Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TRUONG NHAT NGUYEN, Defendant.	No. CR 99-4068-MWB **ORDER REGARDING DEFENDANT'S *PRO SE* MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255**

TABLE OF CONTENTS

I. INTRODUCTION AND FACTUAL BACKGROUND

On November 17, 1999, a one-count indictment was returned against defendant Truong Nhat Nguyen ("Nguyen"), charging him with conspiracy to distribute and possess with intent to distribute 500 or more grams of methamphetamine, in violation of 21 U.S.C.

§ 846. Following a jury trial, defendant Nguyen was convicted on May 26, 2000. He was subsequently sentenced by this court to 238 months imprisonment, eight years of supervised release, and a $100 special assessment.[1] Defendant Nguyen appealed his conviction, which was denied on May 18, 2001, and his request for rehearing was denied on July 20, 2001.

Pursuant to 28 U.S.C. § 2255, defendant Nguyen filed his *pro se* Motion To Vacate, Set Aside Or Correct Sentence which is presently before the court. As an initial matter, the court notes that in this court's Initial Review Order (IRO #82), it was determined that Nguyen's Section 2255 motion was not time barred, but filed within the one-year period during which a federal prisoner may seek collateral review of his conviction. *See* IRO, at 3. Thus, the court will not address that part of the defendant's Section 2255 petition arguing that his petition is not time barred. With regard to the remainder of his Section 2255 motion, Nguyen, for the first time, challenges the validity of his conviction and sentence on the ground of ineffective assistance of trial counsel. Specifically, Nguyen claims his counsel was ineffective because counsel "failed to investigate and raise the fact that there can be no indictable conspiracy involving only the defendant and government agents and informers," Def.'s Br., at 5. Nguyen also alleges that counsel was ineffective in failing to raise an entrapment defense at trial.

II. LEGAL ANALYSIS

A. Standards Applicable To Section 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose

[1]The Honorable Mark W. Bennett, Chief Judge for the United States District Court for the Northern District of Iowa.

of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a 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.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to Section 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] 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." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a Section 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

None of Nguyen's claims presented in his section 2255 motion were raised on appeal. However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims "are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of the deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Apfel*, 97 F.3d at 1076; *Cheek v. United States*, 858 F.2d 1330, 1336 (8th Cir. 1988). The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697. With these standards in mind, the court now turns to its consideration of the issues raised in Nguyen's section 2255 motion.

B. Analysis Of Issues

1. Identifiable conspiracy

Nguyen claims that his attorney failed to effectively assist Nguyen in his defense because he allegedly did not conduct a reasonable pretrial investigation into whether the indictable conspiracy involved only Nguyen and government agents and informers. According to Nguyen, the sole conspirators were Sergeant Mark Langan, Officer Mark Lang, and informer Dean Wimer ("Wimer"), and therefore, there was no indictable conspiracy. Nguyen contends that the three conspired against him beginning with Wimer's introduction to Nguyen at the Zion Brown Treatment Center in Orien, Iowa, where both Nguyen and Wimer were undergoing drug treatment. Moreover, Nguyen argues that the only evidence implicating him in the conspiracy is tape recorded conversations by Wimer that Nguyen asserts should have been suppressed on motion by his attorney, as well as alleged post-*Miranda* statements made by Nguyen at the police station, which Nguyen contends are inadmissible hearsay because there is no audio or video recording of said statements.

The government argues, to the contrary, that Wimer testified at trial that he accompanied Nguyen to Trang's Jewelry Store on Pierce Street in Sioux City. According to Wimer, Nguyen introduced him to a man by the name of Trang whom Wimer was led to believe was Nguyen's methamphetamine source. Specifically, during the visit with Trang, Nguyen identified for Wimer approximately thirty pounds of methamphetamine in a cabinet in the back room of Trang's store, which Wimer had observed. Trial Transcript, at 131-34.

Similarly, Wimer testified that Nguyen arranged for his girlfriend, Lon, to bring steaks to the Zion Brown Treatment Center for all of the residents. Lon arrived at the treatment center in Nguyen's Mazda MX 6. During Lon's visit, Nguyen and Lon asked Wimer to accompany them to the car where Nguyen reached underneath the seat and pulled

out a quarter pound of methamphetamine. Trial Transcript, at 108-111.

In addition, Sergeant Mark Langan with the Omaha Police Department, testified at Nguyen's trial that he received a cellular telephone call from Nguyen regarding an attempted buy of methamphetamine which was to take place in Onawa, Iowa, on October 27, 1999. Sergeant Langan, the supervising officer in the case, received the call from Nguyen on October 28, 1999, while on patrol in Omaha. Nguyen apparently asked to speak with Wimer because Nguyen had been led to believe that he could reach Wimer at this number. Sergeant Langan explained to Nguyen that Wimer was not available, but when questioned by Nguyen whether he was with Wimer the night before in the McDonald's parking lot in Onawa, Sergeant Langan replied that he was. Nguyen went on to explain to the Sergeant that the quarter pound of methamphetamine had been seized by Sioux City police. According to Sergeant Langan, Nguyen stated that his cousin, Anthony Van Nguyen, who Nguyen arranged to deliver the methamphetamine to the McDonald's parking lot in Onawa, had been stopped by police for speeding in Sioux City, at which time the methamphetamine was seized and Nguyen's cousin was jailed. Trial Transcript, at 282-83. Nguyen proceeded to convey to Sergeant Langan that he wanted to execute the buy the following night, on October 29, in person.

