IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

XZAVIER LUSTIN LEE CLARK, Petitioner, v. UNITED STATES OF AMERICA, Defendant.	**No. 4:22-cv-00343-RGE** **ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255**

Petitioner Xzavier Justin Lee Clark seeks relief under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. ECF No. 1. Clark argues he received ineffective assistance of counsel and "is actually innocent of the §2A2.1(a)(1) enhancement." Pet'r's Br. Supp. Mot. Vacate, Set Aside, or Correct Sentence 27, ECF No. 1-1; see also id. at 12–27; ECF No. 1 at 4–5. Clark also seeks leave to amend his § 2255 motion "with one additional claim based on the United States Supreme Court decision in *N[ew] Y[ork] State Rifle & Pistol Ass'n[, Inc.] v. Bruen*, 142 S. Ct. 2111 (2022)." Pet'r's Mot. Leave to Amend 1, ECF No. 5. The Court grants Clark's motion to amend. The Court conducts the following initial review. Finding Clark's claims do not have any arguable merit, the Court summarily dismisses the claims and denies a certificate of appealability.

I. PROCEDURAL HISTORY

In 2019, a grand jury in the Southern District of Iowa returned an indictment charging Clark with being an unlawful user in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). Redacted Indictment, *United States v. Clark*, No. 4:19-cr-00138-RGE (S.D. Iowa Aug. 13, 2019), ECF No. 16. Clark pleaded guilty to the charge. Change of Plea Hr'g Mins., *id.*, ECF No. 29. Following Clark's guilty plea, the Court ordered the United States Probation Office

to complete a presentence investigation and prepare a presentence investigation report. Order Presentence Investigation, *id.*, ECF No. 32.

The draft presentence investigation report calculated a base offense level 14. Sealed Draft Presentence Investigation Report ¶ 15, id., ECF No. 34. The Government objected, noting evidence "support[s] a cross reference under USSG §2K2.1(c)(1)(A), to USSG §2X1.1/2A2.1(a)(1), for a base offense level of 33." Sealed Gov't's Objs. Draft Presentence Investigation Report ¶ 2, ECF No. 35. The Government asked that Clark's involvement in a June 2019 shooting be reflected in the presentence investigation report and considered as part of the guideline calculation. *See id.* ¶¶ 1–2; see also Sentencing Hr'g Tr. 43:11–44:20, *id.*, ECF No. 54. At the sentencing hearing, the Government presented testimony and exhibits supporting its position the cross-reference to attempted murder applied to Clark. Sentencing Hr'g Tr. 12:5–35:14, *id.*, ECF No. 54.

Ultimately, Court "found that a cross reference from USSG §2K2.1(c)(1)(A) to USSG §2A2.1(a)(1) applies, resulting in a base offense level of 33." Sealed J. Crim. Case 8, *id.*, ECF No. 48. The Court sentenced Clark to 120 months of imprisonment. *Id.* at 2. Clark appealed his sentence. *See* Op. 2, *id.*, ECF No. 62-1. The Eighth Circuit affirmed, finding "Clark has not shown that the district court erred in applying the cross-reference to attempted murder." *Id.* at 6.

Clark now moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. ECF No. 1.

II. LEGAL STANDARD

Title 28 of the United States Code, section 2255(a), 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.

Section 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, § 2255 is intended to redress only "fundamental defect[s] which inherently result[ ] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice."). A § 2255 claim is a collateral challenge that is not interchangeable with a direct appeal, and an error that could be reversed on direct appeal "will not necessarily support a collateral attack on a final judgment." *United States v. Frady*, 456 U.S. 152, 165 (1982) (internal quotations marks omitted) (quoting *Addonizio*, 442 U.S. at 184).

Section 2255 motions are subject to an initial review by the district court. Rule 4, Rules Governing § 2255 Proceedings. "If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the [court] must dismiss the motion and direct the clerk to notify the moving party." *Id.* Conversely, if the movant's claims have arguable merit, "the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). Finally, pro se documents must be liberally construed. *See United States v. Sellner*, 773 F.3d 927, 932 (8th Cir. 2014) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel." U.S. Const. amend. VI. The Supreme Court has made clear "the right to counsel is the right to the effective

assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (internal quotation marks omitted) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). A defendant must demonstrate both deficient performance and prejudice to show he or she has been denied the effective assistance of counsel. *Id.* at 687. A court does not need to analyze both *Strickland* prongs when "the defendant makes an insufficient showing on one." *Id.* at 697; *accord United States v. Lee*, 715 F.3d 215, 221 (8th Cir. 2013).

III. DISCUSSION

Clark seeks to vacate, set aside, or correct his sentence, claiming he received ineffective assistance of counsel, he "is actually innocent of the §2A2.1(a)(1) enhancement," and his conviction violates the Second Amendment. ECF No. 1-1 at 12, 26; ECF No. 5 at 5–9. For the reasons set forth below, the Court concludes Clark's arguments fail. Additionally, because "the motion, files and records of the case establish conclusively that [Clark] is not entitled to relief," the Court determines an evidentiary hearing is unnecessary. *Kingsberry v. United States*, 202 F.3d 1030, 1032 (8th Cir. 2000).

A. Ineffective Assistance of Counsel

Clark's claimed Ground One argues his sentence was imposed in violation of the Sixth Amendment because counsel provided ineffective assistance by failing to object to the Government's request to apply a sentencing enhancement under the federal sentencing guidelines, thus rendering his sentence unconstitutional. ECF No. 1-1 at 1. Clark contends counsel provided constitutionally deficient assistance by failing "to point out that the record was void of evidence indicating that the shooting constituted attempted first degree murder under §2A2.1(a)(1), and not some other offense, such as second degree murder or aggravated assault, both of which would receive far lower penalties under §2A2.1(a)(2) or §2A2.2." *Id.* at 18. Further, he points out that with the §2A2.1(a)(1) enhancement he was subject to a mandatory minimum sentence of 120

month while without the §2A2.1(a)(1) enhancement the mandatory maximum sentence would have been 120 months and the guideline imprisonment range would have been 30 to 37 months. *See id.* at 2–3. Because his sentencing exposure increased as a result of his lawyer's allegedly ineffective representation, Clark asserts he was thereby prejudiced. *Id.* at 12–25.

To prevail on an ineffective assistance of counsel claim, a petitioner must show counsel's representation fell below an objective standard of reasonableness. *Strickland* , 466 U.S. at 678–88. The reasonableness of counsel's performance must be judged according to the specific facts of the case at the time of counsel's conduct. *Id.* at 690. Additionally, a petitioner must show he was prejudiced by his attorney's performance. *Id.* at 692. In the context of an alleged error by counsel at sentencing, a petitioner must show that there is reasonable probability he would have received a lesser sentence if counsel had not erred. *Lafler v. Cooper*, 566 U.S. 156, 167–68 (2012). There is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance, and the petitioner bears the burden of demonstrating that counsel's assistance was neither reasonable nor the product of sound strategy. *Strickland*, 466 U.S. at 689. Unsupported, conclusory allegations are not sufficient to warrant relief under § 2255. *Hollis v. United States*, 796 F.2d 1043, 1046 (8th Cir. 1986).

Clark's claim that "[h]ad counsel been able to present the available factual and legal arguments, the district court would not have applied the § 2A2.1(a)(1) enhancement and would have sentenced Mr. Clark to a shorter term of incarceration," is contrary to the record. A petitioner's allegations need not be accepted as true if "they are contradicted by the record, inherently incredible, merely conclusions, or would not entitle the petitioner to relief." *Garcia v. United States*, 679 F.3d 1013, 1014 (8th Cir. 2012). At sentencing the Court

> note[d] that had the Court not applied the cross-reference with the attempted murder guidelines, the Court would nonetheless impose that statutory maximum sentence because of the nature and circumstances of this offense and the history and

> characteristics of this defendant, in particular, the repeated demonstration of the disregard for the safety of the community and the need to protect the public.

Sentencing Hr'g Tr. 61:21–62:3, No. 4:19-cr-00138, ECF No. 54.

Counsel's error in failing to object to the cross-reference—if there was error—did not prejudice Clark. Clark's petition is denied on Ground One.

B. Actual Innocence

Clark claims his sentence should be vacated because he is actually innocent of the §2A2.1(a)(1) enhancement. ECF No. 1-1 at 27. Clark argues the affidavit he received in February 2021 from Layshawn Scott—the victim of the shooting at the heart of the §2A2.1(a)(1) cross-reference previously discussed—purporting to exonerate Clark in that crime "constitutes newly discovered evidence demonstrating that Mr. Clark is actually innocent of shooting Mr. Scott and the §2A2.1(a)(1) first degree murder enhancement." *Id.* at 26. This argument fails.

To the extent an actual innocence challenge to the application of the sentencing guidelines is available, Clark's collateral attack is procedurally defaulted. "Issues raised and decided on direct appeal cannot ordinarily be relitigated in a collateral proceeding based on 28 U.S.C. § 2255." *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001). The Eighth Circuit has recognized an exception to this well established principle "when petitioners have produced convincing new evidence of actual innocence." *Id.* A petitioner raising this limited exception of actual innocence must satisfy a two-part test: 1) "the petitioner's allegations of constitutional error must be supported 'with new reliable evidence ... that was not presented at trial,'" and 2) "the petitioner must establish 'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Bowman v. Gammon*, 85 F.3d 1339, 1346 (8th Cir. 1996) (quoting *Schlup v. Delo,* 513 U.S. 298, 324, 327 (1995)).

Because Clark fails to satisfy the second part of the test, the Court declines to address the

reliability of Clark's newly discovered evidence.

To the extent the actual innocence framework applies to the application of a guideline enhancement, Clark does not establish that no factfinder would have found Clark responsible for attempted murder, triggering the cross reference. *Cf Bowman*, 85 F.3d at 1346. At best the affidavit from Scott can be seen as contradicting evidence received at sentencing. It does not establish his actual innocence. Therefore, the claim must fail.

Because Clark fails to satisfy the second part of the test, the Court declines to address the reliability of Clark's newly discovered evidence.

Clark's petition is denied on Ground Two.

C. *Bruen*

Clark moves to amend his § 2255 motion to assert a third ground related to *Bruen*. ECF No. 5 ¶ 6. Section 2255 proceedings are civil in nature and, therefore, governed by the Federal Rules of Civil Procedure. *See Mandacina v. United States,* 328 F.3d 995, 1000 & n. 3 (8th Cir. 2003). Federal Rule of Civil Procedure 15(a)(1) permits

> [a] party to amend its pleading once as a matter of course within:
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Clark's original pleading has not been served and no responsive pleading is required. Therefore, to the extent the Court's permission is required, the Court allows Clark to amend and conducts initial review of his "proposed supplemental argument." ECF No. 5 at 5.

The Court finds Clark's claim in Ground Three is without merit. Clark's Ground Three asserts "[u]nder the new rule of law handed down by the Supreme Court in *Bruen*, [his] conviction under 18 U.S.C. § 922(g)(3) is unconstitutionally vague and unconstitutionally infringes upon [his] fundamental right to possess a firearm." ECF No. 5 at 3, 5. Clark insists "the government cannot

affirmatively prove that restrictions like § 922(g)(3) are part of the historical traditions that define the outer bounds of the right to keep and bear arms." *Id.* at 9.

Despite Clark's protestations, the activity Clark was convicted of—possessing a firearm as unlawful user of controlled substance—has not been found unconstitutional. *See* Order. Den. Mot. Dismiss, *United States v. Le*, No. 4:23-cr-00014-SHL-HCA (S.D. Iowa April 11, 2023), ECF No. 46; Order Den. Def.'s Mot. Dismiss, *United States v. Wilson*, No. 4:22-cr-00069-RGE-HCA (S.D. Iowa April 6, 2023), ECF No. 30; Order Den. Def.'s Mot. Dismiss, *United States v. Tucker*, No. 4:22-cr-00164-RGE-HCA (S.D. Iowa April 3, 2023), ECF No. 49; Order, *United States v. Randall*, No. 4:22-cr-00099-SMR-HCA-3 (S.D. Iowa Feb. 14, 2023), ECF No. 129; Order Den. Def.'s Mot. Withdraw Plea & Dismiss, *United States v. Veasley*, No. 4:20-cr-00209-RGE-HCA (S.D. Iowa Sept. 22, 2022), ECF No. 54. Therefore, Clark's conviction and sentence do not deny or infringe Clark's constitutional rights. As a result, Clark fails to demonstrate entitlement to § 2255 relief.

Clark's petition fails on Ground Three.

IV. CERTIFICATE OF APPEALABILITY

Before a petitioner can appeal a final order in a proceeding under § 2255 to the court of appeals, the district court judge must issue a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). Such certificate may be issued if "the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The certificate must indicate "which specific issue or issues satisfy the [substantial] showing." *Id.* § 2253(c)(3). To meet the "substantial showing" standard, the petitioner must demonstrate "that 'a reasonable jurist' would find the district court ruling on the constitutional claim 'debatable or wrong.'" *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (quoting *Tennard v. Dretke,* 542 U.S. 274, 276 (2004)); *see also Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) ("[T]he petitioner 'must demonstrate that the issues are

debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'" (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (second alteration in original)).

Here, Clark cannot show that reasonable jurists would disagree or debate whether the issues presented should have had a different outcome. The Court denies a certificate of appealability.

V. CONCLUSION

The Court finds Clark is not entitled to relief under 28 U.S.C. § 2255.

IT IS ORDERED that Petitioner Xzavier Justin Lee Clark's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255, ECF No. 1, is **DENIED**. The Clerk of Court shall enter judgment in favor of Respondent United States of America.

IT IS FURTHER ORDERED that Petitioner Xzavier Justin Lee Clark's Motion to Amend, ECF No. 5, is **GRANTED**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED**.

IT IS SO ORDERED.

Dated this 17th day of July, 2023.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3104

Xzavier Justin Lee Clark

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cv-00343-RGE)

JUDGMENT

Before COLLOTON, Chief Judge, BENTON, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 03, 2025

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

United States Court of Appeals
For the Eighth Circuit

No. 23-3104

Xzavier Justin Lee Clark

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: November 19, 2024
Filed: January 3, 2025

Before COLLOTON, Chief Judge, BENTON and KELLY, Circuit Judges.

BENTON, Circuit Judge.

Xzavier Justin Lee Clark pled guilty to possession of a firearm as an unlawful user of a controlled substance in violation of 18 U.S.C. § 922(g)(3). The district court[1] sentenced him to 120 months in prison. By a 28 U.S.C. § 2255 motion, Clark argues the conviction violated the Second Amendment. The district court dismissed the motion. This court granted a certificate of appealability solely on this

[1]The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

constitutional question. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Clark claims that 18 U.S.C. § 922(g)(3) is unconstitutional, facially and as applied to him. To prove facial unconstitutionality, he must "establish that no set of circumstances exists under which the Act would be valid." ***United States v. Salerno***, 481 U.S. 739, 745 (1987). A facial claim survives a guilty plea. ***United States v. Morgan***, 230 F.3d 1067, 1071 (8th Cir. 2000). "Our review of a district court's ruling in a § 2255 proceeding is de novo both on matters of law and on mixed questions of law and fact." ***Roundtree v. United States***, 751 F.3d 923, 925 (8th Cir. 2014).

Clark's facial challenge is defeated by controlling precedent. *See* ***United States v. Veasley***, 98 F.4th 906, 918 (8th Cir. 2024) (finding § 922(g)(3) constitutional because "at least some drug users and addicts fall within a class of people who historically have had limits placed on their right to bear arms"). *See also* ***United States v. Tucker***, 2024 WL 3634232, at *2 (8th Cir. Aug. 2, 2024) (unpublished) (rejecting a facial challenge to § 922(g)(3) because "another panel of this court held the law is not facially unconstitutional" in *Veasley*); ***United States v. Shannon***, 2024 WL 4224030, at *1 (8th Cir. Sept. 18, 2024) (unpublished) (finding the defendant's facial challenge to § 922(g)(3) fails "as he has not demonstrated any error that was clear or obvious under current law").

Clark alleges § 922(g)(3) is unconstitutional as applied to him. A guilty plea forecloses Clark's as-applied constitutional challenge. ***United States v. Vaughan***, 13 F.3d 1186, 1187 (8th Cir. 1994) ("A defendant's knowing and intelligent guilty plea forecloses independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."); ***United States v. Seay***, 620 F.3d 919, 922 n.3 (8th Cir. 2010) ("To the extent that Seay challenges the constitutionality of § 922(g)(3) as applied to him, we hold that this argument is foreclosed by his guilty plea."); ***United States v. Deng***, 104 F.4th 1052, 1054 (8th Cir. 2024) (finding

Deng's "as-applied challenge" to § 922(g)(3) "fails too because he waived it by pleading guilty unconditionally").

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The judgment is affirmed.
