United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 14, 2026
Decided January 26, 2026

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

REBECCA TAIBLESON, *Circuit Judge*

No. 23-2230

TERRANCE BRASHER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division.

No. 4:21-cv-00096-TWP-KMB

Tanya Walton Pratt,
Judge.

ORDER

Terrance Brasher has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability, as well as a supplemental amended memorandum of law in support of the application. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

App. A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TERRANCE BRASHER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:21-cv-00096-TWP-KMB
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

This matter is now before the Court on Petitioner Terrence Brasher's ("Mr. Brasher") *pro se* Motion to Proceed on Appeal in forma pauperis (Dkt. 15) and Motion for Reconsideration for Certificate of Appealability and Statement of Reasons why Certificate Should be Issued, dated June 20, 2023 (Dkt. 21). For the reasons explained below, the Motions are **denied**.

I. DISCUSSION

On May 23, 2023, the Court denied Mr. Brasher motion pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence (Dkt. 12). In doing so, the Court denied a certificate of appealability, finding that no reasonable jurist would find it debatable whether Mr. Brasher's petition stated a valid claim that he was denied a constitutional right or whether the Court correctly denied his petition. *Id.* at 11. He now asks the Court to reconsider denial of a certificate of appealability and request to proceed on appeal *in forma pauperis*. Because the motion to reconsider was filed within 28 days of the entry of final judgment, that Motion proceeds under Federal Rule of Civil Procedure 59(e).

Rule 59(e) allows a court to amend a judgment only if the movant can "demonstrate a manifest error of law or fact or present newly discovered evidence." *Lightspeed Media Corp. v.*

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Smith, 830 F.3d 500, 505–06 (7th Cir. 2016) (internal citations omitted). A "manifest error" means "the district court commits a wholesale disregard, misapplication, or failure to recognize controlling precedent." *Stragapede v. City of Evanston, Illinois*, 865 F.3d 861, 868 (7th Cir. 2017) (internal quotation omitted). "A manifest error is not demonstrated by the disappointment of the losing party." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal quotations omitted). Relief through a Rule 59(e) motion for reconsideration is an "extraordinary remed[y] reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008).

Mr. Brasher raises four arguments in his motion to reconsider and bases none of them on newly discovered evidence. Accordingly, he is entitled to relief only if he can demonstrate a manifest error. His first and second arguments concern assertions that his trial counsel was constitutionally ineffective. The Court addressed numerous ineffective assistance arguments in denying Mr. Brasher's petition. (*See* Dkt. 12 at 4–8.) Each failed for at least one common reason:

> Brasher has not carried the burden of establishing that he was prejudiced by any act or omission of his trial or appellate attorneys. Indeed, Brasher's § 2255 brief—which was drafted by an attorney—includes no discussion of prejudice at all. Counsel lays out his predecessors' missteps over the span of five pages, then urges the Court—without citing a single fact—to find that none of those missteps were grounded in strategic choices. (Dkt. 2 at 9–15.)

Id. at 6. Mr. Brasher's § 2255 motion was replete with perfunctory and undeveloped arguments and despite having access to transcripts of the trial, counsel failed to cite to the record to support his arguments. Perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived. *United States v. Cisneros*, 846 F.3d 972, 978 (7th Cir. 2017) (internal quotations omitted).

Mr. Brasher's Motion for Reconsideration argues the merits of his various ineffective assistance arguments. It does not address the Court's finding that his petition—presented by counsel—failed to identify any prejudice at all. Without confronting that glaring omission, Mr.

Brasher cannot demonstrate that reasonable jurists would consider that this Court erred in finding that the § 2255 petition lacked viable ineffective assistance claims.

Mr. Brasher's third issue is based on an argument that the Court chilled potentially favorable testimony from his nephew through inappropriate conduct. The Court dismissed this argument in the first instance because Mr. Brasher failed to cite any specific passages in the trial transcript to support his argument. (Dkt. 12 at 10.) Mr. Brasher again fails to confront that omission in his Rule 59(e) motion and therefore cannot demonstrate that reasonable jurists would debate the Court's ruling.

Finally, Mr. Brasher raises an allegedly erroneous jury instruction #37. That instruction is in the Seventh Circuit Pattern Jury Instructions and a correct statement of the law. *See* The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, No. 5.11 (2020 Ed.). Pattern instructions are presumed to accurately state the law. *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019) (citing *United States v. Marr*, 760 F.3d 733, 744 (7th Cir. 2014)). The Court considered Mr. Brasher's jury instruction argument but dismissed it because it included no citation to the trial record and did "not state what aspects of the instruction are problematic or why." (Dkt. 12 at 10.) Again, Mr. Brasher fails to confront his attorney's omissions in his Rule 59(e) motion.

In denying Mr. Brasher's § 2255 motion, the Court found that his motion failed to state a viable claim for relief. That was so because the motion did not address dispositive issues or cite critical evidence and the unsupported, conclusory statements to the contrary are insufficient to demonstrate that he was entitled to any relief on this claims. In denying a certificate of appealability, the Court found that no reasonable jurist could debate whether such a threadbare motion was viable. The question before the Court is not whether the legal arguments in Mr. Brasher's Motion for Reconsideration are sound but, rather, whether the Court manifestly erred in denying the motion that his attorney presented in the first place. Mr. Brasher has not confronted the reasons the Court denied that motion, and he therefore cannot demonstrate a manifest error and the request for reconsideration is **denied** as presented.

Mr. Brasher's motion to appeal *in forma pauperis* (Dkt. 15), is also **denied**. Mr. Brasher has failed demonstrate his inability to pay the appellate fees his motion did not include a certified inmate trust account statement as required by 28 U.S.C. § 1915(a)(2).

II. CONCLUSION

For the reasons explained above, Mr. Brasher's Motion for Reconsideration for Certificate of Appealability and Statement of Reasons why Certificate Should be Issued, Dkt. [21], is **DENIED**. His Motion for Leave to Proceed *in forma pauperis* on Appeal, Dkt. [15], is also **DENIED as presented**. If Mr. Brasher renews his motion, he must demonstrate his inability to pay the appellate fees by filing a certified inmate trust account statement as required by 28 U.S.C. § 1915(a)(2).

SO ORDERED.

Date: 8/3/2023

Tanya Walton Pratt

Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TERRANCE BRASHER,	)	
Petitioner,	)	
v.	)	Case No. 4:21-cv-00096-TWP-KMB
UNITED STATES OF AMERICA,	)	
Respondent.	)	

ORDER DENYING MOTION FOR RELIEF PURSUANT TO 28 U.S.C. § 2255 AND DENYING CERTIFICATE OF APPEALABILITY

This matter is before the Court on Petitioner Terrance Brasher's ("Brasher") Motion to vacate his conviction and sentence pursuant to 28 U.S.C § 2255. (Dkt. 1.) A jury convicted Brasher of distributing and conspiring to distribute controlled substances in 2018. He is serving a life sentence in the Bureau of Prisons. For the reasons discussed below, Brasher's § 2255 motion is **denied**, this action is **dismissed**, and no certificate of appealability will issue.

I. THE § 2255 MOTION

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. *See Davis v. United States*, 417 U.S. 333, 343 (1974). A court may grant relief from a federal conviction or sentence pursuant to § 2255 "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." 28 U.S.C. § 2255(a). "Relief under this statute is available only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." *Blake v. United States*, 723 F.3d 870, 878-79

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(7th Cir. 2013) (citing *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996); *Barnickel v. United States*, 113 F.3d 704, 705 (7th Cir. 1997)).

II. FACTUAL BACKGROUND

On December 15, 2015, a grand jury indicted Brasher as part of a 15-person conspiracy to distribute narcotics in this district and in Kentucky. (Crim. Dkt. 75.)[1] Eighteen months later, the grand jury issued a superseding indictment, which charged that Brasher purchased methamphetamine, heroine, and cocaine from other co-conspirators on credit and then paid them after he resold the drugs. (Crim. Dkt. 539.) According to the superseding indictment, conspirators completed overt acts in furtherance of the conspiracy in the Southern District of Indiana and in Kentucky. *Id.* Brasher operated primarily out of an auto repair shop in Louisville, Kentucky and arranged transactions with co-conspirators by telephone. *Id.*

Brasher proceeded to a four-day jury trial in January 2018. (Crim. Dkts. 773, 776, 777, 778.) Every named defendant in the alleged conspiracy other than Brasher pled guilty. Several co-conspirator's--Carlos Shelton ("Shelton"), Terry Martin ("Martin), and Maycoe Ortiz--testified for the government at Brasher's trial. The jury found Brasher guilty of Count One: Conspiracy to distribute controlled substances; and determined that the conspiracy involved at least 500 grams of methamphetamine, one kilogram of heroine, and five kilograms of cocaine. (Crim. Dkt. 782.) The facts of Brasher's crime, as stated by the Court of Appeals for the Seventh Circuit in its appellate opinion, are as follows:

> Brasher was one spoke in a large hub-and-spoke narcotics conspiracy centered in Louisville, Kentucky. Defendant Carlos Shelton headed the conspiracy and was therefore at its hub. Terry Martin, an Indiana resident whose Louisville auto supply shop served as the de facto headquarters for the operation, was Shelton's partner in the criminal enterprise, frequently pooling money with Shelton to acquire narcotics. Maycoe Ortiz, who had a mechanic shop in Louisville, Kentucky across the street from Martin's auto shop, became a principal supplier of narcotics for the conspiracy.

[1] *United States v. Brasher*, No. 4:15-cr-00028-TWP-VTW-7.

> It was Martin who introduced Brasher to Shelton. Martin knew Brasher from a previous stint of incarceration. In or about September 2014, Martin supplied Brasher with a small quantity of heroin. Brasher quickly sold the heroin and returned to Martin asking for more. Martin did not think that he would be able to supply Brasher with the quantities Brasher needed, so he introduced Brasher to Shelton, and Brasher became Shelton's customer.
>
> Shelton distributed narcotics to dealers in both Indiana and Kentucky. Louisville is on the northern Kentucky border, directly across the Ohio river from multiple southern Indiana municipalities, including New Albany and Jeffersonville, that are part of the greater Louisville metropolitan area. Brasher himself lived in Louisville, Kentucky, and distributed drugs there. After joining the conspiracy in the Fall of 2014, he remained a participant until authorities brought it to an end with multiple searches and arrests in December 2015. So far as the trial record reveals, Brasher did not distribute drugs in Indiana, took no conspiracy-related actions in Indiana, and did not interact with any of the Indiana dealer/spokes.
>
> As he did with other dealers, Shelton typically "fronted" heroin, cocaine, and methamphetamine to Brasher and accepted payment from the proceeds of Brasher's subsequent re-sales of the substances. Dealers, whether operating in Indiana or Kentucky, typically came to Louisville to pick up their drugs or drop off their payments for Shelton; occasionally, Shelton would meet a dealer in Indiana. Like other dealers, Brasher often picked up his supply of narcotics at Martin's auto supply shop and dropped off cash to reimburse Shelton at the same location (Shelton had a key to Martin's shop). Brasher was Shelton's most reliable dealer: He moved relatively large quantities of narcotics and paid his debts to Shelton on time. Shelton came to consider Brasher his "number one customer" and developed "a strong relationship based on trust with [him]." Brasher also on several occasions supplied kilogram quantities of cocaine to Shelton that he obtained from his own supplier in Texas. On one occasion, a multi-kilogram quantity of cocaine that Brasher had purchased with nearly $100,000 of Shelton's money was lost in shipment when the driver was stopped by police. Such was Shelton's trust in Brasher that he accepted Brasher's account of the incident and continued to do business with him.

United States v. Brasher, 962 F.3d 254, 260 (7th Cir. 2020) (internal citations omitted).

The Court sentenced Brasher on April 20, 2018. (Crim. Dkt. 878.) Because he carried two prior convictions for felony drug offenses, the applicable statute mandated a sentence of life in prison. *Id.*; Crim. Dkts. 280, 281. In addition, based on testimony and wire intercepts presented at the sentencing hearing, the Court also found that Brasher was responsible for a murder committed in furtherance of the conspiracy, and that finding resulted in an offense level likewise calling for life imprisonment under the Sentencing Guidelines. *Id.* In compliance with the statutory mandate, the court ordered Brasher to serve a sentence of life imprisonment. The Seventh Circuit affirmed Brasher's conviction and sentence on July 6, 2020. (Crim. Dkt. 999.) Brasher, by attorney Robert Sirianni, Jr., filed the § 2255 motion on June 9, 2021. The motion raises a laundry list of issues, including ineffective assistance from trial and appellate counsel, misconduct by the Court and the Government, and defective jury instructions. Although the entire trial and sentencing hearing have been transcribed and are available on the docket, (*see* Crim. Dkts. 878, 887, 888, 889, 890), Brasher's § 2255 brief cites only one piece of evidence: an affidavit Brasher submitted with his Motion. (Dkt. 2-1).

The Government responded on August 27, 2021. (Dkt. 9.) Brasher filed a four-page reply—again citing no evidence--the following week. (Dkt. 10.) The matter is fully briefed and ripe for this Court's decision.

III. DISCUSSION

Brasher asks the Court to vacate his conviction and sentence on grounds that he was not afforded effective assistance from trial or appellate counsel, that the Government and the Court prejudiced him through misconduct at trial, and that the jury was improperly instructed. However, Mr. Sirianni has not adequately developed any of these arguments, and Brasher's § 2255 motion fails as a result. And as argued by the Government in their response brief (Dkt. 9), Brasher's claims also fail on the merits.

A. Ineffective Assistance of Counsel

Brasher begins by asserting that both his trial and appellate attorneys failed him in several respects:

- "Trial counsel was ineffective when he improperly advised Brasher regarding adequately conveying his acceptance of guilt and failed to enter any objections to the PSR or at sentencing thereby severing Brasher's opportunity to raise sentencing on direct appeal."[2] (Dkt. 2 at 6.)

- Trial counsel did not provide Brasher with evidence obtained in discovery and did not adequately prepare him for trial. *Id.* at 9–10.

- Trial counsel erroneously stipulated to the authenticity of text message exchanges allegedly between Brasher and a co-conspirator; and then flipped his position at trial to argue the messages were not authentic. *Id.* at 10.

- Trial counsel failed to obtain transcripts of pretrial telephone calls between Brasher and counsel that would have proven counsel's ineffectiveness. *Id.* at 10–11.

- Trial counsel failed to suppress evidence obtained by Kentucky law enforcement authorities. *Id.* at 11–12.

- Appellate counsel failed to raise arguments Brasher requested. *Id.* at 12–13.

A petitioner claiming ineffective assistance of counsel bears the burden of showing (1) that counsel's performance fell below objective standards for reasonably effective representation and (2) that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 688–94 (1984); *Resnick v. United States*, 7 F.4th 611, 619 (7th Cir. 2021). If a petitioner cannot establish one of the *Strickland* prongs, the court need not consider the other. *Groves v. United States*, 755 F.3d 588, 591 (7th Cir. 2014).

On the prejudice prong, a petitioner "must show that but for counsel's errors, there is a reasonable probability that the result would have been different." *Perrone v. United States*, 889 F.3d 898, 908 (7th Cir. 2018) (cleaned up). It is fundamental that the § 2255 movant faces the burden of demonstrating prejudice. *See, e.g.*, *Williams v. United States*, 879 F.3d 244, 249 (7th Cir. 2018) ("To demonstrate prejudice, Williams had the burden to show a reasonable probability" of a different outcome "but for the failure by his counsel."); *Faucett v. United States*, 872 F.3d 506, 509 (7th Cir. 2017) ("Under the familiar *Strickland* standard for claims of ineffective

[2] Although the Court dismisses Mr. Brasher's ineffective assistance arguments on other grounds, this one is particularly difficult to understand given that Mr. Brasher was assessed a statutory mandatory minimum sentence and went to trial, so he was not entitled to any reduction in his sentence based on acceptance of guilt.

assistance of counsel, it was Faucett's burden to show that his attorney's performance was deficient and that he suffered prejudice as a result."); *Blake v. United States*, 723 F.3d 870, 879 (7th Cir. 2013) ("A party asserting ineffective assistance of counsel bears the burden of establishing" both deficient performance and prejudice.); *Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993) ("Because counsel is presumed effective, the petitioner bears a heavy burden to prove that his counsel was ineffective and that his defense was actually prejudiced."); *United States v. Springs*, 988 F.2d 746, 749 (7th Cir. 1993) ("Further proceedings on this subject would be a waste of time, because Springs has no prospect of establishing the 'prejudice' that is an element of his burden under the sixth amendment."); *United States v. Davenport*, 986 F.2d 1047, 1049 (7th Cir. 1993) "the burden of both proof and persuasion is" the movant's).

Brasher has not carried the burden of establishing that he was prejudiced by any act or omission of his trial or appellate attorneys. Indeed, Brasher's § 2255 brief—which was drafted by an attorney—includes no discussion of prejudice at all. Counsel lays out his predecessors' missteps over the span of five pages, then urges the Court—without citing a single fact—to find that none of those missteps were grounded in strategic choices. (Dkt. 2 at 9–15.)

Perhaps Brasher attempts to articulate prejudice by asserting that counsel's failure to object to evidence of conduct in Kentucky prevented him from raising the defense that this Court lacked jurisdiction over him because there was no evidence he took any action in Indiana. *See* Dkt. 2 at 11–12, n.2. This argument defeats itself. If this Court has jurisdiction only over actions that occur in Indiana, Brasher merely needed to argue that no evidence established his presence in Indiana. By Brasher's reasoning, evidence of things he did in Kentucky might have been irrelevant to the case, but they would not have established jurisdiction, and counsel's failure to object would not have foreclosed a lack-of-jurisdiction argument.

Regardless, the Seventh Circuit dismissed the lack-of-jurisdiction argument on appeal: "Indeed, it is not at all unusual for conspiracies to cross state and judicial district lines; hence, the law recognizes that such crimes may be prosecuted in any district where one's co-conspirators have acted in furtherance of the conspiracy." *United States v. Brasher*, 962 F.3d 254, 263 (7th Cir. 2020). "As a conspirator, Brasher may be said to have conspired with those dealers operating in Indiana even if he never set foot there on conspiracy business." *Id.* Because the Seventh Circuit found as a matter of law that evidence of Brasher's actions in Kentucky could prove his involvement in a conspiracy in this District, he "is barred from relitigating" the issue "in his § 2255 motion." *Fuller v. United States*, 398 F.3d 644, 648 (7th Cir. 2005) (discussing "law of the case" doctrine).

His claim that trial counsel did not provide him with evidence obtained in discovery and did not adequately prepare him for trial fails because it is underdeveloped. Brasher does not explain what motions his attorney should have responded to, what "key evidence" he should have subpoenaed, how his attorney was unprepared, or what discovery Brasher wanted. As argued by the Government, the argument regarding Brasher's requests for discovery items is a nonstarter, because defendants are not constitutionally entitled to discovery. "The Supreme Court has held, however, that defendants are not constitutionally entitled to discovery." *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Gray v. Netherland*, 518 U.S. 152, 168 (1996)).

Brasher's argument concerning the authenticity of text messages and counsel's failure to secure transcripts of pretrial telephone calls between Brasher and counsel in no way establish that trial counsel was ineffective. His assertion that trial counsel failed to object to the admission of English text messages because they were in Spanish would have been frivolous, because the text messages were not in Spanish. His assertion that the text messages were "only transcribed due to a glitch in the system" (Dkt 2 at 10) is without merit. Both FBI agent Michael Irvin and Shelton testified that the duplicate text messages were by accident (Dkt. 887 at 165-67; Dkt. 888 at 204-205.) His claim that trial counsel should have moved to suppress evidence obtained by Kentucky law enforcement authorities and appellate counsel failed to appeal "unrelated" evidence from Kentucky and a venue claim are not supported by any evidence in the record and thus are waived. Accordingly, counsel's decision to not raise an objection to these matters is without merit because "with no chance of success [these claims]could not possibly prejudice the outcome." *United States v. Carter*, 355 F.3d 920, 924 (7th Cir. 2004).

Brasher concludes his ineffective assistance argument by asking the Court to find that "the gravity of counsels' deficient performance in this case amounts to a deprivation of counsel altogether, giving rise to a presumption of prejudice to satisfy the second prong of *Strickland*." (Dkt. 2 at 15.) Unfortunately, Brasher does not explain how trial or appellate counsel's errors amount to a complete deprivation of counsel. *Id.* at 15–16. Rather, Brasher cites a handful of cases and leaves the Court to determine how (or whether) they apply to this case. "[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." *United States v. Cisneros*, 846 F.3d 972, 978 (7th Cir. 2017) (internal quotations omitted). Brasher's "complete deprivation" argument is perfunctory at best and an undeveloped list of case citations at worst.

Brasher has not articulated how any error by his trial or appellate attorneys prejudiced him. Therefore, ineffective assistance of counsel is not a basis for vacating his conviction or sentence.

B. <u>Prosecutorial and Judicial Misconduct</u>

Brasher next asks the Court to find that he was subjected to misconduct by the Government and the Court. When reviewing a claim of prosecutorial misconduct, "Court[s] first determine[] whether the prosecutor's conduct was improper," and, if so, evaluates "the conduct in light of the entire record to determine if it deprived defendant of a fair trial." *United States v. Flournoy*, 842 F.3d 524, 528 (7th Cir. 2016) Brasher contends first that the Government "engaged in prejudicial misconduct" by introducing evidence obtained by Kentucky law enforcement officers. (Dkt. 2 at 17–18.) His claim is that the prosecution improperly admitted evidence concerning geographic division of the conspiracy, evidence that both this court and and the Seventh Circuit have held was properly admitted.

Again, although the entire trial has been transcribed, Brasher's counsel does not cite the record to allow the Court to determine what this problematic evidence was. Moreover, he does not cite any legal authority to support his assertion that evidence of acts in Kentucky should have been inadmissible—an assertion squarely at odds with the Seventh Circuit's ruling on his direct appeal.

Brasher next contends that the Court "intimidated" one witness who would have testified in his defense into not testifying. (Dkt. 2 at 18–19.) The basis for attributing this intimidation to the Court is unclear, as Brasher states that one of his witnesses was informed before arriving that she would be arrested on outstanding warrants after testifying, but he does not cite any communications to that effect from the Court. Instead, as pointed out by the Government, Brasher's trial counsel explained, that this witness was not called to testify because she was on state parole and could not attend trial because she could not leave her state of supervision, however, she would be able to appear the next morning. (Dkt. 889 at 344). The Court responded "that's fair enough." *Id.* Moreover, for this type of claim to be viable, "at the very least the petitioner must submit an affidavit from the uncalled witness stating the testimony he or she would have given had they been called at trial." *Wright v. Gramley*, 125 F.3d 1038, 1044 (7th Cir. 1997). As previously discussed, the only evidence presented is an affidavit from Brasher.

Brasher also argues that the Court "chilled" testimony that his nephew would have offered on his behalf by questioning him outside the presence of the jury. (Dkt. 2-1. at 19–20.) Contrary to Brasher's claims, his nephew testified at trial and his assertion that this witness was "prevented by the trial court from offering his intended testimony" is untrue (Dkt. 890 at 21-48.) Brasher cites the trial transcript in the portion of his affidavit discussing witnesses he wished to call. *See* Dkt. 2-1 at 17, 19. Unfortunately, Brasher's counsel again fails to cite relevant portions of the transcript or any legal authority that would support his argument. Moreover, Brasher has not shown any prejudice and this claim also fails. Brasher's assertions of prosecutorial and judicial misconduct are perfunctory, undeveloped, unsupported, and, therefore, waived. *Cisneros*, 846 F.3d at 978.

C. <u>Jury Instructions</u>

Finally, Brasher asks the Court to find that he was prejudiced by unlawful jury instructions. But Brasher's counsel—who has access to the docket and the entire record of Brasher's criminal case—presents this argument without any citation to the jury instructions themselves. To his credit, Brasher cites jury instruction 37 in his affidavit. *See* Dkt. 2-1 at 23 (citing Crim. Dkt. 779 at § 37). That instruction is a correct statement of the law. It is the Seventh Circuit Pattern Jury Instruction. See *The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit*, No. 5.11 (2020 Ed.). Pattern instructions are presumed to accurately state the law. *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019) (citing *United States v. Marr*, 760 F.3d 733, 744 (7th Cir. 2014)). Unfortunately for Brasher, his counsel does not state what aspects of the instruction are problematic or why.

Attorneys who accept the responsibility of representing prisoners seeking to collaterally attack their convictions or sentences must understand that they are obliged to do more than write down basic legal principals or bare legal arguments and send the court to find evidence and law to support them. Regrettably, Brasher's attorney has failed to clear this fundamental threshold. Like his other claims, Brasher's jury instruction argument is waived. *Cisneros*, 846 F.3d at 978.

IV. CONCLUSION

For the reasons explained above, Terrance Brasher's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C § 2255, Dkt. [1], is **DENIED**, and this action is **DISMISSED with prejudice**. The **Clerk is directed** to enter final judgment in this action. In the criminal case (*United States v. Brasher*, No. 4:15-cr-00028-TWP-VTW-7), the **Clerk is directed** to docket a copy of this Order and terminate the pending § 2255 motion, Crim. Dkt. [1069].

V. DENIAL OF CERTIFICATE OF APPEALABILITY

A habeas petitioner does not have the absolute right to appeal a district court's denial of his habeas petition; rather, he must first request a certificate of appealability. *See Miller–El v. Cockrell*, 537 U.S. 322, 335 (2003); *Peterson v. Douma*, 751 F.3d 524, 528 (7th Cir. 2014). Pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing § 2255 proceedings, and 28 U.S.C. § 2253(c), the Court finds that Brasher has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The Court **DENIES** a certificate of appealability.

SO ORDERED.

Date: 5/23/2023

Tanya Walton Pratt

Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

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