Furthermore, the government argues that Nguyen admitted to police that he arranged for his cousin to deliver methamphetamine to the McDonald's parking lot in Onawa, Iowa.

The court recognizes, as does defendant Nguyen, that there can be no indictable conspiracy where the conspiracy involved only the defendant and government agents or informers. *E.g. United States v. Pinque*, 234 F.3d 374, 378 (8th Cir. 2000); *United States v. Nelson*, 165 F.3d 1180, 1184 (8th Cir. 1999) (citing *United States v. Nichols*, 986 F.2d 1199, 1204 (8th Cir. 1993)); *United States v. Rios*, 171 F.3d 565, 566 (8th Cir. 1999). However, the evidence presented at trial included statements made by Nguyen to Sioux City

police after his arrest, and at the police station, regarding the previous drug deal that was supposed to have taken place at the McDonald's in Onawa. Nguyen told police that he was responsible for the methamphetamine that his cousin, Anthony Nguyen, had when he was stopped by police for speeding, and subsequently imprisoned. Thus, the jury heard a great deal of evidence tending to show that Nguyen conspired with at least one person who was not a government agent. In light of this and other evidence, discussed above and presented at trial, the court finds that defendant Nguyen has made no showing that his attorney failed to conduct a reasonable pretrial investigation or that an investigation into the charged conspiracy would have likely produced a different result—i.e., that the conspiracy involved only Nguyen and government agents and informers. Therefore, this portion of defendant Nguyen's motion is denied.

2. Entrapment defense

Defendant Nguyen also argues that his counsel "overlooked" the defense theory of entrapment. Def.'s Br., at 7. According to Nguyen, Wimer, a cooperating informant for the Omaha Police Department, illegally solicited Nguyen to deliver methamphetamine from Sioux City, Iowa, to Onawa, Iowa. Nguyen alleges that Wimer's illegal solicitation began with the men's introduction at the Zion Brown Treatment Center and continued even after Nguyen's release from the treatment center in the fall of 1999. Nguyen claims that "It is solely through the illegal solicitation of Dean Wimer, that this case is 'concocted,' via telephonic conversations and false accusations." Def.'s Br., at 7. The government asserts that Nguyen's attorney raised the defense of outrageous governmental conduct, but the court determined that the circumstances alleged by the defendant were insufficient to sustain the defense. Therefore, the government claims that because the defense of entrapment "is based on the same factual argument as the outrageous police conduct defense urged by counsel at trial," the court too would have determined that the defense was without merit if raised by Nguyen's counsel at trial. Pl.'s Resistance, at 12.

In *Gumangan v. United States*, 254 F.3d 701, 705 (8th Cir. 2001) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), the Eighth Circuit Court of Appeals explained "If the claimed error is counsel's failure to notify the petitioner of a potential defense, [resolution of the "prejudice"] inquiry 'will largely depend on whether the affirmative defense likely would have succeeded at trial.'" In *Gumangan*, the plaintiff, in her post-conviction action under 28 U.S.C. § 2255, claimed that her attorney was ineffective because the attorney failed to advise the plaintiff that she could avail herself of the defense of duress or coercion and battered women's syndrome. *Id.* at 704-705. However, the Eighth Circuit Court of Appeals found that the defense was not likely to succeed had the plaintiff proceeded to trial. *Id.* at 705. Therefore, the question presented here is whether Nguyen was in fact entrapped, or whether he was predisposed to deal in methamphetamine at the time the government's informant, Wimer, approached Nguyen rendering the defense unlikely to succeed at trial. *See United States v. Searcy*, 284 F.3d 938, 942 (8th Cir. 2002).

As the Eighth Circuit Court of Appeals delineated in *United States v. Berg*, 178 F.3d 976, 980 (8th Cir. 1999):

> Unlike the defense of outrageous conduct, which focuses on the government's conduct, the entrapment defense focuses on the defendant's predisposition to commit the crime in question. *Cannon*, 88 F.3d at 1506. The defendant must show that the government induced the defendant to commit the crime. *See id.* at 1504. The prosecution then has the burden to prove that "the defendant was predisposed to commit the crime, apart from the government's inducement." *Id.* at 1504 (citing *Jacobson v. United States*, 503 U.S. 540, 553-54, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992)). If the defendant exhibits any predisposition to engage in the criminal conduct, the district court need not instruct the jury on entrapment. "[I]f predisposition exists, then there is not sufficient evidence from which a reasonable jury could find entrapment." *Id.* (citations omitted).

Hence, the defenses are similar in that "Both defenses frequently arise in prosecutions

resulting from sting and reverse-sting operations." *United States v. Cannon*, 88 F.3d 1495, 1504-1507 (8th Cir. 1996). However, where the affirmative defense is that of outrageous conduct the analysis turns on the conduct of the government, whereas, the defense of entrapment focuses on the defendant's predisposition. *Cannon*, 88 F.3d at 1504-1507. "The defense of entrapment stems from a concern that law enforcement officials and agents should not manufacture crime." *United States v. Lard*, 734 F.2d 1290, 1293 (8th Cir.1984)."

The first element of the defense requires that defendants offer evidence that the "government agents implanted the criminal design in their minds and induced them to commit the offense." *United States v. Eldeeb*, 20 F.3d 841, 843 (8th Cir.), *cert. denied*, 513 U.S. 905 (1994); *see Berg*, 178 F.3d at 980. The record evidence indicates that Nguyen's evidence of entrapment consists of Wimer, the government informant, introducing himself to Nguyen while both men were undergoing treatment at the Zion Brown Treatment Center. Nguyen asserts that Wimer maintained contact with him after both men left the center and argues that Wimer solicited him to sell methamphetamine in Onawa, Iowa. Inducement cannot be established merely by showing that the government "'solicited, requested or approached [the defendant] to engage in criminal conduct.'" *United States v. Van Slyke*, 976 F.2d 1159, 1162 (8th Cir.1992) (quoting *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir.1986)). In *Van Slyke*, the Eighth Circuit Court of Appeals noted that inducement may arise from "'pleas based on need, sympathy, or friendship.'" *Id.* at 1162 (quoting *Ortiz*, 804 F.2d at 1165). However, the inquiry does not end there, but demands that the defendant demonstrate that the governmental conduct created "a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.'" *United States v. Stanton*, 973 F.2d at 609 (quoting *United States v. Mendoza-Salgado*, 964 F.2d 993, 1004 (10th Cir. 1992)). In other words, was Nguyen "eager or reluctant to engage in the charged criminal conduct." *Ortiz*, 804 F.2d at 1165. The court finds Nguyen's proffered

evidence insufficient to prove the inducement element of the entrapment defense in light of the record evidence. For instance, Nguyen did not hesitate to indicate his willingness to sell methamphetamine to Wimer and the undercover police officer in Onawa. In fact, when the methamphetamine deal in Onawa did not take place because of Nguyen's cousin's arrest and subsequent seizure of the methamphetamine, Nguyen offered to deliver the methamphetamine in person. In addition, Nguyen arranged voluntarily, and not per the government's request, for his girlfriend to bring methamphetamine to the Zion Brown Treatment Center to show to Wimer.

Because the court finds insufficient evidence of inducement, and so denies this portion of defendant Nguyen's motion, the court need not address the second element of the defense—whether Nguyen was predisposed to distribute methamphetamine. *See Stanton*, 973 F.2d at 610. However, the court acknowledges that Nguyen's counsel, in deciding to raise the defense of outrageous governmental conduct instead of the defense of entrapment, did so because his "research indicated that Truong Nguyen had substantial criminal history; some of it involved drugs." Def.'s Counsel's Aff., at 3. The results of defense counsel's research into the possible predisposition on the part of Nguyen to commit the crime, included a history of time spent at the Zion Brown Treatment Center to work on his drug problem and "in an effort to comply with prior criminal court orders and as a result of prior criminal court involvement (probation violation)." Def.'s Counsel's Aff., at 3. Furthermore, the court notes that the Eighth Circuit Court of Appeals has held that "a defendant's ability to acquire drugs and familiarity with drug terms are probative of a defendant's predisposition to engage in drug distribution." *United States v. Crump*, 934 F.2d 947, 956-57 (8th Cir. 1991); *United States v. Mendoza*, 902 F.2d 693, 696 (8th Cir. 1990). Here, the record evidence indicates, as discussed previously, that Nguyen was familiar with drug terms and had the capability to acquire drugs. *See supra* Part II.B.2.

C. Certificate Of Appealability

In his motion, Nguyen does not seek a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253(c)(1)(B). However, the case *United States v. Tiedeman*, 122 F.3d 518, 522 (8th Cir. 1997), instructs that, despite a petitioner's failure to seek a COA in his motion for *habeas corpus*, district courts should treat a Notice of Appeal as a petition for a COA. Thus, this court must consider whether the issues raised in Nguyen's § 2255 motion merit a certificate of appealability.

Nguyen must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability on these issues. *See Miller-El v. Cockrell*, ___ U.S. ___, ___, 123 S. Ct. 1029, 1039 (2003)*; Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court recently reiterated in *Miller-El v. Cockrell*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" The court determines that Nguyen's petition does not present questions of substance for appellate review, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to these claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

The court has considered each of the grounds raised in defendant Nguyen's motion pursuant to 28 U.S.C. § 2255, and for the reasons set forth above, concludes that defendant Nguyen is not entitled to have his sentence vacated, set aside, or corrected. Therefore, defendant Nguyen's Section 2255 motion is **denied**, and this matter is **dismissed in its entirety**. In addition, for the reasons delineated above, a certificate of appealability will not issue as to these claims.

IT IS SO ORDERED.

DATED this 3rd day of April, 2003.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA