

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

SHAWN PATRICK JONES,

Movant,

vs.

UNITED STATES OF AMERICA.

No. C14-3039-LRR
No. CR11-3017-LRR

ORDER

I. INTRODUCTION

This matter appears before the court on Shawn Patrick Jones' motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1). Shawn Patrick Jones ("the movant") filed such motion on June 25, 2014. On July 11, 2014, the court, among other things, directed the parties to brief the claims that the movant included in his motion pursuant to 28 U.S.C. § 2255 (civil docket no. 3). On August 15, 2014, counsel filed an affidavit (civil docket no. 6). On October 8, 2014, the government filed a resistance (civil docket no. 8). On November 6, 2014, the movant filed a motion for discovery and appointment of investigator (civil docket no. 10). On March 4, 2015, the movant filed a motion to hold motion in abeyance (civil docket no. 11). On April 2, 2015, the movant filed a motion for discovery and appointment of counsel (civil docket no. 12). On April 21, 2015, the movant filed a supplement to his motion for discovery and appointment of counsel (civil docket no. 13). On May 1, 2015, the government filed a resistance to the motion for discovery and appointment of counsel (civil docket no. 15). On May 22, 2015, the movant filed a reply in support of his request for discovery and appointment of counsel (civil docket no. 16). On November 30, 2015, the movant filed

a reply in support of his motion pursuant to 28 U.S.C. § 2255 (civil docket no. 17). The court now turns to consider the movant's motion pursuant to 28 U.S.C. § 2255 and related motions.

II. RELATED MOTIONS AND EVIDENTIARY HEARING

Because the record is clear, the court finds that appointment of counsel is not necessary, *see Davis v. Scott*, 94 F.3d 444, 447 (8th Cir. 1996) (setting forth factors to be considered for appointment of counsel in civil case); *Abdullah v. Gunter*, 949 F.2d 1032, 1035 (8th Cir. 1991) (same); *Wiggins v. Sargent*, 753 F.2d 663, 668 (8th Cir. 1985) (stating an indigent litigant enjoys neither a statutory nor a constitutional right to have counsel appointed in a civil case); *Day v. United States*, 428 F.2d 1193, 1195 (8th Cir. 1970) (“The Sixth Amendment does not extend to persons seeking post conviction relief.” (citing *Baker v. United States*, 334 F.2d 444, 447 (8th Cir. 1964))), and discovery is not necessary, *see* Rule 6, Rules Governing Section 2255 Proceedings. Accordingly, the motion for discovery and appointment of investigator (civil docket no. 10) and motion for discovery and appointment of counsel (civil docket no. 12) shall be denied. The briefing in this matter is complete and the record will not be aided by additional discovery or filings. Accordingly, the motion to hold motion in abeyance (civil docket no. 11) shall be denied.

Further, a district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255. *See United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986). In exercising that discretion, the district court must determine whether the alleged facts, if true, entitle the movant to relief. *See Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996). “Accordingly, [a district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing] if (1) the . . . allegations, accepted as true, would not entitle the [movant] to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.” *Engelen*

v. United States, 68 F.3d 238, 240-41 (8th Cir. 1995) (citations omitted); *see also Delgado v. United States*, 162 F.3d 981, 983 (8th Cir. 1998) (stating that an evidentiary hearing is unnecessary where allegations, even if true, do not warrant relief or allegations cannot be accepted as true because they are contradicted by the record or lack factual evidence and rely on conclusive statements); *United States v. Hester*, 489 F.2d 48, 50 (8th Cir. 1973) (stating that no evidentiary hearing is necessary where the files and records of the case demonstrate that relief is unavailable or where the motion is based on a question of law). Stated differently, a 28 U.S.C. § 2255 motion can be dismissed without a hearing where “the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255; *see also Standing Bear v. United States*, 68 F.3d 271, 272 (8th Cir. 1995) (per curiam).

The court concludes that it is able to resolve the movant’s claims from the record. *See Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993) (holding “[a]ll of the information that the court needed to make its decision with regard to [the movant’s] claims was included in the record . . .” and, therefore, the court “was not required to hold an evidentiary hearing”) (citing Rule Governing Section 2255 Proceedings 8(a) and *United States v. Raddatz*, 447 U.S. 667, 674 (1980)); *see also Premachandra v. United States*, 101 F.3d 68, 70 (8th Cir. 1996) (concluding that district court did not err in denying evidentiary hearing because “the record contain[ed] no response to counsel’s affidavit and no fact submission . . . suggesting a need for an evidentiary hearing”). The evidence of record conclusively demonstrates that the movant is not entitled to the relief sought. Specifically, it indicates that the movant’s claims are procedurally barred and/or without merit. As such, the court finds that there is no need for an evidentiary hearing.

III. ANALYSIS

With respect to the merits of the movant’s claims, the court deems it appropriate to deny the movant’s motion pursuant to 28 U.S.C. § 2255 for the reasons stated in the government’s resistance. The government’s brief adequately sets forth the law that is

applicable to the facts in the movant's case. Specifically, the government correctly concluded that (1) procedurally defaulted claims, such as the actual innocence claim and court reporter claim, do not justify relief and (2) counsel provided professional and effective assistance to the movant and the movant suffered no prejudice as a result of counsel's actions. The record clearly reveals that the movant is unable to overcome substantial evidence that inculpates him. The movant's mischaracterizations of what occurred prior to trial, during trial, after trial and during the sentencing hearing do not provide a valid basis to grant relief.

Moreover, the court thoroughly reviewed the record and finds that the denial of the movant's motion pursuant to 28 U.S.C. § 2255 comports with the Constitution, results in no "miscarriage of justice" and is consistent 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 for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987))). It is clear that relief is not available because all of the movant's claims are contradicted by the record and/or are inherently incredible. The movant's inaccurate statements, inconsistent positions, adverse admissions and dissatisfaction with counsel's representation do not establish that a constitutional violation occurred.

When seeking to vacate his conviction pursuant to 28 U.S.C. § 2255, the movant generally contends that: (1) he is actually innocent in light of the evidence; (2) counsel provided ineffective assistance prior to, during and after trial; (3) the government's agent Lori Lewis, and cooperating witnesses, Jay Monson and James Olson, provided inconsistent, inaccurate and/or false testimony; (4) the transcripts of recorded phone calls are not accurate; (5) the court erred when it failed to ask the movant during the pretrial conference whether he wanted to call the chemist because he wanted to contest drug purity

and did not understand the ramifications of failing to do so; (6) appellate counsel deprived the movant of meaningful appellate review; (7) the court reporter did not accurately report the case; and (8) counsel's cumulative omissions prejudiced the movant. The movant's general contentions overlap, but he expounds most upon his second contention and third contention.

Concerning his third contention, the movant maintains that Lori Lewis: (1) improperly led the jury to believe that Mike Allison did not have fake identification in the movant's name so he could not complete a wire transfer; (2) played fast and loose with the evidence, including the photo selection by Clint Wendel; (3) improperly led the jury to believe that buying and selling cars was just code for buying and selling drugs; (4) intentionally waited a long time to contact the phone company because she knew that if she waited long enough the phone records would not be available; (5) manipulated the recorded phone calls and, even though the movant admitted that he was one of the speakers, the government did not establish that the recorded phone calls were admissible; and (6) manipulated the evidence to save her case and her reputation after she realized that Jay Monson bamboozled her. With regard to Jay Monson, the movant states that he (1) framed the movant by interpreting the movant's buying and selling cars as conspiring with the conspirators the movant knew to be involved in drug trafficking and (2) provided untruthful testimony, which does not establish that the movant's phone number is associated with the conspiracy.

Regarding his second contention, the movant asserts that counsel: (1) failed to properly investigate the case and prepare for trial; (2) failed to properly cross-examine Jay Monson; (3) failed to challenge Jay Monson's misidentification of Robert Gallon, rather than Gary Del Valle, in a recorded phone call and such misidentification undermines Jay Monson's claims that he was speaking with the movant; (4) failed to challenge the admissibility and trustworthiness of the recorded phone calls; (5) failed to challenge whether the methamphetamine was imported from Mexico, when it was clear that the

methamphetamine was not produced in Mexico, and such failure resulted in a two-point sentencing enhancement; (6) failed to adequately prepare for trial so he was unable to impeach Jay Monson's testimony regarding trips that the movant made to Jay Monson's house; (7) failed to point out Jay Monson's inconsistent testimony about amounts owed for drug transactions or dates when drug transactions occurred, including a date when the movant was getting his driver's license renewed; (8) failed to move for a new trial based on the fact that he could not have completed a drug transaction on November 12, 2009, the date that he got his driver's license renewed; (9) failed to make relevant connections after Jay Monson provided inconsistent dates for when the movant was in California and Iowa; (10) failed to challenge Lori Lewis' false testimony, interpretation of the recorded phone calls and over-reliance on a convicted felon; (11) failed to contest the purity of the methamphetamine and erroneously waived the movant's right to confront the witness who performed the drug analysis; (12) failed to call a witness from Western Union to describe procedures and erroneously permitted Lori Lewis to testify about the manner in which Western Union conducted its business; (13) failed to challenge the use of phone records from Jay Monson's stepmother or contest the admission of the phone records based on evidentiary rules; (14) failed to obtain additional phone records to establish that Jay Monson was not at home waiting for the movant to deliver drugs; (15) failed to call a witness from the phone company to authenticate the phone records because it is possible that Lori Lewis altered such records; (16) failed to object to the use of the recorded phone calls during trial; (17) failed to prevent the jury from hearing the recorded phone calls before he prepared his own transcripts to validate the information; (18) failed to point out that the movant's knowledge of the conspirators' unlawful drug dealing does not make his buying and selling cars unlawful; (19) failed to call two alibi witnesses, his boss, Mike Ford, and his probation officer, James Whelpley, to make it clear that he could not travel back and forth from Mexico and Iowa; (20) failed to properly cross-examine James Olson; (21) failed to point out that Jay Monson and James Olson communicated with each other

and the movant did not facilitate their communications; (22) failed to point out that the delivery of cash to Mexico is not a crime, the movant did not know Robert Gallon, who he met once in Mexico to discuss an automobile, and he told James Olson and Robert Gallon that it was stupid to traffic drugs; (23) failed to determine whether Home Depot sold vacuum package devices; and (24) failed to impeach inconsistencies in James Olson's testimony, including facts that relate to how many pounds of methamphetamine were delivered and whether the movant or Mike Allison recruited James Olson to traffic methamphetamine.

Given the record, which includes but is not limited to the indictment (criminal docket no. 1), the information under 21 U.S.C. § 851 (criminal docket no. 29), the government's trial memorandum (criminal docket no. 51), the movant's witness list (criminal docket no. 54), the movant's motion in limine (criminal docket no. 77), the government's exhibit list (criminal docket no. 85), the government's amended trial memorandum (criminal docket no. 90), the exhibits of the jury trial (criminal docket no. 99), the jury trial (criminal docket nos. 141, 142, 143 & 147), the offense conduct statement (criminal docket no. 109), the objections to the pre-sentence investigation report (criminal docket nos. 121 & 125), the final pre-sentence investigation report (criminal docket no. 126), the parties' sentencing memoranda (criminal docket nos. 128 & 129), the movant's sentencing exhibit (criminal docket no. 130), the sentencing hearing (criminal docket no. 144), the judgment (criminal docket no. 132), the statement of reasons (criminal docket no. 133) and the appellate opinion (criminal docket no. 155), the court concludes that some of the movant's claims are procedurally defaulted, there is no basis to conclude that the movant is actually innocent of the crime of conviction, the court did not err, the government conducted itself appropriately, no violation of the movant's constitutional right to effective assistance of counsel occurred and the record is accurate.

The movant is attempting to again challenge the evidence by alleging a grand conspiracy to obtain his conviction that involves everyone except him. But, the movant

is unable to raise claims that he could have asserted in trial or appellate proceedings, and he already had his case reviewed on direct appeal, wherein his contention was that the evidence was insufficient in that it was unworthy of belief because it was offered by cooperators and uncorroborated. Moreover, the movant only offers misleading, preposterous, frivolous, outlandish, farfetched, fanciful, unsupported and/or conclusory statements that do little to undermine the substantial evidence that inculpates him. Few, if any, of the movant's statements can be considered true. Consistent with the court's prior determination that the movant committed perjury when testifying on his own behalf, the movant's additional statements are not credible.

The movant contends that nearly all of the government's witnesses testified falsely and, in support of such contention, he misstates the record. Concerning Lori Lewis, the movant asserts baseless accusations. As to other witnesses, the movant points out inconsistencies or flaws in their testimony. But, slight inconsistencies in testimony do not establish false testimony. *See United States v. Moore*, 639 F.3d 443, 446 (8th Cir. 2011). Having examined the record, including a transcript of the testimony of the witnesses whom the movant now claims in this proceeding were coerced by the government into giving false testimony, nothing therein justifies the movant's assertions. Based on the record as a whole, it is evident that inconsequential inaccuracies in the testimony of the government's cooperating witnesses were developed on cross-examination and in no manner rose to the level of perjury. Because no testimony offered by the government was false, it could not actually prejudice the jury's verdict. And, in this proceeding, the movant has not credibly suggested that he could produce evidence of any kind which might support his bare assertion that four out of five of the government's witnesses provided perjured testimony and that the government was aware thereof and coerced the giving of such testimony. Indeed, the movant's main focus is that he could not travel back and forth from Mexico or Iowa because of his job and probation officer, but he admitted that he repeatedly traveled to Mexico and an eyewitness identified him as being in Iowa.

The evidence strongly weighed in favor of conviction. The cooperating witnesses' acts in the conspiracy were evidenced by other witnesses whose credibility has not been seriously called into question. And, the movant's own trial testimony concerning his interactions with conspirators tends to corroborate, rather than undermine, the cooperating witnesses' testimony. The undisputed circumstantial evidence creates an overwhelming impression that the movant was not an innocent pawn in the scheme. *See United States v. Wintermute*, 443 F.3d 993, 1003 (8th Cir. 2006) ("[A] 'tacit understanding' among co-conspirators may be, and often will be, inferred from circumstantial evidence."). All of the numerous interactions between the conspirators are explained easily if the movant was a knowing participant in the criminal scheme. On the other hand, the movant's theory that he was buying and selling cars while holding a telemarketing job required the jury to believe that he was participating in transnational and interstate vehicle transactions that sometimes involved tens of thousands of dollars. The jury, however, was not persuaded by the movant's vehicle sales explanation. Undoubtedly, the jury did not believe the movant because he was thoroughly impeached at trial. The movant's false testimony that he was engaging in or talking about vehicle transactions was directly contradicted by credible trial witnesses and evidence that related to multiple meetings, prolonged interactions and repeated phone conversations with Mike Allison, James Olson, Jay Monson, Robert Gallon and/or other conspirators. After hearing the testimony of all of the witnesses and considering the other evidence, the jury did not credit the movant's testimony, including but not limited to his testimony concerning the vague topics being discussed in the recorded phone calls, the use of his identification by Mike Allison and the missing recorded conversations that the movant had on his computer. Contrary to the movant's assertions, nothing undermines the notion that the movant received a fair trial.

Additionally, there is nothing within the record that persuades the court that a violation of the movant's constitutional right to counsel occurred. The record indicates that the movant received a fair trial and that counsel exercised the customary skill and

diligence of a reasonably competent criminal attorney. It is apparent that the conduct of counsel fell within a wide range of reasonable professional assistance. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). Stated differently, counsel ably fulfilled his role as advocate.

The movant argues that counsel devoted an insufficient amount of time in investigating the merits of the charge and that a more intensive investigation would have developed more exculpating evidence. The movant also attacks counsel's trial preparation, second-guesses counsel's trial strategy and tactics and chastises counsel's post-verdict actions. The movant's assertions regarding the actions of counsel are baseless.

In the court's judgment, there is no reasonable basis for the charge that counsel failed in his professional duty to the movant. Clearly, counsel conferred with the movant and spent considerable time preparing for trial. This case does not turn on an issue of credibility because, in order to believe movant, the court would have to conclude that an otherwise competent attorney refused the movant's instructions to establish an alibi when counsel pursued all other options when presenting the best possible defense. After observing counsel's conduct at trial, it is clear that he adopted strategies that are consistent with a general denial defense, sought to establish an alibi and skillfully examined and cross-examined witnesses. Under the circumstances, counsel cannot be considered ineffective for failing to seek information that did not substantially undermine the evidence establishing the movant's guilt or for failing to present alibi witnesses, especially considering the evidence and the movant's admissions. The present case involved relatively straightforward factual questions and hinged on whether the jury believed the movant's explanation for his substantial involvement with known drug traffickers. Hence, it cannot be said that counsel failed to raise and fully litigate all issues that were arguably meritorious.

Further, it cannot be said that the performance of counsel prejudiced the movant's defense. *See Strickland*, 466 U.S. at 692-94. Nothing counsel did or failed to do would

have changed the outcome. To establish prejudice, the movant must show the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to him either on cross-examination or in his case-in-chief. There is no prejudice if, factoring in the uncalled witnesses or additional evidence, the government's case remains overwhelming. Here, all of the movant's claims of ineffective assistance of counsel fail because sufficient evidence supports the movant's conviction and nothing before the court indicates that obtaining additional records, offering more witnesses, asking different questions, objecting to the admission of certain evidence or proceeding in a different manner would have altered the outcome of the trial or sentencing.

In sum, after evaluating each of the movant's allegations of ineffective assistance of counsel and the proof adduced in support of them, the court finds that in each instance the movant's counsel acted with the customary skills and diligence that a reasonably competent attorney would have exercised under similar circumstances and that the movant was not materially prejudiced in the presentation of his defense by counsel's action or inaction. Therefore, relief on the basis of any ineffective assistance of counsel claim is not available.

IV. CERTIFICATE OF APPEALABILITY

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order is subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253(a). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*,

211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedeman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. “[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, “the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *See Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, the court finds that the movant failed to make the requisite “substantial showing” with respect to the claims that he raised in his motion pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because he does not present a question of substance for appellate review, there is no reason to grant a certificate of appealability. Accordingly, a certificate of appealability shall be denied. If he desires further review of his motion pursuant to 28 U.S.C. § 2255, the movant may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520-22.

V. CONCLUSION

Based on the foregoing, the movant's motions that relate to his motion pursuant to 28 U.S.C. § 2255 shall be denied. Further, the alleged errors that are asserted by the movant warrant no relief under 28 U.S.C. § 2255. Because the movant's claims are without merit and/or procedurally defaulted, the movant's motion pursuant to 28 U.S.C. § 2255 shall be denied. Additionally, a certificate of appealability will not issue.

IT IS THEREFORE ORDERED:

- (1) The movant's motion pursuant to 28 U.S.C. § 2255 (civil docket no. 1) is denied.
- (2) The movant's motion for discovery and appointment of investigator (civil docket no. 10) is denied.
- (3) The movant's motion to hold motion in abeyance (civil docket no. 11) is denied.
- (4) The movant's motion for discovery and appointment of counsel (civil docket no. 12) is denied.
- (5) A certificate of appealability is denied.

DATED this 26th day of July, 2017.



LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA