IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

KALEB LEON GILPIN,	)	
	)	
Movant,	)	
	)	Civil No. 22-04158-CV-C-RK-P
vs.	)	Crim. No. 20-04050-01-CR-C-RK
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Movant, who is incarcerated at the USP Beaumont in Beaumont, Texas, pursuant to a conviction and sentence entered in the above-cited criminal case, filed pro se this motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. (Docs. 1, 2.) Respondent has filed suggestions in opposition to Movant's motion (Doc. 4), and Movant has replied thereto. (Doc. 6.) Because this Court finds that the motion, files, and record conclusively show that Movant is not entitled to relief,[1] Movant's motion is **DENIED**; a certificate of appealability is **DENIED**; and this case is **DISMISSED**.

I. Background

On July 15, 2020, an indictment was returned in the Western District of Missouri, charging Movant with being an unlawful user of a controlled substance in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(3) (Counts One and Two), and making a false statement to acquire a firearm in violation of 18 U.S.C. §§ 922(a)(6) (Count Three). (Crim. Doc. 1.)[2]

On April 26, 2021, the Supreme Court granted limited certiorari in *New York State Rifle & Pistol Association, Inc. v. Corlett*, 141 S. Ct. 2566 (2021), to determine "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment."

[1] "A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief." *Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) (citation and internal quotation omitted).

[2] "Crim. Doc." refers to the docket entries in Movant's criminal case: 20-04050-01-CR-C-RK. "Doc." refers to the docket entries in Movant's pending civil case: 22-04158-CV-C-RK-P. Page number citations refer to the page numbers assigned by the CM/ECF electronic docketing system.

Pursuant to a plea agreement, on September 30, 2021, Movant pleaded guilty to Counts One and Two of the indictment, charging Movant as being a user of a controlled substance in possession of a firearm in violation of § 922(g)(3). (Crim. Docs. 28, 29, 30.) On October 15, 2021, this Court accepted Movant's guilty plea. (Crim. Doc. 33.) On March 3, 2022, this Court sentenced Movant to 32 months' imprisonment on Counts One and Two, to be served concurrently, followed by three years' supervised release. (Crim. Docs. 40, 41.) Movant did not appeal.

On June 23, 2022, the Supreme Court issued its decision in *Bruen*. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (holding "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. . . . [In that situation, if a government seeks to justify its regulation, it] "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.")

Movant now seeks relief pursuant to 28 U.S.C. § 2255, contending that the Supreme Court's decision in *Bruen* has rendered § 922(g)(3) facially unconstitutional and further, that Movant's counsel was ineffective in failing to recognize this fact. (Docs. 1, 2.) Respondent argues Movant's arguments are without merit. (*See generally* Doc. 4.)

II. Legal Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence by alleging "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]" A motion under this statute "is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors." *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (citations omitted). Instead, § 2255 provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that "constitute[ ] a fundamental defect which inherently results in a complete miscarriage of justice." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (citations omitted).

A claim of ineffective assistance of counsel may be sufficient to attack a sentence under § 2255; however, the "movant faces a heavy burden." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). In such cases, the Court must scrutinize the ineffective assistance of counsel claim

under the two-part test of *Strickland*.[3] *Apfel*, 97 F.3d at 1076. Under *Strickland*, a prevailing defendant must prove "both that his counsel's representation was deficient and that the deficient performance prejudiced the defendant's case." *Cheek v. United States*, 858 F.2d 1330, 1336 (8th Cir. 1988). As to the "deficiency" prong, the defendant must show that counsel "failed to exercise the customary skills and diligence that a reasonably competent attorney would [have] exhibit[ed] under similar circumstances." *Id.* (quoting *Hayes v. Lockhart*, 766 F.2d 1247, 1251 (8th Cir. 1985)). As to the "prejudice" prong, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1336 (quoting *Strickland*, 466 U.S. at 694). To be sure, "[c]ounsel's failure to advance a meritless argument cannot constitute ineffective assistance." *Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994).

"A § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner 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." *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003) (citation and quotation marks omitted). Additionally, a petition that consists only of "conclusory allegations unsupported by specifics [or] contentions that, in the face of the record, are wholly incredible," are insufficient to overcome the barrier to an evidentiary hearing on a § 2255 motion. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

III. Analysis

Movant's motion raises two grounds for relief: (1) the Supreme Court's *Bruen* decision renders 18 U.S.C. § 922(g)(3) "presumptively unconstitutional"; and (2) ineffective assistance of counsel for counsel's alleged failure to recognize and challenge the constitutionality of § 922(g)(3). (Doc. 1 at 4-5.) Respondent argues that Movant's grounds for relief are without merit. (*See generally* Doc. 4.) In his reply, Movant reasserts his motion's arguments and further alleges that § 922(g)(3) is unconstitutional because there is no historical tradition "of prohibiting drug users from possessing firearms." (Doc. 6 at 4.)

It is well-established that "[a] guilty plea waives all defects except those that are jurisdictional." *United States v. Todd*, 521 F.3d 891, 895 (8th Cir. 2008) (internal quotation omitted); *see also Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty

[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

plea forecloses an attack on a conviction unless on the face of the record the court had no power to enter the conviction or impose the sentence.") (internal quotation omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Instead, such movant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [*McMann v. Richardson*, 397 U.S. 759 (1970)]." *Id*. Statements made by a defendant in court under oath should not be lightly set aside, and "constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge*, 431 U.S. at 74; *see also Ingrassia v. Armontrout*, 902 F.2d 1368, 1370 (8th Cir. 1990) (representations made during the plea hearing "carry a strong degree of verity and pose a formidable barrier in any subsequent collateral proceedings").

"A guilty plea is invalid only if it does not represent a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Easter v. Norris*, 100 F.3d 523, 525 (8th Cir. 1996). Accordingly, "a defendant must have knowledge of the law in relation to the facts." *Id*. (citation omitted). However, "'[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.'" *United States v. Gomez*, 326 F.3d 971, 975 (8th Cir. 2003) (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

In Ground One, Movant alleges that the Supreme Court's holding in *Bruen* invalidated § 922(g)(3).[4] Movant argues that because there is no "historical tradition in this country of

[4] In support of his argument, Movant cites to *United States v. Price*, No. 2:22-CR-00097, 2022 WL 6968457 (S.D. W. Va. Oct. 12, 2022) and *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19, 2022). (Doc. 2 at 5-6.) Neither case, however, addressed the constitutionality of § 922(g)(3). In *Price*, the Court addressed the constitutionality of § 922(k), which prohibits possession of firearms with missing or obliterated serial numbers. 2022 WL 6968457 at *2. Ultimately, the district court held § 922(k) unconstitutional because the Government failed to carry its burden to "affirmatively prove that its firearms regulation is part of the [or analogous to a] historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at *6 (citation and internal quotations omitted). The Court further found the defendant's constitutional challenge to § 922(g)(1) to be without merit pursuant to *Bruen*. *Id*. at *7-9. Next, in *Quiroz*, the district court held as unconstitutional § 922(n), illegal receipt of a firearm by a person under indictment. 2022 WL 4352482 *13. As in *Price*, the district court in *Quiroz* found the Government failed in its burden to show that the statute aligned with the Nation's historical tradition. *Id*.

While the Court appreciates Movant's analogizing both cases to the issue pending before this Court,

prohibiting drug users from possessing firearms," § 922(g)(3) is presumptively unconstitutional. (Doc. 2 at 3.) Movant concedes, prior to *Bruen*, that the Eighth Circuit addressed a facial constitutional challenge to this statute based on the Second Amendment and ultimately found "§ 922(g)(3) [to be] the type of 'longstanding prohibition[ ] on the possession of firearms' that *Heller*[5] declared presumptively lawful." *Seay*, 620 F.3d at 925. Movant, however, argues that the holding in *Bruen* rejects and supersedes *Seay*. (Doc. 2 at 4.)

Section 922(g)(3) prohibits a user of a controlled substance from possessing a firearm. As explained below, this restriction does not contradict the protections afforded under the Second Amendment. "In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), [the Supreme Court] recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *Bruen*, 142 S. Ct. at 2122.

> Nonetheless, in *Heller*, the Supreme Court specifically noted that
>
> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27. In *McDonald*, the Supreme Court further reasoned, "[i]t is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626).

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this Court is bound by Eighth Circuit precedent. *See United States v. Seay*, 620 F.3d 919 (8th Cir. 2010) (finding § 922(g)(3) constitutional). In any event, post-*Bruen*, at least three district courts have recognized the constitutionality of § 922(g)(3). *United States v. Sanchez*, No. W-21-CR-00213-ADA, 2022 WL 17815116, at *2-3 (W.D. Tex. Dec. 19, 2022); *United States v. Seiwert*, No. 20 CR 443, 2022 WL 4534605, at *2 (N.D. Ill. Sept. 28, 2022); *United States v. Daniels*, No. 1:22-CR-58-LG-RHWR-1, 2022 WL 2654232, at *4 (S.D. Miss. July 8, 2022). This Court finds persuasive the historical analyses presented in these cases and concludes that § 922(g)(3) is relevantly similar to regulations aimed at preventing dangerous or untrustworthy persons from possessing and using firearms, such as individuals convicted of felonies or suffering from mental illness.

[5] In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment affords people the right to possess firearms in their own homes for self-defense and prohibitions on such ownership are unconstitutional, "[a]ssuming [persons are] not disqualified from the exercise of Second Amendment rights." 544 U.S. 570, 635 (2008).

In *Bruen*, the Supreme Court reiterated that "[t]he Second Amendment 'is the very product of an interest balancing by the people' and it 'surely elevates above all other interests the right of *law-abiding, responsible* citizens to use arms' for self-defense." 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635) (emphasis omitted and added). In this vein, the Court addressed whether the Second Amendment protects "ordinary, law-abiding, adult citizens," undisputedly part of "'the people' whom the Second Amendment protects," the right to carry handguns publicly for self-defense. *Id*. at 2134 (citing *Heller*, 554 U.S. at 580). Ultimately, the Court held in *Bruen* that New York's proper-cause requirement was unconstitutional, and repeated that "[t]he Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public *subject to certain reasonable, well-defined restrictions*." *Id*. at 2156 (citing *Heller*, 554 U.S. at 581) (emphasis added).

Contrary to Movant's argument, *Bruen* did not invalidate *Heller* or *Heller*'s contemplation that certain citizens should be "disqualified" from keeping or bearing arms under the Second Amendment. *Heller*, 554 U.S. at 635. Indeed, throughout the opinion in *Bruen*, the Court relied upon and applied *Heller*'s analysis and logic. Movant's argument that *Seay* is no longer good law is, therefore, without merit. This Court is bound by Eighth Circuit precedent that holds § 922(g)(3) to be presumptively lawful pursuant to *Heller*, and Movant has failed to show that *Seay* is no longer controlling law, even after *Bruen*. *See also United States v. Connelly*, No. EP-22-CR-229(2)-KC, 2022 WL 17829158, at *3-4 (W.D. Tex. Dec. 21, 2022) (relying on both pre- and post-*Heller* Fifth Circuit precedent to reject a *Bruen* challenge to § 922(g)(3)). Ground One is **DENIED**.

Next, insofar as Movant alleges in Ground Two that his counsel was ineffective in failing to argue or recognize the unconstitutionality of § 922(g)(3), the Court finds this argument to be wholly without merit. As explained above, because *Bruen* did not invalidate or supersede *Seay*, consistent with Eighth Circuit precedent, the Court concludes that § 922(g)(3) is constitutional. Further, even assuming that *Bruen* declared § 922(g)(3) unconstitutional – which it did not – *Bruen* was decided after Movant pleaded guilty. Well-recognized in this circuit is the principle in ineffective-assistance-of-counsel claims that "[c]ounsel is not accountable for unknown future changes in the law." *Toledo v. United States*, 581 F.3d 678, 681 (8th Cir. 2009) (citing *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990) (holding counsel is not ineffective for failure to foresee "a significant change in existing law.")); *Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999) (holding counsel is not ineffective for failing "to anticipate a change in the law"); *Hamberg v.*

United States, 675 F.3d 1170, 1173 (8th Cir. 2012) (holding counsel is not ineffective for failing to object to correct application of settled law within circuit); *Brown v. United States*, 311 F.3d 875, 878 (8th Cir. 2002) (counsel not ineffective for failing to make "*Apprendi*-type" argument prior to *Apprendi*); *Fields v. United States*, 201 F.3d 1025, 1027 (8th Cir. 2000) (holding counsel not ineffective for failing to raise claim on issue where there is split of authority among circuits, but no Eighth Circuit or Supreme Court law on subject); *Wadja v. United States*, 64 F.3d 385, 388 (8th Cir. 1995) (holding counsel not ineffective for failing to predict future developments in law). Thus, even assuming *Bruen* modified the law as set forth in *Seay*, Movant would not be entitled to relief on the ground of ineffective assistance of counsel. Ground Two is **DENIED**.

IV. Certificate of Appealability

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only "where a petitioner has made a substantial showing of the denial of a constitutional right." To satisfy this standard, a petitioner must show that a "reasonable jurist" would find the district court ruling on the constitutional claim(s) "debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability is **DENIED**.

V. Conclusion

For the foregoing reasons, Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255 is **DENIED**; a certificate appealability is **DENIED**; and this case is **DISMISSED**.

IT IS SO ORDERED.

/s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: January 3, 2023