No. 16-2144

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARLON OLIVER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Marlon Oliver, a federal prisoner proceeding pro se, appeals a district-court judgment denying his motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255. Oliver requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requests leave to proceed in forma pauperis.

A jury found Oliver guilty of conspiracy to distribute and possess with intent to distribute 500 grams or more of cocaine and 28 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and two counts of distribution of an unspecified quantity of cocaine base in violation of 21 U.S.C. § 841(a)(1). He was sentenced to serve a total of 360 months of imprisonment followed by eight years of supervised release. This court affirmed Oliver's convictions and sentences. *United States v. Miller*, 535 F. App'x 474 (6th Cir. 2013). The United States Supreme Court denied certiorari.

In this motion to vacate sentence, Oliver argued that: (1) he was denied effective assistance of trial counsel during (a) plea negotiations, (b) jury selection, (c) pretrial discovery, and (d) jury instructions; and (2) he was denied effective assistance of appellate counsel. Oliver filed a second motion to vacate, which the district court deemed a supplement to the original,

arguing that his career-offender sentence violated *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied Oliver's motion to vacate, as supplemented, and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Oliver's first ground for relief argued four ineffective-assistance-of-trial-counsel claims. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice inquiry requires the defendant to "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 694.

First, Oliver argued that trial counsel was ineffective during plea negotiations because counsel "misinterpreted and relayed [an] erroneous plea-offer," did not investigate "and obtain material documents," provided "incorrect legal advice that caused [him] to reject the plea-offer," and did not "fully and effectively relay a plea-agreement" regarding the guidelines range. Oliver explained that counsel initially informed him that the prosecutor offered to allow him to plead guilty to the two distribution charges "involving 3.5 grams each" in exchange for dismissal of the conspiracy charge and a sentence of 0-20 years. He argued that counsel estimated his sentence, if he accepted the plea offer, to be fifteen years. Oliver informed counsel that the drug quantity involved was erroneous and that lab reports would show that the actual drug quantity was not "more than 1.5 grams each." Oliver argued that counsel obtained the lab reports before trial, which confirmed that each distribution involved less than 1.5 grams of cocaine base. Oliver stated that he rejected the plea offer because he did not want to plead guilty to the offenses

involving inaccurate drug amounts and because counsel informed him that he would receive the maximum sentence anyway. Oliver also argued that counsel either misinterpreted the government's plea offer or failed to inform him of a later, more favorable offer. The more favorable offer required Oliver to plead guilty to one distribution offense with a 0-20 year maximum sentence. He also argued that an email message from the prosecutor confirms that he would have received a sentence below ten years of imprisonment had counsel correctly advised him of the plea offers.

Trial counsel is ineffective when counsel, aware of a plea offer, either fails to inform his client of the offer or encourages his client to reject the offer based on incorrect advice and, after trial, his client receives a more severe sentence than what would have been imposed under the plea deal. *Missouri v. Frye*, 566 U.S. 133, 145 (2012); *Lafler v. Cooper*, 566 U.S. 156, 174 (2012). "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Frye*, 566 U.S. at 147.

The district court rejected this claim, concluding that even if counsel miscommunicated the plea offer and advised Oliver that it required him to plead guilty to two distribution offenses rather than one, Oliver demonstrated no prejudice because he did not allege or otherwise show "that he would have accepted the plea offer." Each plea offer presented by the prosecutor required Oliver to cooperate and testify against Otis Morris, and Oliver was not willing to cooperate. Both defense counsel and the prosecutor submitted affidavits detailing the plea offers presented by the prosecutor. Oliver did not rebut those affidavits.

Regarding lab reports showing that the amount of drugs actually distributed was 1.5 rather than 3.5 grams, the district court concluded that the actual amount of drugs distributed was irrelevant given Oliver's criminal history and his career-offender-sentence exposure. Defense counsel stated that he informed Oliver that the drug quantity had no bearing on his sentence exposure. But even if counsel did not explain that the drug quantity was irrelevant, the district

court concluded that Oliver demonstrated no prejudice because the government's plea offer involved a plea to an offense involving an unspecified drug quantity, not a specific quantity.

Regarding sentencing advice, the district court pointed out that Oliver was a career offender as a result of his criminal history and that counsel stated that he informed Oliver of that fact. But even if counsel did not inform Oliver that he would be sentenced as a career offender, the district court concluded that Oliver demonstrated no prejudice because a guilty plea to one or two distribution offenses would result in a 151 to 188-month sentence under the career-offender guidelines, "which is approximately the sentence Oliver admits was relayed by counsel"—fifteen years. In fact, counsel admitted that he estimated Oliver's sentence to be fifteen years, which was "within the career offender guideline range." The district court rejected Oliver's reliance on the prosecutor's email message speculating as to the sentence Oliver might have received had he accepted one of the government's early plea offers. The district court pointed out that the government merely offered a "guess" as to Oliver's potential sentence and that this guess likely was unreasonable given that a ten-year sentence was below the career-offender sentencing guidelines range. Reasonable jurists would not debate the district court's rejection of Oliver's ineffective-assistance-of-trial-counsel claim based on plea negotiations. *See Miller-El*, 537 U.S. at 327.

Oliver's second claim argued that trial counsel was ineffective during jury selection because he did not challenge the composition of the jury venire. Oliver argued that his jury "was composed of all Europeans" and that counsel ignored his request to challenge the composition of the jury pool and the "jury selection method." Because no objection was made, Oliver argued that he was tried by a jury that excluded members of his African-American race.

The district court rejected this claim. The district court pointed out that the only evidence supporting Oliver's claim was his assertion "that there were no persons of color in his jury pool." The district court found that evidence insufficient to support a challenge to Oliver's jury venire.

"The Sixth Amendment guarantees only the opportunity for a representative jury, not a representative jury itself." *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012). "The focus, therefore, is on the procedure for selecting juries, and not the outcome of that process." *Id.*

Oliver's claim that the jury was not selected from a fair cross-section of the community is conclusory because he presented no evidence that African-Americans were under-represented in the jury pool and that the under-representation resulted from a systematic exclusion in the jury-selection process. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979); *United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008). Moreover, this court has held that the jury selection process for the Western District of Michigan does not systematically exclude African-Americans. *See United States v. Buchanan*, 213 F.3d 302, 310 (6th Cir. 2000), *mandate recalled on other grounds*, *United States v. Murray*, 2 F. App'x 398 (6th Cir. 2001); *see also United States v. Booker*, 367 F. App'x 571, 574 (6th Cir. 2007). Thus, even assuming that counsel should have objected to the jury venire, Oliver was not prejudiced. This claim does not "deserve encouragement to proceed further." *See Miller-El*, 537 U.S. at 327.

In his third ineffective-assistance-of-trial-counsel claim, Oliver argued that counsel failed to disclose discovery to him, conduct adequate pretrial discovery, request discovery, and file a "timely 'motion to suppress' evidence." He argued that counsel did not inform him before trial that the government intended to introduce four kilograms of cocaine seized during a traffic stop involving Otis Morris, and he faults counsel for failing to file a motion to suppress this evidence. Oliver presumed that counsel failed to discover the drug evidence presented by the government at trial because either counsel did not conduct adequate pretrial discovery or the government did not properly disclose the evidence to counsel before trial.

The district court rejected this claim, finding it speculative. The district court noted that Oliver referenced no evidence that defense counsel "failed to conduct pretrial discovery or that the Government failed to disclose its evidence." Even if counsel did not conduct pretrial discovery, the district court concluded that Oliver demonstrated no prejudice. Oliver did not indicate what information counsel could have discovered "that would have affected his decision

to not plead guilty or the outcome of the trial." Nor did Oliver explain how counsel's alleged failure to discover the government's intention to introduce the cocaine seized during the Morris traffic stop would have affected either his decision to reject a plea offer or the outcome of his trial.

The district court pointed out that counsel had no basis on which to object to the admission of the cocaine seized during the Morris traffic stop because it was relevant evidence. The district court also pointed out that counsel had no basis for filing a suppression motion involving the cocaine seized during the Morris traffic stop because Oliver was not present during that stop and lacked standing to challenge it. Moreover, counsel vigorously cross-examined the law-enforcement officer who searched Morris's vehicle after the traffic stop in an attempt to establish the absence of a connection "between Oliver and the traffic stop or the cocaine" obtained during the stop. Reasonable jurists would not debate the district court's rejection of Oliver's ineffective-assistance-of-trial-counsel claim based on pretrial discovery. *See Miller-El*, 537 U.S. at 327.

Oliver's fourth ineffective-assistance-of-trial-counsel claim argued that counsel was ineffective for failing to propose that "multiple conspiracy" and "buyer-seller" instructions be given to the jury when the jury asked a question about drug quantity during deliberations. He also argued that counsel was ineffective for proposing an "improper drug quantity instruction unfavorable to the defense."

The district court rejected Oliver's fourth claim. First, the district court noted that part of this claim was foreclosed by this court's holding on direct appeal that sufficient evidence was presented to support Oliver's conspiracy conviction. The district court found that Oliver's ineffective-assistance-of-trial-counsel claim based on counsel's failure "to request a multiple conspiracy instruction and a buyer-seller instruction" was nothing more than an improper attempt to relitigate an issue "raised and resolved on appeal." *See Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999).

Second, the district court concluded that, even if Oliver requested counsel to propose multiple-conspiracy and buyer-seller instructions and counsel refused, Oliver did not demonstrate deficient performance. Oliver did not explain "why a multiple conspiracy instruction was applicable" in light of his position all along "that he did not participate in any conspiracy." Nor did Oliver argue "that the conspiracy instruction was somehow incomplete or inadequate, which undermines his argument that a buyer-seller instruction should have been given." *See United States v. McMahan*, 129 F. App'x 924, 931 (6th Cir. 2005) (noting that a complete conspiracy jury instruction eliminates the need for a buyer-seller instruction).

Third, the district court pointed out that counsel objected to the district court's proposed response to the jury's question regarding drug quantity. The district court concluded that Oliver simply disagreed with counsel's arguments and the overall "strategic decision made by counsel." Strategic decisions made after a thorough investigation by counsel "are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Reasonable jurists would not debate the district court's rejection of Oliver's fourth ineffective-assistance-of-trial-counsel claim. *See Miller-El*, 537 U.S. at 327.

Oliver's second ground for relief argued ineffective assistance of appellate counsel. He argued that counsel was ineffective for failing to raise two issues on direct appeal—that the district court abused its discretion in admitting drug-quantity evidence at trial and that the district court erroneously instructed the jury regarding drug quantity during deliberations. He also argued that counsel refused to allow him to review a draft of the appellate brief "to discuss and make appropriate changes" before filing a final copy.

An attorney is not required "to raise every non-frivolous issue on appeal." *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). Indeed, "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). Where, as here, appellate counsel "presents one argument on appeal rather than another . . . the petitioner must demonstrate that the

issue not presented 'was clearly stronger than issues that counsel did present'" to establish ineffective assistance of counsel. *Caver*, 349 F.3d at 348 (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Oliver has not met this burden. The district court also pointed out that "the law does not require attorneys to" provide a proof brief to clients for review prior to filing. Reasonable jurists would not debate the district court's rejection of Oliver's ineffective-assistance-of-appellate-counsel claim. *See Miller-El*, 537 U.S. at 327.

Oliver has abandoned the *Johnson* claim raised in the supplement to his original motion to vacate because he does not request a certificate of appealability for that claim. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002).

Accordingly, the application for a certificate of appealability is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 16-2144

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARLON OLIVER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: SILER and BATCHELDER, Circuit Judges; BERTELSMAN, District Judge.*

Marlon Oliver, a federal prisoner proceeding pro se, petitions for rehearing of this court's March 30, 2017 order denying his application for a certificate of appealability.

On careful consideration, the court concludes that it did not overlook or misapprehend any "point of law or fact" when it issued its order. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Respondent,	)	
	)	No. 1:11-cr-81-PLM-5
-v-	)	
	)	HONORABLE PAUL L. MALONEY
MARLON OLIVER, Petitioner.	)	

OPINION AND ORDER DENYING § 2255 MOTION

Marlon Oliver filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (ECF No. 293.) The Court has reviewed the motion and supporting brief (ECF No. 294), the Government's response (ECF No. 318) and Oliver's reply (ECF No. 321). While his first motion was pending, Oliver filed a second motion (ECF No. 365), in which he requests leave to supplement his earlier motion. In the supplemental motion, Oliver argues he should be resentenced based on the holding in *Johnson*. The Court will consider the two filings as one motion. Oliver has not established prejudice from any of the alleged errors by counsel and the holding in *Johnson* does not apply. Therefore, Oliver is not entitled to habeas relief.

I.

Oliver was named as a defendant in count for conspiracy to distribute and to possess with an intent to distribute cocaine and cocaine base that was included in a first superceding indictment. (ECF No. 24 PageID.37.) On July 8, 2011, Oliver filed a motion to dismiss (ECF Nos. 76 and 77), arguing that he did not know the alleged co-conspirators and did not have any relationship or dealings with them. The Court denied the motion. (ECF No. 98.)

The Government then filed a second superceding indictment. (ECF No. 99.) Oliver was again named in the conspiracy count. He was also named in two new counts, both alleging that Oliver distributed an unknown amount of cocaine base on two separate dates. The case against Oliver went to trial. A jury found Oliver guilty on all three counts. (ECF No. 216.) He was sentenced to 360 months imprisonment for each count, served concurrently. (ECF No. 267.) The conviction and sentence was upheld on appeal. (ECF No. 287.)

Oliver timely filed this motion for habeas relief.

II.

This court must vacate, set aside or correct a sentence if a prisoner shows the sentence he or she serves was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). As a threshold matter, a prisoner seeking relief under § 2255 must allege (1) an error of constitutional magnitude, (2) a sentence was imposed outside the federal statutory limits, or (3) an error of fact or law that was so fundamental as to render the entire criminal proceeding invalid. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496-497 (6th Cir. 2003)). To merit relief under § 2255, "a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict." *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003) (citing *Brecht v. Abramson*, 507 U.S. 619, 637 (1993)).

As a general rule, claims not raised on direct appeal are procedurally defaulted and may not be raised in a § 2255 motion, a collateral attack, unless the petitioner shows either (1) cause and actual

prejudice, or (2) actual innocence. *Massaro v. United States*, 538 U.S. 500, 504 (2003); *Bousley v. United States*, 523 U.S. 614, 626-27 (1998); *Martin v. United States*, 160 F. App'x 447, 449 (6th Cir. 2005). Oliver did file a direct appeal, but did not raise all of the claims brought in this motion. Oliver has not alleged he is actually innocent. Oliver attempts to avoid the procedural default rule by arguing his counsel provided ineffective assistance.

The right to counsel at a criminal trial, enshrined in the Sixth Amendment, assures the fairness and legitimacy of the trial process. *See Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Establishing an ineffective assistance of counsel can therefore excuse the failure to raise particular claim at trial or on direct appeal. *See id.* at 383; *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993). The two-part test for ineffective assistance of counsel was outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must first show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. When reviewing allegations of ineffective assistance, this Court must "strongly presume[]" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 690). The defendant must also show that, but for counsel's errors and omissions, a reasonable probability exists that the result of the proceedings would have been different. *Id.* at 694. Explained another way, the defendant must show that the alleged errors in counsel's performance created actual prejudice and worked to the defendant's substantial disadvantage. *United States v. Frady*, 456 U.S. 152, 170 (1982). For this second factor, the defendant must show actual prejudice, not the mere possibility of prejudice. *Maupin v. Smith*, 785 F.2d 135, 139 (6th Cir. 1986). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 792

(2011). (citing *Strickland*, 466 U.S. at 693).

Ultimately, the question is not simply whether defense counsel was simply inadequate, but rather whether defense counsel was so thoroughly ineffective that the errors caused defeat that was "snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (en banc). Necessarily then, when the alleged underlying error by counsel lacks merit, counsel cannot be deemed constitutionally ineffective for failing to raise the issue. *See Mapes v. Coyle*, 171 F.3d 408, 427 (6th Cir. 1999); *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) ("Counsel was not required to raise meritless arguments in order to avoid a charge of ineffective assistance of counsel.").

Having reviewed the supporting and opposing briefs, the Court concludes that Oliver is not entitled to any relief and an evidentiary hearing is not warranted. *See Arredondo v. United States*, 178 F3d 778, 782 (6th Cir. 1999).

III.

Oliver raises five claims, each relating to distinct phases of his trial or appeal. Within some of the claims, Oliver identifies multiple subclaims.

A. Plea Negotiations

Oliver alleges his trial attorney failed to fully and effectively relay a plea offer and also provided inaccurate advice that caused him to reject the plea offer. Oliver also alleges that counsel did not investigate or otherwise seek documents that would have established the amount of controlled substances that Oliver possessed on each of the two occasions identified in the second superceding indictment.

The right to effective assistance of counsel, protected by the Sixth Amendment, applies to all critical stages of criminal proceedings. *Missouri v. Frye*, –U.S.–, 132 S.Ct. 1399, 1405 (2012) (quoting

Montejo v. Louisiana, 556 U.S. 778, 786 (2009)). Negotiations for a plea bargain is one of the critical stages of a criminal proceedings for which a defendant has a right to effective assistance of counsel. *Id.* at 1406 (citing *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010)). "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* at 1408. To establish prejudice, defendants must "demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Id.* at 1409. Defendants must also show that the prosecution would not have canceled the offer or that the trial court would have refused to accept it, if either the prosecution or the court had the discretion to do so. *Id.* at 1410.

The plea offer was made after the first superceding indictment and before the second superceding indictment. The Government disclosed to defense counsel that it had evidence that Oliver had been involved in two uncharged cocaine deliveries. (ECF No. 317 Upshaw Aff. ¶ 14 PageID.2124.) According to the Government, around June 23, 2011, it offered to allow Oliver to plead guilty to one of the then uncharged delivery offenses, an offense punishable by 0 to 20 years, if Oliver were to provide a full and truthful proffer and to testify against Otis Morris, a defendant in another criminal case. (*Id.* ¶ 15 PageID.2124; ECF No. 318-1 Courtade Aff. ¶ 3 PageID.2167.) Counsel states that he relayed this information to Oliver in a meeting with Oliver on July 7. (Upshaw Aff. ¶¶ 15-16 PageID.2124-25.) Counsel states that Oliver rejected the plea offer because he was not willing to proffer or cooperate with the Government. (*Id.*)

Oliver has not established that counsel provided ineffective assistance during the plea negotiations. Oliver argues that the initial offer, as relayed by counsel, required Oliver to plead guilty to not one but two

delivery offenses. Counsel states that he communicated the offer, plead guilty to a single count, to Oliver on multiple occasions. (Upshaw Aff. ¶ 25 PageID.2126-27.) Assuming, for the sake of argument only, that Oliver is correct and that counsel inaccurately described the plea offer, Oliver has not established any prejudice. Oliver has not alleged or otherwise established that he would have accepted the plea offer if he understood that he needed to plead guilty to only one of two delivery charges. The plea required Oliver to cooperate with the Government and agree to testify against Otis Morris, a requirement Oliver was not willing to fulfill. In fact, Oliver admits in his reply brief that this was the reason he rejected the initial offer.[1] (ECF No. 321 PageID.2205 "...but simply because petitioner did not have to cooperate and testify in order to benefit from it, which was the sole reason he rejected the previous offer proposed on or about June 23, 2011."). Also, Oliver has neither alleged nor established that the Government would have waived the portion of the plea offer that would have required Oliver to testify against Morris.

Oliver has not established that counsel was ineffective for failing to provide him with an accurate assessment of his sentencing guideline range. Oliver argues that the potential sentence relayed by counsel was the "sole" reason he rejected the plea offer. (ECF No. 294 PageID.2045 "... you most-likely will be maxed out anyway,' not only was the reason counsel used to justify why such investigation was unnecessary, but also was the sole reason that led movant to reject the Government's 0-20 year plea offer."). Because of his criminal history, Oliver would be sentenced as a career offender, a fact relayed to Oliver by counsel. (Upshaw Aff. ¶ 11 PageID.2124.) Assuming, for the sake of argument only, that counsel failed to explain that Oliver would be sentenced as a career offender, Oliver has not demonstrated

[1]In his brief in support, Oliver identifies a *different* "sole" reason for rejecting the initial plea offer, the length of the anticipated sentence. (ECF No. 294 PageID.2045.) The Court will assume that Oliver had multiple reasons for rejecting the plea offer.

prejudice. If Oliver pleaded guilty to either one or two distribution counts, which carried a statutory maximum penalty of 20 years, his career offender guideline range would have been 151 to 188 months. And a sentence of 188 months is 15 years and 8 months, which is approximately the sentence Oliver admits was relayed by counsel.[2] (ECF No. 294 PageID.2045.)

Oliver does not establishe prejudice by pointing to the Government's email dated November 15, 2011. (ECF No. 294 PageID.2046). In that email, the prosecutor states that Oliver should have taken the initial plea because Oliver might have received a sentence of less than ten years. "He should have taken the government up on its offers earlier this year- my guess is that he would have received a sentence of less than 10 years - now he (and you) will have to work to try to get it down to ten years and to avoid a sentence of Life in prison." (ECF No. 294-1 PageID.2065.) This statement does not establish prejudice. As indicated above, the low end of the guideline range was 151 months, a sentence greater than ten years. The prosecutor, by his own words, was offering a "guess." This was not the "Government's own detailed theory," as suggested by Oliver. (ECF No. 294 PageID.2045). In his affidavit, counsel states he did not reasonably believe that Oliver would get a ten year sentence, even with cooperation. (Upshaw Aff. ¶ 32 PageID.2127-28.) Counsel was not ineffective at the plea stage for failing to guess that the Court might impose a ten-year sentence if Oliver agreed to take the plea offer.

Finally, Oliver has not established that counsel was ineffective for failing to obtain lab reports that, according to Oliver, would have established that the amount of drugs he was distributing in both instances were approximately 1.5 grams, and not 3.5 grams. As mentioned above, Oliver would have been

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[2]Oliver's "maxed out" sentence would not have been 20 years under the statute, but 188 months under the guidelines.

sentenced as a career offender, so the drug quantity would not have affected his guideline range. Counsel explained to Oliver that the quantity of drugs would not affect his guideline ranges. (Upshaw Aff. ¶¶ 26-27 PageID.2127.) Assuming, for the sake of argument only, that counsel neglected to explain that the quantity of drugs was not relevant, Oliver has not established prejudice. The offer from the Government was to have Oliver plead to an offense that carried a statutory punishment of 0 to 20 years. (Courtade Aff. ¶ 3 PageID.2167.) The Government did not offer to have Oliver plead to distributing a certain quantity of drugs. And, even if the Government's offer did assume a larger quantity than he actually distributed, Oliver has not alleged or established that the Government would have changed its offer if Oliver were to show that he distributed a lower quantity. As Oliver himself concedes, the lab reports were available (ECF No. 294 PageID.2044), and the Court can infer that the Government already knew the quantity of the controlled substance distributed in both instances.

B. Jury Venire

Oliver argues counsel was ineffective for failing to challenge and to object to the jury venire. Oliver contends the entire jury pool was "of the European race." (ECF No. 294 PageID.2047.) Oliver insists he requested counsel object and challenge the pool itself and the method from which the pool was established.

The Sixth Amendment protects a criminal defendant's right to a jury selected from a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975). To establish a violation of this right, a defendant must show (1) the group allegedly excluded is a distinctive group within the community, (2) the representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community, and (3) the under-representation is

because of systemic exclusion of the group in the jury selection process. *United States v. Allen*, 160 F.3d 1096, 1103 (6th Cir. 1998) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). A criminal defendant does not establish the second prong of the test by pointing to a lack of representation of the distinctive group in his or her jury panel. *Id.*; *United States v. Suggs*, 531 F.App'x 609, 619 (6th Cir. 2013) (citing *United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008)).

Oliver has not established that counsel was ineffective for failing to challenge the jury pool. Oliver's only evidence supporting the second and third elements of a Sixth Amendment challenge is the fact that there were no persons of color in his jury pool. And the Sixth Circuit has held that such evidence is not sufficient to establish a violation of his Sixth Amendment right. Oliver complains that this burden is unreasonable and that he could not possibly establish such a claim without discovery. Nevertheless, that is the burden he bears. Furthermore, the Western District of Michigan has undertaken two jury composition studies, one in 1988 and a second in 2000. In both instances, any under representation of African-Americans in jury pools was not the result of systemic exclusion. *United States v. Smith*, No. 1:06-cr-32, 2006 WL 1806484, at *3 (W.D. Mich. June 29, 2006).

C. Pretrial Discovery

Oliver argues counsel was ineffective for failing to disclose discovery to him, failing to fully investigate, failing to request discovery, and failing to timely file a motion to exclude. Oliver acknowledges that he met with counsel and spoke with counsel on a few occasions prior to trial. (ECF No. 294 PageID.2048.) According to Oliver, counsel explained that to prove the conspiracy charge, the Government would have to provide evidence at trial showing that Oliver and another person agreed to distribute and to possess with the intent to distribute 500 grams or more of cocaine and 28 grams or more

of crack. (*Id.*) Oliver contends that he never possessed and never distributed powder cocaine and, therefore, insisted that counsel investigate any and all evidence and witnesses that the Government might use to make the required connection. Oliver infers that counsel neglected to conduct pretrial discovery because the Government presented evidence at trial that counsel allegedly did not discuss with Oliver. Alternatively, Oliver infers that the Government simply failed to provide the evidence to counsel, which would also explain why counsel did not discuss the evidence. Specifically, Oliver points to the introduction of four kilograms of cocaine found during a traffic stop involving Otis Morris and two others.

Oliver has not established that counsel provided ineffective assistance during pretrial discovery. Oliver suggests counsel should have provided him with a bill of particulars. A criminal defendant may move for a bill of particulars under Rule 7(f). Fed. R. Crim. P. 7(f). A bill of particulars is used to assist a defendant to avoid surprise and prepare a defense to preclude a second prosecution for the same crime. *United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993). The indictments put Oliver on sufficient notice of the conspiracy claim, *e.g., United States v. Koehler*, 77 F.App'x 306, 307 (6th Cir. 2003), and the distribution charges. A bill of particular is "not meant as a tool for the defense to obtain detailed disclosure of all evidence held by the government before trial." *Id.* And, "a defendant is not entitled to discovery all the over acts that might be proven at trial." *Id.* Oliver merely speculates that counsel failed to conduct pretrial discovery or that the Government failed to disclose its evidence.

Oliver has not identified how he was prejudiced by counsel's alleged failure to conduct pretrial discovery. The Government disclosed to counsel that it viewed the Otis Morris case, Oliver's case, and a third criminal case as interconnected. (Courtade Aff. ¶ 1 PageID.2166-67.) Oliver insists that counsel should have interviewed or investigated Otis Morris, Corey Morris, and Eric Foster. But Oliver had not

explained what information those individuals would have provided that would have affected his decision to not plead guilty or the outcome of the trial. Indeed, Oliver merely speculates that the three individuals could have provided exculpatory statements, without suggesting what those statements might be. (ECF No. 321 PageID.2211.) Oliver also argues that counsel should have either investigated or requested discovery so that he would have known before trial that the Government would introduce four kilograms of evidence found during the traffic stop involving Otis Morris. Again, Oliver has not explained how this alleged failure affected his plea decision or the outcome of the trial.

Oliver argues that he asked counsel to object to the admission of the four kilograms of cocaine, which counsel declined to do (ECF No. 294-1 Tr. Trans. PageID.2066).[3] Counsel admits that he became aware that the Government intended to admit this evidence approximately two weeks before trial. (Upshaw Aff. ¶ 6 PageID.2122.) Oliver has not, however, explained how or why any objection or motion to exclude would have been successful. Because all relevant evidence is admissible, and because the definition of relevance is quite broad, any objection or motion would, in all likelihood, have been denied. The evidence presented at trial established a connection between Otis Morris and the cocaine. The Government also introduced evidence that Oliver purchased or otherwise acquired cocaine from Morris. (ECF No. 277 Tr. Trans. PageID.1668, 1693-94.) Furthermore, counsel conducted an effective cross examination establishing that there was no direct connection between Oliver and the traffic stop or the cocaine. (*Id.* PageID.2066-69.)

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[3]Oliver states that counsel should have filed a motion to suppress. But Oliver was not involved in the traffic stop and had no standing to challenge the search of the vehicle where the evidence was found. *See United States v. Cooper*, 868 F.2d 1505, 1509 (6th Cir. 1989) (quoting *Alderman v. United States*, 394 U.S. 165, 171 (1969)).

D. Jury Instructions

Oliver argues counsel was ineffective for not proposing certain jury instructions about conspiracies. Oliver also argues counsel was ineffective for jury instructions about the quantity of controlled substances.

Oliver cannot use this motion to relitigate issues resolved against him on appeal. On appeal, Oliver challenged the sufficiency of the evidence to support his participation in a conspiracy. The Sixth Circuit identified evidence presented at trial that supported the verdict. (ECF No. 287 pageID.2012.) The circuit court found that Oliver's repeated purchases from multiple members of the conspiracy was sufficient to overcome Oliver's contention that all he did was sell drugs without participating in the conspiracy, a version of the argument made here that he simply participated in a series of buyer-seller relationships. (*Id.* PageID.2012-13.) These holdings on appeal foreclose Oliver's argument that counsel was ineffective for failing to request a multiple conspiracy instruction and a buyer-seller instruction. Absent exceptional circumstances that are not present here, a motion brought under § 2255 may not be used to relitigate issues raised and resolved on appeal. *DuPont v. United States*, 76 F.3d 109, 110-11 (6th Cir. 1996) (collecting cases).

Oliver has not established that counsel was ineffective with regard to the jury instructions. The Court assumes, for the sake of argument only, that Oliver asked counsel to request a multiple conspiracy instruction and also a buyer-seller instruction. Counsel did not request those instructions. Those facts do not prove counsel was ineffective. Oliver has not explained why a multiple conspiracy instruction was applicable. *See United States v. Davenport*, 808 F.2d 1212, 1217 (6th Cir. 1987) (discussing single and multiple conspiracy situations). Indeed, his argument has always been that he did not participate in any conspiracy. Oliver does not argue that the conspiracy instruction was somehow incomplete or inadequate,

which undermines his argument that a buyer-seller instruction should have been given. *See United States v. McMahan*, 129 F.App'x 924, 931 (6th Cir. 2005) ("Moreover, a 'buyer seller instruction is unnecessary if the district judge has given a complete instruction reciting all the elements of conspiracy and requirements for membership in a conspiracy.'") (quoting *Riggs v. United States*, 209 F.3d 828, 833 (6th Cir. 2000)).

With regard to the drug quantity instruction issue, Oliver has not established counsel provided ineffective assistance. During deliberations, the jury sent a note asking how the amounts of cocaine and cocaine base should be determined. On the record, counsel objected to the Court's response to the jury's question. (ECF No. 228 Tr. Trans. PageID.1884-85.) Oliver insists counsel should have made different arguments to the jury about what quantities of drug might be connected to Oliver. Here, Oliver disagrees with a strategic decision made by counsel (Upshaw Aff. ¶ 6), which cannot establish ineffective assistance.

E. Appellate Counsel

Oliver argues that appellate counsel provided ineffective assistance. Specifically, Oliver contends that appellate counsel should have argued that this Court abused its discretion in allowing the admission of the drugs and also for the instruction to the jury regarding drug quantity. Oliver also argues that appellate counsel provided ineffective assistance by not providing him with a copy of the brief on appeal for feedback prior to the brief being filed.

Oliver has not established that appellate counsel provided ineffective assistance. Other than the abuse of discretion issues, Oliver has not identified any problems or concerns he has with the brief submitted by appellate counsel. And while other attorneys might provide their clients with a copy of a brief as a courtesy, the law does not require attorneys to do so. Because Oliver was not able to show that trial

counsel erred in any manner with respect to the drug quantity issues - admission of evidence and the instruction - Oliver cannot establish that appellate counsel erred by failing to raise the issues. Appellate counsel provided appropriate assistance by eliminating arguments that had no chance of success on appeal.

F. *Johnson*

Oliver argues that the decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015) applies to him and requires the Court to resentence him. In *Johnson*, the Supreme Court considered the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B(ii). Under the ACCA, convicted felons cannot possess firearms and violations of that statute ordinarily result in imprisonment for up to ten years. 18 U.S.C. § 924(a)(2). But if the defendant has three or more convictions for a "serious drug offense" or a "violent felony," the minimum term of imprisonment for possession of a firearm increases to 15 years. *Id.* § 924(e)(1). The phrase "violent felony" is defined in the ACCA.

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that represents a serious potential risk of physical injury to another*; ...

Id. § 924(e)(2)(B) (emphasis added). The latter phrase, the italicized words, constitutes what is known as the residual clause. In *Johnson*, the Court found the residual clause was indeterminate, vague, and invited arbitrary enforcement, which violated the Fifth Amendment's due process clause. *Johnson*, 135 S.Ct. at 2557. *Johnson* did not call into question any part of the phrase violent felony. The Supreme Court has since found that *Johnson* applies retroactively. *Welch v. United States*, 136 S.Ct. 1257, 1265

(2016).

In addition to the ACCA, the language in the residual clause appears in the USSC Sentencing Guidelines. A defendant may be sentenced as a career offender if, among other things, he or she has at least two prior felony convictions of either a crime of violence or a controlled substance offense. USSG § 4B1.1(a)(3). The phrase "crime of violence" is defined in § 4B1.2(a), and generally mirrors the language of 18 U.S.C. § 924(e)(2)(B)(i)-(ii). The Sixth Circuit Court of Appeals has held that the reasoning in *Johnson* applies to the career offender provisions in the Sentencing Guidelines. *United States v. Pawlak*, –F.3d–, 2016 WL 3802723, at *1 (6th Cir. May 13, 2016).

Upon review of Oliver's criminal history, the Court finds that *Johnson* and *Pawlak* do not apply.[4] Oliver's sentence was based in part on his status as a career offender under § 4B1.1 and § 4B1.2. Oliver has at least two prior convictions for delivery of controlled substance felonies. He was convicted in 2000 and again in 2006 for delivery of a controlled substance Those convictions fall under § 4B1.2(b) of the Sentencing Guidelines The convictions do not fall under subsection (a)(2) and do not implicate the residual clause. Although Oliver's sentence was based on his status as a career offender, the holding in *Johnson* does not apply.

IV.

A district court must issue a certificate of appealability either at the time the petition for writ of habeas corpus is denied or upon the filing of a notice of appeal. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002) (per curiam). A court may issue a certificate of appealability "only if the applicant has

[4]Because the Court concludes that the holdings do not apply, the Court need not consider whether *Pawlak* also applies retroactively.

made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). To satisfy this standard, the petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). Courts should undertake an individualized determination of each claim presented by the petitioner when considering whether to issue a certificate of appealability. *Murphy v. Ohio*, 551 F.3d 485, 492 (6th Cir. 2009).

The Court concludes that reasonable jurists would agree with the conclusion that Oliver has is not entitled to habeas relief. Generally, Oliver has not put forth sufficient evidence to establish prejudice from any of the alleged errors by counsel. Oliver has not demonstrated that he would have accepted a plea offer or that the trial outcome would have been different if counsel had acted otherwise. Specifically, none of the alleged errors amounted to a performance by counsel that fell below a reasonableness standard. Counsel's plea discussions were well within the bounds of reasonableness. Counsel appropriately declined to challenge the jury venire, as there was no evidence that the method of selecting jurors is deficient. Although counsel might have communicated more with Oliver, counsel's pretrial preparations were also within the scope of reasonableness. Counsel had no basis for requesting the jury instructions Oliver wanted. Appellate counsel cannot be faulted for making strategic decisions about which issues to raise. Oliver's career offender enhancement was based on his prior controlled substance felonies and *Johnson* does not apply. Reasonable jurists would not disagree with these conclusions.

ORDER

For the reasons provided in the accompanying Opinion, Oliver's motion to vacate, set aside or

correct sentence (ECF Nos. 293 and 365) is **DENIED.** A certificate of appealability is also **DENIED.** Because the Court finds that *Johnson* does not apply, Oliver's motion to appoint counsel (ECF No. 366) is **DENIED. IT IS SO ORDERED.**

Date: July 20, 2016

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge