

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-1337

Edward Jefferson

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00238-BCW)

JUDGMENT

Before LOKEN, BOWMAN and KELLY, Circuit Judges.

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

October 03, 2017

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
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No: 16-1337

Edward Jefferson

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00238-BCW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 07, 2017

Order Entered at the Direction of the Court:
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**

EDWARD JEFFERSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No. 4:15-CV-00238-BCW
	)	Criminal No. 4:10-CR-00045-03-BCW
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on Petitioner Edward Jefferson's pro se¹ motion under 28 U.S.C. § 2255 (Doc. #1). Jefferson asserts twenty-two claims of ineffective assistance of counsel against the various attorneys that represented him in the underlying criminal cases. After reviewing the premises of the motion, the record, and the applicable law, the Court denies Jefferson's motion.

I. BACKGROUND

In October 2009, Jefferson pleaded guilty to a charge of possession with intent to distribute cocaine.² The charge involved conduct from February 2008 ("2008 Case"). At the time of his plea, Patrick W. Peters represented him.

In February 2010, a grand jury returned an indictment charging Jefferson and four others with conspiring to distribute five kilograms or more of cocaine between January 1, 2007, and the date of the indictment ("2010 Case").³ 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. The grand jury also charged Jefferson with using a communication facility to facilitate the distribution of

¹ The Court is mindful of Jefferson's pro se status and liberally construes his filings. Estelle v. Gamble, 429 U.S. 97, 105 (1976).

² United States v. Jefferson, No. 08-CR-00070-01-NKL (W.D. Mo.).

³ United States v. Jefferson, No. 10-CR-00045-03-BCW (W.D. Mo.).

the cocaine. Id. at §§ 843(b), 843(d), and 846. Because Jefferson failed to appear on the new charges, the district court granted the Government's motion to delay sentencing in the earlier case.

In June 2011, the jury found Jefferson guilty of both the conspiracy and communication offenses. James E. Brady represented Jefferson at trial. At a sentencing hearing held to determine and impose sentences for his convictions, the court sentenced Jefferson to 240 months on the possession with intent to distribute conviction, 240 months for the cocaine conspiracy offense, and 48 months on the communication offense, all to be served concurrently. Jack West represented Jefferson at sentencing.⁴

Jefferson appealed and made numerous arguments. West continued to represent Jefferson on appeal. The Eighth Circuit affirmed, and the Supreme Court denied a petition for certiorari. Jefferson timely filed the instant motion and asserts a total of twenty-two claims of ineffective assistance of counsel against attorneys Peters, Brady, and West.

II. ANALYSIS

To succeed on any of his claims, Jefferson must show that (1) his attorney's performance fell below an objective standard of reasonableness, and (2) he suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687 (1984). Under the first prong, Jefferson must demonstrate that his attorney's performance was neither reasonable under prevailing professional norms nor sound trial strategy. Id. at 688–89. Under the second prong, Jefferson must demonstrate a reasonable probability that, but for his attorney's deficient performance, the result of the case would have been different. Id. at 694.

⁴ The Honorable Nannette Laughrey presided over Jefferson's trial and sentencing. The case was subsequently reassigned to this Court.

A. Failure to Subpoena Witness

Jefferson first argues that Brady was constitutionally ineffective in the 2010 Case because Brady failed to properly subpoena Lindsay Parks to testify at trial about a concert flyer she created for Jefferson. This claim does not entitle Jefferson to relief because, even assuming Brady's failure to properly subpoena Parks constitutes deficient performance, Jefferson has not shown prejudice.

Specifically, Jefferson contends that Parks' testimony is relevant to surveillance photographs picturing Jefferson with Alejandro Corredor (the conspiracy's organizer and leader and the Government's principal witness at trial) with a box. Jefferson argues that Parks would have testified that the box contained the concert flyers. But Parks affidavit does not suggest this testimony. See No. 15-CV-00238, Doc. #13-1 at 2 (stating that she would have testified "in regards to the identification of a particular concert flyer I had previously created for [Jefferson] . . . in addition to any useful background information I could provide in relation to the concert flyer"). In addition, Parks was not present at the time of the meeting, so she cannot testify about the content of the box at the exchange. At most, she might have testified that the box, at some point, contained concert flyers. Because her testimony would not have changed the relevant facts at trial, Jefferson has failed to show prejudice.

B. Jury Question

Jefferson next contends that Brady provided ineffective assistance in the 2010 Case by failing "to object to [Jefferson's] absence as the trial court responded to an inquiry from the jury during deliberations." No. 15-CV-00238, Doc. #2 at 7. In the note, the jury requested the call transcripts between Corredor and Jefferson. The district court proposed to allow the jurors to hear the recordings of seven recorded calls referenced by counsel in closing argument because

the transcripts were not in evidence. Before playing the recordings, the court had Jefferson brought into the courtroom.

This claim fails because Jefferson has not shown deficient performance. Although Federal Rule of Criminal Procedure 43(a)(2) provides that a criminal defendant generally has a right to be present “at every stage of trial,” Rule 43(b)(3) explains that this right does not extend to proceedings only involving a question of law. The Eighth Circuit has recognized that, under Rule 43(b)(3), defendants need not be present at conferences regarding jury questions. See United States v. Clark, 409 F.3d 1039, 1043–44 (8th Cir. 2005) (“Rule 43(b)(3) does not require the defendant’s presence at a chambers conference held to determine a jury’s request for more instructions.”). Therefore, Brady’s failure to object to Jefferson’s absence during this conference does not constitute deficient performance.

C. Pretrial Order

In his third claim, Jefferson argues Brady was constitutional ineffective during the 2010 Case when Brady “failed to object to [the court’s] failure to comply with its own pretrial order.” No. 15-CV-00238, Doc. # 2 at 8. Jefferson explains that the court’s pretrial order (1) required the parties to translate the audio recordings and (2) stated that the transcripts will be used as evidence at trial. Jefferson contends that the district court did not comply with this order at trial because the court admitted the recordings instead of the transcripts. He argues Brady’s failure to object to this changed ruling constitutes deficient performance that prejudiced him.

Jefferson again fails to show deficient performance. The Eighth Circuit has explained that

[i]n the case of English-language recordings, the audio recordings typically are on the only evidence of the conversation; any transcripts are furnished to the jury merely as an aid in following the audio. But where the evidence is a foreign-language recording, the jury usually cannot understand the audio recording. Transcripts

must be prepared and introduced as evidence so that the jury has a basis for considering the substance of the recording.

United States v. Gutierrez, 757 F.3d 785, 788 (8th Cir. 2014) (internal citation omitted). Based on a review of the record, it appears the district court's pretrial order related to foreign-language calls. It therefore appears that the district court's trial rulings were consistent with the pretrial order, so there was no reason for Brady to object. And, regardless, the district court properly admitted the recordings of the English-language calls and the transcripts of Spanish-language language calls.⁵ Brady therefore did not perform deficiently by failing to object to a proper application of the law. Furthermore, Jefferson fails to show prejudice because he has not explained how admission of the recordings instead of the transcripts impacted the outcome of trial.

D. Response to Jury Question

In his fourth and fifth claims, Jefferson contends Brady performed deficiently during the 2010 Case by not objecting to the district court's response to the jury's inquiry about the recorded conversations (i.e., not objecting to the court's proposal to replay the seven recorded calls referenced in the Government's closing) and by not requesting a limiting instruction that cautioned the jury on the proper use of the seven replayed recordings. At a minimum, this claim fails because Jefferson has not shown prejudice.

Jefferson has not shown that an objection to the district court's response to the jury's inquiry would have been meritorious; nor has he demonstrated a reasonable probability that his proposed response—sending back the transcripts—would have yielded a different outcome. See United States v. Jefferson, 725 F.3d 829, 837 (8th Cir. 2013) (finding the district court did not abuse her discretion in responding to this inquiry). Similarly, Jefferson does not demonstrate a

⁵ Furthermore, Jefferson fails to show prejudice. He has nowhere explained how admission of the recordings instead of the transcripts impacted the outcome of the trial.

reasonable probability that, but for Brady's failure to request a limiting instruction on the use of the recordings, the result of the case would have been different.⁶

E. Rule 404(b) Evidence

Jefferson's next two claims involve the district court's admission of Rule 404(b) evidence in the 2010 Case. In 2008, a traffic stop of a vehicle driven by Jefferson led to the discovery of more than 400 grams of cocaine. This stop was the basis for the 2008 Case. In 2009, Jefferson pleaded guilty to possession with intent to distribute cocaine based on these events. Before trial, the Government gave notice that it intended to offer this evidence under Rule 404(b). Brady objected. The district court noted that the incident occurred during the charged conspiracy period and thus the conduct was relevant to the alleged conspiracy. The court also ruled that it would admit the prior conviction under Rule 404(b) and invited Brady to request a limiting instruction.

Jefferson first argues that Brady performed deficiently by not requesting a limiting instruction on the use of the Rule 404(b) evidence. This claim fails because Jefferson does not demonstrate a reasonable probability that, but for Brady's failure to request a limiting instruction on the use of the Rule 404(b) evidence, the result of the case would have been different.

Jefferson next argues Brady performed deficiently when Brady did not object to this evidence as improper Rule 404(b) evidence because it occurred during the time of the charged conspiracy and was, therefore, intrinsic to the crime. But this objection would not have aided Jefferson at trial. Rather, assuming Brady made this objection and the court sustained it, the events underlying Jefferson's 2009 guilty plea still would have been admissible as relevant evidence without reliance on Rule 404(b). Accordingly, both claims fail.

⁶ Notably, Jefferson does not suggest what limiting instruction should have been requested or given.

F. Drug Deals Before 2007

In his eighth and ninth claims, Jefferson contends Brady performed deficiently during the 2010 Case by failing to object to Corredor's testimony concerning drug dealings before 2007. Jefferson first argues that Brady's failure to object to this testimony resulted in an amendment or variance to the indictment. The Eighth Circuit rejected this argument on direct appeal and found Corredor's passing reference to events before 2007 to be "too inconsequential" to constitute a variance or amendment. Jefferson, 725 F.3d at 836. Jefferson next argues that Brady failed to request a cautionary instruction. But Jefferson again has not demonstrated a reasonable probability that, but for Brady's failure to request a limiting instruction on this issue, the result of the case would have been different. Jefferson therefore does not show prejudice for either claim.

G. Drug Quantity

Jefferson's tenth claim alleges Brady performed deficiently during the 2010 Case when he failed to "object or challenge the alleged drug amounts that [Corredor] testified to." No. 15-CV-00238, Doc. #2 at 14. Jefferson contends that Brady's failure to object or challenge this testimony resulted in Jefferson being attributed with 154 kilograms of cocaine at sentencing. This claim fails both prongs of Strickland.

Jefferson fails to show deficient performance. At trial, Brady focused his cross-examination of Corredor on Corredor's uncharged murder for hire. Cross-examining Corredor on this source of biasness, which could have potentially led to an acquittal, instead of focusing on discrepancies between drug quantities seems to be a reasonable trial strategy. Strickland, 466 U.S. 668 at 688–89.

Jefferson also fails to show prejudice. As an initial point, Jefferson does not demonstrate a reasonable probability that, but for Brady failing to cross-examine Corredor on the alleged drug

amount, the result of the case (or his sentence) would have been different.⁷ In addition, Jefferson's sentencing attorney (West) raised the discrepancies in Corredor's drug-quantity testimony at sentencing and the district court overruled his objection. See, e.g., No. 10-CR-00045, Doc. #313 at 9 (arguing that "you cannot rely on [Corredor's] testimony regarding drug weights because it changed depending on venue"). For all of these reasons, his claim fails.

H. Challenge to and Investigation of Corredor

In his next two claims, Jefferson contends Brady's representation was constitutionally infirm during the 2010 Case because Brady did not "vigorously challenge the credibility of [Corredor]" and "failed to investigate, obtain, or present evidence to impeach [Corredor] at trial." No. 4:15-CV-00238, Doc. #2 at 15, 17. For reasons similar to those discussed above, the Court rejects this claim. Brady's line of cross-examination and his focus on the uncharged murder for hire appears to be a reasonable strategic decision. Jefferson also fails to demonstrate a reasonable probability that, but for Brady failing to cross-examine Corredor on the facts identified in Jefferson's brief, the result of the case (or his sentence) would have been different.⁸

I. Prosecutorial Misconduct

Jefferson's thirteenth claim alleges Brady performed deficiently in the 2010 Case when he "failed to challenge or object to the prosecutor's misconduct." No. 4:15-CV-00238, Doc. #2 at 18. The Court disagrees. After reviewing the briefs, the record, and the applicable law, the Court finds no grounds supporting prosecutorial misconduct. Brady did not perform deficiently by failing to object to the Government's: (1) discussion of the cocaine possession; (2) presentation of a photo of the seized cocaine; (3) presentation of the music album during closing; or (4)

⁷ The Court notes that the district court varied downward from the guideline range for the conspiracy count, which Jefferson does not mention.

⁸ The Court notes that Jefferson raised a similar issue on direct appeal when he argued that Corredor committed perjury (based on Corredor's statements in a prior trial) and that the Government committed misconduct in presenting the allegedly perjured testimony. The Eighth Circuit rejected these claims and barred him Jefferson from re-raising these arguments in a motion for post-conviction relief. Jefferson, 725 F.3d at 837-38.

statements during closing about Corredor and Jefferson. Even assuming deficient performance, Jefferson has not shown prejudice.

J. Wiretap

Jefferson next claims Brady was constitutionally ineffective in the 2010 Case because Brady “failed to file a pretrial motion to suppress the wiretap evidence.” No. 4:15-CV-00238, Doc. #2 at 20. Jefferson identifies multiple alleged infirmities with the Title III interceptions including (1) he was not named in the Title III application or the extension application, (2) the Title III was improperly granted, and (3) he was not properly identified as the participant in the telephone calls. Although this claim fails for all of the reasons identified in the Government’s opposition, the Court specifically notes that: (1) the district court overruled Brady’s objection at trial to the admissibility of all recordings because Jefferson was not named in the initial application and was not known to be a coconspirator at the time of the wiretap application,⁹ (2) the listening post utilized against Corredor’s telephone was in the Western District of Missouri, so a judge in this district had authority to grant the application, and (3) Corredor testified at trial that he had spoken to Jefferson in person and on the telephone and recognized his voice.¹⁰

K. Conflict of Interest

In his fifteenth claim, Jefferson claims his “Sixth Amendment right to have the assistance of counsel for his defense [during the 2010 Case] was denied when he had a conflict of interest with his attorney during trial.” No. 4:15-CV-000238, Doc. #2 at 21. During trial, the court denied Jefferson’s request for new counsel. Id. at Doc. #218 at 78–79. The court offered to let Jefferson represent himself, but Jefferson decided to continue with Brady. Id. Brady raised the issue again and offered to withdraw, which the court again denied. Id. at 150–51.

⁹ See No. 4:10-CR-00045, Doc. #217 at 65–66.

¹⁰ Id. at 44.

The Court denies this claim. Jefferson's argument does not satisfy either prong of Strickland. Apart from the failure to subpoena Parks, which was discussed above, Jefferson does not identify the alleged conflict of interest or any other grounds of deficient performance. Likewise, Jefferson fails to show prejudice. Accordingly, this claim fails.

L. Disparate Drug Quantity

Jefferson's sixteenth claim alleges that West's representation during sentencing was constitutionally infirm because West failed to investigate and disclose the different drug quantity amounts attributed to his codefendants. Jefferson raised this issue on direct appeal when he argued that his sentence was "grossly disproportionate to the sentences imposed on others convicted in two separate trials of conspiring with Corredor to distribute cocaine." Jefferson, 725 F.3d at 837. The Eighth Circuit rejected this claim and also stated that it cannot be raised in a motion for post-conviction relief. Id. Even if this claim was not barred, Jefferson fails to show prejudice because he has not demonstrated a reasonable probability that his sentence would have been lower but for West's failure to disclose at sentencing the different drug amounts attributed to codefendants that were sentenced by the same judge.

M. Appealing Ruling Denying Substitute Counsel

In his seventeenth claim, Jefferson contends West was constitutionally ineffective during the appeal of his 2010 Case because West did not appeal the district court's denial of substitute counsel. He also contends West should have appealed the district court's allegedly inadequate inquiry into the issue. Had West raised these issues on appeal, the district court's decisions would have been reviewed for abuse of discretion. United States v. Armstrong, 112 F.3d 342, 345 (8th Cir. 1997). Based on the facts of this case, the timing of Jefferson's request for new counsel (i.e., the middle of trial), and the deferential standard of review that would have been

afforded the district court's ruling, the Court finds that West's failure to raise these arguments on appeal does not constitute deficient performance. The Court similarly finds no showing of prejudice.

N. Entry of Guilty Plea

Jefferson argues in his eighteenth claim that Peters (his attorney in the 2008 Case) failed to properly prepare Jefferson for his 2009 guilty plea. This argument is belied by the record and the district court's colloquy at the plea hearing. For example, Jefferson acknowledged in the plea agreement that "counsel has fully advised him of his rights and obligations in connection with the plea agreement." No. 4:08-CR-00070-01, Doc. #51 at 11. Based on such statements, Jefferson fails to show deficient performance.

O. Unconstitutional Sentence

In his nineteenth claim, Jefferson argues West was constitutionally ineffective because West failed to appeal the unconstitutionality of his sentence. Specifically, Jefferson contends that the district court penalized him for going to trial and that West should have appealed this issue. Jefferson fails to show either Strickland prong. First, the district court's vague statement about the "consequences" of going to trial in a different case does not establish that Jefferson received an unconstitutional sentence.¹¹ This is particularly true when the sentencing transcript is reviewed because the district court properly reviewed and applied the factors. Second, Jefferson has not demonstrated a reasonable probability that this argument would have been successful on appeal and resulted in a different outcome.

¹¹ As an example, one consequence of going to trial is the forfeiture of the three-level reduction for acceptance of responsibility, which is entirely constitutional.

P. Conflict Between Prosecutor and Defense Witness

Jefferson's twentieth claim alleges that Brady performed deficiently during the 2010 Case when Brady failed to notify the district court of a conflict of interest between the prosecutor and a potential defense witness. Jefferson contends Brady did not call Aaron Yates because Yates and the prosecutor were "good friends." As an initial point, Jefferson offers no evidence indicating that the prosecutor and Yates were friends or that this was Brady's explanation for not calling Yates. Regardless, even assuming deficient performance, the district court ruled that this evidence was irrelevant and Jefferson does not explain how Yates's testimony is material to the case or how its exclusion prejudiced him. This claim fails.

Q. Immigration History and Status

In his penultimate claim, Jefferson contends that Brady was constitutionally ineffective during the 2010 Case because Brady did not investigate and disclose Corredor's immigration history and status. This claim fails because it appears from a review of the record that defense counsel did examine Corredor's immigration status. Jefferson also fails to demonstrate a reasonable probability that this further development of this line of cross-examination would have resulted in a different outcome.

R. Cumulative Error

Jefferson's final claim is that the cumulative effect of each of these issues deprived him of the effective assistance of counsel at each important stage (trial, sentencing, appeal) of this action. But the Eighth Circuit does not recognize a claim of "cumulative error." Rather, the Eighth Circuit has stated that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Middleton v. Roper, 455 F.3d

838, 851 (8th Cir. 2006) (internal quotation and citation omitted). Here, Jefferson fails to show that any of the alleged errors standing alone resulted in Strickland prejudice. This claim fails.

III. HEARING AND CERTIFICATE OF APPEALABILITY

For all of these reasons, the Court denies Jefferson's motion. The Court also denies his request for an evidentiary hearing because the motion, the files, and records of the case conclusively show that Jefferson is entitled to no relief. 28 U.S.C. § 2255(b). The Court also declines to issue a certificate of appealability because Jefferson has not shown that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotations omitted). Accordingly, it is hereby

ORDERED Edward Jefferson's pro se motion under 28 U.S.C. § 2255 (Doc. #1) is DENIED. It is further

ORDERED Jefferson's request for an evidentiary hearing is DENIED. It is further

ORDERED that a certificate of appealability is DENIED.

IT IS SO ORDERED.

DATED: November 25, 2015

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT