2023, the Sixth Circuit Court of Appeals entered an order denying Petitioner's case. See Jerry J. *Davis, Jr. v. United States of America,* Case No. 22-3947 (6th Cir. May 12, 2023).

Judgment Sought to be Reviewed

The Court's review is warranted to resolve significant issues of law on which the decision below departs from this Court's precedents. Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2255 on February 22, 2020. After denial on October 21, 2022, Petitioner filed a notice of appeal on November 9, 2022. Thereafter, the Sixth Circuit denied Petitioner's request for a certificate of appealability on May 12, 2023.

This case involves significant constitutional issues that requires this honorable Court's review. First, trial counsel did not adequately challenge inadmissible evidence through a meaningful motion to suppress, nor was the issue properly presented on appeal. Additionally, the appellate counsel failed to raise a meritorious Franks issue. Lastly, without the consent of Mr. Davis, trial counsel conceded guilt. All of these issues call into question a grave deprivation of Mr. Davis's right to due process and effective assistance of counsel.

Reasons for Extension of Time

The additional time is warranted due to significant professional obligations in pending appellate matters and the need to consult and obtain documentary evidence. The legal issues in the case require coordination between counsel and Petitioner. Currently, Petitioner is incarcerated in FCI Loretto, Federal Correctional Institution P.O. Box 1000, Cresson, PA 16630. Counsel was unable to communicate with Petitioner until June 21, 2023. This process is lengthened by the custody status of Petitioner, where arranging legal calls has proven to be a cumbersome and lengthy process.

Petitioner believes an extension will result in no prejudice to Respondent.

CONCLUSION

Petitioner's request is intended to ensure that Petitioner and counsel have adequate opportunity to discuss the merits of their claim, retrieve and review all appellate documents, and provide complete and effective assistance of counsel.

Respectfully submitted,

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Dated: July 11, 2023.

CERTIFICATE OF CONSULTATION

I HEREBY CERTIFY that counsel for Respondent was contacted via telephone and electronic mail for Respondent's position regarding this extension and no response was received as to an objection.

CERTIFICATE OF SERVICE

I, Robert L. Sirianni, Jr., hereby certify that an original and 2 copies of the foregoing Application for Extension of Time for the matter of *Jerry J. Davis, Jr. v. United State of America*, were sent via Next Day Service to the U.S. Supreme Court, and 1 copy was sent Next Day Service and email to the following parties listed below, this 11th day July 2023.

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Robert L. Sirianni, Jr., Esquire

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3947

JERRY J. DAVIS, JR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: McKEAGUE, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Jerry J. Davis, Jr., for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 22-3947

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

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 the 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 these 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

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT

for the

Middle District of Florida

CERTIFICATE OF GOOD STANDING

I, **Elizabeth M. Warren**, Clerk of this Court, do hereby certify that **Robert Lawrence Sirianni**, Florida Bar # **0684716**, was duly admitted to practice in this Court on **July 05, 2007**, and is in good standing as a member of the Bar of this Court.

Dated at: **Orlando, Florida** on June 09, 2023.

Elizabeth M. Warren
Clerk of Court