IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff/Respondent,** **v.** **MARCUS D. ROBERSON,** **Defendant/Petitioner.**	**No. 11-40078-02-JAR**

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner Marcus Roberson's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 817). After the Government responded (Doc. 826), the Court ordered it to expand the record (Doc. 832). The Government has submitted the affidavit of trial counsel (Doc. 845) and the Court is prepared to rule. For the reasons explained below, Roberson's motion is denied without an evidentiary hearing.

I. Background

A. Procedural and Factual History

On October 19, 2011, Roberson and seven co-defendants were charged with conspiracy to distribute 280 grams or more of crack cocaine (Count 1) and conspiracy to distribute five kilograms or more of powder cocaine (Count 2), in violation of 21 U.S.C. § 846.[1] Roberson, along with co-defendant Virok Webb, was also charged with one count of murder to prevent another from providing information concerning a federal crime to a law enforcement officer of the United States, in violation of 18 U.S.C. § 1512(a)(1)(C). Roberson proceeded to trial, with

[1]Doc. 50.

all but one of the other co-defendants entering into plea agreements with the Government.[2] Many of the co-conspirators testified: Jermaine Jackson, Raschon Smith, Antonio Cooper, Ria Roberson, Jamaica Chism, Megan Fuller, Alisha Escobedo, and Michael Lillibridge. The extensive evidence at trial is set forth in this Court's Memorandum and Order denying Roberson's post-conviction motions, which the Court incorporates by reference herein.[3]

On March 6, 2014, Roberson was convicted by a jury on all three counts.[4] The jury also returned special verdicts determining that Roberson conspired to distribute 280 grams or more of crack cocaine and five kilograms or more of powder cocaine.[5] On July 14, 2015, the Court denied Roberson's motions for judgment of acquittal and new trial,[6] and on December 2, 2015, sentenced Roberson to a controlling term of life imprisonment.[7] On November 16, 2016, the Tenth Circuit Court of Appeals affirmed Roberson's conviction and sentence.[8] This Court subsequently issued an order directing that Roberson file either a motion to withdraw his pending *pro se* Rule 33 motion and a notice of his desire not to have the motion re-characterized as a request for § 2255 relief, or a motion amending the Rule 33 motion to include all claims that can

[2]On July 25, 2013, co-defendant Kennin Dewberry was convicted by a jury of conspiracy to distribute crack and powder cocaine. Doc. 388.

[3]Doc. 700, 1–31. The Tenth Circuit Court of Appeals also summarized the evidence at trial in its order affirming Roberson's conviction on a sufficiency of the evidence challenge. *See United States v. Roberson*, 664 F. App'x 743, 745–47 (10th Cir. 2016).

[4]Doc. 525.

[5]*Id.*

[6]Doc. 700.

[7]Doc. 737; 21 U.S.C. § 841(b)(1)(A).

[8]*Roberson*, 664 F. App'x at 750.

be brought under § 2255.[9] Roberson withdrew his motion,[10] and this timely § 2255 motion followed.[11]

B. Virok Webb

On March 7, 2014, the day after Roberson was convicted by a jury, Virok Webb entered a binding guilty plea to one count of conspiracy to distribute crack cocaine.[12] As an appropriate sentence, the parties proposed a term of imprisonment between twenty and thirty years; the Government agreed to dismiss the second drug conspiracy charge as well as the murder charge, and limited its § 851(a)(1) information to one prior felony drug conviction, resulting in a mandatory minimum sentence of twenty years rather than life imprisonment.[13]

Roberson submits the purported affidavit of Virok Webb dated March 9, 2014:

> Forrest Lowry ,
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> I am willing to testify in Marcus Robersons defense in his appeal trial that we had NO illegal drug dealings or he and I had any parts in the homicide attributed to us. Unfortunetly I was not able to testify at his trial do to my own case that was pending. My attorney advise against it continously. Me and Roberson did not deal in drugs together nor did he ever purchase, receive, or contact me about anything like that. We did not discuss or plot, or plan any homicide. I apologize for not doing this for you or Dewberrys attorney. I recently took a plea so I am free to testify for you and Roberson during his appeal process. I get sentenced May 27th.[14]

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[9]Doc. 792.

[10]Docs. 795, 796.

[11]28 U.S.C. § 2255(f).

[12]Docs. 511, 512.

[13]Doc. 512 at 2–3.

[14]Doc. 817-1 at 64 (errors in original).

Roberson submits a second purported affidavit of Webb dated November 2014:

> TO: Charles Rogers (Attorney for Marcus D. Roberson),
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> I, Virok D. Webb, typed this as a truthful and correct Affidavit, and on my own free will, the information I am about to state is true and accurate. And is willing to testify in court to this information I state in this affidavit. I am willing to testify in Marcus D. Roberson [sic] defense, that he and I "never" had no agreement in no illegal drug activities. Mr. Roberson, never conspired together to purchase any kinda of illegal drugs or any other illegal items, with me or from me. I never sold or gave Mr. Roberson me, any kinda of illegal drugs. On June 29, 2010, I had a interview with Junction City, KS JCPD detective Joshua Brown, and during the interview detective J. Brown asked me specifically about was Mr. Roberson involved in the distribution me and detective J. Brown was discussing, and when I stated Mr. Roberson was not involved with me, I was stating the truth. Mr. Roberson has no involvement in the distribution me and detective J. Brown was discussing. Also me and Mr. Roberson, never discussed, plotted, or plan any homicide. And that goes for the one we was wrongly accused of. I apologize for not being able to relay this information to Mr. Roberson's defense but due to my attorney at the time would not allow me to testify in Mr. Roberson's defense. I recently took a plea back in March 2014, so I am free to testify for Mr. Roberson's behalf, because what I plead out to Mr. Roberson had no involvement with me.[15]

After the Court denied Webb's motion to withdraw the binding Plea Agreement,[16] the Court sentenced Webb to a controlling term of 360 months' imprisonment.[17] His direct appeal was dismissed by the Tenth Circuit.[18]

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[15]*Id.* at 65 (errors in original)

[16]*United States v. Webb*, No. 11-40078-01-JAR, 2015 WL 4275949, at *6–7 (D. Kan. July 14, 2015).

[17]Doc. 715, Judgment.

[18]*United States v. Webb*, 651 F. App'x 740, 745 (10th Cir. 2016).

C. Expansion of the § 2255 Record

After the Tenth Circuit affirmed Roberson's conviction and sentence, he filed the instant timely § 2255 motion raising eight discrete claims that his various trial and appellate counsel were ineffective. This Court ordered the Government to expand the record to supply sworn statements with respect to Roberson's third claim that trial counsel were ineffective for failing to submit Virok Webb's affidavits in further support of the motion for new trial filed pursuant to Rule 33.[19]

The Government submitted the affidavit of Roberson's trial counsel, Forrest Lowry, who represented Roberson at trial and drafted the Rule 33 Motion.[20] Lowry states that he recalls the purported affidavit from Webb, but by the time it was received the trial was over. Lowry wrote and filed the Motion for New Trial on March 20, 2014, but did not include the affidavit from Webb, or his willingness to testify, as a basis for his motion

> because I believed Mr. Webb was not credible and that no jury would ever believe the statements he made in the note in question. The evidence of his involvement was, I believed, overwhelming, and I thought that there were better reasons to request a new trial than Webb's note, and I included those in the motion.[21]

After Roberson moved for his withdrawal, Lowry was replaced by Charles Rogers as counsel for Roberson; Mr. Rogers states that he is retired from the practice of law and does not remember the note from Webb.[22] Roberson submitted an unsworn response refuting Lowry's statements.[23]

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[19]Doc. 832.

[20]Doc. 845. Ex. 1.

[21]*Id.* ¶ 5.

[22]*Id.* ¶¶ 1, 6.

[23]Doc. 847.

II. Legal Standard

Section 2255 entitles a federal prisoner to relief if the court finds that "the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or [is] otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack."[24] The court must hold an evidentiary hearing on a § 2255 motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."[25] A § 2255 petitioner must allege facts that, if proven, would warrant relief from his conviction or sentence.[26] An evidentiary hearing is not necessary, however, where the factual allegations are contradicted by the record, inherently incredible, or when they are conclusion rather than statements of fact.[27]

The Sixth Amendment guarantees that "[i]n all criminal prosecution, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[28] A successful claim of ineffective assistance of counsel must meet the two-pronged test set forth in *Strickland v. Washington*.[29] First, a defendant must show that his counsel's performance was deficient in that it "fell below an objective standard of reasonableness."[30] To meet this first prong, a defendant

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[24]28 U.S.C. § 2255(b).

[25]*United States v. Galloway*, 56 F.3d 1239, 1240 n.1 (10th Cir. 1995) (quoting 28 U.S.C. § 2255(b)).

[26]*In re Lindsey*, 582 F.3d 1173, 1175 (10th Cir. 2009).

[27]*See Hatch v. Oklahoma*, 58 F.3d 1447, 1471 (10th Cir. 1995), *cert. denied*, 517 U.S. 1235 (1996) ("The allegations must be specific and particularized, not general or conclusory."); *United States v. Fisher*, 38 F.3d 1143, 1147 (10th Cir. 1994) (rejecting ineffective assistance of counsel claims that are merely conclusory in nature and without supporting factual averments).

[28]U.S. Const. amend. VI; *see Kansas v. Ventris*, 556 U.S. 586 (2009).

[29]466 U.S. 668 (1984).

[30]*Id.* at 688.

must demonstrate that the omissions of his counsel fell "outside the wide range of professionally competent assistance."[31] This standard is "highly demanding."[32] Strategic or tactical decisions on the part of counsel are presumed correct, unless they were "completely unreasonable, not merely wrong, so that [they] bear no relationship to a possible defense strategy."[33] In all events, judicial scrutiny of the adequacy of attorney performance must be strongly deferential: "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[34] Moreover, the reasonableness of the challenged conduct must be evaluated from counsel's perspective at the time of the alleged error, and "every effort should be made to 'eliminate the distorting effects of hindsight.'"[35]

To meet the second prong, a defendant must also show that his counsel's deficient performance actually prejudiced his defense.[36] To prevail on this prong, a defendant "must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different."[37] A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome."[38] This, in turn, requires the court to focus on "the

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[31]*Id.* at 690.

[32]*Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

[33]*Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) (quotation and citations omitted).

[34]*Strickland*, 466 U.S. at 687.

[35]*Edens v. Hannigan*, 87 F.3d 1109, 1114 (10th Cir. 1996) (quoting *Strickland*, 466 U.S. at 689).

[36]*Strickland*, 466 U.S. at 687.

[37]*Id.* at 694.

[38]*Id.*

question whether counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair."[39]

Claims of ineffective assistance of appellate counsel are also governed by *Strickland's* standards. To prove that appellate counsel was ineffective under *Strickland*, a defendant must show "(1) constitutionally deficient performance, by demonstrating that his appellate counsel was objectively unreasonable, and (2) resulting prejudice, by demonstrating that but for counsel's unprofessional error(s), the result of . . . appeal . . . would have been different."[40] Although "[a] claim of appellate ineffectiveness can be based on counsel's failure to raise a particular issue on appeal, . . . counsel need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal."[41] The strength of the omitted issue guides the court's assessment of the ineffectiveness claim. "If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance."[42] "[I]f the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission."[43] And "if the issue is meritless, its omission will not constitute deficient

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[39]*Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

[40]*United States v. Turrentine*, 638 F. App'x 704, 705 (10th Cir. 2016) (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003)).

[41]*Id.*

[42]*Id.*

[43]*Id.*

performance."[44] As the Tenth Circuit has explained, the omission of a "dead-bang winner" by counsel is deficient performance that may result in prejudice; a dead-bang-winner is "an issue which was obvious from the trial record *and* one which would have resulted in a reversal on appeal."[45]

A defendant must demonstrate both *Strickland* prongs to establish a claim of ineffective assistance of counsel, and a failure to prove either one is dispositive.[46] "The performance component need not be addressed first. 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'"[47]

III. Discussion

Roberson raises eight discrete claims that his trial and appellate counsel were ineffective. The Court addresses each claim in turn.

A. Claim One: Trial and appellate counsel were ineffective for failing to challenge Count Three of the Superseding Indictment

Count Three of the Superseding Indictment states in relevant part:

> That on or about March 2, 2010, and up to and including March 3, 2010, in the District of Kansas, the defendants,
>
> VIROK D. WEBB and
> MARCUS D. ROBERSON,
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> did willfully, deliberately, maliciously, with premeditation and malice aforethought, kill one CRYSTAL K. FISHER, with the intent to prevent CRYSTAL K. FISHER from communicating to a law enforcement officer of the United States the facts and

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[44] *Id.*

[45] *United States v. Challoner*, 583 F.3d 745, 749 (10th Cir. 2009) (quoting *United States v. Cook*, 45 F.3d 388, 394 (10th Cir. 1995)).

[46] *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000).

[47] *Id.* (quoting *Strickland*, 466 U.S. at 697); *see also Romano v. Gibson*, 239 F.3d 1156, 1181 (10th Cir. 2001) ("This court can affirm the denial of habeas relief on whichever *Strickland* prong is the easier to resolve.").

> details of the commission and possible commission of federal offenses, namely the distribution of cocaine and cocaine base, commonly known as "powder cocaine" and "crack cocaine," respectively, and conspiracy to distribute cocaine and cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and 846; all in violation of Title 18, United States Code, Section 1512(a)(1)(C) and Title 18, United States Code, Section 2.[48]

Roberson argues that trial and appellate counsel were ineffective by failing to challenge "the jurisdictional defect involving the indictment." Roberson claims, in effect, that Count Three of the Superseding Indictment provided insufficient notice of the charges against him because the charge failed to identify the official federal proceeding that was impacted by Fisher's murder, and failed to identify the Federal law enforcement officer. Roberson contends that the charge is fatally defective and that trial and appellate counsel were ineffective in failing to challenge Count Three.

It is settled law that:

> To satisfy the Fifth and Sixth Amendments, an indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable the defendant to plead double jeopardy as a defense in future prosecution for the same offense; under this standard, it is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.[49]

In the Tenth Circuit,

> "An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to

[48]Doc. 50 at 3.

[49]*United States v. Blankenship*, 846 F.3d 663, 668 (4th Cir. 2017) (citing *Hamling v. United States*, 418 U.S. 87, 117–18 (1974)) (internal quotation marks omitted).

> assert a double jeopardy defense." *United States v. Redcorn*, 528 F.3d 727, 733 (10th Cir. 2008) (quotations omitted). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the [offense] intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974) (quotation omitted). "Therefore, where the indictment quotes the language of a statute and includes the date, place, and nature of the illegal activity, it need not go further and allege in detail the factual proof that will be relied upon to support the charges." *Redcorn*, 528 F.3d at 733 (quotations omitted). "An indictment need only meet minimal constitutional standards[;] . . . we determine the sufficiency of an indictment by practical rather than technical considerations." *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir. 1997).[50]

In this case, Count Three of the Superseding Indictment was pleaded in the language of the statute. It provided Roberson notice that Fisher was murdered to prevent her from speaking to a federal law enforcement official about a particular federal offense, the distribution of powder and crack cocaine by the Webb drug trafficking organization in which Roberson held a significant position. Thus, the Court agrees with the Government that the words set forth in the charge "fully, directly, and expressly, without any uncertainty and ambiguity, set forth all the elements necessary to constitute the [offense] intended to be punished."[51]

Roberson's argument that Count Three was constitutionally infirm because it did not specifically identify "an officer of the United States" as a special agent of the Drug Enforcement Administration is also without merit. The Court denied a motion to dismiss Count Three filed on

[50] *United States v. Powell*, 767 F.3d 1026, 1030 (10th Cir. 2014).

[51] *Id.*

similar grounds by co-defendant Webb, and adopts that reasoning here.[52] Likewise, Roberson's argument that Count Three failed to set forth in greater specificity the actual federal offense also fails. The Tenth Circuit has held that courts are governed by practical rather than technical considerations, and thus read the indictment as a whole, construing it with common sense and in light of its basic purpose of informing the defendant of the pending charges.[53] Counts One and Two of the Superseding Indictment spelled out in sufficient detail the narcotics offenses in question. Accordingly, Roberson falls short of demonstrating counsels' performance fell below an objective standard of reasonableness for failing to challenge Count Three either before trial or on appeal.

Roberson also falls short of demonstrating the prejudice prong under *Strickland*, given he has failed to show the Government could not have withstood a challenge to Count Three by amending the Indictment had trial counsel moved to dismiss. Likewise, appellate counsel could not have raised a "dead bang winner" on direct appeal, given that Count Three was properly pleaded and did not undermine the fairness of Roberson's trial. This claim is denied.

B. Claim Two: Trial counsel was ineffective for failing to properly challenge the testimony of a Government witness

Roberson contends that Government witness Antonio Cooper provided false testimony about his cooperation with the Government and that trial counsel failed to adequately confront Cooper about his cooperation with the United States. It appears that Roberson's claim is premised on the assumption that the Government's recommendation of a sixty-month sentence in Cooper's unrelated case was the equivalent of a substantial assistance reduction under U.S.S.G.

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[52] *United States v. Webb*, No. 11-40078-1-JAR, 2013 WL 5966135, at *1–2 (D. Kan. Nov. 8, 2013) (discussing *Fowler v. United States*, 131 S. Ct. 2045, 2052 (2011)).

[53] *United States v. Phillips*, 869 F.2d 1361, 1364 (10th Cir. 1988).

§ 5K1.1. Prior to Roberson being charged in the instant case, however, Cooper entered a guilty plea to possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i).[54] As part of the agreement, the Government recommended that Cooper be sentenced to a term of sixty months, the statutory mandatory minimum sentence for that charge.[55] The plea agreement also contained a substantial assistance provision.[56] Thus, because Cooper had resolved his unrelated case with the United States through a plea agreement, his testimony that he had not been promised a reduced sentence because of his testimony in this case was accurate and consistent with the terms of the plea agreement.[57]

Moreover, Roberson's trial counsel received a copy of Cooper's plea agreement in advance of trial. Given trial counsel's cross-examination of Cooper, it is clear that counsel was aware of both the underlying facts supporting Cooper's conviction as well as the plea agreement and his criminal history. Counsel cross-examined Cooper about his twenty-year history as a drug dealer; that Cooper was exclusively a drug dealer, made a lot of money selling crack, and paid no taxes; that Cooper had an association with Crystal Fisher and that she posed a threat to him if she spoke to law enforcement; that Cooper had misled law enforcement during his arrest on gun charges; that his sentencing on the gun charges was postponed until he testified in Roberson's trial; that although no one told him he was getting a substantial assistance reduction, he hoped to get a decrease in his sentence because of his testimony; that Cooper regularly smoked marijuana;

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[54]*See United States v. Cooper*, 11-40034-01-JAR, Doc. 15, Plea Agreement at 8–18.

[55]*Id.* ¶ 5(c).

[56]*Id.* ¶ 7.

[57]Trial Tr. at 117. The transcripts of the jury trial consist of eleven volumes found at Docs. 606 through 616, and collectively consist of 1,811 sequentially paginated pages. For convenience, the Court cites to these documents collectively as "Trial Tr." followed by a reference to the page number in the transcript that appears in the upper right corner of each page.

that Cooper assisted Webb in procuring a firearm that was directly linked to the murder of Fisher; that Cooper only disclosed the existence of this firearm after his arrest and after questioning by law enforcement officers about Fisher's murder; that Cooper's statements to law enforcement appeared inconsistent; and that Cooper had an incentive to provide evidence against Roberson.[58]

Trial counsel has broad latitude in deciding how to question a witness, and Roberson cannot establish that counsel's purported failure to thoroughly cross-examine Cooper satisfies both prongs of *Strickland*.[59] Decisions by trial counsel on how to best cross-examine a witness presumptively arise from sound trial strategy.[60] Trial counsel's decision on what topics to cross-examine Cooper was likely strategic and Roberson cites no reason for the Court to depart from that presumption. Nor does Roberson demonstrate that the jury would have altered its conclusion if he had pressed Cooper more on his agreement with the Government.[61] Roberson's claim is denied.

C. Claim Three: Both assigned trial counsel were ineffective for failing to submit affidavits of co-conspirator Virok Webb

Roberson claims that counsel Lowry and Rogers were ineffective by failing to submit Webb's affidavits in further support of the motion filed pursuant to Fed. R. Civ. P. 33. Specifically, Roberson contends that these "affidavits would have proven that there was no

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[58]Trial Tr. at 702–745.

[59]*See Cannon v. Mullin*, 383 F.3d 1152, 1163 (10th Cir. 2004) ("Decisions on how to question a witness are generally committed to trial counsel's discretion.").

[60]*Richie v. Mullin*, 417 F.3d 1117, 1124 (10th Cir. 2005); *DeLozier v. Simmons*, 531 F.3d 1306, 1325 (10th Cir. 2008).

[61]The Court instructed the jury regarding the testimony of a cooperating witness: "The testimony of a witness who provides evidence against a defendant for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness's testimony has been affected by interest, or by prejudice against a defendant." Doc. 524, Instr. 35.

conspiracy agreement between [the defendant] and Virok Webb's drug distribution organization."[62] As related in Webb's affidavits, he was now "free to testify" as he recently took a plea. The Government contends that Roberson would have been able to utilize Webb's affidavits only under circumstances where Webb's statements would be subject to cross-examination; whether to call a particular witness is "a tactical decision and, thus, a matter of discretion for trial counsel."[63] The Court agrees that this claim does not meet either *Strickland* prong.

First, the Court agrees with the Government that merely submitting Webb's self-serving affidavits in a Rule 33 motion would not demonstrate newly discovered evidence—at most, the affidavits suggest that Webb would have been willing to testify that Roberson was not involved in the drug trafficking organization. Roberson would have been able to utilize the affidavits only under circumstances where Webb's statements were subject to cross-examination and thus, standing alone, the affidavits would have provided no relief to Roberson.

Second, trial counsel's decision not to introduce Webb's affidavits is not unreasonable. A defendant's difference in opinion regarding the method and strategy of trial counsel is insufficient to overcome "the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[64] The decision of which witnesses to call is "quintessentially a matter of strategy for the trial attorney."[65] Matters of strategy and tactics are significant in ineffective assistance claims because counsel's decisions in those areas "are presumed correct, unless they were completely unreasonable, not merely wrong, so that they bear no relationship to

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[62]Doc. 817-1 at 24. Notably, Webb provided a similar affidavit to co-Defendant Kennin Dewberry; the Court rejected his claim that trial counsel was ineffective for failing to call Webb as a witness at his trial. Doc. 831.

[63]*United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986).

[64]*Strickland*, 466 U.S. at 689.

[65]*Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008).

a possible defense strategy."[66] Generally, whether to call a particular witness is "a tactical decision and, thus, a matter of discretion for trial counsel."[67] After all, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings [and] knew of materials outside the record."[68]

Moreover, Roberson's argument is foreclosed by the fact that trial counsel would have violated the Kansas Rules of Professional Conduct had they attempted to speak with Webb and were required to go through his counsel regarding any attempt to have Webb interviewed or to have him testify. As Webb relates in his affidavit, however, his counsel prevented him from testifying.

Finally, to establish prejudice from counsel's failure to investigate a potential witness, a petitioner must show that the witness would have testified and that their testimony would have probably changed the outcome of the trial. Subjecting Webb to cross-examination would have resulted in the Government's ability to put before the jury Webb's statement to Sgt. Brown wherein Webb brags at length about his high-ranking position in the crack cocaine distribution ring in Junction City and how he controlled the flow of drugs in the community. Given the overwhelming amount of evidence arrayed against both Webb and Roberson, trial counsels' decision not to call Webb as a witness was a reasonable exercise of judgment.[69] Accordingly, Roberson cannot demonstrate either *Strickland* prong, and this claim is denied.

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[66]*Moore v. Marr*, 254 F.3d 1235, 1239 (10th Cir. 2001).

[67]*United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986).

[68]*Harrington v. Richter*, 562 U.S. 86, 105 (2011).

[69]*See United States v. Dewberry*, ---F. App'x---, 2018 WL 3752136, at *1 (10th Cir. 2018) (rejecting co-defendant Dewberry's similar claim that trial counsel was ineffective for failing to call Webb as a witness after he sent a similar affidavit disavowing Dewberry's involvement in the drug trafficking conspiracy).

D. Claim Four: Trial counsel was ineffective for failing to challenge the testimony of trial witness Raschon Smith

Roberson claims that counsel was ineffective for failing to object to the testimony of Government witness Raschon Smith. Roberson argues that Smith's statement that Roberson confessed to the murder of Crystal Fisher ran afoul of Fed. R. Evid. 801(d)(2)(E), and that trial counsel erred by not objecting to the statement.

During trial, the Government called Smith to testify during its case-in-chief.[70] Smith testified about incriminating statements made by both Roberson and Virok Webb.[71] Smith testified that while they were incarcerated together, Roberson confessed to him that Roberson had killed Fisher because she was going to testify against him and others in the drug trafficking organization.[72] Roberson takes issue with this statement, and argues that trial counsel should have objected on grounds that it did not meet the hearsay exception under Rule 801(d)(2)(E), which provides that a statement made "by the party's coconspirator during and in furtherance of the conspiracy" is not hearsay. The Government successfully admitted the co-conspirator statements of Virok Webb under this rule, but Smith was not charged as a co-conspirator in the underlying criminal case.[73]

Roberson's argument is misplaced, as the statement was not submitted under Rule 801(d)(2)(E), but rather was a statement against interest admissible under Rule 804(b)(3)(A). The Tenth Circuit has explained,

> Under this rule, hearsay can be admitted for its truth if: (1) the declarant is considered to be unavailable to testify, for example,

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[70]Trial Tr. at 1048–1074.

[71]*Id.*

[72]*Id.* at 1059.

[73]Doc. 466.

> because of privilege, refusal to testify, or memory, Fed. R. Evid. 804(a); (2) the statement was so contrary to the declarant's interest that a reasonable person would only make it if he believed it to be true, Fed. R. Evid. 804(b)(3)(A); and (3) corroborating circumstances clearly support the statement's trustworthiness, Fed. R. Evid. 804(b)(3)(B).[74]

Accordingly, even if made under the proper argument, Roberson's claim falls short of establishing trial counsel's failure to object to this statement was unreasonable under *Strickland*.[75] This claim is denied.

E. Claim Five: Trial counsel was ineffective for failing to obtain the cell phone records of named co-conspirators who appeared as Government witnesses

Roberson argues that trial counsel was ineffective for failing to subpoena his cell phone records, as well as the cell phone records of co-defendants Alisha Escobedo and Jamaica Chism, and of Esther Roberson. Roberson's claim that these records would have supported an alibi defense is without merit.

First, the Government provided in the discovery materials the records of both phones associated with Roberson at the time of the homicide, and thus trial counsel cannot be considered ineffective for failure to subpoena records he already had in his possession. Moreover, even assuming trial counsel's failure to obtain the records of the Government witnesses somehow constituted deficient representation, Roberson has failed to establish how these records would have been exculpatory as opposed to what each of these witnesses testified to at trial. Roberson claims that these three witnesses all lied in their testimony to the jury and that the cell phone

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[74] *United States v. Tolliver*, 730 F.3d 1216, 1228 n.3 (10th Cir. 2013).

[75] The Court instructed the jury that any alleged statement or confession alleged to have been made by a defendant outside of court should always "be considered by the jury with caution and weighed with great care," and should be disregarded entirely "unless the other evidence in the case convinces the jury beyond a reasonable doubt that the statement, confession, admission, or act or omission was made knowingly and voluntarily." Doc. 524, Instr. 38.

records would corroborate this unfounded assertion. As the Government notes, however, testimony about cell phone records in the trial of this matter was significant and supported its charge that Roberson murdered Crystal Fisher.[76] It is Roberson's responsibility to demonstrate with particularity what evidence existed that trial counsel failed to discover when alleging that he was ineffective in conducting a proper investigation.[77] This unsubstantiated allegation is insufficient to sustain a claim under *Strickland*.[78]

F. Claim Six: Trial counsel was ineffective by failing to properly challenge the amount of controlled substances attributable to Roberson

Roberson argues that trial counsel J.R. Hobbs failed to adequately challenge the amount of narcotics attributed to him. In anticipation of sentencing, a presentence investigation report ("PSIR") was prepared for the Court's consideration using the 2013 Guidelines Manual.[79] Counts 1 and 2 were grouped for Guideline calculation purposes and resulted in a base offense level of 34, as 16,901.46 kilograms of marijuana were attributed to Roberson using the drug equivalency formula.[80] With respect to the actual narcotics alleged in Counts 1 and 2, the PSIR calculated that 4,141.54 grams of crack cocaine and 9,922.33 grams of powder cocaine were attributable to Roberson.[81] However, because the base offense level of 43 for Count 3, the murder charge, was

[76]*See* Trial Tr. at 1312–1425 (testimony of DEA Special Agent Anthony Archer).

[77]*See Stafford v. Saffle*, 34 F.3d 1557, 1564–65 (10th Cir. 1994) (holding vague and conclusory evidence is insufficient to satisfy *Strickland's* prejudice prong).

[78]*Cummings v. Sirmons*, 506 F.3d 1211, 1228–29, 1233–34 (10th Cir. 2007).

[79]Doc. 735.

[80]*Id.* ¶¶ 72–73

[81]*Id.* ¶ 40.

the greater of the adjusted offense level for Counts 1 and 2, the PSIR applied the base offense level for Count 3 to calculate the overall sentence.[82]

Contrary to Roberson's argument, trial counsel did challenge the amount of narcotics attributed to him in the PSIR. Counsel filed a sentencing memorandum challenging a number of issues, including the amount of crack and powder cocaine set forth in Paragraph 73 of the PSIR.[83] The Government also proved beyond a reasonable doubt at trial that Roberson conspired to distribute 280 grams or more of crack cocaine, and five kilograms or more of powder cocaine.[84] Those statutory minimum threshold amounts warrant a sentence under 21 U.S.C. § 841(b)(1)(A); coupled with the Information filed pursuant to 21 U.S.C. § 851, Roberson was subject to a statutory, non-Guideline sentence of Life. Accordingly, Roberson cannot establish prejudice under these circumstances because he was not sentenced under the Guidelines, but rather, received a mandatory life sentence under § 841(b)(1)(A).[85] Even if trial counsel's failure to challenge the drug calculations fell below an objective standard of reasonableness, however, Roberson cannot establish prejudice because he was sentenced to a term of Life on Count 3.[86] This claim is denied.

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[82]*Id.* ¶¶ 79–91.

[83]Doc. 733 at 7–9.

[84]Doc. 525, Special Verdict.

[85]*See United States v. Goodwin*, 541 F. App'x 851, 853 (10th Cir. 2013).

[86]Doc. 737, Judgment.

G. Claim Seven: Trial counsel was ineffective by (1) failing to inform Roberson that the Government filed an Information pursuant to 21 U.S.C. § 851, and (2) failing to object to the prior convictions used to support the Government's Information

Roberson argues that trial counsel failed to inform him that the Government filed an Information pursuant to 21 U.S.C. § 851, seeking to increase his punishment by reason of two prior convictions for controlled substance offenses. Roberson further argues that trial counsel were ineffective for not challenging the prior convictions used to support the Government's Information. These arguments are without merit.

There is no dispute that the Government filed the Information four days after the original Indictment was filed, and before the August 30, 2011 arraignment proceedings.[87] Roberson's conclusory allegation that trial counsel did not inform him that the Information had been filed is not supported by the record. Certainly, Roberson knew of the § 851 Information by the time of his sentencing, when counsel challenged the Government's ability to file the Information without submitting that evidence to a jury to be proven by a reasonable doubt; [88] the Tenth Court affirmed this Court's rejection of that argument, as "the 'fact' of a prior conviction may be found by a sentencing judge rather than a jury."[89] Although Roberson urges that counsel should have challenged the two prior convictions, he fails to establish what viable grounds upon which counsel could have based such a challenge. In fact, the Government presented evidence of the two prior convictions at the sentencing hearing; one of these convictions was a federal narcotics

[87]Doc. 13.

[88]Doc. 733 at 3–6.

[89]*United States v. Roberson*, 664 F. App'x 743, 750 (citing *United States v. Prince*, 647 F.3d 1257, 1271 (10th Cir. 2011)).

offense to which Roberson pleaded guilty before this Court,[90] the other a 2002 state narcotics offense in Geary County, Kansas. Both convictions were well-established, with sufficient record support to demonstrate the qualified status of each prior offense. Accordingly, Roberson has not established that counsel's performance was objectively unreasonable, and this claim is denied.

H. Claim Eight: Trial counsel was ineffective by failing to obtain newly discovered evidence immediately following the trial

Finally, Roberson argues that trial counsel failed to obtain a DEA report after trial, which he claims would have provided sufficient reason for this Court to order a new trial under Fed. R. Crim. P. 33(b)(1). Roberson argues that because the DEA had originally closed the investigation into the Webb drug trafficking organization, this somehow established that there was insufficient evidence to convict him of conspiring with others to distribute crack and powder cocaine. However, Roberson is mistaken that the document in question constitutes "newly discovered evidence." As the Government points out, this document, along with several other related DEA documents, were turned over in discovery to all defense counsel in July 2012. Consequently, the material was not "new."

Nor does Roberson's allegation of a *Brady v. Maryland*[91] violation carry any weight, as the evidence Roberson complains of had no material bearing on his role in the Webb drug trafficking organization. This information was addressed in part during direct examination of DEA Special Agent John Shannon, where he testified about using a confidential informant within the Webb drug trafficking organization that did not pan out.[92] The Court agrees with the

[90]Case No. 06-40066-JAR.

[91]373 U.S. 83, 87 (1963).

[92]Trial Tr. at 1245–52.

Government that the fact that the DEA originally failed to get an in-road to the Webb trafficking organization does not translate to Roberson being absolved of his culpability as a leader within the organization, as established at trial. As the Tenth Circuit held, Roberson's argument that he had no involvement in Webb's organization "is contradicted by overwhelming evidence of significant involvement in Webb's organization," that he distributed and acquired large amounts of powder and crack cocaine for the organization, and that "he exercised authority over other members of the organization and he murdered Fisher to protect the organization."[93] Accordingly, trial counsel did not act unreasonably under *Strickland* and this claim is rejected.

IV. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.[94] A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.[95] To satisfy this standard, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[96] For the reasons stated above, the Court finds that Roberson has not satisfied this standard and, therefore, denies a certificate of appealability as to its ruling on his § 2255 motion.

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[93]*United States v. Roberson*, 664 F. App'x 743, 750 (10th Cir. 2016).

[94]The denial of a § 2255 motion is not appealable unless a circuit justice or a district judge issues a certificate of appealability. Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1).

[95]28 U.S.C. § 2253(c)(2).

[96]*Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)).

IT IS THEREFORE ORDERED BY THE COURT that Petitioner Marcus Roberson's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 817) is **denied** without evidentiary hearing; Roberson is also denied a certificate of appealability.

IT IS SO ORDERED.

Dated: August 29, 2018

S/ Julie A. Robinson
JULIE A. ROBINSON
CHIEF UNITED STATES DISTRICT JUDGE