Appendices A

Nos. 18-6120/6254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 14, 2019
DEBORAH S. HUNT, Clerk

ERNEST WILLIAM SINGLETON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Ernest William Singleton, a federal prisoner proceeding pro se, appeals the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, as well as the district court's order denying his motion for sanctions and motions to show cause why the government should not be held in civil and criminal contempt. Singleton has filed an application for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b), a motion to reconsider this court's order consolidating his appeals, and a motion for leave to amend his reconsideration motion.

A federal jury convicted Singleton of various drug and money-laundering offenses stemming from his ownership and operation of two Kentucky pain management clinics. Specifically, the jury convicted Singleton of two counts of conspiracy to distribute and dispense controlled substances outside the scope of professional practice and not for a legitimate medical purpose, in violation of 21 U.S.C. § 846 (Counts 1-2); eight counts of aiding and abetting the distribution of controlled substances outside the scope of professional practice and not for a legitimate medical purpose, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Counts 3-10);

one count of operating his clinics for the purpose of unlawfully distributing and dispensing controlled substances, in violation of 21 U.S.C. § 856(a)(1) (Count 11); one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count 12); and eleven counts of money laundering, in violation of 18 U.S.C. §§ 1956 and 1957 (Counts 13-23). The district court granted Singleton's post-verdict motion for acquittal with respect to Count 10 because Ultram, the drug identified in that count of the indictment, was not then a controlled substance under federal law. *United States v. Singleton*, 19 F. Supp. 3d 716, 724, 737 (E.D. Ky. 2014). The district court sentenced Singleton to an aggregate term of 240 months' imprisonment. This court affirmed Singleton's convictions on direct appeal. *United States v. Singleton*, 626 F. App'x 589, 604 (6th Cir. 2015).

In January 2017, Singleton filed a § 2255 motion, in which he raised the following fifteen claims: (1) the government committed *Brady* violations, *see Brady v. Maryland*, 373 U.S. 83 (1963); (2) the government knowingly presented false testimony; (3) the government committed a *Giglio* violation by not disclosing that a certain witness had received a benefit in exchange for his testimony, *see Giglio v. United States*, 405 U.S. 150 (1972); (4) the district court violated his due-process and confrontation rights by holding the final pretrial conference in his absence; (5) trial and appellate counsel rendered ineffective assistance; (6) the chain of custody for many evidentiary items was not established; (7) the indictment was defective and the district court improperly used a general verdict form; (8) the district court gave improper jury instructions, misstated the law, and permitted a constructive amendment of the indictment; (9) the district court made erroneous evidentiary rulings; (10) the judge was biased; (11) the prosecutor committed misconduct; (12) the Kentucky State Police ("KSP") engaged in activity constituting entrapment; (13) the district court "abused its discretion by allowing witnesses to testify to legal conclusions by the use of vernacular with specific meaning in law"; (14) the KSP and confidential informants ("CIs") conspired to violate state and federal laws; and (15) he was deprived of his choice of counsel.

During the § 2255 proceeding, Singleton filed a motion for sanctions against the government under Rule 11 of the Federal Rules of Civil Procedure, as well as motions for the

government to show cause why it should not be held in civil and criminal contempt. The district court summarily denied Singleton's motions. Singleton appealed that decision, which was docketed as Case No. 18-6120.

Meanwhile, a magistrate judge recommended that the § 2255 motion be denied in its entirety after concluding that all of Singleton's claims were meritless. The district court adopted the magistrate judge's report and recommendation over Singleton's objections, denied the § 2255 motion, and declined to issue a COA. Singleton appealed the district court's denial of his § 2255 motion, which was docketed as Case No. 18-6254.

This court subsequently consolidated Case Nos. 18-6120 and 18-6254. Singleton has moved for reconsideration of that decision, and for leave to amend his reconsideration motion. Singleton's motion for leave to amend is granted. His reconsideration motion is denied because his appeals both arise from the same § 2255 proceeding.

The court must first confront a jurisdictional question. Absent an exception not applicable here, this court may review only "final decisions of the district courts of the United States." 28 U.S.C. § 1291. Ordinarily, the court would not have jurisdiction to review, in an interlocutory posture, an order denying sanctions or denying a motion to show cause. 15B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3914.30, at 228 (2d ed. 1992); *Haskell v. Washington Twp.*, 891 F.2d 132, 133 (6th Cir. 1989). Critically for Singleton, however, the district court entered its judgment in this case before his first notice of appeal was docketed. And it is "well settled that an appeal from a final judgment draws into question all prior non-final rulings and orders." *McLaurin v. Fischer*, 768 F.2d 98, 101 (6th Cir. 1985). Because a final judgment includes all interlocutory orders, we may hear these appeals.

Nevertheless, Singleton faces another jurisdictional requirement—the need for a COA. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To satisfy this standard, the petitioner must demonstrate "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*, 537 U.S. at 327.

I. Case No. 18-6120

Singleton advances three arguments concerning the district court's denial of his motion for sanctions and his two contempt-related motions. First, he argues that the district court erred by issuing an order completely devoid of explanation. Second, he contends that the district court's order violates Rules 52(a) and 58(a) of the Federal Rules of Civil Procedure. Lastly, he challenges the merits of the district court's denial of his motions. None of Singleton's arguments with respect to these earlier orders in this § 2255 proceeding has met the standard for granting a COA and, therefore, his claims do not deserve encouragement to proceed further. *See United States v. Castaneda*, 475 F. App'x 309, 310 (5th Cir. 2012).

II. Case No. 18-6254

Singleton seeks a COA from this court with respect to the following claims: the indictment was defective and the district court improperly used a general verdict form (Claim 7); the district court reviewed two ineffective-assistance-of-counsel claims under the wrong standard (Claims 5.2 & 5.8); the district court misapprehended one of his ineffective-assistance-of-trial-counsel claims (Claim 5.8); the government committed a *Giglio* violation by not disclosing impeachment evidence concerning a certain witness (Claim 3); the government failed to disclose copies of the CI's recorded debriefings (Claim 1.18); and the district court erred by not holding an evidentiary hearing with respect to three of his claims (Claims 1.1, 1.18, & 5.8). Singleton's failure to raise his remaining claims in his COA application means that they are effectively abandoned. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A. General Verdict Form

Singleton argues that because the district court instructed the jury on a legally inadequate theory of guilt, and used a general verdict form, the jury could have relied on a misstatement of the law in reaching its verdict. To that end, he contends that because the district court erroneously instructed the jury that Ultram was a controlled substance and the general verdict form did not

require the jury to specify which particular substance(s) it found involved in the applicable counts, the jury may have convicted him based upon Ultram.

"When a jury is instructed that it may convict on one of two legal theories, one erroneous and one proper, the possibility that it could choose to convict on the permissible theory does not necessarily save a general guilty verdict from reversal." *United States v. Kurlemann*, 736 F.3d 439, 449-50 (6th Cir. 2013). However, the Supreme Court has "held that such errors are subject to the same type of harmless error analysis as other instructional errors." *United States v. Donovan*, 539 F. App'x 648, 653 (6th Cir. 2013) (citing *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (per curiam)).

In this case, although the jury instructions incorrectly stated that Ultram was a controlled substance, they also correctly stated that oxycodone and diazepam were controlled substances. The district court adopted the magistrate judge's conclusion that the jury's verdict rested on a valid legal theory—that Singleton's criminality involved oxycodone and diazepam, not just Ultram. In reaching that conclusion, the magistrate judge noted that "the jury convicted [Singleton] on Counts 1, 3, 4, 5, 6, 7, 8, and 9 [of the second superseding indictment], indisputably demonstrating that it found the involvement of Oxycodone and/or Diazepam—not solely Ultram—in the conspiracies and other criminality." The magistrate judge also noted that the record supported this conclusion because ample evidence was presented showing that Singleton's clinics prescribed oxycodone and diazepam. In contrast, the record "contained no references to 'Ultram' itself and only two references to the Ultram-equivalent, Tramadol." Singleton does not dispute the magistrate judge's finding that the government presented virtually no evidence concerning Ultram at his trial. Reasonable jurists therefore could not debate the district court's resolution of this claim. *See id.*

B. Ineffective-Assistance-of-Trial-Counsel Claims

Singleton challenges the district court's denial of two of his 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). To establish prejudice, 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 694.

Singleton argues that counsel was ineffective for failing to investigate information that would have revealed that the government violated *Brady* by withholding Medicaid reports and copies of computer hard disk drives that were seized from his businesses. He argues that this evidence would have helped him prove that his businesses were legitimate. The district court concluded that Singleton was not prejudiced by the government's alleged suppression of this evidence because "[t]he evidence presented at trial overwhelmingly demonstrated that Singleton's pain clinics were not legitimate—the most unfavorable of which was the number of opioid prescriptions issued by Singleton's clinics." Singleton insists that had he possessed the Medicaid reports, he "could have matched the names on the prescriptions with the clinic's known patients" and shown "that the clinics were legitimate and that [he] was not responsible for 'the number of op[i]oid prescriptions issued.'" He further contends that the information contained in the Medicaid reports may have reduced his prison sentence, which "was calculated for the entire amount of the prescriptions at issue." But Singleton's arguments are wholly speculative, as evidenced by his acknowledgment in his § 2255 motion that he has "never seen the reports" and is unaware of their contents. Reasonable jurists could not debate the district court's resolution of this claim. *See Fautenberry v. Mitchell*, 515 F.3d 614, 634 (6th Cir. 2008).

Singleton also argues that trial counsel was ineffective for not refuting allegedly false, misleading, or inconsistent testimony given by his business partner, John Morgan; Task Force Officer Lynne Thompson; KSP Detective Hector Alcala; and clinic patients Shelaine Aydelott, Thomas Moon, and Adrinne Likins. Singleton contends that counsel either possessed or had knowledge of evidence that would have impeached these witnesses' respective testimony. The district court rejected this claim, in part, because Singleton was not prejudiced by counsel's alleged failure to refute the purportedly false, misleading, or inconsistent testimony. Given the overwhelming evidence of Singleton's guilt that was adduced at trial, *see Singleton*, 626 F. App'x

at 591-97, reasonable jurists could not debate the district court's resolution of this claim, *see Poindexter v. Mitchell*, 454 F.3d 564, 582 (6th Cir. 2006).

Finally, Singleton contends that the district court erroneously analyzed both aforementioned ineffective-assistance-of-counsel claims under the prejudice prong of *Brady* rather than *Strickland*. However, "it is well settled that 'the test for prejudice under *Brady* and *Strickland* is the same.'" *Montgomery v. Bobby*, 654 F.3d 668, 679 n.4 (6th Cir. 2011) (en banc) (quoting *Avila v. Quarterman*, 560 F.3d 299, 314 (5th Cir. 2009)). Because *Brady* and *Strickland* "use the same 'reasonable probability' standard to assess prejudice," *Moreland v. Robinson*, 813 F.3d 315, 330 (6th Cir. 2016), Singleton's argument on this point is not adequate to "deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327.

C. *Brady & Giglio* Claims

Singleton argues that the government violated *Giglio* by not disclosing to the jury that witness Chad Monroe had been compensated for his testimony, namely by acquiring a leasehold in farmland that he used to own. "Under *Brady* and *Giglio* the prosecution is required to disclose exculpatory evidence, including evidence that may impeach the credibility of a witness." *United States v. Jones*, 399 F.3d 640, 647 (6th Cir. 2005) (citing *Giglio*, 405 U.S. at 153-54) (extending *Brady* to nondisclosure of evidence regarding the credibility of material witnesses). A defendant has the constitutional right to impeach a witness by showing bias. *Robinson v. Mills*, 592 F.3d 730, 737 (6th Cir. 2010).

In support of this claim, Singleton filed a copy of a lease agreement between Monroe and a third party dated April 25, 2013—roughly six weeks before trial commenced—concerning the same farmland that Singleton owned up until the United States Marshals seized it following his indictment. Singleton baldly contended that the prosecutors "knew or should have known the Legal Status of the property" because the marshals were holding his assets in trust during the trial. In denying this claim, the district court noted that, although the parties executed the lease agreement prior to Singleton's trial, the parties did not file the agreement until August 23, 2013, over two months *after* the jury had rendered its verdict. Because Singleton does not demonstrate

that the government actually knew of the lease at trial, reasonable jurists could not debate the district court's resolution of this claim. *Cf. Thomas v. United States*, 849 F.3d 669, 673 (6th Cir. 2017) (rejecting a comparable *Brady* claim where, as here, a witness received a benefit after trial and no evidence existed showing that the witness made a deal to testify in exchange for that benefit).

Singleton further argues that the government committed a *Brady* violation by withholding recorded debriefings of the CIs who visited his businesses as part of the KSP's investigation. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. A *Brady* claim contains three elements: (1) the evidence "must be favorable to the accused" because it is exculpatory or impeaching; (2) the State must have suppressed the evidence, whether willfully or inadvertently, and (3) the evidence must be material, meaning "prejudice must have ensued" from its suppression. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Singleton argued in his § 2255 motion that the "recordings would have shown the jury that the KSP [and] CIs were violating state and federal law" by using drugs and fake MRIs. He further argued that he could have used the recordings to attack the CIs' credibility at trial. The magistrate judge concluded that Singleton was not prejudiced by the government's alleged withholding of the recordings because they were merely cumulative evidence. Singleton subsequently altered his argument in his objections to the report and recommendation, contending instead that the recordings would have helped him prove that his businesses were legitimate, namely by refuting the CIs' testimony that the clinics' doctors visited with them for only 30 minutes or less, and showing that his clinics refused to examine the CIs on several occasions. The district court overruled Singleton's objection because "[t]he evidence overwhelmingly demonstrated that [Singleton's] pain clinics were illegitimate." Given the copious amounts of evidence presented at trial concerning the illegitimate nature of Singleton's businesses, *see Singleton*, 626 F. App'x at

591-97, reasonable jurists could not debate the district court's resolution of this claim, *see Poindexter*, 454 F.3d at 582.

D. Evidentiary Hearing

Lastly, Singleton argues that the district court erred by not conducting an evidentiary hearing with respect to three of his claims. However, the district court was not required to conduct an evidentiary hearing because "the motion and the files and records of the case conclusively show that [Singleton] is entitled to no relief." 28 U.S.C. § 2255(b); *see also Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007).

Accordingly, Singleton's motion for leave to amend his reconsideration motion is **GRANTED**. Singleton's motion to reconsider the consolidation of his appeals and his COA application are **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON

UNITED STATES OF AMERICA, **Plaintiff,** **V.** **ERNEST WILLIAM SINGLETON,** **Defendant.**	**CRIMINAL ACTION NO. 5:13-08-KKC** **ORDER AND OPINION**

*** *** ***

Defendant Ernest Singleton has moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. [DE 409.] Pursuant to local practice, the motion was referred to United States Magistrate Judge Robert Wier for review under 28 U.S.C. § 636(b)(1)(B). This matter is now before the Court on the Magistrate's R&R [DE 462] and Defendant's objections. [DE 493.] Having conducted a de novo review of the portions of the R&R to which Defendant Singleton objects, the Court will adopt the Magistrate's recommended disposition and **DENY** Defendant's motion for § 2255 relief. Moreover, the Court **REFUSES** to issue a certificate of appealability.

BACKGROUND

A detailed background of this case is contained in the Magistrate's Report and Recommendation ("R&R"). [DE 462.] Here, the Court mentions only those facts necessary to frame its discussion and analysis of the issues presented.

In June of 2013, Defendant Ernest Singleton was convicted of multiple crimes relating to the operation of two pain clinics in the Eastern District of Kentucky. [DE 202.] On March 18, 2014, Singleton was sentenced to 240 months in prison, followed by 3 years of supervised

release. Singleton filed an appeal and in September of 2015 the Sixth Circuit affirmed the decision of the district court. Singleton then sought a writ of certiorari, which the Supreme Court denied. On January 11, 2017, Singleton submitted a timely § 2255 motion. [DE 409.] In his motion, Singleton presented almost 300 pages of alleged constitutional violations.

Singleton's lengthy § 2255 motion was referred to Magistrate Judge Wier, who issued a R&R on March 30, 2018. [DE 462.] The Magistrate recommended that the Court (1) fully deny Singleton's § 2255 relief and (2) refuse to issue a certificate of appealability. [DE 462, at 2.] Singleton filed his first objections to the Magistrate's R&R on April 13, 2018. [DE 469.] Following his original objections, Singleton motioned the Court on several occasions to grant him leave him amend the objections. On October 10, 2018, this Court granted Singleton's request. Specifically, the Court instructed the clerk to file Singleton's proposed amended objections [DE 472-1] into the record. [DE 493.] It is these amended objections that the Court now uses for its review.

In his amended objections [DE 493], Singleton suggests that the Magistrate's R&R is replete with errors. While Singleton concedes several points, the Court must still address dozens of outstanding contentions.

ANALYSIS

I. Standard of Review

This Court performs a de novo review of those portions of the Magistrate's R&R to which the Defendant has objected. *See* 28 U.S.C. § 636(b). The Court, however, need not and does not perform a de novo review of the R&R's unobjected-to findings. *Thomas v. Arn*, 474 U.S. 140, 150 (1985).

The Court further recognizes its obligation to review Singleton's objections under a more lenient standard than the one applied to attorneys because he is proceeding pro se. *See Franklin v. Rose*, 765 F.2d 82, 84-85 (6th Cir. 1985). Under this more lenient construction,

Singleton's objections are sufficiently definite to trigger the Court's obligation to conduct a de novo review. *See* 28 U.S.C. § 636(b)(1)(c). The Court has satisfied its duty, reviewing the entire record. For the following reasons, Singleton's objections [DE 493] will be **OVERRULED** and his motion for relief under § 2255 [DE 409] will be **DENIED**.

II. Alleged Violations of *Brady*

Singleton objects to the R&R on the basis that the Magistrate erred in dismissing his *Brady* claims wholesale. Singleton makes four key arguments. First, he claims that the government failed to provide copies of computer hard disk drives ("HDDs") to his counsel. [DE 493, at 30.] Second, Singleton asserts that certain MedCo and Medicaid reports were improperly withheld [DE 425, at 8.] Third, he claims that the United States failed to turn over "true [and] correct copies of the original recordings made in the course of the KSP's investigation." [DE 425, at 11.] Fourth and finally, Singleton suggests that the United States withheld recorded debriefings with certain confidential informants. [DE 493, at 34.] The Court rejects each of these four arguments.

Pursuant to *Brady*, the United States must disclose evidence "in its possession that is both favorable to the accused and material to guilt or punishment." *United States v. Fields*, 763 F.3d 443, 458 (6th Cir. 2014) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). To establish a violation of *Brady*'s rule, a defendant must show that: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "th[e] evidence must have been suppressed by the [government], either willfully or inadvertently"; and (3) "prejudice must have ensued." *United States v. Rafidi*, 829 F.3d 437, 447 (6th Cir. 2016). Prejudice exists "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

As to the HDDs, Singleton argues that the government's alleged withholding violates *Brady*. [DE 493, at 33.] Singleton asserts that the hard drives contained data tending to show that the patient-doctor interactions were longer than alleged. This, Singleton claims, would have cut against the finding that his pain clinics were actually "pill mills." Singleton further argues that the data could have also explained why it was necessary for the clinics to double and triple book patient time slots. The Magistrate found that, even if the HDDs contained the data alleged, Singleton's argument would still fail under *Brady*'s third prong. That is, there is no reasonable probability that the trial would have been different had Singleton possessed the HDD data. This Court reaches the same conclusion. The evidence presented at trial overwhelmingly demonstrated that Singleton's pain clinics were not legitimate—the most unfavorable of which was the number of opioid prescriptions issued by Singleton's clinics.

Singleton next argues that the United States violated *Brady* by failing to turn over certain MedCo and Medicaid reports to the defense. The Magistrate found, however, that Singleton fails to show that the reports are favorable to him (*Brady* prong 1) and that the withholding was prejudicial (*Brady* prong 3).

In his amended objections, Singleton argues that the reports could have been used, at a minimum, to impeach Dr. Lee Ann Marlow. [DE 493, at 32.] Specifically, Singleton claims that the reports would show that Dr. Marlow issued prescriptions outside of her employment at the pain clinics. This extracurricular activity, so the argument goes, would illustrate her predisposition to unsavory prescription practices. Again, even if it were conceded that the reports would have been favorable to Singleton, he would still undoubtedly fail on prong 3 of *Brady*. The Court is not convinced that there is a reasonable probability that the trial would have turned out any differently.

Third, Singleton faults the United States for failing to turn over true and correct copies of the original records made during the KSP's investigation into his pain clinics. [DE 425, at 11.] Upon reviewing Singleton's claim, the Magistrate noted that during the trial, Detective Alcala testified as to the integrity of the recordings in question. The Magistrate further observed that there is no "real question as to the copies' inauthenticity." [DE 462, at 22.] This Court finds that the testimony of Alcala, along with other evidence presented at trial, supports the authenticity of the recordings provided to the defense. Therefore, Singleton's *Brady* claim as to these purported recordings is without merit.

Lastly, Singleton criticizes the United States for allegedly withholding the recorded debriefings of confidential informants. Singleton submits that had these videos been proffered, Agent Alcala and others could have been impeached regarding their testimony that the confidential informants saw the doctors usually for 30 minutes or less. [DE 493, at 34.] Singleton further asserts that if the recorded debriefings been turned over, they would have shown that several of the confidential informants were turned away from his clinics. [DE 493, at 36.] As such, Singleton claims that he would have been able to better argue the legitimacy of his businesses. The Court is unconvinced by these arguments. Again, even if these alleged debriefings were proffered, the likely outcome of the trial would not have been any different. The evidence overwhelmingly demonstrated that Lewis' pain clinics were illegitimate.

In sum, the Court rejects all of Singleton's alleged *Brady* violations.

III. Due Process Claims

Singleton presents a litany of due process claims. Though eventually rejecting all, the Court will go through each of these allegations one by one.

Singleton claims that the United States violated his due process by knowingly presenting false evidence throughout his trial. To establish a denial of due process in this context, the Singleton must show that: (1) the statements were actually false; (2) the

statements were material; and (3) the prosecution knew they were false. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). Moreover, the burden is on the Singleton to show that the testimony was actually perjured. Put differently, simple inconsistencies in testimony by government witnesses do not establish the knowing use of false testimony. *Brooks v. Tennessee*, 626 F.3d 878, 894-95 (6th Cir. 2010).

Singleton first contends that Task Force Officer Lynne Thompson testified inconsistently. At trial, Thompson proclaimed that "all the drugs obtained in the investigation were placed into evidence by the KSP." [DE 425, at 15.] Singleton hints to the fact that there were outstanding pills not actually placed into evidence. Upon review, the Magistrate noted that "whether or not every single pill was placed into evidence has no reasonable bearing on Singleton's pill-mill culpability." [DE 462, at 28.] As such, the Magistrate found that the materiality prong had not been satisfied. Having observed the quantity of pills put into evidence at trial, the Court accepts the Magistrate's reasoning and adopts his conclusion.

Next, Singleton targets the testimony of Detective Hector Alcala. Singleton claims that statements made by Alcala regarding his own adherence to the law were misleading. Singleton specifically points to the fact that investigators prepared false medical records for confidential informants before sending them into Singleton's pain clinics. [DE 493, at 19.] This practice, however, is not illegal. *See* KSR 218.A.220. In fact, they were reasonably necessary to conduct the undercover investigation. Therefore, the statements made by Alcala regarding his adherence to the law are not negated by the investigatory tactics emphasized by Singleton.

Singleton also asserts a due process violation by way of breaks in the chain of custody. Though it is not crystal clear, the crux of Singleton's argument seems to be that the chain of custody was broken when detectives allegedly allowed Shelaine Aydelott, a CI, to keep

narcotics prescribed to her by the pain clinic. This allegation, however, was directly refuted by the testimony of the witnesses and by the record as a whole. Thus, the Court adopts the Magistrate's conclusion.

Fourth, Singleton claims that since two witnesses, Alcala and Aydelott, testified inconsistently, the government must have presented false testimony. [DE 493, at 19.] This reasoning is flawed. As noted by the Magistrate, mere inconsistencies in testimony do not amount to perjury. Singleton, therefore, falls well short of satisfying the three prongs of his due process claim.

Fifth, Singleton complains that Detective Alcala knew that his CIs were taking drugs, as evidenced by their continued ability to pass the clinics' urine analyses. In noting this, however, Singleton fails to show what testimony has been falsified. Alcala was under no obligation to pursue charges against the CIs and their alleged drug use was extensively relayed to the jury. As such, upon the recommendation of the Magistrate, the Court rejects Singleton's claim.

Sixth, Singleton maintains that the testimony of Thomas Moon was critically flawed. [DE 493, at 20.] Singleton points to specific instances where the testimony of Moon was contradicted by the record. Each of these alleged instances was thoroughly reviewed by the Magistrate. The Court, upon de novo review, finds no evidence in the record that supports Singleton's claim. Even in a light most favorable light to Singleton, his claim regarding Moon falters under the materiality prong of the due process analysis.

Seventh, Singleton contends that Adrianne Likins inconsistently testified as to her prior criminal history. [DE 493, at 22.] Singleton suggests that Likins never disclosed to the pain clinic that she had a previous cocaine trafficking charge, despite telling the jury she had done so. Again, even if Singleton were correct here, the materiality prong is still not satisfied because such testimony would not likely have changed the outcome. As the Magistrate notes,

even if the clinic was not aware of the cocaine trafficking charges, it was still aware of her container charge. And, despite this, the clinic kept her on as a patient and continued to prescribe her controlled substances.

Finally, Singleton avers that John Morgan falsely testified as to a business loan extended by Singleton. [DE 493, at 22.] Singleton argues that Morgan falsely testified to never receiving a letter from Singleton indicating that he (Morgan) had defaulted on the loan. As observed by the Magistrate though, a disagreement on this point does not prove the knowing presentation of false testimony. For this reason, Singleton's claim is denied.

Having reviewed the matter de novo, the Court rejects all of Singleton's due process claims.

IV. *Giglio* Claims

Singleton's next series of allegations concerns violations of *Giglio*. *Giglio* stands for the proposition that a prosecutor may not deceive a court and jurors through the presentation of known false evidence. *Rosencrantz v. Lafler*, 568 F.3d 577, 583 (6th Cir. 2009). "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.' " *Carter v. Mitchell*, 443 F.3d 517, 535 (6th Cir. 2006) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

Here, Singleton essentially argues that the prosecution secured the testimony of Chad Monroe in exchange for several acres of Singleton's property—property that at the time was under the control of U.S. Marshals. [DE 493, at 37.] And, Singleton argues, this fact was never disclosed to the jury in contravention of *Giglio*.

Singleton submits that Monroe was miraculously "able to obtain a farm lease [agreement] some two months" before testifying at trial [DE 493, at 37.] In opposite, the United States argues that at the time of trial, it was unaware that Monroe sought to assert a claim against Singleton or any of his properties. [DE 438, at 16.] The Magistrate concluded

that insofar as Monroe received assets of Singleton, it occurred after the trial. And as a result, *Giglio* was not violated. [DE 462, at 39.] The Magistrate cites *Thomas v. United States* in support. There, the Sixth Circuit rejected a *Brady/Giglio* claim in a situation where a witness was paid after testifying. *Thomas v. United States*, 849 F.3d 669, 673. However, the witness was not informed of this fact before she testified. *Id.*

The Court finds that *Thomas* requires the conclusion reached by the Magistrate. Though Singleton claims that an agreement between Monroe and another private party was reached before Monroe's testimony, the United States maintains that it was unaware of such agreement. In fact, the United States claims that it was unaware of any intentions of Monroe to assert a claim against Singleton or his properties. And, since the alleged transaction occurred in August of 2013—two months following Singleton's trial—the Magistrate's invocation of *Thomas* was proper. As such, the Court rejects Singleton's *Giglio* claims.

V. Ineffective Assistance of Counsel Claims

Singleton presents several ineffective of counsel claims pursuant to *Strickland*. Singleton originally raised twenty-one grounds against his trial and appellate counsel. Through his objection to the recommended disposition, however, he has seemingly narrowed his argument to cover six specific instances of alleged incompetence. [DE 493, at 14.]

Singleton begins by arguing that his trial counsel erred in failing to investigate information that would have highlighted certain violations of *Brady*. Second, Singleton suggests that trial counsel failed to adequately review the indictment, which led him to "be found guilty for conduct that wasn't legal." [DE 425.] Third, Singleton argues that his trial counsel failed to conduct interviews of certain prosecution witnesses. Fourth, Singleton faults his counsel for not flagging the alleged presentation of false testimony by the prosecution. Fifth, Singleton claims that that his counsel erred in failing to make chain-of-custody

challenges to various portions of the prosecution's evidence. And finally, Singleton purports that his trail counsel failed to object to what he categorizes as "erroneous jury instructions." [DE 425, at 35.]

To prevail on a claim of ineffective assistance of counsel, Singleton must satisfy the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), requiring him to first "establish that counsel's performance was deficient, and second, the deficient performance prejudiced the defense." *Id.* Regarding the deficiency prong, Singleton must identify specific acts (or omissions) that were outside the range of competent assistance." *Borch v. United States*, 47 F.3d 1167 (6th Cir. 1995). To show prejudice, Singleton must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Sixth Circuit has interpreted *Strickland* as allowing a finding of ineffective assistance of counsel "only if [counsel's] performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

As to Singleton's assertion that his trial counsel failed to investigate information that would have revealed *Brady* violations, the Magistrate found that these claims were meritless. In support, the magistrate observed that since he previously rejected the direct *Brady* violations, there could not be a finding of deficient performance for a failure to illuminate the nonexistent violations. In the alternative, the magistrate concluded that even if the deficiency prong were somehow met, Singleton's claim undoubtedly fails the prejudice prong. [DE 462, at 48.] That is, Singleton fails to show that had his counsel discovered said information, that the jury would have come out differently. The Court finds no basis on which to reject the Magistrate's finding. Therefore, the Court adopts his conclusion.

Next, Singleton faults his trial counsel for inadequately reviewing his indictment. Had counsel performed a satisfactory review, Singleton argues, they would have discovered that Ultram was not, at the time, a controlled substance under federal law. [DE 493.] Singleton's *Strickland* claim on this issue fails. As observed by the Magistrate, the prejudice prong has not been satisfied because Singleton's counsel successfully obtained a dismissal of Count 10 of the indictment, which specifically involved Ultram. And, despite the contentions of Singleton, the other references to Ultram did not materially alter the outcome of his trial. The central theme of the case was the distribution of Oxycodone and Diazepam, not Ultram.

Third, Singleton states that counsel erred by not interviewing certain prosecution witnesses. In his objections to the recommended disposition, Singleton specifically points out that had counsel properly interviewed Detective Hector Alcala, Thomas Moon, Adrianne Likins, John Morgan, and Shelaine Aydelott, they would have discovered information allowing them to impeach said witnesses. [DE 493, at 17.] The Court, however, is unpersuaded by Singleton's arguments that these failures satisfy *Strickland*'s deficiency prong. And, even if it were determined that the deficiency prong was satisfied, the Court finds that likely result of the trial would not have been any different.

Singleton further maintains that his counsel failed to flag the allegedly false testimony presented by the United States. In rejecting this claim, the Magistrate explained that because no *Giglio*/due process violations were found, Singleton could not satisfy the deficiency prong of a *Strickland* claim. Moreover, the Magistrate concluded that even if the deficiency prong were somehow satisfied, Singleton would still fail on the prejudice prong. [DE 462, at 52.] The Court agrees with the Magistrate's logic. Allegations of sporadic testimonial inconsistencies are not enough to show that the outcome of trial would have been any different. This is especially true in light of the overwhelming amount of evidence that was presented against Singleton.

Fifth, Singleton asserts that his counsel erred in failing to adequately raise chain-of-custody arguments. The tenet of this claim seems to be that counsel should have presented chain of custody arguments regarding (1) prescriptions filled by third-party pharmacies and (2) the allegation that certain confidential informants, namely Aydelotte, were allowed to keep pills distributed by Singleton's pain clinics. The Magistrate correctly points out that there is no precedent suggesting that defense counsel must bring every possible chain of custody of custody challenge in order to satisfy the Sixth Amendment.

Moreover, the decision by counsel to refrain making these challenges does not fall outside the professional range of competence. To succeed on these chain of custody arguments, counsel would have been required to show a clear abuse of the Court's discretion. *See United States v. Levy*, 904 F.2d 1026, 1030 (6th Cir.1990). Not only were these arguments likely to fail, but Singleton's attorneys could have jeopardized their credibility in the process. It is clear from the record that Singleton's claim that confidential informants were allowed to keep pills obtained from the clinics was not substantiated. In fact, it was directly refuted by witnesses. Moreover, there is a strong possibility that the Court would have disfavored a chain of custody argument regarding third-party pharmacies. As such, both of Singleton's claims fail to satisfy Strickland's deficiency prong. Alternatively, if the claims were somehow adjudged to meet the deficiency prong, they would certainly fail at the prejudice stage.

Lastly, Singleton faults his attorneys for their failure to object to two of the Court's jury instructions: (1) the deliberate ignorance instruction and (2) the Ultram related instruction. Both arguments fail. First, contrary to what Singleton states, his attorneys did object to the use of the deliberate ignorance instruction. [DE 215-1, at 2.] This issue was also addressed on appeal, with the Sixth Circuit ruling against Singleton. [DE 356, at 14.] Second, Singleton fails on his claim regarding the Ultram-related instruction because this conviction was later acquitted. As a result, the prejudice prong of *Strickland* has not been satisfied.

VI. Allegations Related to the Verdict Form

Singleton challenges the use of a general verdict form in his trial. [DE 493, at 8.] The specific nature of this claim was eloquently summarized by the Magistrate in his recommended disposition [DE 462, at 7]:

> Singleton's theory boils down to the following thought progression: (1) some Counts included Ultram as a charged controlled substance; (2) Judge Caldwell instructed that Ultram was, in fact, a controlled substance; (3) the verdict form, DE #202, did not require the jury to specify which particular controlled substance(s) it found involved in the applicable counts; (4) therefore, the jury could have convicted based on Ultram; and, (5) thus, the verdict is invalid.

Upon review, the Court adopts the findings of the Magistrate. When a general verdict form is used, if there is ample evidence to uphold one of the theories that the government alleged, then the Court is to presume that the jury relied on that theory and uphold the conviction. *United States v. Dedman*, 527 F.3d 577, 599 (6th Cir. 2008); *see United States v. Boyle*, 700 F.3d 1138, 1145 (8th Cir. 2012).

Here there is enough evidence to support the theory that the jury convicted Singleton on Counts II and XI for criminality involving Oxycodone/Diazepam, and not Ultram. This is evidenced by the fact that the jury convicted him on eight other counts—all of which did not involve Ultram. Further, as the Magistrate points out, the record makes zero mentions to Ultram and only two references to its equivalent, Tramadol. As such, the Court will deny Singleton relief on these grounds.

VII. Allegations Regarding Prosecutorial Misconduct

Singleton asserts prosecutorial misconduct via his allegation that the United States failed to disclose *Brady* evidence and knowingly presented false testimony at trial. In doing so, Singleton is essentially reasserting his *Giglio* and *Brady* claims. Having rejected them previously, the Court will do so again.

Singleton also suggests that the "prosecution elicited false testimony from law enforcement agents and CIs to support it['s] allegations." [DE 425, at 73.] This argument is also unpersuasive as the Court previously rejected the same claim couched in different language. Lastly, Singleton alleges that the failure to notify the jury of the alleged payment of land to Monroe amounts to prosecutorial misconduct. Again, this argument has already been rejected by the Court and fails here too.

VIII. Singleton's Abuse of Discretion Claims

Singleton seemingly asserts two abuse of discretion arguments. First, Singleton argues that the testimony of Jeffrey Sagrecy improperly espoused legal opinions. [DE 493.] Second, Singleton maintains that because he is not licensed to prescribe the drugs in question, he cannot face criminal liability. Both of these arguments are misguided.

As to the testimony of Jeffrey Sagrecy, Singleton argues that the witness crossed the line of propriety when he opined that Singleton was "trafficking narcotics." In making this assertion, Singleton misconstrues the record. As the Magistrate points out, Sagrecy did not speak to the looming question of guilt or innocence. Rather, the agent simply identified the alleged underlying activity behind the money laundering charges. Moreover, on several occasions, the testifying agent informed the jury that he was not testifying as to the underlying guilt. [DE 462, at 95.]

Next, Singleton's claims that he is not a "prescribing practitioner" are not relevant to his § 2255 claim. The government alleged, and the jury found, that Singleton was heavily involved in "virtually every aspect of administrating the clinic[s]." [DE 327.] As such, the fact that he was not a prescribing physician does not preclude his culpability and is not a proper basis to attack his convictions and resulting sentence.

IX. Singleton's Alleged Sixth Amendment Violations

In his final argument, Singleton asserts that he was denied his Sixth Amendment right to a choice of counsel. Particularly, Singleton complains that the forfeiture of his assets prevented him from obtaining the counsel of his choice. [425, at 84.] This argument is nonsensical. As the magistrate observes, Singleton failed to show in his pre-trial motion [DE 38] that his assets were "untainted." The Court therefore rejects Singleton's claim that his Sixth Amendment rights were violated.

X. Certificate of Appealability

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003). When the denial of a motion filed under § 2255 is based on the merits, the defendant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

As discussed above, there is no claim or objection that raises a meritorious issue regarding constitutional rights. Jurists of reason would not conclude that this Court's assessment of any constitutional claims raised by Singleton was either debatable or wrong. This Court agrees with the Magistrate's finding that a certificate of appealability should not issue in this case.

CONCLUSION

It is HEREBY ORDERED that:

(1) United States Magistrate Judge Robert E. Wier's Recommended Disposition [DE 462] is **ADOPTED** and **INCORPORATED** herein by reference;

(2) Defendant Ernest Singleton's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255 [DE 409] is **DENIED**;

(3) Judgment shall be entered contemporaneously with this Order; and

(4) A Certificate of Appealability **SHALL NOT ISSUE**.

Dated October 17, 2018.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION - LEXINGTON

UNITED STATES OF AMERICA, **Plaintiff,** **V.** **ERNEST WILLIAM SINGLETON,** **Defendant.**	**CRIMINAL ACTION NO. 5:13-08-KKC** **JUDGMENT**

In accordance with the Order entered contemporaneously with this Judgment, the Court **HEREBY ORDERS AND ADJUDGES** that:

(1) United States Magistrate Judge Robert E. Wier's Recommended Disposition [DE 462] is **ADOPTED** and **INCORPORATED** herein by reference;

(2) Defendant Ernest Singleton's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255 [DE 409] is **DENIED** with prejudice;

(3) A Certificate of Appealability **SHALL NOT BE ISSUED** because Defendant has failed to make a substantial showing of the denial of a constitutional right;

(4) This judgment is **FINAL**; and

(5) This matter is **DISMISSED AND STRICKEN** from the active docket.

Dated October 17, 2018.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON

UNITED STATES OF AMERICA, Plaintiff, V. ERNEST WILLIAM SINGLETON, Defendant.	CRIMINAL ACTION NO. 5:13-08-KKC ORDER

*** *** ***

This matter is before the Court on various motions filed by Defendant Ernest Singleton. The Court having been sufficiently advised, it is HEREBY ORDERED that:

(1) Defendant's motion for Rule 11 sanctions (DE 448) is **DENIED**.

(2) Defendant's motion for order to show cause (DE 456) is **DENIED**.

(3) Defendant's motion for a hearing (DE 459) is **DENIED**.

(4) Defendant's motion for leave to appear via video conference (DE 460) is **DENIED**.

(5) Defendant's motion for order to show cause (DE 471) is **DENIED**.

(6) Defendant's motion for leave to file a late reply (DE 482) is **DENIED**.

(7) Defendant's motion to compel (DE 489) is **DENIED**.

Dated October 10, 2018.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	No. 5:13-CR-8-KKC-REW
	)	No. 5:17-CV-24-KKC-REW
v.	)	
	)	
ERNEST WILLIAM SINGLETON,	)	RECOMMENDED DISPOSITION
	)	
Defendant/Movant.	)	

*** *** *** ***

For years, Ernest Singleton and the pain clinics he operated fed a perennial scourge of this District: widespread opioid and other controlled substance abuse.[1] In 2013, a jury convicted him of his crimes. In 2015, the Sixth Circuit affirmed. In 2016, the Supreme Court denied review. Unsatisfied, Singleton now extensively pursues collateral relief via 28 U.S.C. § 2255.

Specifically, on January 11, 2017,[2] Singleton, now a federal inmate, filed a lengthy *pro se*[3] § 2255 motion, along with voluminous exhibits.[4] *See generally* DE #409.[5]

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[1] *See United States v. Chaney*, 211 F. Supp. 3d 960, 966 (E.D. Ky. 2016) (labeling the "story" of the Chaneys' "pill mill" operation a sadly "familiar one in this District").

[2] The filing date reflects the prison mailbox rule. *See Richard v. Ray*, 290 F.3d 810, 812-13 (6th Cir. 2002) (per curiam). Here, Singleton declared under penalty of perjury that he placed the § 2255 motion in the prison mailing system on January 11, 2017. DE #409-5, at 91.

[3] *Pro se* petitions receive a comparatively lenient construction by the Court. *Franklin v. Rose*, 765 F.2d 82, 84-85 (6th Cir. 1985) (noting that "allegations of a *pro se* habeas petition, though vague and conclusory, are entitled to a liberal construction" including "active interpretation" toward encompassing "any allegation stating federal relief" (citations and internal quotation marks omitted)).

[4] As a general comment and criticism, the Court notes that Singleton does not attempt to authenticate any tendered exhibit. The Court has considered them in an effort to fully and fairly evaluate Singleton's § 2255 materials, but unauthenticated exhibits are not properly

The Court, per a specific analysis, denied Movant permission to file the tendered 291-page brief but liberally permitted a 100-page filing (pagination well in excess of the applicable Local Rule's allowance). DE #413 (Order). Singleton objected, and Chief Judge Caldwell upheld the ruling. DE #421 (Order).[6] Movant then filed a compliant brief. DE #425. The United States responded in opposition. DE #438 (Response). Movant replied. DE #440 (Reply). On the United States's motion, and again per a specific analysis, the Court found that, as to communications necessary to litigate the claims of ineffective assistance, Singleton waived attorney-client privilege. DE #433 (Order). Singleton objected, and Judge Caldwell upheld the ruling. DE #444 (Order).

The § 2255 matter is, thus, ripe for consideration. Per normal practice, the District assigned the matter to the undersigned for a recommended disposition. For the reasons explained, the Court **RECOMMENDS** that the District Judge fully **DENY** § 2255 relief (DE #409) and issue **NO** Certificate of Appealability.

I. BACKGROUND INFORMATION

On March 7, 2013, a grand jury returned a second superseding indictment, charging Singleton (along with 4 closely held entity co-defendants) with 23 Counts, including, generally stated: (1) conspiring to distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, certain controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846; (2) aiding and abetting

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subject to consideration. *See Garcia v. United States*, Nos. 1:11CR253-3, 1:14CV150, 2015 WL 7283136, at *2 n.5 (M.D.N.C. Nov. 16, 2015) (collecting cases and holding unauthenticated documents not proper evidence in § 2255 proceedings).

[5] The total tendered pages numbered 672.

[6] Post-resolution of the memorandum-length issue, the Sixth Circuit provided helpful guidance on the question, suggesting approval of the District's comparatively generous treatment here. *See Martinez v. United States*, 865 F.3d 842, 843-44 (6th Cir. 2017) (affirming district court's decision to apply a memoranda-length Local Rule and strike a 628-page § 2255 filing).

distributing and dispensing certain controlled substances, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; (3) opening and maintaining establishments for the purpose of unlawfully distributing and dispensing certain controlled substances, in violation of 21 U.S.C. § 856(a)(1); and (4) money laundering and conspiring to money launder, in violation of 18 U.S.C. §§ 1956 and 1957. DE #73. Singleton went to trial, and the jury convicted him on all submitted Counts. DE #202 (Verdicts).[7] Chief Judge Caldwell sentenced Singleton on March 18, 2014. DE #277 (Sentencing Minute Entry). Movant received a total prison sentence of 240 months followed by 3 years of supervised release. DE #285 (Judgment). Singleton appealed; the Sixth Circuit affirmed. *See Singleton*, 626 F. App'x at 604. Singleton then sought a writ of certiorari; the Supreme Court denied the petition. *Singleton v. United States*, 136 S. Ct. 917 (2016). On January 11, 2017, Movant timely submitted a § 2255 motion. DE #409. Proceedings developed as indicated above. The encyclopedic motion stands ripe for review.

In assessing Singleton's § 2255 effort, the Court has comprehensively reviewed the entire case record, including every page of the transcripts from an eleven-day trial, the § 2255-related briefing, and both sides' § 2255 exhibits. Given the breadth and variety of Singleton's § 2255 challenges, an extended factual background discussion is appropriate. Upon review of the full record, the Court determines it wise to restate the thorough synopsis of the Circuit:

> In December 2010, Defendant, a nurse by profession, opened the Central Kentucky Bariatric and Pain Management Clinic in Georgetown, Kentucky ("Georgetown Clinic"). In May 2011, Defendant opened the

[7] On Defendant's pretrial motion, Judge Caldwell dismissed Counts 14 and 16. DE #110 (Order). On post-trial motion, the District Court acquitted Singleton of Count 10. *United States v. Singleton*, 19 F. Supp. 3d 716, 724 (E.D. Ky. 2014); *see also United States v. Singleton*, 626 F. App'x 589, 594 & 594 n.1 (6th Cir. 2015).

nearby Grant County Wellness Center in Dry Ridge, Kentucky ("Dry Ridge Clinic").

At these two locations, patients obtained prescriptions for narcotic painkillers with little medical scrutiny or supervision. Between December 2010 and March 2012, the Georgetown and Dry Ridge Clinics prescribed over 2.5 million dosage units of Oxycodone, a "quite disturbing" amount of a frequently abused prescription drug.

A "constant flow" of patients visited the Georgetown and Dry Ridge Clinics. Patients often drove to the clinics from distant counties and states, and some visitors even carpooled together. The clinics attracted a "young clientele," with the average patient under 40 years of age. Many of these patients exhibited signs of drug use and addiction, such as pale skin, a lack of physical coordination, disorientation, and dilated pupils.

On average, the clinics served approximately sixty patients per day, with the number of patients exceeding eighty on occasion. Staff frequently double and triple-booked patients for the same appointment slot. Because of the volume of visitors, the clinics would run out of seating in their waiting rooms, with patients sitting on the floor or on the outside street curb.

Due to the number of patients visiting each day, appointments with a physician typically lasted ten minutes. Doctors often had no time to examine each patient, but would instead "just ask how the [painkiller] medicine was, and if it was helping [the patient]." And when the physicians did provide examinations, they were perfunctory. For instance, one patient testified that a doctor offered him Roxicodone and Xanax after a ten minute examination, during which the physician briefly rubbed his hand along a scar on the patient's back.

The examination rooms were not well equipped for medical evaluation. They lacked surgical gloves, paper towels, sheets, examination table paper, and medical equipment. Furthermore, the medical charts from these brief appointments contained "very cursory" notes. Although the charts included basic details about the patient, like blood pressure, urine test results, and prescription history, they did not indicate individualized or personalized treatment. The charts also revealed that "[t]he vast majority of people were receiving the same prescriptions in the same quantities."

The Georgetown and Dry Ridge Clinics did not take measures to keep prescriptions away from individuals who abused or diverted drugs. The Kentucky Medical Board recommended that pain management clinics conduct urine drug screens. A drug screen that tests positive for the presence of narcotics, beyond those already prescribed for a patient,

suggests that the patient obtained additional prescriptions from other clinics. A totally negative drug test for a patient who was previously prescribed painkillers indicates that the patient diverted pills from that earlier prescription to other persons.

The staff at the Georgetown and Dry Ridge Clinics often failed to perform these tests because the clinics ran out of urine screen kits. On the other hand, when a patient was given a drug test and failed it, clinic staff still prescribed narcotic medication. In one instance, a physician refilled a prescription for an undercover officer whose urine test showed no controlled substances in his system, even though the officer stated he had "tak[en] pills inappropriately" and "too soon." In another instance, a husband and wife who failed their drug screens were merely given a lower dosage of painkillers. Additionally, Defendant personally made decisions to retain patients who failed their urine tests. If Defendant "didn't want somebody let go, he would say, 'No, we're going to give them another chance.'" Defendant also directed staff to doctor the results of failed drug test results.

The clinics were similarly lax about "pill counts." A pill count occurs when a patient brings his or her prescription pill bottle to the office for an inspection of the number of pills remaining in that container. The number reveals whether the patient is taking the pills properly, or whether the patient is abusing or diverting them. Clinic staff often did not perform these counts. And when pill counts took place, many patients at the Georgetown and Dry Ridge Clinics failed.

Patient records confirmed the overall lack of medical scrutiny at these clinics. The patient files lacked physician referrals, even for those patients complaining of chronic pain. And whereas most legitimate pain management doctors prescribed long-acting narcotics for chronic pain, physicians at the Georgetown and Dry Ridge Clinics prescribed multiple daily doses of short-acting narcotics, which were more commonly used to treat "break-through" pain.

Defendant's own employees criticized the standards at the Georgetown and Dry Ridge Clinics. Dr. Paul Craig, a physician who briefly worked at the Georgetown Clinic in 2011, believed that clinic staff prescribed narcotics at dosages "higher than most people would need" for non-cancerous conditions. According to him, the Georgetown Clinic operated "on the fringe" and fell "out of [his] comfort zone." Similarly, Eileen Fowler, a registered nurse who worked at the Dry Ridge Clinic, told Defendant: "This is nothing but a pill mill . . . you cannot do this." Defendant responded, "Oh, yes, I can."

Defendant exercised great influence over the medical practices of his physician employees. For instance, Dr. Alan Godofsky, a physician who worked at the Georgetown clinic between March 2011 and January 2012, complained that it was "so busy the doctors can't put in full notes and do the appropriate research." But Defendant felt Dr. Godofsky "wasn't seeing enough patients" and "was dragging his feet and slowing down his care of the patients, the time that he was spending with the patients." Defendant told Dr. Godofsky, "If you don't give [the patients] what they want, they won't come back." As a result, Dr. Godofsky wrote 6,000 prescriptions for over 500,000 Oxycodone dosage units in under one year.

Defendant exercised an even greater degree of influence over Dr. Gregory White. Defendant hired Dr. White at the Georgetown Clinic in May 2011, but later sent him to the Dry Ridge Clinic. Dr. White saw up to ninety-two patients a day. Because Defendant felt Dr. White "wasn't working fast enough," Defendant instructed him to limit his appointments to fifteen minutes for new patients and five minutes for returning patients. Dr. White felt that he was doing his patients a "disservice" by seeing them for such short durations, but nonetheless refused to reduce his patient load because "[t]hat's not what [Defendant] wants." Moreover, Defendant created a set of prescription guidelines and imposed them on Dr. White. The guidelines set upper limits on Oxycodone and Valium dosages, as well as proscribed combinations of certain drugs. Defendant even made direct changes to patient charts to justify prescribing certain drugs, and then personally wrote out prescriptions to match the chart. Under Defendant's direction, Dr. White prescribed nearly 1.5 million dosage units of Oxycodone over a 10–month period.

Defendant had similar interactions with Dr. Lea Ann Marlow. A *locum tenen* agency placed Dr. Marlow at the Georgetown Clinic in February 2012. She assumed a permanent role two months later, working primarily at the Georgetown Clinic and occasionally at the Dry Ridge Clinic. Because she had not previously worked at a pain clinic, Dr. Marlow sought guidance about prescription practices on her first day at the clinic, but she received none. She "w[rote] more prescriptions for Oxycodone that day than [she] had in [her] prior 16 years" of practice. When Dr. Marlow switched to Hydrocodone, a less potent narcotic, patients complained to Defendant and his office manager. Her attempt at changing to Hydrocodone "lasted approximately one month" before Dr. Marlow "changed [the patients] back to their previous dosage." Dr. Marlow deemed it "very, very plain" that Defendant would fire her if she reduced dosages, causing patients to leave. Defendant also became "very angry" when Dr. Marlow refused to see patients who did not have completed lab work or seek the referrals Dr. Marlow recommended. On one occasion, Defendant "told" Dr. Marlow to prescribe medication for a patient who Dr. Marlow believed should have instead seen a cardiologist

due to an abnormal EKG. Overall, Dr. Marlow prescribed 99% of her patients the same regimen: Oxycodone, Valium, a nerve pain drug, and an anti-depressant.

Defendant profited from his businesses. Patients paid $300 in cash for an initial appointment, and then $250 for subsequent appointments. Third party individuals sometimes sponsored patients financially in exchange for medication. The clinics also referred patients to other entities owned by Defendant. For example, because the clinics required a recent MRI before treatment, staff directed patients to Bluegrass MRI, a company owned by Defendant. Bluegrass MRI charged an upfront cash payment of $450 for an MRI. And after local pharmacies stopped honoring the prescriptions issued by the two clinics, Defendant opened the Central Kentucky Family Pharmacy, where he "funneled the patients . . . so it would be easier to purchase their medication there and also make a profit [for Defendant] from it."

Bank records from 2011 and 2012 indicated that Defendant deposited over $2 million, largely in cash, in the bank accounts for the Georgetown and Dry Ridge Clinics. During that period, he deposited nearly $500,000 in the Bluegrass MRI bank account and a little over $61,000 in the Central Kentucky Family Pharmacy bank account. At the same time, millions of dollars flowed into accounts registered to Defendant and Double D Holdings, a company owned and controlled by Defendant. Defendant used this money to purchase or lease large land plots for a residence and a farm. He also bought expensive farm equipment, two tractors, a Dodge truck, and a Marine Tahoe boat.

In November 2011, the Kentucky Office of the Inspector General began to review the prescribing practices of physicians at the Georgetown Clinic. Investigators identified several troubling trends in the Georgetown Clinic's practice: (1) the long-term use of controlled substances; (2) the use of "combinations of controlled substances favored by individuals who abuse or divert prescription drugs"; (3) a "young" patient population comprised of individuals in their 20s; (4) the distances traveled by many patients to the clinic; (5) the treatment of multiple family members with the same type of drugs; and (6) the decision to initiate most patients on high doses of potent narcotics, specifically Oxycodone. Investigators noted that the medical charts contained "cursory" information and no individualized treatment plans. Furthermore, some charts appeared altered. The Kentucky Medical Board subpoenaed the clinics' charts, conducted inspections, and interviewed several doctors. The Board ultimately suspended the licenses of two doctors, including Dr. White, and prohibited three others, including Dr. Godofsky, from prescribing controlled substances for a period of time.

> In late 2011 through early 2012, the Kentucky State Police conducted its own investigation, dispatching five undercover informants to the clinics. The informants posed as patients seeking drug prescriptions, and secretly videotaped their conversations with physicians. Staff evicted one informant after discovering his camera. The other four informants successfully recorded their conversations as they obtained narcotic prescriptions.
>
> In July 2012, Kentucky enacted a law mandating that pain clinics be owned and operated by physicians, although existing clinics could apply for an exemption if they had no history of sanctions. Because the Kentucky Medical Board's decisions eliminated the possibility of that exemption for the Georgetown and Dry Ridge Clinics, they closed down soon after the law went into effect.

Singleton, 626 F. App'x at 591-94; *see also Singleton*, 19 F. Supp. 3d at 723-24 (Judge Caldwell's background recitation).

Singleton now, essentially, attempts wholesale relitigation of the entire case via § 2255, challenging in some way virtually every aspect of the pretrial, trial, and post-trial proceedings. Singleton clearly feels that the federal criminal process fundamentally wronged him, but not a single claim or argument he asserts, in the Court's view, has merit. Accordingly, for the reasons that follow, the Court rejects each of Movant's varied (and often repeated / overlapping) claims and recommends plenary dismissal. The District Court should also decline to issue a Certificate of Appealability. The Government effectively unveiled Singleton's Oxycodone (and other controlled substance) scheme, sophisticated and nuanced as it was, resulting in the convictions before the Court. Try as he may to self-depict as a victim (of the system, of ineffective assistance, of prosecutorial misconduct, of Court bias), Singleton faces the consequences of his own actions. He justifies no relief.

II. STANDARD OF REVIEW

Under 28 U.S.C. § 2255, a federal prisoner may obtain post-conviction relief if his sentence violates the Constitution or federal law, the federal court lacked jurisdiction to impose such sentence, or the sentence exceeds the maximum authorized by law. 28 U.S.C. § 2255(a); *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003) ("In order to prevail upon a § 2255 motion, the movant must allege as a basis for relief: '(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.'" (quoting *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001))). A defendant alleging a constitutional basis must establish "an error of constitutional magnitude" and show that the error had a "substantial and injurious effect or influence on the proceedings" in order to obtain § 2255 relief. *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721-22 (1993)). When alleging a non-constitutional error, a defendant must prove that the error constituted a "'fundamental defect which inherently results in a complete miscarriage of justice,' or, an error so egregious that it amounts to a violation of due process." *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990) (quoting *Hill v. United States*, 82 S. Ct. 468, 471 (1968)); *see also Watson*, 165 F.3d at 488. In making a § 2255 motion, a movant generally bears the burden of proving factual assertions by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (per curiam) ("Defendants seeking to set aside their sentences pursuant to 28 U.S.C. § 2255 have the burden of sustaining their contentions by a preponderance of the evidence.").

III. ANALYSIS

In the § 2255 motion, Singleton raises 15 broad grounds for relief, most of which have numerous and varied subparts. Many claims interlock with or restate other claims. Per the following analysis, all theories conclusively fail, on this record, under § 2255.[8]

1. Ground 1: Alleged *Brady* Violations

First, Singleton makes a variety of *Brady* claims.[9] *Brady v. Maryland* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 83 S. Ct. 1194, 1196-97 (1963). Thus, under *Brady*, "'a defendant's due process rights are violated if the

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[8] At the outset, the Court considers the procedural default doctrine, which the United States raised as to Grounds 6, 9, 10, 12, 13, and 14. DE #438, at 2-3. "Section 2255 is not a substitute for a direct appeal, and thus a defendant cannot use it to circumvent the direct appeal process." *Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003). The procedural default doctrine bars "claims that could have been raised on direct appeal, but were not[.]" *Ray v. United States*, 721 F.3d 758, 761 (6th Cir. 2013). "In the case where the defendant has failed to assert his claims on direct appeal and thus has procedurally defaulted, in order to raise them in a § 2255 motion he also must show either that (1) he had good cause for his failure to raise such arguments and he would suffer prejudice if unable to proceed, or (2) he is actually innocent." *Regalado*, 334 F.3d at 528. Cause sufficient to excuse default ordinarily consists of "some objective factor external to the defense" that prevented Defendant from raising the issue on direct appeal, "not . . . whether counsel erred[.]" *Murray v. Carrier*, 106 S. Ct. 2639, 2645 (1986).

The Court holds that Singleton defaulted the arguments raised in Grounds 6, 9, 10, 12, 13, and 14 by not raising them on direct appeal (but declines to, on this record, raise the doctrine *sua sponte* as to any other Ground). Despite the Government's argument, Movant did not address either *Regalado* prong (or grapple with procedural default at all), and the Court sees no obvious basis to conclude that either is satisfied in these circumstances. However, because the arguments contained in the at-issue Grounds all have a correlated ineffective assistance claim (thus likely fairly necessitating merits review), and generally due to the interrelatedness of many of the claims and Singleton's general intensity of litigation, the Court primarily relies on the subsequent merits analysis to recommend dismissal regarding each assertion.

[9] Judge Caldwell, post-trial, already addressed this general topic, holding that "nothing in this case indicates . . . that the government failed to meet its obligations under *Brady*." *Singleton*, 19 F. Supp. 3d at 730.

prosecution suppresses material exculpatory evidence that is favorable to the defense.' *Hanna v. Ishee*, 694 F.3d 596, 610 (6th Cir. 2012). 'Likewise, the prosecution violates *Brady* if it . . . fails to volunteer evidence not requested by the defense, or requested only generally.' *Id.* To succeed on a *Brady* claim, 'a habeas petitioner must show that (1) the withheld evidence was favorable to the petitioner, (2) the evidence was suppressed by the government, and (3) the petitioner suffered prejudice.' *Jells v. Mitchell*, 538 F.3d 478, 501 (6th Cir. 2008)." *Jefferson v. United States*, 730 F.3d 537, 550 (6th Cir. 2013).

"The prejudice analysis under *Brady* evaluates the materiality of the evidence. 'Evidence is material under *Brady* if a reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Jells*, 538 F.3d at 501-02. 'The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)." *Jefferson*, 730 F.3d at 550. While the Court ultimately considers materiality "collectively, not item by item," *Kyles*, 115 S. Ct. at 1567, the Court must "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Id.* at 1567 n.10; *see also, e.g.*, *Wagle v. Sherry*, 687 F. App'x 487, 490 (6th Cir. 2017) ("Although we consider materiality in light of the evidence as a whole, we evaluate the tendency and force of the undisclosed evidence item by item." (internal quotation marks removed)). The Constitution, thus, simply "is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Id.* at 1567.

1.1. Subparts 1 & 2: Singleton's first two volleys involve computers and security systems used at his businesses. *See* DE #425, at 3-5. Movant alleges the Kentucky State Police (KSP) seized his business computers, which contained "business records" and "patient records," and did not "turn[] over" "copies of the computers[']' Hard Disk Drives[s] . . . to extract relevant exculpatory / impeaching evidence." *Id.* at 3. He lists six things that the HDD data allegedly "could have been used to refute." *See id.* Relatedly, Singleton argues concerning the HDDs of his business security systems. DE #425, at 4.

The Court rejects these arguments on, at a minimum, *Brady* prongs 1 and 3. As a starting point, Singleton provides the Court with none of the alleged HDD data, so the Court is unable to assess the claims with reference to any particular item of proof or make a determination that any of the data would be favorable to Movant. Singleton certainly does not, on this record, presenting only his own argumentation, prove that any withheld HDD data was favorable to him. He wholly speculates about drive content.

Even assuming the truth of Singleton's generalized content proffer, he contested at trial the basic points that he says the data would have shown. Further, even if the data might reveal certain differences regarding, *e.g.*, the length of individual patient-doctor interactions (or other discrete details), that would not call into question the overwhelming amount of otherwise damning evidence presented. Typical visit length was but one factor of an overpowering totality indicating that the jury viewed as Singleton, beyond a reasonable doubt, running pill mills—including, to list but a few examples, the OIG's findings, the "constant flow" of patients, the sheer amount of Oxycodone prescribed from the clinics, the relationship with Bluegrass MRI, the nature and variety of the direct

inculpatory testimony (from doctors, patients, investigators, etc.), the uneven self-policing practices, the cash-only business model, and the condition of the exam rooms.

The jury did not buy Singleton's defenses at trial, and the Government presented (as the Sixth Circuit affirmed) sufficient evidence on all statutory elements. Singleton's indeterminate offer of speculative HDD data here does not, in the Court's assessment, call the jury's verdict into question.[10] There is, accordingly, no reasonable probability, on this record, that the result of Singleton's trial would have been different if he had the HDD data. Even in its absence, Singleton received a fair trial, and the verdict remains worthy of confidence. Further, and regardless, "there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question," *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007), a principle certainly applicable to information gathered from events Singleton personally lived and which he claims came from his own record-keeping / organizational efforts.[11]

1.2. Subpart 3: Next, Singleton charges that the prosecution withheld certain lab reports concerning testing of "all of the pills." DE #425, at 5. In support, he

[10] Singleton includes a distinct evidentiary argument concerning pharmacy control, but he does not explain why an alleged lack of "operational control" of a pharmacy would result in exclusion of any proof. *See* DE #425, at 4. The Court sees no merit to this undeveloped suggestion. The pharmacy itself was rarely mentioned at trial.

[11] The exact status of the hard drives is somewhat unclear. The Government reports that it simply imaged most computer information on site. *See* DE ##438, at 5; 451, at 4-5, 8. Some papers perhaps suggest the United States did take some devices (using the generic term "computer," not "hard drive") for later imaging. *See* DE #443-4 (letter from prosecutor referencing "computers seized by DEA"); *see also* DE #450, at 3. Nothing convinces the Court that the United States took property of Singleton that it did not later give him access to via discovery. He had that trial-related right, per Rule 16(a)(1)(E)(iii). Plainly, Singleton knew what his own digital records would offer. He did not bleat about not having access to digital data in the pre-trial phase, and the Court does not perceive any legitimate *Brady* matter here.

cites to confirmatory language in Dr. White's and Dr. Marlow's plea agreements, as well as his own proposed plea agreement. *See* Exhibits 1-7, 1-8, and 1-9. In response, the United States essentially confesses drafting error, stating that the language "is standard language in drug plea agreements" but was not, in fact, "applicable for these plea agreements because the pills were dispensed by a licensed physician or pharmacy." DE #438, at 6. The pharmaceutical substance eliminated a typical need to test.

The claim, thus, fails on numerous grounds. First, and most obviously, Singleton does not prove, via his citation to certain plea agreement language, that there was any withheld proof. The United States advises that "there were no lab reports," and the Government could not have withheld from Singleton reports that did not exist. Even assuming there were extant, undisclosed lab reports, the Court does not perceive that Singleton satisfied *Brady* prong 1. The plea agreement language concerns the generic phrasing "pills obtained from prescriptions"—nothing about any particular instance Singleton's Indictment charged—and advised that the subject pills were positive for controlled substances. A lab report stating a drug positive would not have been favorable to Singleton's defense. Accordingly, there is no *Brady* violation in these circumstances and, further, no reasonable probability that the result of Singleton's trial would have been different if he had various lab reports showing drug positives.[12]

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[12] Movant ends this sub-section with a bizarre argument that, "[w]ithout the lab test results, there is no way to confront the person(s) who tested the pills, or to challenge the methods employed in such testing. This violates my right under the [C]onfrontation [C]lause." DE #425, at 5. Obviously, if at-issue alleged lab test results were not introduced at trial (as this argument presumes), the underlying predicate of the contention dissipates. If the trial did not involve the at-issue proof, the Confrontation Clause is not implicated. *See Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004) (conceptualizing the Clause to apply to "in-court testimony" and "out-of-court statements introduced at trial"); *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal

1.3. Subpart 4: Next, Singleton argues that the United States withheld "information" regarding Dr. White's and Dr. Marlow's "mental health treatment." DE #425, at 5. Movant bemoans being unable to use such purported evidence "to impeach the[i]r testimony." *Id.*

This claim, too, fails on numerous grounds. Most fundamentally, Singleton does not prove that the Government had any such mental health treatment records or information in its possession. Indeed, the United States tells the Court that it "does not [have] nor ever had possession of any such mental health records regarding White or Marlow." DE #438, at 6. Accordingly, the United States could not have suppressed evidence it did not have. Further, even if there were such records, Singleton "has not demonstrated that [either doctor] has any condition that would affect [his or] her ability to know, comprehend, or relate to the truth. Defendant also has not established that [either doctor]'s purported mental health issues are relevant to the question of whether [he or] she can testify truthfully[.]" *United States v. Cyr*, No. 16-cr-20626, 2017 WL 783472, at *3 (E.D. Mich. Mar. 1, 2017). Further, Marlow herself told the jury that she had seen a "psychiatrist" and "counselor." DE #303, at 177. The Court finds no *Brady* violation on this speculative claim.

1.4. Subpart 5: Singleton next inscrutably complains about "blood test results of informants." DE #425, at 5-6. He claims to identify two tests that the prosecution allegedly withheld. *Id.* at 6. Movant contends that "these tests would have shown the clinic that the CIs were presenting as patients who were taking the medications

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defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

prescribed to them" and "would have allowed me to impeach the testimony of the CIs." *Id.*

There is no *Brady* violation here. First, the Court sees no relevance to the two exhibits Singleton cites. Neither Exhibit 1-10 nor 1-12 has any notation of a drug positive from a blood test. Singleton thus does not establish the most fundamental *Brady* predicate—that there were, in fact, any withheld blood test results in the prosecution's possession. Further, Movant does not prove, via his bare argumentation, that any such results would have been positive for controlled substances (and thus even arguably favorable to the defense). Additionally, "*Brady* obviously does not apply to information that is not wholly within the control of the prosecution. There is no *Brady* violation where . . . the evidence is available . . . from another source[.]" *Owens v. Guida*, 549 F.3d 399, 415 (6th Cir. 2008). Any blood test results would have been available either from the testing site or from Singleton's own clinic. Finally, Aydelott's and Preston's controlled substance use was fully before the jury, *see* DE ##304, at 95, 107-09, 192; 305, at 89; *see also generally* DE #200, at 42 (Instruction 33). As such, the jury knew at least two CIs were using contrary to KSP rules. For all these reasons, the Court sees no *Brady* violation on this vague and speculative claim.

1.5. Subpart 6: Singleton's next claim concerns his own cooperation with local law enforcement. DE #425, at 6-7. Movant alleges that the prosecution "never provided copies" of certain "reports" and "recordings." *Id.* at 7.

Singleton made his ostensible cooperation with law enforcement a central issue at trial, apparently as an attempted defense to the intent element of the accused Title 21 crimes. He presented plenteous evidence and elicited extensive testimony on the

cooperation topic. *See also Singleton*, 626 F. App'x at 602 (referencing Singleton's well-established "close relationship with Georgetown police"). He offered numerous confirmatory exhibits. *See* DE #212, at 2-4 (listing them). The jury, though, was unpersuaded, found the requisite intent beyond a reasonable doubt, and convicted Singleton despite much evidence of his proactive cooperation. Movant, presenting none of the proof to the Court that he alleges was withheld, now generally claims that *more* evidence of the same defense would have swayed the jury to acquittal. The Court does not buy it. "Evidence that is merely cumulative to evidence presented at trial is not material for purposes of *Brady* analysis." *Brooks v. Tennessee*, 626 F.3d 878, 893 (6th Cir. 2010) (internal quotation marks removed). That is—at most—what Singleton presents here, and the Court rejects the cumulative-proof-dependent *Brady* claim. The jury hearing more of Singleton's cooperation artifice would not have created a reasonable probability of acquittal. Further, again, this is third-party proof fully available to the defense via process, if sought.

1.6. Subpart 7: Singleton next takes issue with the alleged "suppression of DEA notes." DE #425, at 7-8. Specifically, he asserts that the "prosecution withheld evidence in the mat[t]er of Josh Akers" that allegedly concerned, again, his own cooperation with law enforcement. *Id.* at 8.

This is really just an argument regarding a specific piece of evidence within the broader Subpart 6. Josh Akers was not involved in Singleton's trial. Instead, Movant basically (again) desires additional cooperation-related evidence. He gives little in the way of particulars or how the proof would fit. The Court rejects the argument for all the reasons stated in Section 1.5. Further, since Singleton apparently was involved in the

Akers investigation, there "is no *Brady* violation [because Movant] knew or should have known the essential facts permitting him to take advantage of any exculpatory information[.]" *Owens*, 549 F.3d at 415.

1.7. Subpart 8: Next is Singleton's complaint about MedCo reports concerning "suspect Medicaide [sic] claims." DE #425, at 8. He nags that he has "never seen the reports that are referenced in Exhibit 1-23." *Id.*

As the United States points out, these alleged MedCo / Medicaid reports have nothing apparent to do with the substance of Singleton's case. "The United States did not allege Medicaid fraud as part of the case," and, thus, Movant's "inability to determine if any of his clinic patients were the subject of any reports is of no consequence and irrelevant to the charges against him." DE #438, at 9-10. Singleton does not prove that any withheld evidence was favorable to him, and he certainly makes no showing of prejudice. He fails to connect, in any logical way, the MedCo reports (which he does not present or describe with any precision) to his guilt or innocence. There is no reasonable probability that, had Singleton possessed the seemingly irrelevant MedCo reports, the result of his trial would have been different.

1.8. Subpart 9: Singleton next seems to contend that the Government withheld two documents (tendered as Exhibits 1-26 & 1-27) that allegedly "show that the prosecution knew of my cooperation with law enforcement." DE #425, at 9.

The Court foundationally sees no relevance of either document for *Brady* purposes. This is, again, really just an argument regarding a specific piece of evidence within the broad Subparts 6 & 7. Singleton offers no reasonable details on this alleged claim. The Court rejects the argument for all the reasons stated previously.

1.9. Subpart 10: Singleton (in a theme oft repeated) next derides the alleged "use of fake medical records by the KSP." DE #425, at 9. Specifically, Movant charges that the "prosecution withheld evidence of the routine use of fake medical records by the KSP, which they knew was a violation of state and federal law." *Id.* The only specific document Singleton says the Government did not produce was "the first fake MRI." *Id.*

Testimony about the use of fake MRIs and other such records was prominent at trial; the jury was fully aware of that general practice. Singleton does not identify specifically which MRI he means by "the first fake MRI," but even assuming the Government did not disclose one fake MRI to him, the United States has never hidden or denied using fabricated medical records. Singleton's complaint really seems to be based on his perception that such use is illegal, although it is not. *See* KRS 218A.220 ("The provisions of this chapter shall not apply to . . . persons whose possession is for the purpose of aiding public officers in performing their official duties."); *Commonwealth v. Adkins*, 331 S.W.3d 260, 266 (Ky. 2011) ("Among the evident purposes of KRS 218A.220 is the facilitation of police efforts to combat illegal drug activity. The statute makes clear not only that the officers themselves do not violate the law when in the course of their duties they possess controlled substances or buy and sell them, but exempts as well agents of the officers, such as informants."). Section 218A.140 addresses false medical records, in this context, and the 218A.220 exemption, which applies to all "provisions of this chapter [*i.e.*, Chapter 218A]," would logically insulate Alcala from Singleton's KRS 218A.140(4) (and other 218A-based) charge(s), *see* DE #425, at 61.

[Further, Singleton presents no argument or authority regarding the "knowingly assist" language.] A sting requires law enforcement leeway.

Singleton also generally asserts that the practices were illegal under federal law, but, in DE #425, cites no actual law to so establish. In Exhibit DD, ¶ 27, Movant appears to invoke or allude to 21 U.S.C. § 843(a)(3), but federal courts regularly endorse (or tolerate) such investigative tactics. *See, e.g.*, *United States v. Vogel*, No. 4:08-CR-224(1), 2010 WL 2268237, at *2-8 (E.D. Tex. May 25, 2010) (perceiving no illegality regarding DEA agents using "fake names, fake identifications, [and] false medical records" to attempt to receive prescriptions). Regardless, as relevant here, "a prescription by itself does not entitle its holder to unconditional access to the drugs prescribed," and, therefore, "a prescription is not tantamount to possession" for purposes of § 843(a)(3). *United States v. Walker*, 972 F.2d 679, 681 (6th Cir. 1992). Further, and additionally, Singleton's conduct—not the KSP's or any informant's—was on trial, and third-party illegality is no excuse for one's own. *United States v. Farrow*, 574 F. App'x 723, 730-31 (6th Cir. 2014) ("[T]he possible guilt of others is not a defense to a criminal charge." (citing 6th Circuit Pattern Jury Instruction 8.08(2))); *Nat'l Lead Co. v. Wolfe*, 223 F.2d 195, 204 (9th Cir. 1955). Even if Singleton did establish illegality, that would not result in exclusion of proof, for the reasons discussed in Ground 9. For all these reasons, Singleton establishes no *Brady* violation here. He and the jury knew at all times during trial that part of the case was a KSP sting operation, with the falsity that normally imports.

1.10. Subpart 11: Next, Movant, yet again, raises issues with his "additional cooperation with law enforcement," specifically concerning six separate investigations. *See* DE #425, at 10. This is just another cumulative argument regarding

specific pieces of evidence within the broad Subparts 6, 7, and 9. The Court rejects this claim for all the reasons previously stated.

1.11. Subpart 12: Singleton's next barrage targets alleged "missing evidence of Ronnie Ross." DE #425, at 10. Movant says that "[s]ome evidence obtained by CI Ross was never placed into evidence." *Id.* He specifically mentions "a prescription" and an alleged "outstanding 20 pills." *Id.*

This claim, too, fails for a number of reasons. Singleton does not foundationally articulate how, precisely, one of Ross's prescriptions or an outstanding 20 Tramadol pills would be favorable to the defense. Further, and regardless, Singleton makes no sufficient prejudice showing. The trial contained various Ross-related pill testimony. *See, e.g.*, DE ##304, at 115-17; 305, at 46-47 (acknowledging pharmacy could not fill full script). Even if this alleged proof had been disclosed, the Court sees no reasonable probability that the result of the trial would have been different. Whether Ross retained 20 Tramadol pills is simply immaterial to the criminal charges against Singleton. Further, Det. Alcala flatly denied letting any CI keep any pills. DE #304, at 94. Singleton had the chance to cross Ross and could have asked about the pharmacy short-fill notation. The only verified proof is what Alcala said, and Movant in no way frames a valid *Brady* theory as to this evidence.

1.12. Subpart 13: Singleton next asserts that the "prosecution never turned over true & correct copies of the original recordings made in the course of the KSP's investigation." DE #425, at 11 (all as in original).

The videos, many of them, were at the core of the case and received much discussion before and at trial. The jury saw several recordings, and Det. Alcala testified

that he "maintained the integrity" of the hard drive and videos "all the way up to . . . coming to court." DE #304, at 84-85. Singleton certainly makes no showing of or raises any real question as to the copies' inauthenticity, and, regardless, does not prove that some speculative other, undisclosed version of the recordings (1) existed or (2) would be favorable to the defense. Likewise, Movant also makes no prejudice showing—*i.e.*, he does not prove that the allegedly "original" recordings would have been sufficiently different in any way so as to create a reasonable probability that the jury would have acquitted.

1.13. Subpart 14: Next, Singleton charges, in totality, that the "prosecution withheld the 'numerous complaints' they [sic] alleged were loged [sic] against my clinics. They were the pretext for the for [sic] KSP's investigation of me and the clinics. Had the complaints been produced, I could have shown there was a reasonable probability that most, if not all, were incorrect or false, and thus there was no grounds [sic] for the original KSP investigation at all." DE #425, at 11.

This claim fails for numerous reasons. Most fundamentally, Singleton makes no showing that any allegedly withheld "complaint" would be favorable to him; to the contrary, it seems plain to the Court that such a complaint would be, if anything, inculpatory. Singleton knew the allegations against him; they came, in this case, via the grand jury's Indictment (not generic antecedent "complaints"), and Movant had a full opportunity, at trial, to, using Singleton's language, "show[] there was a reasonable probability that most, if not all, [the charges] were incorrect or false." The jury, though, did not buy his efforts. Regardless, the Indictment itself conclusively established probable cause, which Singleton could not have challenged in the way he insinuates. *See*

Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2376-77 (1988) (reiterating a prior holding that "an indictment valid on its face is not subject to . . . a challenge" regarding "the reliability or competence of the evidence presented to the grand jury"). Finally, Singleton makes no convincing prejudice showing. There is no reasonable probability that the jury would have acquitted had it seen certain unspecified "complaints" about his clinics. The Court also notes that several Government witnesses described in detail the genesis of investigations by the AG, the KBML, and the KSP.

1.14. Subpart 15: Singleton moves on to complaints concerning the B. J. Stacy traffic stop. DE #425, at 11-12. Movant tenders a report of the stop as Exhibit 1-37. He says that page "KSP_00048" of this report references "a traffic stop report . . . withheld by the prosecution." *Id.* at 11. Singleton also generally criticizes Alcala's alleged conduct during or related to the stop. *Id.* at 11-12.

The only reference to a "report" the Court sees on page KSP_00048 is to "reports" of 29 calls Singleton and associates made to the KSP for assistance from May 2011 through May 2012. Singleton, thus, does not satisfy the most basic *Brady* obligation, particularly identifying some item of withheld evidence. He certainly does not show that any theoretical missing report, regarding a third-party traffic stop, would have been favorable to the defense or that there is a reasonable probability that it would have changed the outcome of trial. Additionally, Singleton's extraneous disagreements with Alcala's policing tactics (which seem to be his focus here), vis-à-vis a traffic stop (for speeding) of a third party, are simply not the stuff of *Brady*.[13]

[13] Singleton has no basis for complaining about a traffic stop of someone else.

1.15. Subpart 16: Relatedly, Singleton asserts that the "prosecution withheld evidence from the numerous traffic stops that were conducted by the police of 'patients' of my clinics." DE #425, at 12-13.

Singleton is fishing here—pure and simple. Jeremy DeVasher indeed testified that he "personally stopped a multitude of vehicles . . . that had traveled to the clinic to seek . . . treatment[.]" DE #307, at 48. DeVasher said utterly nothing regarding the existence of any evidence from those stops; he did not say, for instance, that he issued citations or there was dash-cam footage. The United States candidly responds that it has "no records . . . to produce." DE #438, at 11. Even if there were records that the Government withheld, Singleton fails to show that they would be favorable to his defense, and he certainly does not prove that there is a reasonable probability that the result of the trial would have been different, had the jury seen certain records from various third-party traffic stops. The proof as to all stops but Kielman was generic, and Singleton has no claim premised on the Kielman evidence.

1.16. Subpart 17: Singleton, for the fourth time, raises another issue regarding his cooperation with local law enforcement—this time, telling the Court that the prosecution had "records showing that I reported numerous persons to the GPD for using fake MRIs to attempt to get drugs." DE #425, at 13. This, again, was a central part of Singleton's defense at trial. The Court rejects this claim, as it has above, for all the reasons stated previously. Singleton does not distinguish this from other proof, does not address the cumulative nature, and does not detail any proof content (*e.g.*, saying "numerous persons") at issue.

1.17. Subpart 18: Finally, Singleton argues about allegedly withheld CI recorded debriefings. DE #425, at 13. He says these recordings "would have shown the jury that the KSP adn [sic] CIs were violating state and federal law by the use of fake MRIs[.]" *Id.* Again, the issue of CIs using fake MRIs was completely before the jury at trial, and the jury convicted regardless. Cumulative proof—here, proof of nothing more than what the jury already knew—does not a successful *Brady* claim make, *Brooks*, 626 F.3d at 893, and the Court rejects the substantive lawbreaking suggestions elsewhere in this Recommendation.

1.18. Conclusion

Finally, the Court has considered the materiality of all the allegedly withheld pieces of evidence collectively, *see Kyles*, 115 S. Ct. at 1567, and, upon review of the totality, sees no sufficient prejudice to Singleton. He received a full and fair trial before a jury of his peers. The United States presented sufficient proof, the jury found him guilty beyond a reasonable doubt, the Court of Appeals affirmed, and the Supreme Court denied review. Each of the individual items he argues has very low tendency and force to impact the case. Even considering in toto all the alleged items of proof Movant now complains were missing—none of which remotely calls any of the core evidentiary items or theories into doubt—the Court has complete confidence that there is no reasonable probability that the jury would have acquitted. The guilty verdicts resolutely, on this record, remain worthy of confidence. Therefore, for all the reasons stated, none of Movant's *Brady* claims has merit, and the District Court should deny *Brady*-based § 2255 relief.

2. Ground 2: Alleged Due Process Violations

In Ground 2, Singleton charges that the "presentation of known false testimony violates due process." DE #425, at 13. Essentially, Movant mounts a series of generalized due process complaints regarding trial testimony.

The Due Process Clause generally "guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 87 S. Ct. 648, 653 (1967). Specific to most of Singleton's allegations, the "knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. In order to establish prosecutorial misconduct or denial of due process, the defendant[] must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. The burden is on the defendant[] to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). "[F]alse testimony qualifies as material if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Rosencrantz v. Lafler*, 568 F.3d 577, 587 (6th Cir. 2009) (internal quotation marks removed). "In other words, [the Court] will only excuse . . . perjury as immaterial if [it] can say that no reasonable jury could have been affected by the undisclosed information." *Id.* (internal quotation marks removed).

2.1. Subpart 1: First, Singleton complains, in total, that "Agent Thompson testified that 'all the prescriptions were filled.' However, there was never any pills [sic] entered into evidence in support of counts 2 & 3 of the indictment." DE #425, at 14. Exhibit 2-1, a page of grand jury testimony, shows Thompson's comment.

There is no due process violation here. Even assuming, for sake of argument, that this single sentence was actually false, it was not actually presented to the trial jury. Further, and regardless, even evaluating the argument as to the grand jury process, Singleton certainly proves nothing regarding the singular comment's materiality. Count 2 is a § 846 conspiracy charge; the United States was not required to introduce actual pills to prove a violation. Count 3 was a distinct trafficking count. Trial testimony and distinct exhibits supported the Count 3 conviction. *See* DE #305, at 196-97 (Dials testifying to the Count 3 conduct and validating Exhibit 68-A as the Valium prescription received as an undercover patient on August 23, 2011). The UC scripts were not actually filled. *See* DE #304, at 154 (Alcala so testifying). Such a sentence of testimony by Thompson, even if presented to the trial jury, could not have reasonably affected the outcome, and certainly would not have (processing the argument on Movant's terms) "influenced substantially the grand jury's decision to indict[.]" *Bank of Nova Scotia*, 108 S. Ct. at 2376.

2.2. Subpart 2: Singleton's next argument concerns Thompson's grand jury testimony about Ultram. DE #425, at 14-15. The United States concedes "that TFO Thompson testified that Ultram was a controlled substance under federal law and that this testimony is incorrect." DE #438, at 13. However, the prosecution tells the Court that, at the time, it "was unaware of this distinction and, upon becoming aware," conceded that Count 10 should be dismissed. *Id.* The federal scheduling of Ultram occurred after Singleton's conviction.

Singleton's claim fails on various grounds. First, Movant does not prove that the prosecution knew the Ultram testimony was false; indeed, the prosecution has directly told the Court that it did *not* know the testimony was false. The Government did, though,

cop to the mistake as soon as it was discovered. Further, there is certainly no materiality or prejudice here (considering either the trial[14] or grand jury) because the District Court ultimately acquitted Singleton of Count 10 (the lone Ultram-exclusive count), *see* DE #284, at 26, and there is no other error requiring reversal. (The Court discusses this issue at many points in this Recommendation). *See infra* Sections 5.5, 5.12, and 7.2.

2.3. Subpart 3: Next, Singleton targets Thompson's testimony "that all the drugs obtained in the investigation were placed into evidence by the KSP." DE #425, at 15. He says this "testimony was contradicted by witness testimony at trial." *Id.* As a starting point, the page Singleton cites arguably does not say what he represents it says. All Thompson testified was that the medications obtained on one date from one patient "were booked in by the Kentucky State Police and held in their evidence." *See* Exhibit 2-2. Even assuming, though, that Singleton's representation was accurate and the testimonial excerpt was actually false (which the United States contests), Movant fails on the materiality prong. Thus, there is no reasonable likelihood that this line of grand jury testimony influenced the charging decision or, even if presented to the trial jury, could have affected the verdict. Whether or not every single pill was placed into evidence has no reasonable bearing on Singleton's pill-mill culpability. Quite simply, mere testimonial inconsistencies, all Singleton here asserts, "do not establish knowing use of false testimony." *Coe*, 161 F.3d at 343. Det. Alcala accounted for all controlled prescriptions filled, and Singleton's counterpoint is ineffectual.

2.4. Subpart 4: Singleton's penultimate complaint about Thompson is that she testified that Singleton did not take steps to be able to accept insurance. DE #425,

[14] Alcala had likewise made this mistake. DE #304, at 126. The trial had precious-few references to that narcotic.

at 15-16. Thompson only testified that, at the time, this was her "understanding," and Singleton certainly does not prove that this was actually false, or that the Government knew it to be false. Further, and regardless, the comment is not material because there is no indication it affected the charging decision and no reasonable likelihood that it could have affected the verdict, if it had even been presented to the trial jury. The cash-only nature of the clinics was well-documented at trial, and Singleton allegedly "taking steps" to be able to accept insurance would not have reasonably impacted the jury's evaluation of the testimony that he, in fact, only accepted cash. This comment did not violate due process. Further, there was a blend of testimony on the issue, but without question, the clinics never took insurance during the period of operation.

2.5. Subpart 5: Finally, and somewhat relatedly, as to Thompson, Singleton complains that she testified that his clinics "only accepted cash as payment." DE #425, at 16. Movant does not here argue that this was false; rather, he says that Thompson was "attempting to make something illegal that wasn't." *Id.* Singleton, thus, obviously states no due process violation here. He does not prove that Thompson's cash-only comment was false, or that the prosecution knew it to be false. Further, the comment was not to intimate that accepting cash was illegal, but rather that it was one of many "red flags" to suggest that Singleton was operating pill mills.

2.6. Subpart 6: Next, Singleton identifies eight areas where Alcala allegedly falsely testified. First, Movant isolates the Detective's comment regarding law enforcement having to abide by the law. DE #425, at 16-17. As an initial matter, the comment, *see* DE #304, at 81-82, merely concerned KSP payment record-keeping, which Singleton fails to address in any way. However, even if the Court construed the comment

more generally, Singleton offers nothing to prove that it is false (or that the Government knew it to be). As the Court detailed in Section 1.9, Singleton did not prove that police or informants using fake medical records is illegal. Informants illegally using controlled substances or otherwise breaking the law is *not* equivalent to law enforcement breaking the law, and police are not required to arrest or pursue charges in every instance of lawbreaking. A CI breaching a private contract also is not criminal conduct. There is no merit to any of Singleton's arguments on this front and, thus, no due process violation.

2.7. Subpart 7: Second, Singleton bemoans Alcala's alleged failure to preserve, or create, a valid chain of custody. DE #425, at 17. Singleton claims to have identified "over 70 instances where the KSP's chain-of-custody for items is incomplete, improper, missing, or altered." *Id.* His only specific complaint concerns Aydelott's alleged retention of certain pills. *Id.*

This states no due process violation. *See also infra* discussion at Ground 6. Aydelott and her prescriptions is a topic of complaint Singleton keeps on replay. He claims she testified that the KSP allowed her to keep and use Valium and / or Percocet. The testimony is directly to the contrary. Aydelott obviously testified that she secured some substances illegally—not from KSP—during the period and used them. DE #305, at 87-88 (Aydelott testifying, "I tried to keep that in my system" [not, "keep" the drugs secured by prescription] to give confirmatory drug screens). She explicitly testified that KSP did not provide the substances: "No. . . . [M]y dad gets a script[.] . . . I can get them off her [another relative] or my dad." *Id.* at 88; *see also id.* at 88-89 ("Were you permitted by Detective Alcala to keep any of what was filled in those prescriptions? **Absolutely not**." (emphasis added)); *id.* at 102. Singleton's contrary claim, as to testimonial falsity,

obviously misconstrues the record and flatly fails. Finally, the Court is simply unable to meaningfully assess Singleton's broader, factless claim of 70 alleged chain of custody violations, due to Movant's complete paucity of detail.

2.8. Subpart 8: Third, Singleton makes arguments concerning perceived inconsistencies between Alcala's and Aydelott's testimony. DE #425, at 17-18. Two witnesses testifying inconsistently does not mean that one has committed perjury or that the Government knowingly presented false testimony. *See, e.g., Stepanovich v. Bradshaw*, No. 2:14CV270-PAM-MRM, 2017 WL 5249535, at *3 (M.D. Fla. Apr. 17, 2017) ("[I]nconsistencies do not necessarily amount to perjury."); *Zimmerman v. United States*, Nos. 3:07cv295, 3:02cr156-3, 2011 WL 744509, at *14 (W.D.N.C. Feb. 23, 2011) ("The fact that various witnesses testified inconsistently with each other, however, is insufficient to show that the prosecutor suborned perjury."); *United States v. Wilson*, 988 F.2d 126, No. 92-10346, 1993 WL 55193, at *6-7 (9th Cir. Mar. 3, 1993) (table); *United States v. Guyon*, 717 F.2d 1536, 1542-43 (6th Cir. 1983) (indicating the jury can choose between competing stories and that the Court cannot "choose between disputed issues of fact" post-verdict); *United States v. Diaz-Arias*, 717 F.3d 1, 16 (1st Cir. 2013) ("[I]t is the prerogative of the jury to choose between varying interpretations of the evidence." (internal quotation marks omitted)); *see also Martin v. Johnson*, No. 5:15-CV-234, 2016 WL 6699138, at *4 (E.D. Ky. Nov. 14, 2016) ("[A] jury's choice between competing stories is the essence of the sacred fact-finding role entrusted to that body.").

As Singleton himself describes, the parties fully presented the jury with both Alcala's and Aydelott's testimony. The jury weighed it, among the other trial proof, and convicted Movant. Whether Aydelott had used drugs prior to her first visit (as opposed to

her second) or spent 10 minutes or an hour with a doctor on her first visit (Exhibit 2-4 only indicates Aydelott's self-report "that she was w/ doc for 1 hr.") simply are not critical factors to the verdict. Alcala and Aydelott agreed that she was using improperly, and Aydelott explained how that occurred. The witnesses consistently detailed the specific clinic experience. Singleton fly-specking Alcala's notes to suggest impropriety is unpersuasive and certainly does not implicate due process concerns. This is especially so given the extensive amount of non-Aydelott-dependent inculpatory evidence, as detailed elsewhere in this Recommendation, by Judge Caldwell, and by the Court of Appeals.[15] *See, e.g.*, *Singleton*, 626 F. App'x at 596 (upholding Count 9 conviction without mentioning these factors).

2.9. Subpart 9: Fourth, Singleton alleges that Alcala knew that the informants "were using drugs to pass UAs [presumably, urine analyses]." DE #425, at 18. Essentially, Singleton says Alcala knew that because (1) he took all prescribed medications from the CIs, and (2) because the CIs continued to pass UAs so as to continue as clinic patients, then (3) the CIs must have been taking controlled substances obtained from other sources. *Id.* Singleton does not actually identify any false testimony here, and the Court accordingly rejects any alleged due process violation out of hand. Alcala and the CIs divulged drug use status to the jury; there was no falsity. DE #304, at

[15] The Court sees no reference in Alcala's testimony to "Percocet 30s," as Singleton argues at length in reply. DE #440, at 8-12. Movant also never directs the Court to a particular page of testimony on that front. *But cf., e.g.*, DE #304, at 153 (Alcala referencing "Percocet, 10 milligram"). [There is a lone reference to "Perc 30" in Exhibit 2-4.] Regardless, there is no reasonable likelihood, on this record, considering all the trial proof, that any extraneous evidence regarding "Percocet 30s" could have affected the jury's judgment, given the generic testimonial equivalency between Percocet and Oxycodone (especially in the context of law enforcement quickly jotting down investigational notes).

95. Again, Alcala had no obligation to pursue charges against any individual he suspected of acting illegally, and this was fodder for the defense.

2.10. Subpart 10: Fifth, and somewhat relatedly, Singleton contends that Alcala knew the CIs used illegal drugs while working as informants. DE #425, at 18-19. As above, Movant, who has the burden, identifies no specific instance of false testimony. Regardless, as the Court has explained, Alcala had no obligation, vis-à-vis due process, to pursue charges against any informant or compel any person to obey a third-party contract.

2.11. Subpart 11: Sixth, Singleton impugns Alcala for providing the CIs with fake medical records. DE #425, at 19. Indeed, this was well-established at trial. As the Court has detailed elsewhere, however, Singleton proves nothing "illegal" about the practice, and no due process violation emanates from it.

2.12. Subpart 12: Seventh, Singleton simply asserts that Alcala's "credibility is suspect." DE #425, at 19. Witness credibility is purely a jury assessment, *United States v. Latouf*, 132 F.3d 320, 330-31 (6th Cir. 1997), and the Court sees utterly no basis from this one-paragraph argument on which to find a due process violation.

2.13. Subpart 13: Eighth, and last, as to Alcala, Singleton charges that he conspired with other KSP officers to commit perjury and other crime. DE #425, at 19-20. For all the reasons stated elsewhere, this claim has no merit and states no due process violation.

2.14. Subpart 14: Next, Singleton makes a variety of claims regarding Thomas Moon. DE #425, at 20-22. First, Singleton targets Moon's testimony that he was a patient at a subject clinic in 2011. *See* DE #306, at 66-67. The testimony, in fact, was distinctly indeterminate; Moon confirmed that he was "not real sure" when he started,

maybe either "two years ago" or "last year." He ultimately said that he "th[ought]" 2011 was the year. Therefore, due to the vague nature of the testimony, Singleton makes no showing that this constituted the knowing presentation of false evidence. Regardless, whether Moon began in 2011 or 2012 is immaterial to Singleton's convictions; Moon detailed his relevant involvement at the clinics, and the precise beginning date, in this scenario, made no reasonable difference.

Next, Singleton makes certain suggestions regarding Moon's past drug use. Moon testified that, before seeing Dr. White, he was taking locally prescribed Lortab 10s. DE #306, at 68. Even if, as Exhibit 2-6 suggests, Moon was also using marijuana or, possibly, another opiate, that would not amount to a due process violation because it does not actually contradict Moon's trial testimony and, regardless, it is immaterial, considering the full trial record, to Singleton's own culpability. *See also* DE #200, at 42 (Instruction 33, reminding the jury that Moon (and others) "used controlled substances" and instructing that the jury "should consider [his] testimony with more caution that the testimony of other witnesses").

Crediting the records Singleton tenders, Exhibits 2-6 to 2-11, as accurate, it does seem that Moon mischaracterized (or understated) his drug past. Moon, per the records, reported to the clinic he had self-medicated with Oxy, although he also disclosed the prescription Lortab. He also reported some Florida treatment from early 2011. Moon's testimony that he had never taken Oxycodone before was not accurate, although he did also testify to having a prior Percocet prescription from the ER. *See* DE #306, at 79. With all parties having access to the records, this hardly is a situation of knowing false evidence presentation. Moon, a fallible witness, may have believed the questions related

to prescribed Oxycodone, and the precise accident / treatment chronology is not in the record. In any event, the defense could have parsed the details. Perhaps defense counsel thought it more helpful for Moon to appear as a legitimately injured patient warranting the meds given. In any event, the problems in Moon's testimony in no way threaten the validity of the trial result. A more accurate rendition may have undercut part of Moon's story, but that accuracy also would have hurt Singleton insofar as it would have depicted Moon as a long-term pill seeker.

Next, Singleton alleges that Moon fabricated the reason the left the clinic. DE #425, at 21; *see also* DE #306, at 72-73. The jury knew Moon was taking Lortab before stepping foot inside Singleton's clinic, and his ultimate reason for leaving is immaterial to Movant's guilt. Regardless, Singleton's simple disagreement with Moon's stated reason is no basis to conclude that Moon testified falsely, or the prosecution knew it to be false. *Guyon*, 717 F.2d at 1542-43; *Diaz-Arias*, 717 F.3d at 16; *Zimmerman*, 2011 WL 744509, at *14.

Next, Singleton claims that Moon falsely testified "that the clinic staff drew blood from him." DE #425, at 21; *see also* DE #306, at 83. Again, Singleton's disagreement with Moon's professed first-hand knowledge is no basis to conclude that statement constituted the knowing presentation of false testimony. Regardless, whether the clinic did or did not perform blood draws is not material to the crimes alleged or Singleton's culpability. Per Exhibit 2-12, the clinic did order blood tests, and the procedural issue of testing mechanics is not here material.

Next, Singleton disagrees with Moon's testimony regarding being advised of the risk of addiction. Singleton grossly mischaracterizes the trial proof. The prosecutor asked,

"I believe you testified that you did not raise the issue of a potential addiction with the doctors at the clinics; is that correct?" Moon responded, "Yes, sir." DE #306, at 84. That is not, as Singleton described it, Moon saying "that he was never advised of the risk of addiction to pain management medications." DE #425, at 21. Regardless, the discrete issue is immaterial to Singleton's culpability on the charges or the trial outcome.

Finally, as to Moon, Singleton generally complains that Moon lied on the stand, although he testified that "he knew the difference between telling the truth and lying." DE #425, at 21-22. Of course, Moon averred that he understood "the difference between telling the truth and not telling the truth," and Singleton presents no reason to call that understanding into doubt (even if Moon did lie). Moon can understand such a difference and still choose to lie. Regardless, Moon's ability (or not) to perceive truth-lie distinctions is not material to Singleton's guilt or innocence of the charged crimes.

2.15. Subpart 15: Singleton's next volley concerns Adrianne Likins, whom Singleton nebulously charges with inconsistently testifying concerning her criminal history. DE #425, at 22. Likins testified at trial that she had been convicted of "trafficking" and "for pills." DE #305, at 175-76. She also testified that she disclosed to the Georgetown clinic prior cocaine trafficking charges. *Id.* at 179. Singleton's beef, premised on his Exhibits 2-13 to 2-20, is that Likins misrepresented the prior charges. He claims Likins disclosed only a container charge, not a cocaine trafficking charge. The record is indeterminate. It certainly is possible that Likins has more in her past than the particular record Singleton proffers. In any event, Likins remained a patient despite the clinic's awareness of pending criminal matters related to a controlled substance.

Singleton has not shown falsity and has not shown materiality as to the granular issue he presses.

2.16. Subpart 16: Finally, Singleton charges that "Mr. Morgan provided false testimony regarding a business loan I made him, and with us being partners in the MRI business." DE #425, at 22; *see also* DE #440, at 35. Specifically, Singleton says that Morgan falsely testified that he never received a letter from Movant regarding default on the loan. *Id.* Singleton's disagreement with Morgan's testimony on this point does not render it false and does not prove that the prosecution knowingly presented false testimony. Further, the unrelated issue of whether Morgan did or did not receive a certain loan-related letter (assuming Movant's description is true) is immaterial to Singleton's culpability for the crimes. Without a doubt, Morgan testified to the relationship split; the particulars of intra-party documentation are not material, and Morgan did not testify falsely. He denied letter receipt but acknowledged Singleton presenting (or "whipping out") a demand document. DE #305, at 169. Singleton's claim here fails.

2.17. Conclusion

For the reasons stated, none of Singleton's due process arguments has merit. The District Court should deny § 2255 relief concerning each asserted ground.

3. Ground 3: Alleged *Giglio* Violations

Ground 3 alleges that "the prosecution allowed the introduction of known false evidence to the jury during trial in violation of Giglio." DE #425, at 22. *Giglio v. United States* concerned "a situation where the prosecution withheld from the jury the fact that it had promised a key witness that he would not be prosecuted for his part in a crime if he testified against his companion." *Crozier v. United States*, Nos. 3:03-cv-116, 3:97-cr-154,

2007 WL 1541880, at *8 (E.D. Tenn. May 23, 2007); *see also* 92 S. Ct. 763 (1972). The gist of *Giglio* is that "it is fundamentally unfair for the government to achieve a conviction through the concealment of evidence which undermines the strength of the government's case against the defendant." *United States v. Presser*, 844 F.2d 1275, 1282-83 (6th Cir. 1988). "*Giglio*'s rule [is] that a prosecutor may not deliberately deceive a court and jurors by presenting known false evidence." *Rosencrantz*, 568 F.3d at 583 (internal quotation marks and alteration removed). For a "knowing-presentation-of-false-testimony" *Giglio* claim, the Court asks "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 583-84.

3.1. Subpart 1: Here, Singleton first argues that the prosecution "secured" Chad Monroe's testimony "about the daily operations of my farm and cattle operations" by providing him "18 acres of wheat I owned[.]" DE #425, at 23. Movant calls this payment to a witness and says "this was disclosed well after the conclusion of my trial, a violation of Giglio." *Id.*

The Court rejects the factual premise of the argument as supported by no record evidence. Exhibit 3-1, Singleton's sole basis for the allegation, has utterly nothing to do with the United States or any member of the prosecution team. Instead, it is a lease between Troy and Karen Winders and Mr. Monroe in which Monroe agrees to rent 97 acres of farmland from the Winders for $18,000 per month. This document is not proof that the prosecution "provid[ed]" Monroe with 18 acres of wheat as remuneration for his testimony. The Court sees no factual basis for this claim.[16]

[16] The Government's response substantiates only a post-trial, forfeiture-related transaction. DE #438, at 16. *See also infra* Section 3.2.

3.2. Subpart 2: Second, and relatedly, Singleton argues that Monroe "was provided assets that were never part of any forfeiture proceedings," a fact he says the prosecution did not disclose, in violation of *Giglio*. DE #425, at 23. Movant articulates no further factual basis for this claim.

On August 1, 2013, after Singleton's trial, Monroe indeed filed a *pro se* "Acknowledgment of Receipt of Notice of Forfeiture and Third Party Claimant Procedure" in the record. *See* DE #245-3. Monroe settled his claims on October 29, 2013, well after the jury convicted Singleton. *See* DE #255-7; *see also* DE #291 (Partial Final Decree and Order of Forfeiture, dated May 7, 2014). To the extent Monroe did receive Singleton-related assets, that occurred post-testimony and post-trial. Singleton's factless assertion to the contrary is no basis for a *Giglio* violation. *See Thomas v. United States*, 849 F.3d 669, 680 (6th Cir. 2017) (rejecting a similar claim due to the "timing of the payment," which occurred "after the federal trial").

3.3. Conclusion

For these reasons, Singleton proves no *Giglio* violation. The District Court should, thus, reject Singleton's Ground 3 claims.

4. Ground 4: Pretrial-Conference-Related Arguments

Singleton's Ground 4 asserts that his "due process and Confrontation Clause rights were violated by the Court holding the final pretrial conference without [him] present." DE #425, at 23. "[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 107 S. Ct. 2658, 2667 (1987). "The right to be present at the critical stages of criminal proceedings is," as Singleton

intimates, "rooted in the Due Process Clause of the Fifth and Fourteenth Amendments and the Confrontation Clause of the Sixth Amendment." *Ralston v. Prelesnik*, No. 1:13-cv-4, 2016 WL 4646222, at *12 (W.D. Mich. Sept. 7, 2016).[17] However, "a defendant's right to be present at every stage of the trial is not absolute, but exists only when his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *United States v. Henderson*, 626 F.3d 326, 343 (6th Cir. 2010) (internal quotation marks removed). An absent defendant must show that he "could have done" something "had he been at the hearing" or "would . . . have gained" something "by attending" to succeed on such a claim. *Stincer*, 107 S. Ct. at 2668.

"A violation of the right to be present is subject to harmless error analysis. *Rushen v. Spain*, 464 U.S. 114, 119 n.2, 104 S. Ct. 453, 78 L.Ed.2d 267 (1983)." *Neal v. Wolfenbarger*, 57 F. Supp. 3d 804, 821 (E.D. Mich. 2014); *see also Spikes v. Mackie*, 541 F. App'x 637, 649 (6th Cir. 2013) ("When a court conducts criminal proceedings outside the presence of a defendant, the lower court's actions are subject to harmless error review."). "On habeas review, the test for harmless error is whether [any error] had a substantial and injurious effect or influence on the result of the proceeding." *Id.* at 649-50 (internal quotation marks removed).

Here, the District Court did, indeed, conduct a portion of the final pretrial conference outside Singleton's presence. *See* DE #298 (Transcript), at 3 (noting his

[17] The Court dispenses with the discrete Confrontation Clause claim from the outset. "[C]ourts routinely have concluded that the Confrontation Clause is not ordinarily implicated by a defendant's absence from a pretrial conference." *Ralston*, 2016 WL 4646222, at *12 (collecting cases). Singleton does not argue that his absence "could have affected his ability to effectively cross-examine witnesses" at trial; he thus "fails to demonstrate a violation of the Confrontation Clause." *Id.*

absence), 42 (noting, by the end of the proceeding, his presence). Singleton now cursorily raises 11 discrete complaints based on that absence. The Court evaluates each in turn.

4.1. Subpart 1: First, Singleton generally says he "would have objected to counsel withdrawing from representing my companies." DE #425, at 24.[18] Singleton does not identify the particular legal basis for any such objection, and, regardless, this claim does not state a basis for § 2255 relief.[19] Movant's companies were separate entities and separate defendants; this motion concerns only Movant's personal case. Even if the Court agreed with Singleton on this argument, that would not be a basis for Singleton himself to "claim[] the right to be released[.]" § 2255(a). Thus, even if he had objected, that would not have impacted his own case, leading to no habeas relief.

4.2. Subpart 2: Second, Singleton claims he "would have objected to the court ruling that DE #131 was denied as 'moot[.]'" DE #425, at 24.[20] DE #131 was the Government's motion *in limine* requesting limitations on certain surveillance audio / video played to the jury. This general topic received much attention at the final pretrial conference, but, concerning DE #131, the parties simply advised that they had reached an agreement on the specific issues. *See* DE #298, at 6. Singleton (with the burden) states no particular reason his objection would have been successful, especially given Judge

[18] Singleton's trial counsel were Hon. Benjamin G. Dusing and Hon. Edward L. Metzger, III. Both integrally participated in trial, although Mr. Dusing occupied the lead role.

[19] Each withdrawal motion affirmed that counsel discussed "[w]ithdrawal from representation of the corporate Defendants . . . with Defendant Singleton," who "underst[ood] and . . . accepted counsels' withdrawal." DE #158 & 159, at 2.

[20] A general problem underlying most of Singleton's pretrial-conference arguments is that he never expressed a desire to proceed in the case *pro se* during the pretrial or trial proceedings. Thus, even if he had sought to raise the bulk of the issues he now claims he would have raised, Judge Caldwell would not have permitted such behavior, without him asserting a desire to proceed *pro se* (which, again, he never did). *See also* DE #371 (Singleton's motion for § 2255-related appointment of counsel). A represented criminal defendant cannot raise *pro se* arguments. *United States v. Williams*, 641 F.3d 758, 770 (6th Cir. 2011).

Caldwell's treatment of the general topic, and thus earns no relief. *See id.* at 16-17 (excluding similar proof as "not relevant to the matter at hand" and as "more prejudicial than probative"). His agent indicated agreement, and the motion was, in fact, moot.

4.3. Subpart 3: Third, Singleton "would have objected to DE #132[.]" DE #425, at 24. DE #132 was Defendant's *own* motion *in limine* concerning three specific documents. At the pretrial conference, the United States agreed to "withdraw that portion of the exhibit that I believe refers to the pill mill that is objectionable." DE #298, at 6-7. That agreement, thus, mooted the motion. *Id.* at 7. Singleton's objection in DE #425 would not have altered that outcome, and the Court fails to see how admitting documents referencing "pill mills" would have bolstered Singleton's case at trial.

4.4. Subpart 4: Fourth, Movant "would have urged counsel to work harder to get the hearsay evidence / testimony suppressed / excluded." DE #425, at 24. This states no basis for § 2255 relief. Singleton does not establish, via his unadorned statement, that tougher client urging would have resulted in a different outcome for any particular piece of alleged hearsay. He offers no substantive analysis.

4.5. Subpart 5: Fifth, Singleton argues he "would have objected to DE #135" because he "didn't agree to the exclusion of trial exhibit 19." DE #425, at 24. At the pretrial conference, the parties simply advised that they had "worked that out." DE #298, at 10. Singleton, who has the burden, states no particular objection or any reason why his objection would have resulted in a different outcome and, thus, earns no § 2255 relief on this ground.

4.6. Subpart 6: Sixth, Movant claims he "would have objected to the exclusion of trial exhibit 28." DE #425, at 24. Proposed exhibit 28 was also at issue in

DE #135. At the PTC, the parties also advised that they "worked that out." DE #298, at 10. As above, Singleton again fails in his duty and provides no detail as to why any unstated objection would have changed the outcome, and so earns no habeas relief.

4.7. Subpart 7: Seventh, Singleton says he "would have objected to DE #160[.]" DE #425, at 24. Movant's counsel objected vehemently to DE #160, a Governmental motion *in limine*, at the final pretrial conference. Judge Caldwell, upon full review, granted the motion, finding the matters at issue "not relevant," and moreover "more prejudicial than probative." DE #298, at 16-17. After Mr. Dusing made *even further* post-ruling objections, the Chief Judge remained unconvinced and still did not "see how it's relevant to any charge in this case." *Id.* at 20. Further *pro se* objections from Singleton would not have changed this outcome, given Judge Caldwell's careful and clear pretrial treatment. *See also Singleton*, 19 F. Supp. 3d at 730-31; *Singleton*, 626 F. App'x at 600 (affirming relevance ruling: "The comments made by the agents . . . did not implicate Defendant or speak to his guilt or innocence."). Singleton's personal presence would not have displaced ruling status.

4.8. Subpart 8: Eighth, Movant argues he "would have agrued [sic] that DE #160 was in violation of Fed. R. of Evid. [sic] 430 [sic], as it allowed evidence to be presented to the jury in a form other than its original form." DE #425, at 24. Foundationally, there is no Federal Rule of Evidence 430, so the Court sees no basis for habeas relief on this argument. Even if the Court liberally construed the argument as one raising Rule 1002 contentions, the Court sees no basis for § 2255 relief. Not showing a complete recording does not mean the portion shown was not "original." Judge Caldwell permitted such a presentation of proof, and the Court sees no reason to call that trial

management decision into doubt via Singleton's cursory argument on habeas review. Rule 1003 generally treats a genuine duplicate as admissible as an original.

4.9. Subpart 9: Ninth, Singleton "would have raised the issue of the speed of trial, as my case was 'complex' and this pace didn't allow sufficient time for counsel to adequately prepare for trial." DE #425, at 24-25. The Court sees utterly no merit to this argument. Mr. Dusing affirmed that he would "be ready to go [to trial] earlier" than May 1, 2013, *see* DE #349, at 7 (also asserting Singleton's unwillingness to "waive his rights under the Speedy Trial Act"); trial ultimately began on June 3, 2013, roughly five months after the grand jury originally indicted. If counsel had needed additional time to prepare, he could have raised such a desire via motion or orally at any of the various pretrial conferences. Counsel did not do so, and in fact confirmed readiness to begin trial *before* May 1, 2013. Singleton's bare assertion to the contrary states no basis for § 2255 relief.

4.10. Subpart 10: Tenth, Singleton says he "would have raised issues with the indictment charging conduct that wasn't illegal under federal law." DE #425, at 25. Movant states no specific factual or legal basis for this argument. The defensive motions deadline had expired, and Singleton gives no details as to any unasserted motion. The Court cannot meaningfully evaluate such a generic claim, completely devoid of particulars. Movant earns no § 2255 relief here.

4.11. Subpart 11: Finally, Movant "would have raised the issue that the KSP used illegal methods to manufacture the evidence against me[.]" DE #425, at 25. As above, Singleton does not articulate the change in outcome such a statement would have created, and the Court sees none. Singleton's conduct, not the KSP's, was on trial, and, as

stated above, the Court foundationally sees nothing illegal about the KSP's methods. Movant had a full and fair trial. Further, and regardless, as further described in Ground 9, proof exclusion surely would not have resulted from Singleton raising this issue.

4.12. Conclusion[21]

For these reasons, Singleton's absence during a portion of the final pretrial conference did not violate his constitutional rights.[22] The District Court should deny § 2255 relief based on these arguments.

5. Ground 5: Ineffective Assistance of Counsel Arguments

Singleton next makes numerous ineffective assistance of counsel arguments.[23] When asserting an ineffective assistance claim, a movant must prove both deficient performance and prejudice. *Strickland v. Washington*, 104 S. Ct. 2052, 2064 (1984); *Campbell v. Bradshaw*, 674 F.3d 578, 586 (6th Cir. 2012); *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006) (noting that a movant must prove ineffective assistance by a preponderance of the evidence). In order to prove deficient performance, a movant must

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[21] The Court must note that Singleton plainly planned not to attend. His counsel evidently advised him that attendance was voluntary, and Singleton only headed to court after Mr. Dusing alerted him that Judge Caldwell expected party presence. DE #298, at 3-4. The point here is that, absent Dusing's notice on the day of the pretrial, Singleton would, of his own volition, have elected absence. This empties any force from Singleton's technical arguments. If Singleton truly had his list of pressing matters to raise, he surely would have planned to be present to raise them.

[22] Singleton's concluding Rule 17.1-based argument likewise earns no § 2255 relief. The Minute Entry Order (DE #171) and transcript (DE #298) reflect the District Court's rulings and other "matters agreed to during the conference." *See* Fed. R. Crim. P. 17.1. Regardless, if Singleton "had felt the failure to prepare a memorandum prejudiced his right to a fair trial, he could then have petitioned the court for relief." *United States v. Stapleton*, 600 F.2d 780, 782 (9th Cir. 1979). He did not do so, and the Court sees no reason here to so conclude on collateral review.

[23] The Court bears in mind Singleton's own emphasis that his claims are "more directed to outrageous [G]overnment misconduct than ineffectiveness of [c]ounsel[.]" DE #440, at 1 (internal quotation marks removed). Indeed, Judge Caldwell noted counsel's "outstanding job" at trial. DE #309, at 11.

show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 104 S. Ct. at 2064. A movant meets this burden by showing "that counsel's representation fell below an objective standard of reasonableness" as measured under "prevailing professional norms" and evaluated "considering all the circumstances." *Id.* at 2064-65. Judicial scrutiny of counsel's performance, however, is "highly deferential," featuring a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 2065.

Deficient performance is considered constitutionally prejudicial only when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 2064. In order to prove prejudice, a movant "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 2068. When evaluating prejudice, courts generally must take into consideration the "totality of the evidence before the judge or jury." *Id.* at 2069.[24] Again, the Court has reviewed the record in its entirety. The defense team of Dusing and Metzger was aggressive, engaged, prepared, thoughtful, and diligent at each and every step of the case, including throughout the eleven-day trial.

5.1. Subpart 1: First, Singleton argues that counsel "based trial strategies on financial issues." DE #425, at 27-28. Essentially, Movant claims that the transition from private retention to a CJA appointment "represented a seismic shift" in representational choices "based not on sound legal principles, but simply on how counsel was being paid, and how much." *Id.*

[24] Singleton repeatedly cites to "ABA standards" throughout his ineffective assistance arguments. Those are "'only guides' to what reasonableness means, not its definition." *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (quoting *Strickland*, 104 S. Ct. at 2065).

The Court sees no ineffectiveness here, on either *Strickland* prong. The Court, at the outset, rejects the premise of the argument; CJA counsel, of course, must and do provide constitutionally adequate representation. *See also infra* discussion at Ground 15 & n.53. The simple fact that Movant's counsel shifted from being retained to appointed does not portend ineffectiveness. Essentially no defendant—even one with the financial ability to retain a powerful team of lawyers—is immune from pecuniary pressure. Every lawyer-client relationship encounters variants of funding tension, and litigants (and lawyers) must often make hard choices concerning when to press, or drop, contestation of a particular issue. That happening here does not mean counsel was ineffective. Every well has a bottom.

Notably, the Court is aware that Singleton benefitted from case budgeting, a process for mega cases that involves Sixth Circuit prior approval of a CJA litigation plan. Quite unusually, and based on the budgeting materials, the Court gave Singleton two lawyers. Further, the Circuit approved a budget for well in excess of $100,000 (featuring two lawyers, an investigator, and two experts). As with any defendant, the fact that limits exist on resources for defense is not, of itself, an area of constitutional significance. The Court approved the sought budget, which intentionally served to assure Singleton a constitutionally adequate defense, from the perspective of access to necessary funds.

Even processing the claim under *Strickland*, on the performance prong, Singleton points to no specific instance in which counsel's CJA appointment negatively affected a particular litigation choice. [He purports to attach Exhibits 5-1 through 5-6 detailing such instances, but the Court does not see those in the record.][25] At most, he says that counsel

[25] In fact, Singleton labels purported Exhibits 5-1 through 5-20 as "not available, seized by Government." He provides no detail for when this alleged seizure occurred, or how

did not review "new discovery" and "refus[ed] to have a transcript of a viode [sic] made to introduce at trial because of budget issues." DE #425, at 28. As to prejudice, Movant gives utterly no details of what this "new discovery" contained or what the alleged video showed (or why production of a transcript of that video was constitutionally necessary). Thus, Singleton does not tie any such performance lapse with the outcome of trial. That is, he does not show a reasonable probability that the jury would have acquitted based on any of the details of this argument.

5.2. Subpart 2: Second, Singleton charges that "counsel failed to investigate potential *Brady* material." DE #425, at 29-30. The basic argument is that counsel "failed to investigate information in its [sic] possession that would have led to the discovery of Brady evidence not turned over by the prosecution." *Id.* at 29.

The Court sees no ineffectiveness on this ground. Certainly, a failure to investigate can, in appropriate circumstances, constitute ineffective assistance. *See, e.g.*, *Towns v. Smith*, 395 F.3d 251, 258-59 (6th Cir. 2005). Here, though, Singleton establishes no specific instance of deficient performance. As above, he purports to attach Exhibits 5-7 through 5-12, but the Court does not see those in the record. Further, the Court rejected the direct *Brady* claims previously. However, even if Singleton could establish deficient performance, he proves no prejudice. The Court found no direct *Brady* violation, and the Court sees nothing in Singleton's mostly specific-free, two-paragraph argument on this topic that would amount to a reasonable probability that the jury would

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the "Government" "seized" attachments to his own § 2255 motion. Singleton, as the party here seeking relief, has the burden of proving his case and providing pertinent materials, or, alternatively, appropriately requesting antecedent relief. Nevertheless, the Court, for purposes of this motion, has assumed Movant's descriptions of the omitted exhibits are essentially accurate.

have acquitted him, had counsel done any of the generic things he states they should have. The § 2255 Movant has the burden, and Singleton fails it.

5.3. Subpart 3: Third, Movant argues that counsel "failed to use exculpatory / impeachment evidence." DE #425, at 30-31. The Court, again, sees no ineffectiveness. Singleton purports to attach (and does summarize) Exhibits 5-13, 5-14, 5-16, 5-17, and 5-18, but the Court does not see those in the record.[26] Exhibit 5-15, which Movant does attach, shows only (unsurprisingly) that Mr. Metzger did not need, at a specific time, to be provided a copy of the defense's own exhibits—not that, as Singleton spuriously claims, those exhibits "were never produced for use at trial." Although Singleton establishes no instance of deficient performance, he also proves no prejudice. The Court does not see a reasonable probability that he would have been acquitted, even if counsel had done all the things Singleton desires in this section. Movant fails to

[26] Regardless, the issues Singleton raises have no merit. He does not prove that the alleged surveillance video would have demonstrated lengthy doctor visits; further, the jury heard that some visits lasted as long as 25 minutes, *see* DE #304, at 207-08, and convicted still. Singleton suggests no specific reason why "the actual number of patients visiting my clinics" or the alleged exhibits that "were never produced for use at trial" impacted the trial result. Same with counsel allegedly "not reviewing, or investigating, any of the prosecution's accounting or exhibits." The defense expert credited the prosecution's accounting, but not its conclusions. *See* DE #308, at 13-28 (Lieb testimony). Singleton also argues concerning a missing "witness file for Barbara Goldman," a neighboring businesswoman who briefly testified to her dissatisfaction with office-related parking after Singleton's clinic opened, the appearance of some of the clinic's patients, and the like. DE #304, at 60-68. Movant does not explain what in the "witness file" would have enabled impeachment, and, regardless, calling parts of Goldman's testimony into doubt certainly would not have reasonably altered the jury's verdict. Singleton also tacks on an odd complaint that Thompson's witness file "went missing for about 2 weeks," but does not claim that such a 2-week span impeded trial preparation or credibly impacted the trial outcome.

meaningfully connect any of the alleged performance lapses, each on relatively tangential trial issues, with the jury's verdict.[27]

5.4. Subpart 4: Fourth, in two sentences, Singleton argues that counsel ineffectively "provided strategy information to a prosecution witness." DE #425, at 31. He purports to attach this communication as Exhibit 5-19, but he did not actually include such an exhibit. The Court, therefore, cannot read the communication for itself. On the claim as Singleton presents it, though, the Court sees no deficient performance. Even if counsel "provided insights into my defense" to this witness, Singleton himself says that counsel did so because they "approached the witness to testify in my defense." *Id.* Counsel of course would need to provide certain case details to a potential defensive witness, and pursuing / exploring potential witnesses is obviously sound trial strategy. Even if, though, counsel did deficiently perform, the Court sees no prejudice. Singleton does not rationally connect the "strategy information" allegedly provided with the witness's trial testimony or the jury's verdict.

5.5. Subpart 5: Fifth, Singleton charges that counsel's failure "to review the elements in the indictment," specifically regarding Ultram, "allowed me to be found guilty for conduct that wasn't illegal." DE #425, at 31. Even assuming (without

[27] Only in reply, Singleton impugns counsel for "fail[ing] to bring in satisfied patients whom were properly treated and discharged from the clinic" or for not calling "an absolute plithera [sic] of potential witnesses." DE #440, at 32. The Court rejects issues first broached in reply. *Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir. 1986). Further, unfortunately, he does not specifically identify any such patient or witness, present an affidavit from anyone, present any proof on these topics, or explain the effect such testimony would have had on the verdict. Such speculative claims do not lead to habeas relief. *Malcum v. Burt*, 276 F. Supp. 2d 664, 679 (E.D. Mich. 2003) ("To present an ineffective assistance of counsel claim based on a failure to call a witness, a defendant must make an affirmative showing as to what the missing evidence would have been and prove that the witness' testimony would have produced a different result."); *Dell v. Straub*, 194 F. Supp. 2d 629, 650 (E.D. Mich. 2002) ("[V]ague and speculative allegations" concerning witnesses do not entitle Petitioner to habeas relief.).

finding) deficient performance on this ground, there is no prejudice to Singleton because the District Court ultimately acquitted him of the lone Ultram-exclusive charge, and there is no other prejudice, per the subsequent discussions in Sections 5.12 and 7.2. All case participants made the mistaken assumption that federal law controlled Ultram (as Kentucky law then did). That shared mistake, subject to post-trial correction, did not infect the full trial. Indeed, in eleven days of proof, the Court could find only two references to Ultram or Tramadol. *See* DE ##304, at 126; 305, at 46. Alcala mentioned Tramadol once, in relation to the Count 10 conduct, Ross's 3/21/12 clinic visit. DE #304, at 125-26. This was a case centrally about Oxycodone trafficking and money laundering.

5.6. Subpart 6: Sixth, Movant argues that "counsel didn't secure *Brady* evidence." DE #425, at 31-33. At the very least, the Court sees no prejudice to Singleton on any of the varied sub-arguments; the Court rejected Singleton's direct *Brady* claims above (analysis of which the Court incorporates here), eliminating the possibility of prejudice on many of the arguments. To the extent Singleton raises new *Brady*-related arguments, concerning, for example, "lab test results," he does not establish that there is a reasonably probability that, had counsel possessed such evidence, the jury would have acquitted.[28]

5.7. Subpart 7: Seventh, Singleton charges that counsel "couldn't counter false testimony due to prosecution's failure to provide *Brady / Giglio* evidence." DE #425, at 33. He also says that counsel "didn't conduct interviews of the prosecution's witnesses." *Id.* The Court dismisses any insinuation of ineffectiveness here. The Court

[28] All Movant says about these alleged "lab test results" is that they would have been "relevant to challenges to the chain-of-custody for those drugs." DE #425, at 32. As discussed, the prescribed drugs actually were not tested. *See supra* Section 1.2. The Court rejects the chain of custody arguments elsewhere in this Recommendation.

rejected all *Brady* / *Giglio* claims above, precluding a prejudice finding on IAC review. Further, Singleton does not list pertinent witnesses or establish what witness interviews would have uncovered or why conducting them reasonably would have changed the outcome of trial.

5.8. Subpart 8: Eighth, Singleton alleges that counsel was ineffective for not knowing that the prosecution presented false testimony. DE #425, at 33-34. Singleton establishes no ineffectiveness on this ground. First, he proves no deficient performance. Singleton's only (somewhat) specific arguments here regard witnesses Morgan, Likins, and Moon. On Morgan, Singleton generically alleges that a "missing part" of Morgan's "file" would have "shown conclusively that Mr. Morgan's testimony was false." DE #425, at 33-34. Movant fatally does not tell the Court what that "missing part" contained or why it would prove testimonial falsity. On Likins, Singleton says her medical records would have proven falsity; again, he does not explain *why* that is so or identify any particular portion of her testimony he claims is false. Finally, on Moon, Singleton simply says that he "was presenting false evidence." Movant here identifies nothing specific Moon presented that was false. The Court rejected many of these same (or related) claims in Ground 2, discussions the Court incorporates here. Even if Singleton could establish deficient performance, the Court perceives no prejudice in the vast inculpatory fabric of this case. Movant does not establish that minor instances of testimonial inconsistency or discrepancies with other documents would reasonably have changed the outcome of trial (or even amount to actual falsity).

5.9. Subpart 9: Ninth, Movant claims that counsel "failed to keep me informed." DE #425, at 34. Specifically, Singleton bemoans counsel not telling him "of

my need to be present at the final pretrial conference" and not seeking "a postponement till I could be there." *Id.* The Court rejects this argument based on, at a minimum, non-satisfaction of *Strickland*'s prejudice prong. The Court rejected each of Singleton's arguments concerning the final pretrial conference above, which negates the prejudice predicate of this IAC claim. Per the discussion above, even if Singleton had been at the PTC and been able to raise all the proffered *pro se* arguments, that would not have reasonably impacted the trial (or even PTC) outcome. There is, accordingly, no constitutional ineffectiveness.

5.10. Subpart 10: Tenth, Singleton faults counsel for not challenging "the faulty / missing chain-of-custody records." DE #425, at 34-35. He charges, "Counsel never challenged the chain-of-custody for most of the prosecution's evidence, even those with obvious issues, or were completely missing." *Id.* at 35 (all as in original).

"Physical evidence is admissible when the possibilities of misidentification or alteration are eliminated, not absolutely, but as a matter of reasonable probability. Merely raising the possibility of tampering is insufficient to render evidence inadmissible. Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. Absent a clear abuse of discretion, challenges to the chain of custody go to the weight of the evidence, not its admissibility." *United States v. Allen*, 106 F.3d 695, 700 (6th Cir. 1997) (internal quotation marks and citations removed). All evidence here had a valid sponsor and custodial basis. Singleton's nitpicking is ineffectual.

At bottom, this claim "falters on the prejudice prong of *Strickland*." *Cowens v. Bagley*, 639 F.3d 241, 252 (6th Cir. 2011). Quite simply, "[n]o precedent establishes that

defense counsel must challenge the chain of custody . . . or risk falling below the minimum requirements of the Sixth Amendment." *Id.* Here, Singleton "has not provided any evidence that . . . raises a question about whether the [at-issue evidence] in fact ever left the [Government]'s custody," failing his obligation to prove *Strickland* prejudice. Singleton's bare assertions are not "evidence that the chain of custody was in fact assailable," leading to no § 2255 relief. *See, e.g.*, *Grant v. McCall*, No. 2:12-2859-CMC-BHH, 2013 WL 4041958, at *8 (D.S.C. Aug. 8, 2013). Singleton "merely raises the possibility that someone tampered with the evidence; he points to no evidence showing that alteration actually occurred." *Allen*, 106 F.3d at 700. Movant thus establishes no ineffectiveness here.

5.11. Subpart 11: Eleventh, Singleton argues that counsel "allowed me to be convicted under a 'conspiracy of one' theory." DE #425, at 35. Movant essentially argues that counsel failed to perceive and assert a legal defense to the conspiracy charges based on his role "as an employee / officer of the companies [also] named in the indictment." *Id.*

The Court rejects this argument for a simple reason: the Second Superseding Indictment plainly charged, in all relevant Counts, that Singleton and his businesses conspired together "and with others" to commit various crimes. *See* DE #73; *see also* DE #307, at 180 (Judge Caldwell orally denying an acquittal motion, referencing "testimony of the two coconspirators," meaning the testifying, convicted doctors); *Singleton*, 19 F. Supp. 3d at 725; *Singleton*, 626 F. App'x at 595 (upholding conspiracy convictions based "on Defendant's influence over the schedules and prescribing practices of his physicians"). Thus, as a factual matter, the grand jury did not charge Singleton with a

"conspiracy of one." Therefore, any challenge to the operative Indictment on this ground would not have been meritorious, and there is, thus, no deficiency and no prejudice on § 2255 *Strickland* review. *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial.").

5.12. Subpart 12: Twelfth, Singleton argues that counsel "failed to object to erroneous jury instructions." DE #425, at 35. He mounts two specific challenges: to a "deliberate ignorance" instruction, and to an Ultram-related instruction(s). *See id.*

Judge Caldwell indeed gave a "deliberate ignorance" instruction. *See* DE #200, at 14; *see also* DE #308, at 47-49. "[T]he decision to give this instruction is to be approached with significant prudence and caution." *United States v. Mitchell*, 681 F.3d 867, 876-77 (6th Cir. 2012). "It is appropriate when: (1) the defendant claims a lack of guilty knowledge; and (2) the facts and evidence support an inference of deliberate ignorance. Before giving the instruction, the district court therefore must determine that there is evidence to support an inference that the defendant acted with reckless disregard of the high probability of illegality or with a conscious purpose to avoid learning the truth." *Id.* at 876 (internal quotation marks and alteration removed).

The Chief Judge quite properly gave a deliberate ignorance instruction here. Singleton certainly claimed a lack of guilty knowledge; indeed, he contested the elements of the charges throughout trial and, even at sentencing, maintained his factual innocence. Further, the evidence at trial easily supported an inference of deliberate ignorance; that is, there was evidence, via the doctors', patients', and investigators' testimony (and plenteous other proof clearly summarized by the Sixth Circuit) clearly painting Singleton's clinics as illegitimate pill mills, to support the inference that Singleton acted

with reckless disregard of a high probability of illegality (*i.e.*, others dispensing / distributing controlled substances without a legitimate medical purpose and outside the usual course of medical practice). Movant's one-line argument to the contrary does not, on this record, demonstrate instructional error. Accordingly, because the District Court properly gave the deliberate ignorance instruction, counsel was not ineffective for failing to challenge it. *See also Singleton*, 626 F. App'x at 598-99 (upholding the deliberate indifference instruction on direct appeal); *Singleton*, 19 F. Supp. 3d at 733-34 (upholding the instruction on post-trial motion). Singleton's very model was to create an environment of deniability, where he could disclaim knowledge and point to the doctors. *See* DE #305, at 154 (Morgan: "[I]t was foolproof, because, I mean, nothing could go wrong as long as it was ran correctly. Basically, he suggested -- or he told me that if anything happened we wouldn't be in any trouble, because we were completely legal. It was the people, the doctors writing prescriptions, as far as if anything happened to the business.").

Singleton's Ultram-related objection relates to the Instructions' reference to Ultram as "a federally controlled substance." DE #425, at 35. Instruction 13 indeed includes Ultram in a definitional reference to "controlled substance." *See* DE #200, at 16. The jury convicted on all submitted Counts. *See* DE #202 (Verdicts). Only Count 10 related solely to Ultram, *see* DE #73, at 6, and the United States conceded acquittal was proper on that Count. The only other Counts that mention Ultram are Counts 2 (conspiring to knowingly and intentionally distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, pills "containing Diazepam and Ultram") and 11 (knowingly and intentionally opening and maintaining

premises for the purpose of distributing and dispensing, outside the scope of professional practice and not for a legitimate medical purpose pills containing "Oxycodone . . . and Diazepam and Ultram").

In Instruction 13 (which differentiates between Counts 1 (which involved only Oxycodone) and 2), Judge Caldwell carefully told the jury, as to Count 2, that the conspiracy must simply involve "Schedule IV controlled substances"—not specifically Ultram. DE #200, at 16. Likewise, as to Count 11, the Chief Judge instructed the jury that the criminal purpose must be to manufacture, distribute, or dispense "controlled substances outside the scope of professional practice and not for a legitimate medical purpose"—again, with no specific mention of Ultram. *Id.* at 24 (Instruction 19).[29] The jury, of course, convicted on all other submitted Counts, involving Oxycodone and Diazepam. *See* DE #202.

Singleton earns no *Strickland* relief here because, at a minimum, he proves no prejudice. There is no prejudice as to Count 10 because Judge Caldwell ultimately acquitted him of that charge. As to Counts 2 and 11, Judge Caldwell's specific instructions were not improper (or were, at least, harmless); therefore, counsel was not ineffective in failing to object. *Coley*, 706 F.3d at 752. [To the extent applicable and appropriate, the Court references and incorporates the subsequent Section 7.2 discussion, which touches further on issues similar to the ones Singleton raises here.]

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[29] Of note, to the Court, is that Ultram itself received not a single mention during the proof presentation; the word "Ultram," charged in the Indictment, simply does not appear. Singleton's hollow claims to the contrary, *see, e.g.*, DE #440, at 2 (referencing "repeated reference to Ultram through the trial"), 6 ("Ultram is literally everywhere in the record."), 14 ("repeated references to Ultram"), simply are incorrect. Tramadol receives but 2 single-line mentions throughout the 11-day trial: DE #304, at 126, and DE #305, at 46. The jury did not hear a word about the term "Ultram" during the presentation of case evidence.

Even if an indictment charges in the conjunctive (as this one did, in the relevant places), the Government need not prove both substances to secure a conviction. *See, e.g.*, *United States v. Pritchett*, 749 F.3d 417, 429 (6th Cir. 2014) ("It is settled law that an offense may be charged conjunctively in an indictment[, and a]t trial, the government may prove and the trial judge may instruct in the disjunctive form[.]"). As Judge Merritt cogently explained:

> The government's right to charge in the conjunctive and prove in the disjunctive reflects the necessary discrepancies between indictments and jury instructions. Indictments must be phrased in the conjunctive so that society can be confident that the grand jury has found probable cause for all of the alternative theories that go forward. Juries, on the other hand, may convict a defendant on any theory contained in the indictment. As a result, judges read jury instructions in the disjunctive. . . . [P]rosecutors . . ., at trial, must succeed on only one of an indictment's theories.

United States v. LaPointe, 690 F.3d 434, 440 (6th Cir. 2012).

The Count 2 conspiracy also involved Diazepam, distribution / dispensation of which the jury found beyond a reasonable doubt via the Count 3 conviction (which involved *only* Diazepam). The Count 11 purpose also involved distributing and dispensing Oxycodone and Diazepam, which the jury found via convicting of the other non-acquitted Counts (none of which involved only Ultram). The Chief Judge's instructions carefully used broad language, avoiding Ultram particularity, concerning each of Counts 2 and 11. The Government adequately proved—and Judge Caldwell's instructions properly let the Government prove—Singleton's criminality "in the disjunctive"—*i.e.*, without reference to Ultram—and the jury validly convicted based on its findings of the involvement of Oxycodone and / or Diazepam. *See Pritchett*, 749 F.3d at 429 (affirming when indictment charged "pseudoephedrine and iodine" and the judge instructed "pseudoephedrine or iodine"); *United States v. Jones*, 533 F. App'x 562, 572

(6th Cir. 2013) (rejecting as "completely lack[ing] merit" an argument that "the indictment required the government to prove that [Jones] conspired to commit all three underlying crimes, whereas the jury instruction required conviction where he conspired to commit only one of the underlying crimes").[30] For these reasons, Singleton earns no § 2255 relief on this argument.

5.13. Subpart 13: Thirteenth, Singleton complains that counsel "failed to present the affirmative defense of entrapment." DE #425, at 36. A failure to present an affirmative defense may, in appropriate circumstances, amount to ineffective assistance. *See, e.g.*, *Brown v. United States*, 261 F. App'x 865, 868 (6th Cir. 2008). Singleton must show "a reasonable probability that, but for counsel's failure to raise this affirmative defense, the result of the proceeding would have been different." *Id.* (internal alteration removed).

The "central inquiry" when assessing an entrapment defense "is whether law enforcement officials implanted a criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to commit a crime to one who was already predisposed to do so." *United States v. Al-Cholan*, 610 F.3d 945, 950 (6th Cir. 2010). "Thus, a valid entrapment defense requires proof of two elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity." *Id.* (internal quotation marks and alteration removed). There are several "relevant" factors to consider. *See id.* ("the character or reputation of the defendant, including any prior criminal record; whether the

[30] Thus, unfortunately, yes—"the jury was told [Singleton] could be convicted for something that was legal," DE #425, at 35, but he faces no prejudice from that unhappy oversight because the jury undoubtedly convicted him for conduct that was indisputably illegal, involving Oxycodone and / or Diazepam. Each, disjunctively, is a sufficient basis to uphold the instructions and convictions. *See also infra* Section 7.2.

suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducements or persuasion; and the nature of the inducement or persuasion supplied by the Government" (internal alteration removed)).

Singleton fails to grapple with any of these elements or factors in this sub-section; he, thus, does not prove that an entrapment defense would have been successful at trial or that there is a reasonable probability that, but for counsel's failure to raise the defense, the result of the trial would have been different. [The Court also, for thoroughness, incorporates the Ground 12 discussion.] The Government here obviously, upon full review of the trial record, did not "implant a criminal design" in Singleton's mind; he had opened the at-issue businesses, tainted at root with illegality, before the Government began investigating. The CI proof was but a small part of the overwhelmingly damning evidence. The United States did not induce Singleton to act illegally, and he was clearly, based on the Court's assessment of the trial proof, predisposed to engage in the convicted criminality. The Court notes only a few telling pieces of evidence: (1) Elaine Fowler, a partner at the time, knew as soon as the clinic in Grant County opened, that she was seeing a pill mill. She confronted Singleton, and he did not deny the characterization. *See* DE #301, at 89 ("I told Will and said, 'You cannot do this. This is nothing but a pill mill, and you cannot do this." He says to me, 'Oh yes, I can.'"); (2) Singleton pitched the business to John David Morgan as a foolproof operation where a clinic would see 60 patients per day and generate $12,000 in cash per day. *See* DE #305, at 152 ("We talked about it was approximately 60 patients a day at $250 a head was about $12,000 a day

coming in. It seemed like a very lucrative investment to make at the time."); (3) Singleton designed and policed a high-volume practice, carrying a gun, using a German Shepherd, and employing a stop watch (via Stacy) to hasten the pace. *See* DE ##301, at 8; *id.* at 14-15; 302, at 7; *id.* at 73-74; *id.* at 85-86; 303, at 91; (4) One of the clinic physicians (now convicted for her conduct) drove a car with the vanity plate "tilulae regina," which she translated as "Pill Queen." *See* DE #303, at 119. Singleton was not, it is reasonable to conclude, entrapped. There is no ineffectiveness in not raising a defense that would have been unsuccessful. Accordingly, Movant gets no § 2255 relief on this ground.

5.14. Subpart 14: Fourteenth, Singleton bemoans counsel allowing "prosecutorial misconduct to remain unchallenged." DE #425, at 36-37. The Court rejects all direct prosecutorial misconduct claims in Ground 11. The text of this argument, though, does not, despite the introductory remark, involve prosecutorial misconduct. Instead, Movant mentions 7 specific things that defense counsel "should have brought . . . to the attention of the court and jury." *Id.* The Court addresses each.

First, Singleton says he "was indicted for something that wasn't illegal under federal law, thus the indictment was made by the presentation of false testimony." *Id.* at 36. As the Court has recounted, there is no prejudice on the Ultram topic due to the Count 10 acquittal and the Section 5.12 discussion. *See also infra* Section 7.2. Second, Singleton nebulously says, "counsel never showed that 2 of the counts had no evidence to support them[.]" DE #425, at 36. Unfortunately, Movant does not tell the Court what two Counts he is referencing; the Court, thus, is unable to analyze the factless claim. Third, Movant reiterates his *Brady / Giglio* arguments, which the Court has rejected elsewhere. Fourth, he reiterates the chain of custody argument, which the Court dismisses elsewhere.

Fifth, Singleton again restates his belief that the KSP acted illegally, which, for the reasons fully discussed, is wrong and earns no relief.

Sixth, Movant complains that "counsel never challenged the prosecution's illegal seizure of my untainted assets." DE #425, at 36-37. Counsel did, in fact, extensively challenge the restraint / seizure. *See* DE ##38, 64, 77, 79, 91, 96, 104. Singleton states no basis for a further challenge in this single line of text, and certainly no reason or basis for counsel to raise the issue to "the court and jury" during trial. [The Court further addresses this general claim in Ground 15, a discussion the Court fully incorporates here.] Seventh, and finally, Singleton complains that "counsel never raised the issue of the known false testimony presented by prosecution witnesses." DE #425, at 37. The Court has rejected that argument elsewhere; this, for the same reasons, earns no relief. Accordingly, none of the things that Singleton claims defense counsel "should have brought . . . to the attention of the court and jury" would have created a reasonable probability that the trial result would be different. This is repackaging, by Singleton, of losing theories. Accordingly, defense counsel was not ineffective on this ground.

5.15. Subpart 15: Fifteenth, Singleton complains that counsel "didn't preserve issues for appeal." DE #425, at 37. Movant fails to, however, mention any specific issue he wishes counsel had preserved. Accordingly, the Court cannot meaningfully analyze the generic claim, and it earns Movant no § 2255 relief.

5.16. Subpart 16: Sixteenth, Singleton charges that counsel "didn't challenge prosecution's evidence derived from entrapment." DE #425, at 37. Because the Court has rejected the predicate(s) to this argument, the Court also rejects this variant.

The Government did not entrap Singleton, and the KSP did not act illegally. There is no resulting ineffectiveness here as to case evidence.

5.17. Subpart 17: Seventeenth, Singleton faults counsel for not challenging "witness testimony presenting legal conclusions." DE #425, at 37. He generically complains that "counsel allowed witnesses for the prosecution to present testimony that presented legal conclusions to the jury." *Id.* Movant, though, fails to identify any particular witness who testified in such a manner and, thus, earns no § 2255 relief on the nonspecific claim. Further, the Court's independent review of the trial record revealed no such testimony invading the Chief Judge's province to state the law. Singleton earns no § 2255 relief on this ground. [To the extent Singleton intended this claim to overlap with the Agent Sagrecy arguments in Ground 13, the Court rejects it for the reasons stated, which the Court incorporates here.]

5.18. Subpart 18: Eighteenth, Singleton alleges that "counsel failed to show that law enforcement and CIs conspired to violate state and federal laws to obtain 'evidence' used at trial." DE #425, at 38. The Court has rejected this claim many times and, for all the previously stated reasons, rejects it here again. There is no ineffectiveness on this ground.

5.19. Subpart 19: Nineteenth, Movant argues that "counsel had a conflict of interest in his representation of me." DE #425, at 38-39. The alleged conflict Singleton claims to identify is as follows: Dusing represented a separate criminal defendant, Renus Delph; Delph was on trial for murdering Eli Markum; and Markum was a person Singleton "turned over to the GPD for attempting to get drugs using fake medical records." *Id.* at 38. Per Singleton, "[t]here is information in Mr. Delph's case file that is

exculpatory to my case," of which Singleton says Dusing failed to inform him due to operation of Dusing's attorney-client privilege with Delph.

A habeas court "cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Cuyler v. Sullivan*, 100 S. Ct. 1708, 1718 (1980). Instead, "to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.*

Singleton does not establish (or even allege) Markum's involvement in the facts of this case—only that, at some point in the past, he (Singleton) reported Markum to law enforcement for perceived criminality. The Court sees no obvious conflict in a simultaneous representation of Singleton and Delph with Markum as the lone, and tangential, common tie. Singleton, presenting no proof, certainly does not establish an actual conflict (or, really, even the possibility for or appearance of conflict). Similarly, Singleton chose not to support his bare assertion of exculpatory proof "in Mr. Delph's case file" with record evidence or argumentative particularity, and the Court perceives no such proof as obviously in Delph's file.[31] Movant makes no assertion of, for example, a plausible alternative defensive strategy that Dusing could have pursued, but did not pursue, because of the alleged conflict. *See, e.g.*, *Bradley v. Smith*, No. 3:13-CV-454-JGH, 2014 WL 10463472, at *12 (W.D. Ky. Dec. 12, 2014). Singleton does not, on this record, establish an actual conflict that would, under *Cuyler*, render counsel ineffective. The complete lack of detail dooms the claim. The Court rejects the application for § 2255 relief here.

[31] To the extent that the alleged proof simply pertains to Singleton's own cooperation with law enforcement, the Court rejects an IAC theory on this repeated ground for all the reasons previously stated on this topic.

5.20. Subpart 20: Twentieth, Singleton makes the quite serious allegation that "counsel was impaired during criminal proceedings." DE #425, at 39. Movant alleges, referencing Mr. Dusing, that "[d]uring trial, it was apparent that [counsel] often was under the influence." *Id.* Singleton later specifically says he noticed "the signs of recent alcohol use . . . on day two of trial." Exhibit DD, at ¶ 32.

Even assuming that Singleton's fanciful allegations are true (without so finding),[32] the Court rejects this argument on *Strickland*'s prejudice prong. Singleton identifies no specific instance in the trial where Dusing's alleged drinking altered a particular decision or result. The claim is general and untied to any particular trial event or decision. The Court has specifically analyzed the day 2 transcript (indeed the full transcript), and sees nothing of obvious concern. Defense counsel vigorously participated throughout trial, making plenteous evidentiary and other objections, and intently cross-examining the prosecution's witnesses (including on day 2). The Court has independently reviewed the entire trial record and sees (besides utterly no indication of counsel's drunkenness or substance-based inadequate performance) no sufficient prejudice showing—*i.e.*, no specific instance where Dusing's alleged intoxication created a reasonable probability that the jury would have acquitted.

Accordingly, because Singleton has not demonstrated a reasonable probability that the trial outcome would have been different based on this argument, the District

[32] The Court simply must comment, although this is not a basis of decision, on the immense unlikelihood that Singleton perceived his own lawyer to be drunk during trial, as he now claims, and yet sat silent, refusing to make the issue known to Judge Caldwell (or any other case actor). This allegation smacks of spurious post-hoc fabrication. No one else involved (Judge Caldwell, the prosecutor(s), Defendant's own co-counsel (an officer of the Court), or any Court or other staff) raised an issue with alleged inebriation during trial itself, despite numerous days spent together in relatively close quarters (including many bench conferences). Singleton proffers that he alone perceived the issue and then informed no one until his § 2255 filing.

Court should reject it. *See, e.g.*, *Muniz v. Smith*, 647 F.3d 619, 624-25 (6th Cir. 2011) (rejecting IAC claims based on counsel's alleged sleeping and cocaine use during trial, even considering "a litany of supposed errors committed by his attorney due to his drug use," "given the incredible strength of the case against him"); *Caballero v. Keane*, 42 F.3d 738, 740-41 (2d Cir. 1994) (holding that "drug use alone" is not ineffective); *Taylor v. Phillips*, No. 05-CV-2596, 2016 WL 5678582, at *11 (E.D.N.Y. Sept. 30, 2016) (rejecting a "claim of inebriation" because "neither the prosecutor nor the trial judge 'had the slightest hint' trial counsel was impaired and there nothing on the record to so indicate"); *Friedgood v. Keane*, 51 F. Supp. 2d 327, 341 (E.D.N.Y. 1999) (rejecting claim of ineffective assistance based on counsel's alleged drinking where the "record disclose[d] no incapacity on counsel's part resulting from his alleged drinking, or any concern expressed by the court with regard to counsel's condition" and "petitioner neither replaced his counsel, indicated dissatisfaction with this counsel to the court, [nor] cited a single instance where the alleged drinking and illness affected counsel's performance"); *United States v. Lloyd*, 983 F. Supp. 738, 742-43 (N.D. Ill. 1997) (rejecting IAC claim that "trial counsel was drunk during the proceedings" on *Strickland*'s prejudice prong).[33]

5.21. Subpart 21: Ineffective Assistance of Appellate Counsel (IAAC)

Next, Singleton makes several ineffective assistance of appellate counsel claims. "Appellate counsel does not have an obligation to raise every possible claim that a client may have, and counsel's performance is presumed to be effective. Only when ignored issues are clearly stronger than those presented, will the presumption of effective

[33] Further, as *Lloyd* noted, Singleton had a second lawyer, and Metzger's "ability to monitor and correct any of [Dusing]'s mistakes makes [Singleton]'s case a tougher one to make." 983 F. Supp. at 743. Singleton does not impugn Metzger's sobriety.

assistance of appellate counsel be overcome. To succeed on a claim that appellate counsel performed ineffectively, a petitioner also must demonstrate a reasonable probability that, but for his counsel's unreasonable failure to raise an issue on appeal, he would have prevailed." *Dufresne v. Palmer*, 876 F.3d 248, 257 (6th Cir. 2017) (internal citations, quotation marks, and alterations removed). The familiar *Strickland* standard thus continues to apply. *Kelly v. Lazaroff*, 846 F.3d 819, 832 (6th Cir. 2017); *see also Huff v. United States*, 734 F.3d 600, 606 (6th Cir. 2013) ("The familiar two-prong test set forth in *Strickland* . . . applies to claims of ineffective assistance of appellate counsel raised in a motion under section 2255.")

Singleton perfunctorily raises "4 issues . . . that I wanted included in the appeal" that appellate counsel allegedly did not include. They are: "a) The issue with the defective chain-of-custody; b) the conspiracy between the KSP and CIs; c) the defective jury instructions; and d) my conviction for something that wasn't illegal under federal law." DE #425, at 39. The Court rejects these IAAC claims for all the reasons previously stated for rejecting the identical substantive arguments packaged as IAC claims. Not raising baseless appellate arguments does not transgress *Strickland.*

5.22. Conclusion

For all the reasons stated, neither trial nor appellate counsel ineffectively assisted Singleton, and the District Court should reject all Ground 5 claims.

6. Ground 6: Chain of Custody Arguments

Singleton's next ground alleges problems with the chain of custody of numerous evidentiary items. DE #425, at 40-48. An overarching problem with this Ground is that "[c]hain of custody is not . . . properly challenged as a constitutional due process

violation." *United States v. Gibson*, No. CR 14-20083, 2014 WL 6612484, at *2 (W.D. Tenn. Nov. 20, 2014); *see also Baker v. Kassulke*, 959 F.2d 233, No. 91-6262, 1992 WL 64736, at *1 (6th Cir. Apr. 1, 1992) (table) ("Baker was not denied due process. She is not constitutionally entitled to an 'air-tight' chain of custody."); *Thompson v. Owens*, 889 F.2d 500, 502 (3d Cir. 1989) (holding that an argument concerning failure to "subject a complete chain of custody . . . does not present a viable constitutional claim"). A challenge such as this, thus, is not § 2255 fodder. *Grant v. United States*, 72 F.3d 503, 506 (6th Cir. 1996) ("[N]onconstitutional claims not raised at trial or on direct appeal are waived for collateral review except where the errors amount to something akin to a denial of due process."). The Court dismisses this claim, in all of its many iterations, independently on this basis.

For thoroughness, though, the Court also evaluates the merits, such as they are. The Court has already addressed this general claim in Section 5.10, but repeats the standard here. "Physical evidence is admissible when the possibilities of misidentification or alteration are eliminated, not absolutely, but as a matter of reasonable probability. Merely raising the possibility of tampering is insufficient to render evidence inadmissible. Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. Absent a clear abuse of discretion, challenges to the chain of custody go to the weight of the evidence, not its admissibility." *Allen*, 106 F.3d at 700 (internal quotation marks and citations removed).

Here, Singleton, at most, "merely raises the possibility that someone tampered with the evidence; he points to no evidence showing that alteration actually occurred."

Id.; *see, e.g.*, DE #425, at 41 ("appeared to have been falsified"; "the chance for tampering or alteration"). "Merely raising the possibility of tampering is insufficient to render evidence inadmissible." *Allen*, 106 F.3d at 700. Further, simply asserting a lack of an extant chain of custody in no way establishes a basis for relief. *United States v. Thomas*, 749 F.3d 1302, 1310 (10th Cir. 2014) ("Admissibility does not require a perfect chain of custody."); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 n.1 (2009); *United States v. Mejia*, 597 F.3d 1329, 1335 n.4 (D.C. Cir. 2010); *United States v. Lee*, 502 F.3d 691, 697 (7th Cir. 2007); *United States v. McFadden*, 458 F.2d 440, 441 (6th Cir. 1972). In the Court's assessment, Movant has not proven that Judge Caldwell abused her discretion in admitting any of the now-disputed evidence at trial, and the Court thus also rejects Singleton's chain of custody arguments on this alternative basis.[34]

The Court elects against addressing granularly the dozens of evidence pieces Singleton assaults. He seems to contend that the United States must tender each and every scrap of paper related to an evidence chain in advance of admissibility. That is not the law. Here, (and to the extent there was not agreement on admission of evidence) a valid sponsor authenticated videos, medical records, and prescriptions, including filled prescriptions, from CI involvement. The Court already rejected the notion that only "originals" may be admitted. Further, the Court already noted that there were not, in fact, lab tests of drugs admitted before the jury. These matters, discussed at various places and in detail in other parts of this Recommendation, do not support § 2255 relief.

[34] The Court has closely examined the "one time a chain-of-custody issue was raised," according to Singleton. *See* DE #425, at 41 (citing DE #304, at 154-55). The cited in-court exchange does not reflect that any item (or "bag of pills") was then improperly introduced into evidence.

7. Ground 7: Indictment Dismissal Arguments

Singleton next makes several general Indictment dismissal arguments—using his language, contentions that "the Indictment is flawed and requires the verdict to be vacated and the case scheduled for a new trial." DE #425, at 49-54. The Court examines each specific issue in turn.

7.1. Subpart 1: First, Singleton repeats the argument that the Indictment invalidly charged a "conspiracy of one." *Id.* at 49. The Court rejects this argument for the reasons previously stated in Section 5.11.

7.2. Subpart 2: Second, Singleton complains about the "use of a general verdict form." DE #425, at 49-51. "In general, special verdicts are not favored and may in fact be more productive of confusion than of clarity." *United States v. Wilson*, 629 F.2d 439, 444 (6th Cir. 1980) (internal quotation marks and footnote removed); *see also Black v. United States*, 130 S. Ct. 2963, 2968 (2010) (noting "the absence of any provision in the Federal Rules of Criminal Procedure for submission of special questions to the jury" and "counsel[ing] caution" before using a special verdict form in a criminal case). This is because, for example, special verdict forms have the potential to "confuse the jury." *Wilson*, 629 F.2d at 444. "[G]eneral verdicts in criminal cases are preferred because a jury is entitled to acquit the defendant because it has no sympathy for the government's position. It has a general veto power, and this power should not be attenuated by requiring the jury to answer in writing a detailed list of questions or explain its reasons." *United States v. Stonefish*, 402 F.3d 691, 697-98 (6th Cir. 2005) (internal quotation marks removed).

Singleton's theory boils down to the following thought progression: (1) some Counts included Ultram as a charged controlled substance; (2) Judge Caldwell instructed that Ultram was, in fact, a controlled substance; (3) the verdict form, DE #202, did not require the jury to specify which particular controlled substance(s) it found involved in the applicable counts; (4) therefore, the jury *could have* convicted based on Ultram; and, (5) thus, the verdict is invalid. This theory implicates many of the same topics discussed in Section 5.12, a discussion the Court incorporates here, to the extent applicable and appropriate.

Singleton's argument fails for the simple reason that the jury convicted him on Counts 1, 3, 4, 5, 6, 7, 8, and 9, indisputably demonstrating that it found the involvement of Oxycodone and / or Diazepam—not solely Ultram—in the conspiracies and other criminality. "According to [Sixth Circuit] precedent, if there was sufficient evidence to support one of the [criminal theories] that the government alleged, then [the Court] must presume that the jury relied on that [theory], and [the Court] must uphold the conviction." *United States v. Dedman*, 527 F.3d 577, 599 (6th Cir. 2008); *see also, e.g.*, *United States v. Boyle*, 700 F.3d 1138, 1145 (8th Cir. 2012) ("Because the jury returned a general verdict of guilty, we must uphold the jury's verdict if the evidence is sufficient to support **either** of the charged theories." (emphasis added)). Simply put, "[i]n *Zant v. Stephens*, the [Supreme] Court clarified that *Stromberg* requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, **unless it is possible to determine the verdict rested on the valid ground**." *United States v. Holly*, 488 F.3d 1298, 1305 (10th Cir. 2007) (internal quotation marks removed; boldface added). The Court can

confidently say that each verdict on each non-acquitted Count rested on a valid ground, based on the jury's undisputed findings related to Oxycodone and / or Diazepam.

Again, the full record informs this analysis. The record contained no references to "Ultram" itself and only two references to the Ultram-equivalent, Tramadol. *See* DE ##304, at 126; 305, at 46. By comparison, the record showed that the clinics, during the target period, prescribed over 2.5 million dosage units of Oxycodone, an amount the investigator labelled of "astounding" magnitude. DE #301, at 170-72. Further, the doctors typically prescribed a cocktail that including Oxycodone and Diazepam. *See* DE #301, at 25-28, 50, 82. The jury undoubtedly found that the case involved all identified controlled substances; but the jury certainly did not peg its Count 2 or 11 conviction (or any other non-acquitted conviction) on Ultram alone. The infamous "Prescription Guidelines," authored by Singleton, regulated prescriptions for Oxycodone and Valium, but did not reference Ultram or Tramadol. *See* Gov't Trial Ex. 12a. Tellingly, that document made specific MRI requirements, with the fateful post-script: "No exceptions unless approved by Will!!!" The full conspiracy charges in Counts 1 and 2 blanketed the periods of individual distribution in Counts 3-10; by finding guilt on all of the submitted charges, the jury necessarily treated the conspiracies as premised on all of the substances alleged. Accordingly, for all these reasons, the Court must uphold the general verdict.

The cases Singleton cites do not change this result. *Griffin v. United States*, 112 S. Ct. 466 (1991), actually hurts Movant's case. There, the Supreme Court took pains to tally its disagreements with (and all-but-complete repudiation of) *Yates v. United States*, 77 S. Ct. 1064 (1957), a prior case that purported to endorse a rule similar to that Singleton would prefer. *See Griffin*, 112 S. Ct. at 472 (heavily criticizing *Yates* as a lone

outlier—as "unexplained"—for "apply[ing] *Stromberg* to a general verdict in which one of the possible bases of conviction did not violate any provision of the Constitution but was simply legally inadequate"); *see also United States v. Palazzolo*, 71 F.3d 1233, 1235-36 (6th Cir. 1995) (narrating the progression from *Stromberg* to *Williams* to *Yates* to *Zant*). Further, Singleton's structural error contention (although it is not critical to the result here) is based on an outdated understanding of the law and is simply incorrect. *See Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (holding that "the Court of Appeals erred by treating the instructional error in this case," which involved "a jury instructed on multiple theories of guilt, one of which is improper," "as structural" and instead stating that harmless error analysis "should govern in that particular context"). *Pulido* endorsed harmless error analysis when assessing a multi-theory instruction with partial validity.

Martinez v. Garcia, 371 F.3d 600 (9th Cir. 2003), *opinion amended and superseded on denial of reh'g*, 379 F.3d 1034 (9th Cir. 2004), also does not aid Singleton. That case (as did *Yates*) addressed a situation in which the court had "no way of determining which theory of conviction was the basis of the jury's guilty verdict." 371 F.3d at 605. Here, on the other hand, based on the jury's convictions on Counts 1, 3, 4, 5, 6, 7, 8, and 9, the Court *can* determine that the jury unquestionably found a valid basis of conviction via Oxycodone and / or Diazepam, validating the verdicts on all non-acquitted Counts. The conspiracy period overlapped the individual dispensation Counts (3-10). Further, the very structure of the Counts, which involved Singleton aiding and abetting others (to wit: the prescribing doctors) confirms the necessity that the jury viewed Oxycodone and Diazepam as substances within the convicted conspiracies. *See, e.g.*, *Dedman*, 527 F.3d at 599; *Holly*, 488 F.3d at 1306 (endorsing and upholding a general

verdict when "the jury necessarily made the findings required to support a conviction on the valid ground"). The Court sees no basis for relief on this argument.

7.3. Subpart 3: Third, Singleton asserts that the "prosecution failed to present sufficient evidence to support the jury's finding of guilt." DE #425, at 51-52. The Sixth Circuit has already rejected this claim as to Movant specifically. *See Singleton*, 626 F. App'x at 594-97.[35] Nevertheless, Singleton protests, as to Counts 3 and 4, "there wasn't any pills [sic] dispensed for the actions that those counts charged, nor did the prosecution present evidence to support those counts." DE #425, at 51. The Circuit summarized:

> Counts 3 and 4 encompassed Detective Tim Dials's visits to the Georgetown Clinic in 2011. At trial, Detective Dials testified that he met with a physician on August 23, who briefly touched his back and prescribed him Percocet and Valium. This testimony served as the basis of Count 3. Detective Dials stated that he then met with Dr. Godofsky on September 20, who saw Detective Dials for less than five minutes and prescribed him Oxycodone without a physical examination. Detective Dials further testified that he met with Dr. Godofsky again on October 26. Dr. Godofsky increased his Oxycodone dosage even though Detective Dials's urine tested negative for Oxycodone, and he told Dr. Godofsky he had "been taking pills inappropriately" and "too soon." This testimony formed the basis of Count 4.

[35] Litigating a claim on appeal erects a formidable § 2255 hurdle. "A § 2255 motion may not be used to relitigate an issue that was raised on appeal absent highly exceptional circumstances." *DuPont v. United States*, 76 F.3d 108, 110 (6th Cir. 1996) (citing cases); *accord Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999) ("It is equally well settled that a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law."); *Oliver v. United States*, 90 F.3d 177, 180 (6th Cir. 1996) (same). The United States argues that the § 2255 relitigation bar applies to Grounds 7, 8, and 11. DE #438, at 3. Given (1) the particulars and nuances to Singleton's arguments in each Ground, (2) the ease with which all subject claims ultimately fail, and (3) the many related ineffective assistance claims, the Court declines solely to apply the relitigation bar in these circumstances and also relies on this Recommendation's merits analysis as the primary dismissal basis. Still, the Court notes and considers the Sixth Circuit's prior consideration of a claim when it pertains.

Singleton, 626 F. App'x at 596 (upholding evidence sufficiency on Counts 3 and 4). Singleton now argumentatively disputing, but presenting no evidence, whether any pills were actually dispensed does not call the prior evidence sufficiency determination into question. *United States v. Blake*, 695 F. App'x 859, 862 (6th Cir. 2017); *Guyon*, 717 F.2d at 1542-43; *Diaz-Arias*, 717 F.3d at 16. Tim Dials was undercover, and he secured the prescriptions supporting the bases for these Counts. Singleton does not demonstrate that filling of the illicit prescriptions is a necessary part of the crime, and the United States explained not completing the transactions as to the Dials prescriptions. *See* DE #305, at 201, 207; *see also* 21 U.S.C. § 802(10) (defining "dispense" to include "the prescribing and administering of a controlled substance"). The Counts, again, contained aiding and abetting liability theories.

7.4. Subpart 4: Fourth, Movant argues that the "prosecution impermissibly constructively amended the indictment." DE #425, at 52-54. A "constructive amendment results when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007). Singleton's arguments on this front, again, concern Ultram. As the Court has explained elsewhere (discussions the Court incorporates here), the District Court acquitted Singleton of Count 10, and the other convictions remain, in this scenario, valid. Accordingly, the Court sees no basis to find a

constructive amendment of the Indictment based on the repeated Ultram-centered arguments.[36]

7.5. Conclusion

For the reasons stated, the District Judge should reject all claims Singleton raises in Ground 7.

8. Ground 8: Jury Instruction Arguments

Next, Singleton asserts (or repeats) various jury instruction-related arguments. Specifically, he asserts that "flawed jury instructions allowed conviction based on an invalid legal theory, misstated the law, and constructively amended the Indictment." DE #425, at 54-57. The Court considers each specific claim in turn.

First, to the extent Singleton repeats arguments concerning the deliberate ignorance instruction, the Court rejects them for the reasons stated previously.[37]

Second, to the extent Singleton repeats Ultram-related instructional arguments, the Court rejects them for all the reasons stated previously in this Recommendation. For

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[36] As to Singleton's grand jury-related argument, DE #425, at 53, Movant simply cannot here relitigate the grand jury's probable cause finding. *Gerstein v. Pugh*, 95 S. Ct. 854, 865 n.19 (1975). Regardless, given the Court's discussion of the Ultram-centered issues, any error here is harmless; the Court, thus, could not dismiss the Indictment on this basis. *Bank of Nova Scotia*, 108 S. Ct. at 2374.

[37] Additionally, as to some of Singleton's tangential meanderings in this ground, the Court can only repeat what the Sixth Circuit has already said: "[T]he district court in this case applied the deliberate ignorance instruction only to specific misconduct. By its own terms, the deliberate ignorance instruction below spoke to whether Defendant was 'aware of a high probability that others were issuing controlled substances without a legitimate medical purpose and outside the usual course of medical practice' and 'deliberately closed his eyes to what was obvious.' Instruction No. 12 thus articulated the knowledge requirement for Counts 3 through 10, which charged Defendant with aiding and abetting the distribution and dispensation of controlled substances outside the scope of professional practice and not for a legitimate medical purpose." *Singleton*, 626 F. App'x at 598-99 (contrasting Instruction 12 with 19, which applied to Count 11). The same distinction applies to Instruction 13, applicable to Counts 1 and 2, which told the jury that each defendant must have "knowingly and voluntarily joined the conspiracy" to be guilty.

the reasons explained, the instructions did err in classifying Ultram as a controlled substance, but any such error is harmless / inapplicable in this scenario. *United States v. Adams*, 583 F.3d 457, 469 (6th Cir. 2009) ("This Court will not reverse a decision on the basis of an erroneous jury instruction where the error is harmless." (internal quotation marks removed)).

Third, Singleton charges, "the indictment never mentioned aiding / abetting in the drug counts, but jury instruction #17 . . . constructively amended the indictment to include aiding and abetting to certain charges as elements of them, elements that are not contained in the indictment." DE #425, at 56 (all as in original, but one citation removed).

Singleton's argument is factually wrong. Each "drug count" did include aiding and abetting language, and cited 18 U.S.C. § 2. *See* DE #73, at Counts 3, 4, 5, 6, 7, 8, and 9. Regardless, even if they did not, "aiding and abetting [is] merely a theory of liability, and not an offense distinct in and of itself." *United States v. Taniguchi*, 49 F. App'x 506, 520 (6th Cir. 2002). Therefore, "an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either." *United States v. McGee*, 529 F.3d 691, 695 (6th Cir. 2008). "[A]iding and abetting is embedded in federal indictments, [and] an indictment need not charge or refer to 18 U.S.C. § 2 to support a conviction based on a theory of aiding and abetting." *Id.* at 696.[38] Judge Caldwell discussed this issue at the charge conference. DE #308, at 44.

[38] Singleton also throws in an offhand comment that the "prosecution didn't present any testimony on the question of whether the medications at issue were dispensed outside the scope of professional conduct[.]" DE #425, at 56. The Sixth Circuit has already affirmed proof sufficiency, and the Court's independent review of the trial record confirms that the

Therefore, for these reasons, the District Judge should reject all claims Singleton raises in Ground 8.

9. Ground 9: Evidentiary Arguments

Movant next makes (or echoes) several arguments about the case evidence. DE #425, at 57-64. The Court considers each.

First, Singleton generally argues that the District Court should have excluded "illegally obtained evidence" from trial. DE #425, at 57-62. He repeats, yet again, his arguments that the KSP and / or CIs illegally used "fake medical records" with respect to his businesses. The Court again rejects these arguments for all the reasons previously stated. Because Singleton does not prove that law enforcement acted illegally (independently or through CIs), the predicate of this argument collapses; there simply is no "illegally obtained evidence" to exclude.[39]

Second, Singleton alleges that the "KSP violated federal wiretapping laws during the investigation of me and my businesses." DE #425, at 62-64. He specifically cites 18 U.S.C. §§ 2510(2) and 2511 as the allegedly offended statutes. The former simply defines

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United States did adequately prove this point. Singleton fails to meaningfully develop this argument. The proof mass—including from the convicted doctors, from other practitioners, and from the patients—surely counters Singleton's contention.

[39] Further, the remedy of exclusion, even if Singleton did prove illegality, surely would not apply. Singleton's argument does not concern a violation of his (or a third party's) constitutional rights; rather, he simply asserts that law enforcement themselves broke federal and state statutory law during the investigation. The Supreme Court, quite simply, "has never held" that federal courts can suppress "evidence obtained . . . in violation of . . . statute." *United States v. Payner*, 100 S. Ct. 2439, 2446 n.7 (1980). Even if the Court were wrong in its prior discussion finding no illegality, given that discussion, the Court certainly sees no "willful disobedience of law," *id.*, or "purpose[ful] or flagran[t]" law violation, *Brown v. Illinois*, 95 S. Ct. 2254, 2262 (1975), to militate toward suppression as a remedy. *Cf. Utah v. Strieff*, 136 S. Ct. 2056, 2063, 2065 (2016) (reversing suppression ruling, finding "no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct," although, in Justice Sotomayor's words, "the officer in this case himself broke the law").

"oral communication" to mean "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication[.]" The latter generally criminalizes a person "intentionally intercept[ing], endeavor[ing] to intercept, or procur[ing] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." § 2511(1)(a).

This claim fails. Section 2511(2)(c) provides, in relevant part, that it is not "unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication[.]" Further, § 2510(5)(a) exempts from the definition of "electronic, mechanical, or other device" those "being used . . . by an investigative or law enforcement officer in the ordinary course of his duties." Courts refer to these provisions collectively as the "law enforcement exception to Title III's general injunction against wiretapping." *United States v. Hammond*, 286 F.3d 189, 191 (4th Cir. 2002).[40]

Conduct consistent with those two provisions is what happened here; § 2511 does not criminalize such behavior. "In cases, like this one, where the government makes a recording with the consent and cooperation of a government informant who is a participant in the conversation, there is no duty to inform the defendant or to obtain a court order." *Porter*, 29 F. App'x at 238. The Government is "free to use the intercepted conversations once they [a]re excepted under either § 2510(5)(a)(1) or § 2511(2)(c)."

[40] Further, "informants who record private conversations at the direction of government investigators are 'acting under color of law.'" *Obron Atl. Corp. v. Barr*, 990 F.2d 861, 864 (6th Cir. 1993). "[P]romises of leniency or assistance to informants or coconspirators in return for their cooperation in recording conversations do not render their consent involuntary or coerced and thus invalid under § 2511(2)(c)." *United States v. Porter*, 29 F. App'x 232, 238 (6th Cir. 2002).

Hammond, 286 F.3d at 193. Additionally, as to some of Singleton's other arguments, "the Fourth Amendment provide[s] no protection to an individual against the recording of his statements by the [Governmental] agent to whom he was speaking." *United States v. Caceres*, 99 S. Ct. 1465, 1470 (1979); *see also id.* at 1467 ("Neither the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of **one of the conversants**." (emphasis added)).

For these reasons, the District Judge should reject all claims Singleton raises in Ground 9.

10. Ground 10: Court Bias Arguments

Tenth, Singleton raises a variety of arguments concerning Chief Judge Caldwell's alleged bias toward him. DE #425, at 64-69. He charges that "the Court showed prejudicial bias against me which denied me a fair trial, thus constituting judicial misconduct. *Id.* at 64. Movant pursues two theories in this section—one grounded in due process, and one in 28 U.S.C. § 455.

Under § 455, a district judge "shall disqualify h[er]self in any proceeding in which h[er] impartiality might reasonably be questioned" or when she "has a personal bias or prejudice concerning a party." 28 U.S.C. §§ 455(a), (b)(1). "A district court judge must recuse h[er]self where a reasonable person with knowledge of the all facts would conclude that the judge's impartiality might reasonably be questioned. . . . This is an objective standard." *United States v. Adams*, 722 F.3d 788, 837 (6th Cir. 2013).

"[D]ue process demands that the judge be unbiased." *Railey v. Webb*, 540 F.3d 393, 399 (6th Cir. 2008). A "judge can and should be disqualified for bias, a likelihood of

bias, or even an appearance of bias." *Id.* at 399-400 (internal quotation marks and alterations omitted). However, "it is also clear that judicial disqualification based on a likelihood or an appearance of bias is not always of constitutional significance[.]" *Id.* at 400 (emphasis removed). Alleged "personal bias" does not generally rise to a constitutional level. *Id.* Instead, the "Due Process Clause establishes a constitutional floor, which requires that parties be given a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Gordon v. Lafler*, 710 F. App'x 654, 663 (6th Cir. 2017) (internal quotation marks omitted). "So central is this right that failure to have a trial before such an impartial adjudicator can never be a harmless error." *Id.*

10.1. Subpart 1: First, Singleton charges that Judge Caldwell "violated my right to be present at every trial stage . . . by holding the final pretrial conference without me present." DE #425, at 65 (internal quotation marks omitted and capitalization altered). As discussed throughout Ground 4, Judge Caldwell did indeed hold a portion of the final pretrial conference with Singleton absent. The Court has rejected any relief based on his absence, and the mere fact that the Chief Judge proceeded in that fashion—all Singleton asserts—says absolutely nothing about (much less establishes) bias of any sort. Defense counsel admitted that it was his "fault" that Singleton was absent; counsel had "informed him that he did not need to be present here today." DE #298, at 3. Movant's absence thus had nothing to do with the Chief Judge. The hearing was part of the public record, and Singleton knew he could attend if he desired. Further, a reasonable person would not conclude that Judge Caldwell's impartiality might reasonably be questioned based on this.

10.2. Subpart 2: Second, Singleton alleges that Judge Caldwell "violated my due process right with jury instruction #1." DE #425, at 65-66. Additionally, he complains that Judge Caldwell said, "once this defendant gets to prison" during trial, allegedly implying that a finding of guilt was preordained. *See id.*

Neither circumstance earns habeas relief. First, there is nothing improper about Instruction 1. It mirrors Sixth Circuit Pattern Jury Instruction 1.02, which the Sixth Circuit has approved in the cases cited in the Committee Commentary. Singleton really seems to include an argument concerning this instruction, in combination with the prison remark, simply because the instruction informs the jury that "[w]hat [Judge Caldwell] sa[id] about the law controls." [Of course, Instruction 42 tells the jury that "[n]othing that I [Judge Caldwell] have said or done during this trial was meant to influence your decision in any way." DE #200, at 51. Singleton does not mention this.]

On the ninth day of trial, Judge Caldwell did, indeed, remark as follows: "Once this defendant gets to prison, this doesn't need to be out there." DE #307, at 35. The second "this," in that sentence, refers to the sealed supplement to Dr. White's (who was then testifying) plea agreement. *See id.* at 34-35.

The Court rejects any bias or recusal argument concerning this singular remark. As an initial matter, the transcript, in context, DE 304, at 34-35, plainly indicates that Judge Caldwell was referring to White, not to Singleton. The whole discussion involved the need to keep the already convicted White's cooperation from being broadly known in prison. No fair reading suggests that Judge Caldwell, in this bench conference, pointed to Singleton as the object. Judge Caldwell has already addressed this contention similarly and confirmed that she was, in fact, referring to White. DE #402, at 6 ("Second, and most

importantly, the 'defendant' the Court referenced was the witness on the stand at that time, Dr. Bruce Gregory White."). Further, the isolated remark occurred during "proceedings . . . held at the bench." DE #398, at 34-35. Accordingly, the jury did not hear the comment (negating any Instruction 1-based concern). Due to the Chief Judge's own attestation that she was referring to White (which the Court's independent review of the record logically confirmed), the remark's completely isolated nature, and the inability for the jury to hear it, the Court concludes that the remark does not suggest in any way judicial bias violative of due process. Further, a reasonable person would not conclude that Judge Caldwell's impartiality might reasonably be questioned based on this one, isolated remark, with these situational particulars.

10.3. Subpart 3: Third, Singleton accuses Judge Caldwell of displaying a "lack of integrity" toward him "regarding the prosecution's motion to exclude the audio portion of surveilance [sic] recordings made by the KSP." DE #425, at 67. Essentially, he accuses the Chief Judge of lying about her review of the at-issue video. The Court sees utterly no basis for the specious allegations.

On day 6 of trial, Judge Caldwell indeed commented that she had "reviewed all of them [the tapes.]" DE #304, at 167 (cited by Singleton). There is no indication that this review "took place during a 30 minute recess," as Singleton baselessly claims. There is no reason to suggest the comment encompassed every scrap of tape. To the contrary, on the *first* day of trial, Judge Caldwell explained:

> [L]et me say that I have reviewed all of the videotapes that we discussed last week in the context of the United States' motion in limine, and the Court will reiterate its earlier ruling.
>
> I listened to all of the audio. I find that it is irrelevant to anything in this case. Again, while I think that it's conduct unbecoming an officer for

> some of the comments that were made, I don't see how it has any bearing on the facts of this case. So I will abide by my prior ruling.

DE #299, at 22. Singleton does not meaningfully call the physical possibility of such review, over such a lengthy interim period, into doubt. Further, and regardless, the Chief Judge has helpfully already explained that she, quite obviously, was referring to "the videos that were to be introduced at trial, not every second of surveillance footage gathered during the course of the Government's investigation." DE #402, at 2-3. Singleton, to belabor the obvious, does not establish that the Chief Judge was false in these comments or otherwise prove judicial bias in violation of due process. Finally, a reasonable person would not conclude that Judge Caldwell's impartiality might reasonably be questioned based on her statements regarding or handling of audio / video review. *See id.* at 3 ("The [audio / video] ruling was based on firm legal principles, not any undue bias toward Defendant. In short, neither this Court's statements regarding exclusion of audio portions of the video nor the exclusion itself forms a reasonable basis for questioning this Court's impartiality.").

10.4. Subpart 4: Fourth, Movant impugns the Chief Judge for allegedly not "promptly dispos[ing] of the business of the court." DE #425, at 68. Essentially, he complains about the length of delay between his convictions and sentencing. *See id.* This states no meritorious bias or recusal claim. The jury convicted Singleton on June 20, 2013. DE #201. Within days, he had filed (1) a renewed motion for judgment of acquittal and (2) a motion for a new trial. DE ##215, 216 (Motions). Judge Caldwell thoughtfully considered those lengthy and weighty requests until March 2014. DE #275 (Order). The Chief Judge sentenced Singleton on March 18, 2014. DE #277. She then issued a supplementary opinion, DE #284, and entered Judgment on April 29, 2014. This timeline

reflects a judicial officer earnestly giving Singleton's case (which had an 11-day record) full, fair, and comprehensive consideration, not bias. *See also* DE #402, at 8. Given the sentence he received, Movant certainly cites no harm that came from the less-than-one-year delay between conviction and Judgment. Singleton, in this argument, proves no due-process-violative bias,[41] and a reasonable person would not conclude that Judge Caldwell's impartiality might reasonably be questioned based on the rational timeline between conviction and Judgment.

10.5. Subpart 5: Fifth, Singleton charges that Judge Caldwell "knew one of the medications I was indicted for wasn't a federally controlled substance." DE #425, at 68. The only basis Singleton expresses for this argument is that Judge Caldwell initialed Lea Ann Marlow's plea agreement (Exhibit 1-8) next to where the parties crossed out "and Diazepam and Ultram, each a Schedule IV controlled substance." [Contrary to Singleton's assertion, White's plea agreement did not mention Ultram.] This obviously does not establish that Judge Caldwell knew that Ultram "wasn't a federally controlled substance." First, the Marlow plea agreement redaction involved *both* Diazepam and Ultram; Singleton does not dispute that Diazepam is controlled, and Judge Caldwell initialed beside redactions involving both. Second, and more fundamentally, such a redaction by no means suggests that the involved players realized that Ultram was not controlled; rather, it simply suggests that Marlow only admitted to Oxycodone-related conduct. Third, the agreement retains another (unstricken) reference to Ultram, at ¶ 3(j), logically undercutting Singleton's inference-based argument. Quite simply, Judge Caldwell (who corrected the common error post-trial) would not have instructed a jury in

[41] *See also Betterman v. Montana*, 136 S. Ct. 1609, 1618 (2016) (holding that the "Sixth Amendment's speedy trial right" does not regulate delay between conviction and sentencing and affirming judgment with an over-14-month delay involved).

a knowingly incorrect way, and Singleton, via his citations to two plea agreements (one inapplicable) does not prove judicial bias in violation of the Due Process Clause. Additionally, a reasonable person would not conclude that Judge Caldwell's impartiality might reasonably be questioned based on this argument.

10.6. Subpart 6: Sixth, and finally, Singleton alleges that Judge Caldwell "allowed the prosecution to use evidence that was obtained by illegal methods." DE #425, at 68. The Court, yet again, rejects the substantive premise of this claim, as it has in many places throughout this Recommendation. Accordingly, because the evidence was not illegally obtained, Singleton establishes no foundation for constitutionally significant bias, and a reasonable person would not conclude that Judge Caldwell's impartiality might reasonably be questioned based on this argument.

10.7. Conclusion

For these reasons, the District Court should reject all claims in Ground 10.

11. Ground 11: Prosecutorial Misconduct Arguments

Eleventh, Singleton makes a series of prosecutorial misconduct arguments. DE #425, at 69-74. The Court "employs a two-step inquiry to determine whether prosecutorial misconduct has occurred." *United States v. Henry*, 545 F.3d 367, 376 (6th Cir. 2008). As to argument, "[f]irst, [the Court] determine[s] whether a statement was improper. If it was improper, [the Court] next examine[s] whether the statement was so flagrant as to warrant reversal. [The Court] consider[s] four factors in determining whether a statement was flagrant: (1) whether the prosecutor's remarks or conduct tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were accidentally or deliberately made; and (4) the

overall strength of the evidence against the accused." *Id.* (internal quotation marks and citation omitted); *see also United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001) (applying the two-step approach and the 4 factors to prosecutorial "conduct and remarks"). In the context of "conduct," rather than a "statement," Singleton must show that the "prosecutor's conduct was plainly improper." *Washington v. Hofbauer*, 228 F.3d 689, 698-99 (6th Cir. 2000). The prejudice / flagrancy analysis mirrors that applicable to remarks. *Id.* at 699-700; *Slagle v. Bagley*, 457 F.3d 502, 515-16 (6th Cir. 2006).

11.1. Subpart 1: First, Singleton charges that the "prosecution knowingly presented tetsimony [sic] and evidence at all stages of my criminal proceedings that were false and perjured." DE #425, at 70-71. He specifically, again, targets Ultram-related proof, an alleged lack of "pills associated with Counts 3 & 4," and the KSP's alleged "illegal methods to manufacture the evidence the prosecution used at trial." *Id.* The Court has rejected all of these arguments previously in this Recommendation. Accordingly, there was no prosecutorial impropriety at all—much less flagrant or plain impropriety. The Court rejects any prosecutorial misconduct claim based on these repeated arguments.

11.2. Subpart 2: Second, Movant alleges (again) that the "prosecution withheld Brady evidence from me." DE #425, at 71. He later throws in a *Giglio* claim, as well. *Id.* The Court has rejected the substance of these claims elsewhere in this Recommendation and thus concludes, as above, that Singleton proves no prosecutorial impropriety at all—much less flagrant or plain impropriety. The Court rejects any prosecutorial misconduct claim based on a *Brady* or *Giglio* argument.[42]

[42] Regarding some of Singleton's insinuations, the "U.S. Attorney's Manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *United States v. Myers*, 123 F.3d 350, 356 (6th Cir. 1997).

11.3. Subpart 3: Third, Singleton argues that the "prosecution knew there were significant issues with the chain-of-custody for many of the KSP's evidentiary items." DE #425, at 71-72, 73. The Court has rejected Singleton's substantive chain of custody arguments, as well as his particular "bag of pills" argument. Accordingly, the Court holds that Singleton proves no prosecutorial impropriety regarding chain of custody issues, much less flagrant or plain impropriety. The Court rejects any prosecutorial misconduct claim here.

11.4. Subpart 4: Fourth, Movant complains that the "prosecution illegally obtained assets that were untainted by the alleged criminal conduct." DE #425, at 72. This argument fails because the Court, consistent with appropriate process, endorsed the pretrial restraint / seizure. *See* DE ##64, 104. [To the extent Movant raises broader Sixth Amendment claims here, the Court addresses this general argument in Ground 15, which the Court fully incorporates in this sub-section.] Accordingly, because the Court, during pretrial proceedings, determined restraint / seizure was proper, and because the Court, in Ground 15, perceives no basis for related § 2255 relief, the Court holds that Singleton proves no prosecutorial misconduct regarding this claim.

11.5. Subpart 5: Fifth, Singleton says that the "prosecution elicited false testimony from law enforcement agents and CIs to support it [sic] allegations against me." DE #425, at 73. He lists no particular piece of "false testimony" in this one-paragraph argument; regardless, the Court has rejected variants of this brand of claim throughout this Recommendation. Accordingly, Singleton proves no prosecutorial misconduct on this factless and nonspecific claim.

11.6. Subpart 6: Sixth, Movant alleges that the "prosecution failed to disclose information about payments made to a witness to secure his testimony." DE #425, at 73. Singleton fails to identify to which witness this argument relates. If he is referring to Monroe, the Court rejected that claim earlier in this Recommendation. Accordingly, Singleton proves no prosecutorial misconduct on this generalized and particular-free (or previously rejected) claim.[43]

11.7. Subpart 7: Seventh, Singleton charges that the prosecution failed in its alleged "duty to correct mistakes." DE #425, at 73-74. He complains that the prosecution "chose not to correct any of the obvious mistakes during trial," though "with one exception"—Ultram. *Id.* Unfortunately, Singleton does not identify any of the other "obvious mistakes" that the prosecution should have corrected. Accordingly, Singleton proves no prosecutorial misconduct on this generic, fact-free claim.

11.8. Subpart 8: Eighth, and finally, Singleton complains that the prosecution "had my case file seized and placed into cusdoty [sic] of the KSP." DE #425, at 74.[44] Such an argument (even assuming its truth) states no prosecutorial misconduct

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[43] The same ruling applies to Movant's repeated chain-of-custody-based suggestion regarding the submission of "all of the pills obtained in the KSP's investigation . . . to a lab for testing / identification." DE #425, at 73.

[44] Similarly, Singleton states he replied "under the 'noted objection'" concerning an alleged "seizure" of certain "files and evidence." DE #440, at 1; *see also id.* at 34-36. He does not, though, detail how any such alleged behavior prevented his ability to prepare a reply or otherwise brief the issues. *See, e.g., Allah v. Virginia*, No. 7:16CV2, 2016 WL 3911989, at *4 n.2 (W.D. Va. July 15, 2016) (rejecting a similar assertion because Allah did not prove that "confiscation" of his "case file materials hampered his ability to . . . litigate any viable legal claim"); DE #401 (Order), at 3 (Judge Caldwell noting that Singleton "has not identified any specific facts tending to show prejudice to his litigation" concerning a claim of "denial of access to Defendant's newly redacted case file"). Further, there simply "is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 97 S. Ct. 837, 846 (1977); *see also, e.g., Monroe v. Beard*, 536 F.3d 198, 210 (3d Cir. 2008) ("An unauthorized intentional deprivation of property by prison officials does not violate the Due Process Clause if a meaningful

claim, which requires proof of prosecutorial "actions at trial," not at some undefined point post-trial. *Washington*, 228 F.3d at 708; *Darden v. Wainwright*, 106 S. Ct. 2464, 2471 (1986) (stating that the "relevant question" regarding prosecutorial misconduct is whether it "so infected the trial with unfairness as to make the resulting conviction a denial of due process"). The point, thus, of recognizing a prohibition on prosecutorial misconduct is to make real "our judicial system's ideal of providing each defendant with a fair trial." *Carter*, 236 F.3d at 793. Thus, if a claim is made or action is taken not "in the presence of the jury," it "could not have misled the jury or prejudiced the defendant[,]" especially when, as here, the "other evidence presented by the government was strong." *United States v. Mikell*, 344 F. App'x 218, 226-27 (6th Cir. 2009) (holding that the record disclosed no prosecutorial misconduct because, *inter alia*, "all of the accusations made by the government as to Harris's role as a co-conspirator were made outside the presence of the jury"). This claim does not relate to conduct at trial; Singleton, thus, proves no prosecutorial misconduct on this argument.

11.9. Conclusion

For these reasons, the District Court should reject all of Singleton's Ground 11 arguments.

12. Ground 12: Entrapment Arguments

Twelfth, Singleton argues that the "KSP used tactics that resulted in entrapment by inducing the commission of a crime by an innocent person." DE #425, at 74-77. "[T]he defense of entrapment is not based on due process." *Sosa v. Jones*, 389 F.3d 644,

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postdeprivation remedy for the loss is available." (internal quotation marks and alteration removed) (quoting *Hudson v. Palmer*, 104 S. Ct. 3194, 3204 (1984))). Further, Rule 16 pertains to use "at trial," and the work-product doctrine "protects *an attorney's* trial preparation materials from discovery[.]" *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009).

648 (6th Cir. 2004). Accordingly, an entrapment-defense argument cannot be a direct route for habeas relief. *Id.* at 649. The Court thus rejects the claim on this basis. However, to ensure full and fair consideration of Movant's arguments, the Court also, alternatively (re)considers the merits.

As recounted in Section 5.13, the "central inquiry" in an entrapment defense "is whether law enforcement officials implanted a criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to commit a crime to one who was already predisposed to do so." *Al-Cholan*, 610 F.3d at 950. "Thus, a valid entrapment defense requires proof of two elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity." *Id.* (internal quotation marks and alteration removed). There are several "relevant" factors to consider. *See id.* (listing them). *See also supra* Section 5.13.

In this Ground, Singleton basically repeats many of his trial defenses, concerning the use of fake medical records, his alleged "procedures in place to prevent drug abusers and doctor / pill shoppers," and his purported efforts to "deter doctor / pill shoppers." DE #425, at 75-76. Specifically, Movant argues that the "fake medical records were the 'inducement' used by the KSP to cause the criminal acts, which never would have happened if not for those fake medical records provided to the CIs by the KSP." *Id.* at 76. Singleton says he "and the clinics . . . unwittingly and unknowingly violate[d] the law by treating the CIs as if they had the medical conditions their fake medical records stated they had. Thus, the KSP induced the very violations they sought to have me and my businesses convicted for." *Id.* at 77.

These arguments fail. The Government (including the KSP) obviously did not "implant a criminal design" in Singleton's mind; he had opened the at-issue businesses, employing their particular (and found to be illegal) prescribing practices, before law enforcement began investigating. The CIs were but a small part of the investigation and ultimate proof at trial. The use of fake medical records, likewise, was clearly no inducement to criminality; rather, that practice, as the trial proof reasonably showed, "merely provided an opportunity to commit a crime to one who was already predisposed to do so." *Al-Cholan*, 610 F.3d at 950.[45]

Considering the relevant factors, at least four weigh in favor of finding no entrapment: (1) Singleton's "character or reputation," as extensively (and quite negatively) described at trial, supports a conclusion of no inducement and affirmative predisposition; (2) the suggestion of criminality, as described above, was not initially made by the Government; (3) Singleton "was engaged in criminal activity for profit"—indeed, as the money laundering proof and convictions and related forfeiture / seizure proceedings demonstrate, he profited handsomely from his criminality;[46] and (4) based on the trial testimony, Singleton did not reasonably evidence "reluctance to commit the offense," which was overcome "only by repeated Governmental inducements or persuasion." *See id.*

Again, to list but a few telling facts: Singleton conceived of the business. Fowler, a nascent partner, immediately called the operation a "pill mill," and Singleton did not

[45] Further, the jury validly found the requisite *mens rea* for each conviction, and Singleton's perfunctory insinuation to the contrary does not call that determination into question.

[46] *See also* DE #327, at 49-52 (Judge Caldwell noting that Singleton "line[d] his pockets while exploiting others" and "wanted to get rich and he wanted to get rich quick"). Sagrecy further detailed Singleton's immense profits. His "Willionaire" nickname aptly fit. *See* DE #306, at 30.

demur. Pharmacists seeing the pattern raised alarms (but could not even get through to the clinic to discuss the problems). Neighbors described the very unusual flow and climate of the clinics. To Morgan, Singleton pitched a plan framed on a 60 patient-per-day model, which plainly and sharply limits exam time. Singleton installed an MRI and directly regulated the MRI requirement at the clinics. Singleton imposed prescribing rules as to controlled substances. One patient (Woods, DE #300, at 193), not a CI, described the sketchy examination he encountered and the austere and unusual physical set-up in the exam rooms, noting the lack of typical medical materials. The doctors Singleton contracted with or employed basically either sampled the practice and quickly fled (Craig, Coleman) or stayed and ended up convicted or suspended for illegal prescription practices (Marlow, White, and others with practice restrictions). Marlow donned a license plate calling herself "Pill Queen." The ostensible rules Singleton touts (*e.g.*, reliance on drug tests and pill counts) were frequently more honored in the breach—Tim Dials's experience is a good example, and many witnesses noted inconsistency in rule application. Finally, Singleton carried a loaded sidearm in clinic, dispatched a German Shepherd among patients, and had a stop watch deployed on a too-deliberate physician. The jury saw Singleton's clinics for exactly what they were; it ignored the window dressing of legitimacy and perceived the thriving pill mills within.

Accordingly, the Court concludes that Singleton's attempted entrapment defense is not meritorious now and would not have been successful at trial. If raised, he would have proven neither Governmental inducement nor a lack of predisposition. The District Court should, therefore, reject § 2255 relief based on Ground 12.

13. Ground 13: Abuse of Discretion Arguments

Next, Singleton argues that the District Court "abused its discretion by allowing witnesses to testify to legal conclusions by the use of vernacular with specific meaning in law." DE #425, at 77-81 (all as in original). He particularly disclaims "meet[ing] the qualifications of the vernacular within the scope of 21 C.F.R. § 1306.04." *Id.* This general Ground thus appears to contain two discrete claims, which the Court analyzes in turn.

First, Singleton complains about SA Jeffrey Sagrecy's testimony, which is located at DE #307, at 60-162. Specifically, Singleton faults Sagrecy for "espous[ing] legal opinions through the use of specialized vernacular that has a specific meaning in the law" and "[u]ltimately telling the jury what conclusion to reach based on his testimony." DE #425, at 77.

District courts have "a wide, but not unlimited, degree of discretion in admitting or excluding testimony that arguably contains a legal conclusion." *United States v. Volkman*, 797 F.3d 377, 388 (6th Cir. 2015) (internal quotation marks and alteration removed). "A witness' testimony contains a legal conclusion only if the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. An expert may not opine on the overarching question of guilt or innocence, but he or she may state opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue." *Id.* (internal quotation marks, citation, and alteration removed).

Singleton charges that Sagrecy "irrevocably crossed" the Sixth Circuit's "boundry [sic] when he opined . . . that I was 'trafficking narcotics' rather than sticking to his role as an expert witness regarding money laundering." DE #425, at 78. Movant lists a variety

of other related Sagrecy statements. *Id.* at 78-79. At bottom, Singleton's complaint is that Sagrecy "told the jury that I was 'trafficking," engaged in 'illegal activity,' and guilty of 'trafficking in controlled substances.'" *Id.* at 79.

This argument has no merit. Sagrecy's first use of the word "trafficking" occurred on DE #307, page 102. There, the Special Agent certainly did not "opine on the overarching question of guilt or innocence"; rather, he identified and explained to the jury the *accused* "specified unlawful activity" underlying these money laundering charges. Same with the references to "illegal activity at the clinic" and "trafficking in controlled substances" on pages 103, 109, and 141; "illegal activity" on page 119; and "trafficking" on pages 123 and 142—Sagrecy was simply explaining or stating the general case accusations (and part of any laundering theory), not opining on whether Singleton, himself, was guilty or innocent.[47] Singleton's own counsel ensured that the jury knew that the "entire money-laundering analysis *assume[d]* . . . that the clinics are dirty." *Id.* at 143 (emphasis added); *see also id.* at 143-44 (Sagrecy agreeing); *id.* at 147 (Sagrecy admitting he was "not qualified" to testify about whether "there was improper storage of controlled substances or anything").

Further, Sagrecy's statements on cross that (1) "[t]he evidence shows that the SUA occurred" (page 156); (2) "[i]n my eyes, it [an SUA] occurred" (page 157); and (3) "[i]n this case, it is" (page 160) all simply state his expert "opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue." *Volkman*, 797 F.3d at 388. Sagrecy *never* said, for instance, "In my opinion, Singleton is guilty." The first two statements contain critical

[47] The reference to "illegal activity" on page 118 has nothing to do specifically with Singleton; instead, Sagrecy was simply explaining his "experience" with the goals of money launderers in general.

qualifiers—"the evidence shows" and "in my eyes." The third is distinctly indeterminate. The Court sees two possibilities, in context: the hypothetical next word or phrase being "a money scheme," or "complicated." *See* DE #307, at 159-60. In either circumstance, Sagrecy was either (1) expressing the case allegation, or (2) expressing his own expert characterization of the alleged scheme at issue. The very next sentence confirmed that was only his "opinion." *Id.* at 160. Sagrecy calling the operation a complicated money scheme is hardly news—that was the Government's case. In fact, the Special Agent himself explicitly declared that he was *not* testifying that any specified unlawful activity in fact occurred because "[y]ou [the jury] do get to decide that[.]" DE #307, at 156-57. He told the jury: "If there is no SUA, there's no money laundering." *Id.* at 157. Further, Judge Caldwell plainly instructed the jury that "you don't have to accept [Sagrecy's] opinions." *Id.* at 68; *see also id.* at 101-02 (the Chief Judge reminding the jury that it "may reject" any of Sagrecy's testimony and that, if "the law as he understands it" is different from the law she told the jury to apply, the jury must apply the law as instructed by the Court); DE #200, at 38 (Instruction 29). The Court has reviewed the entirety of Sagrecy's testimony and finds it, under the applicable standard, to be wholly proper.[48]

Second, Singleton asserts that he is not a "prescribing practitioner," per the 21 C.F.R. § 1306.04 meaning. There is no dispute that Singleton is correct; he is not a prescribing practitioner. Judge Caldwell herself saw "no evidence that he [directly]

[48] Singleton also confusingly asserts that, alternatively, Sagrecy's testimony "constitute[d] a 'fatal variance.'" DE #425, at 81. He does not expound on this theory, and the Court sees no merit to it. "Generally speaking, a variance occurs when the charging terms of the indictment are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment." *Budd*, 496 F.3d at 521 (internal quotation marks and alteration removed). Singleton establishes (and the Court sees) nothing about Sagrecy's testimony that "proves facts materially different from those alleged in the indictment," which, as discussed, included conspiracy, aiding and abetting, and money laundering theories.

distributed or dispensed, because he didn't have the authority to do that." DE #307, at 174. Singleton assigns no meaningful significance to this, however, and the Court sees none. All § 1306.04 says, in relevant part, is that a "prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." There was no dispute at trial that Singleton had no such actual authority. The jury considered all elements of the charged crimes (including the conspiracy and aiding / abetting theories) and convicted him; this argument does not alter the trial outcome or earn § 2255 relief. *See Singleton*, 19 F. Supp. 3d at 726 (explaining that "an aiding and abetting charge does not require that the defendant actually take the unlawful act" (citing *United States v. Phibbs*, 999 F.2d 1053, 1063 (6th Cir. 1993))); *see also id.* at 727.

Singleton simply did not have to be a doctor or prescriber to face criminal liability. *United States v. Darji*, 609 F. App'x 320, 333-35 (6th Cir. 2015) (affirming non-doctor's and non-pharmacist's convictions for, *inter alia*, conspiracy to distribute or dispense controlled substances in an "Internet pill mill" scheme); *United States v. Johnson*, 831 F.2d 124, 128-29 (6th Cir. 1987) (affirming a clinic administrator's conviction because he "was intimately involved in virtually every facet of administrating the clinic, including the hiring and firing of the doctors and staff, the recording of the receipts and the prescriptions, and the supervision of the employees who actually handed out the prescriptions and received the payments"); DE #327 (Sentencing Transcript), at 51-52 (noting Singleton's "carefully conceived plan" to "multipl[y] the doctors' abilities to illegally distribute otherwise legal drugs" and that "Singleton may not have been able to write the prescriptions, but he made possible all the methods and manner by which the

prescriptions were illegally distributed and almost exponentially increased the amount of harm done by any one individual doctor").[49]

Per this discussion, the District Court should reject Singleton's Ground 13 claims.

14. Ground 14: Arguments Regarding an Alleged KSP—CIs Conspiracy to Violate Laws

Fourteenth, Singleton—yet again—complains that the "KSP and informants conspired to violate state and federal law in order to obtain controlled substances under false pretenses by lying to medical professionals and the use of fake medical records." DE #425, at 81-83. The Court rejects this repeated, nebulous claim (and any repeated insinuations at an entrapment defense) for all the reasons previously stated in this Recommendation.

To the extent Movant claims, with no support, that he could not conspire "with a government agent," *id.* at 81, that was not a conspiracy the trial proof reasonably showed or attempted. Even processing the argument on Singleton's terms, many courts have agreed that, indeed, a person cannot conspire "solely" with a government agent. *See, e.g.*, *United States v. Rojas-Diaz*, 643 F. App'x 279, 283 (4th Cir. 2016). "[A] government agent may," though, "serve as a 'link' between 'genuine' conspirators." *United States v. Rogers*, 118 F.3d 466, 478 (6th Cir. 1997) (citing *United States v. Fincher*, 723 F.2d 862, 863 (11th Cir. 1984) for the proposition that "although [a defendant] dealt directly only with a government agent," the conviction was valid because "it was obvious and known

[49] Singleton confusingly hints at a claim regarding expert opinions concerning the issue of a "legitimate medical purpose," DE #425, at 80, but the Court sees no reasoned argument there. The citation to *United States v. Chube*, 538 F.3d 693, 699 (7th Cir. 2007) does not aid his cause; there, the Court of Appeals *affirmed* the district court "permitting [the relevant] line of questioning." *Id.* The Court sees nothing in Sagrecy's testimony that relates to medical purpose, other than (at most) Singleton's specific complaints considered and rejected above.

to [that defendant] that other participants were necessary to the enterprise"). Singleton's convictions survive via the Sixth Circuit's "link" theory and / or because the trial proof simply did not factually hinge on a Singleton-agent conspiracy. The involved (and convicted) physicians obviously were private actors.

For these reasons, the Chief Judge should deny § 2255 relief on this ground.

15. Ground 15: Alleged Sixth Amendment Violations

Fifteenth, and finally, Singleton alleges that his "Sixth Amendment right to counsel of choice was violated." DE #425, at 83-86. The complaints center on the pre-trial restraint of certain of Singleton's assets.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2561 (2008). "[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2652 (1989). A corollary, however, is that a "defendant may not insist on representation by an attorney he cannot afford." *Id.* Still, "[t]he right to select counsel of one's choice . . . [i]s the root meaning of the constitutional guarantee." *Gonzalez-Lopez*, 126 S. Ct. at 2563.

In general, the burden that forfeiture law "imposes on a criminal defendant is limited. [It] does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Caplin & Drysdale*, 109 S. Ct. at 2652. "Nonetheless," the

Court recognized, "there will be cases where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets[.]" *Id.* Even in this scenario, the submission "that the Sixth Amendment puts limits on the forfeiture statute" is "untenable." *Id.* The Sixth Amendment's "protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of counsel." *Id.* (internal quotation marks and alteration omitted). "A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended." *Id.*; *see also id.* at 2655 (rejecting "any notion of a constitutional right to use the proceeds of crime to finance an expensive defense").

Of course, *Caplin & Drysdale* concerned "assets adjudged forfeitable," *id.* at 2656, but the Supreme Court, on the same day, also addressed the Sixth Amendment's relation to "assets not yet judged forfeitable," *id.*, in *United States v. Monsanto*, 109 S. Ct. 2657 (1989).

The Supreme Court was clear: "Permitting a defendant to use assets for his private purposes that . . . will become the property of the United States if a conviction occurs cannot be sanctioned." *Monsanto*, 109 S. Ct. at 2665. The Court

> conclude[d] that there is no exemption from § 853's forfeiture or pretrial restraining order provisions for assets which a defendant wishes to use to retain an attorney. In enacting § 853, Congress decided to give force to the old adage that 'crime does not pay.' We find no evidence that Congress intended to modify that nostrum to read, 'crime does not pay, except for attorney's fees.'

Id. To the extent Singleton here makes a "sweeping constitutional claim" that "operation of the forfeiture statute interferes with a defendant's Sixth Amendment right to counsel of choice," *id.* at 2666, the Court rejects it, following the Supreme Court's guidance:

"[A]ssets in a defendant's possession may be restrained . . . based on a finding of probable cause to believe that the assets are forfeitable." *Id.* The Court was clear: "[A] pretrial restraining order does not arbitrarily interfere with a defendant's fair opportunity to retain counsel." *Id.* at 2667 (internal quotation marks removed). "Put another way: if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Id.*

The Supreme Court, in 2014, reaffirmed the vitality of *Monsanto*'s holding. *See Kaley v. United States*, 134 S. Ct. 1090, 1095 (2014) ("In *Monsanto*, our principal case involving [pre-trial restraining orders or injunctions to preserve the availability of forfeitable property], we held a pre-trial asset restraint constitutionally permissible whenever there is probable cause to believe that the property is forfeitable."). "Even prior to conviction (or trial)—when the presumption of innocence still applies—the Government c[an] constitutionally use § 853(e) to freeze assets of an indicted defendant based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." *Id.* at 1096-97 (internal quotation marks removed). Simply put: "With probable cause, a freeze is valid." *Id.* at 1097.

In March 2016—and this period is Singleton's focus—the Supreme Court clarified that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016) (plurality opinion). The Court made clear that *Luis* was "differen[t]" from, *i.e.*, involved a variant factual predicate than, *Caplin & Drysdale* and *Monsanto* because "the

property here is untainted; *i.e.*, it belongs to the defendant, pure and simple." *Luis*, 136 S. Ct. at 1090. The difference was that "[i]n *Caplin & Drysdale* and *Monsanto*, the Government wanted to impose restrictions upon (or seize) property that the Government had probable cause to believe was the proceeds of, or traceable to, a crime." *Id.* at 1091. In *Luis*, "by contrast, the Government s[ought] to impose restrictions upon Luis' *un*tainted property without any showing of any equivalent governmental interest in that property." *Id.* at 1092. The Court rejected the effort, "insofar as innocent (*i.e.*, untainted) funds are needed to obtain counsel of choice," because "the Sixth Amendment prohibits" the pre-trial restraint of such property. *Id.* at 1093.

Since 2005, the Sixth Circuit has agreed that a defendant has a right to a hearing, as applicable, on this topic "only when the defendant can (1) demonstrate to the court's satisfaction that []he has no assets and (2) make a prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constitute or are derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." *United States v. Jamieson*, 427 F.3d 394, 406 (6th Cir. 2005) (citing and quoting *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998)) (internal quotation marks removed). "When the defendant makes the required showings," the Sixth Circuit instructed lower courts, "the burden then shifts to the prosecution to establish, by probable cause at an adversarial hearing, that the restrained assets are traceable to the underlying offense." *Id.* (at least expressing "no quarrel" with applying the *Jones* framework and recognizing the opportunity to be heard as a fundamental requirement of due process). "Certainly, due process should be honored when a defendant's Sixth Amendment right to counsel of choice is threatened by virtue of the restraint of his

funds[,]" and "the opportunity to be heard is non-existent when a district court grants a [pre-trial restraint] based only on the indictment." *Id.* at 407.

Nothing about *Kaley* or *Luis* purports to (or does) overrule or invalidate the *Jones-Jamieson* hearing preconditions or burden regime.[50] *See United States v. Wood*, No. 3:15-CR-14-GFVT-REW, 2016 WL 8131240, at *5-6 & 6 n.8 (E.D. Ky. Oct. 3, 2016) (citing cases for this proposition); *United States v. Fisch*, 851 F.3d 402, 409 (5th Cir. 2017) (treating the *Jones* framework as surviving *Kaley* and *Luis*); *United States v. Johnson*, 683 F. App'x 241, 248-50 (4th Cir. 2017) (same); *United States v. Hernandez-Gonzalez*, No. 16-20669-CR-SCOLA/TORRES, 2017 WL 2954676, at *5-7 (S.D. Fla. June 26, 2017) (same); *United States v. Stokes*, No. 1:14-CR-290-TWT-JKL-1, 2017 WL 5986231, at *4-5 (N.D. Ga. Oct. 23, 2017) (same: "*Luis* . . . does not change the general rule that to be entitled to a hearing to determine whether seized assets are tainted, the defendant must make a prima facie showing of substantial financial need for those assets."); *United States v. Rashid*, No. 17-20465, 2017 WL 4467501, at *3 (E.D. Mich. Oct. 6, 2017) (treating the *Jamieson* framework as surviving *Kaley* and *Luis*).

Applying these principles, the Court here perceives no Sixth Amendment violation. Singleton, pretrial, sought asset-related relief. DE #38 (Motion). The Court

[50] *Luis* does not, thus, "place[] the trial court's denial of [Singleton's] motions . . . in a new light." DE #425, at 84. *Luis* worked no relevant change in the law, as applied here, based on Singleton's non-establishment of a lack of taint, *Luis*'s factual predicate. Further and regardless, there is no indication that *Luis* (a case decided after Singleton's convictions became final) is retroactive to cases on collateral review. *See, e.g., United States v. Hopkins*, No. CR 09-863 MCA, 2018 WL 550594, at *3 (D.N.M. Jan. 23, 2018) (noting that "the Supreme Court did not expressly make *Luis* retroactively applicable on collateral review" and that the court found no "lower court opinion holding that *Luis* applies retroactively on collateral review" (collecting cases)); *Farkas v. Andrews*, No. 5:17-HC-2070-D, 2017 WL 4518684, at *3 (E.D.N.C. Oct. 10, 2017) ("*Luis* does not apply retroactively on collateral review."); *Valencia-Trujillo v. United States*, Nos. 8:11-cv-428-T-17EAJ, 8:02-cr-329-T-17EAJ, 2017 WL 3336491, at *8 (M.D. Fla. Aug. 4, 2017) (same).

denied the motion, engaging in an extensive *Jamieson* analysis. DE #64 (Order).[51] Specifically, the Court concluded that Singleton failed on prong 2—he did not satisfactorily "make a prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constitute or are derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." *Id.* at 1, 4.

Singleton provides no convincing reason in DE #425 to call the Court's previous *Jamieson* determination into doubt, even applying *Luis* and processing the claim on his terms.[52] *See* DE #64, at 5 (noting that "Singleton went through bankruptcy" in 2010-11 "and that all assets seized, except the contested pharmacy loan are attributable, directly or indirectly, to the operation of the clinics" (internal quotation marks removed)). The operative Indictment "undoubtedly color[ed] the entire clinic operation as founded on an illegal purpose," and the grand jury indicted under § 856, thus conclusively establishing probable cause to believe "that the reason Defendant[] opened and maintained the clinics was [O]xycodone distribution, the core of the criminal conduct at issue." *Id.* at 9. This defeats any Singleton effort "to parse between legitimate and illegitimate activities" and showed an "overall catalyst behind the clinics" as one that was "simply . . . not lawful." *Id.* at 9-10. "[T]he Superseding Indictment charge[d] Singleton . . . with conspiring to dispense [O]xycodone unlawfully throughout the clinics' existence and further charge[d]

[51] Judge Caldwell upheld this Order over Singleton's objections. *See* DE #350 (Transcript stating reasoning), at 2-5.

[52] For instance, Movant asserts, giving no particulars, that he "had several untainted sources of income unconnected with the clinics." DE #425, at 85. Unfortunately, he fails to identify what any such source was. Singleton also asserts that, post-trial, he "determined" that he "had about $3,061,000.00 in untainted assets the government seized[.]" *Id.*; *see also id.* at 96 n.85. Again, this bald statement does not prove that the Court's prior *Jamieson* determination was wrong. *See also* DE ##64, at 6 (noting a defensive failure based on "lack of specificity in the proffer"); 400, at 3 (Judge Caldwell denying "return of property forfeited by the government").

that [he] formed and ran the clinics, during the entire period, for that express purpose." *Id.* at 10-11 (perceiving an insufficient evidentiary basis "to doubt forfeitability of **all assets** generated by the S&R clinics, an operation, per Count 9, with an overarching improper purpose" (footnote removed; emphasis added)). The *Jamieson* framework survives *Luis*, and, for the reasons stated, Singleton does not convince the Court that a different result under *Jamieson* is now (or was then) justified.[53]

Again, SA Sagrecy carefully analyzed Singleton's financial picture. As of the bankruptcy (in 2010), Singleton had essentially no assets other than his home. By the time of the Indictment, Singleton had amassed over $2,000,000 in assets, all of which the Indictment targeted. DE #73, at 15-19; *see, e.g.*, DE #307, at 90-96 (Sagrecy detailing deposits, including over $2 million in cash from S&R Medical and the Grant County clinic each independently). Singleton himself says his worth ballooned to over $3 million.

[53] To the extent Singleton complains about Hon. Angela M. Hayden's exit from the case, *see* DE #425, at 85, the Court perceives no constitutional issue of concern. An indigent defendant, as Singleton then was, foundationally has no right to select the lawyer to be appointed under the Criminal Justice Act. *See, e.g.*, *Daniels v. Lafler*, 501 F.3d 735, 739 (6th Cir. 2007) ("Daniels, an indigent defendant forced to rely on court-appointed counsel, has no choice-of-counsel right."). The Court here, based on the particular status and nature of the case, generously permitted Dusing and Metzger, Singleton's previously chosen counsel, to continue in the case as CJA counsel, a highly unusual step. Obviously, thus, as to Dusing and Metzger, the *identity* of Singleton's counsel did not change, and to the extent Movant complains about losing his *third* chosen lawyer, he had no right, based on the required appointment, to keep her in the case. [The Court also could have refused to appoint Dusing and / or Metzger, after rejecting Singleton's arguments under the *Jamieson* framework, without violating his rights.] Singleton's arguments here instead principally relate to the antecedent, discrete issue of the pretrial restraint / seizure of assets, as was relevant to his ability to retain and counsel's compensation. The Court also notes, based on some of Movant's comments, *see* DE #425, at 85, that CJA counsel represent defendants in many of the most complicated cases in this District, and their appointed status does not impede zealous (and constitutionally adequate) representation. Unsurprisingly, the generic CJA compensation cap is waivable, and the statute and regulations provide for employment of investigators and other experts. 18 U.S.C. §§ 3006A(d)(3), (e); *Guide to Judiciary Policy*, Vol. 7, Part A, Ch. 2 §§ 230.23.10, 230.23.40, 320.10, 320.70.10. The Sixth Circuit approved, and the lawyers defended Singleton under, a budget of well over $100,000.00.

DE #425, at 85. The only engine of wealth, from the bankruptcy to indictment, was the pill-mill operation. The motion does not effectively suggest, in any way, the existence of untainted funds. Further, the Court's election to essentially transition his retained team to CJA appointment effectively negates any prejudice from the asset seizure and restraint.

Accordingly, the District Court should reject the Ground 15 claims.[54]

16. Evidentiary Hearing

Singleton requests an evidentiary hearing. DE #425, at 1; *see also* DE ##453, 454. The Court must hold one unless "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Further, no hearing is necessary "where the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Huff v. United States*, 734 F.3d 600, 607 (6th Cir. 2013) (quoting *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999)) (internal quotation marks removed). Singleton's claims do not warrant a hearing; the § 2255 motion filings and record of the case conclusively show, for the reasons stated, that Singleton's claims fail. There are no contested factual issues, based on the Court's assessment of each claim, that justify a hearing. The voluminous record, which needs no further development, forecloses relief.

IV. CERTIFICATE OF APPEALABILITY

A Certificate of Appealability may issue where a movant has made a "substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). This standard requires a movant to demonstrate that "reasonable jurists would find the district court's

[54] The District Court should also reject any additional claims Singleton vaguely hints at in Exhibit DD, but not addressed in DE #425, as (1) abandoned / waived via Movant's failure to substantively brief the issues, *see, e.g.*, *Coleman v. Shoney's, Inc.*, 79 F. App'x 155, 156-57 (6th Cir. 2003) (citing cases), and / or (2) asserted outside the permission of DE ##413 & 421, *see Martinez*, 865 F.3d at 844.

assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 120 S. Ct. 1595, 1604 (2000); *see also Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039-40 (2003) (discussing development of standard). The reviewing court must indicate which specific issues satisfy the "substantial showing" requirement. *See* 28 U.S.C. § 2253(c)(3); *Bradley v. Birkett*, 156 F. App'x 771, 774 (6th Cir. 2005) (noting requirement of "individualized assessment of . . . claims") (citing *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001)). For dismissal on procedural grounds, as to when a Certificate of Appealability should issue, the movant must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 120 S. Ct. at 1604. Movant has not made a "substantial showing" as to any claimed denial of rights; per the above analysis, all of Singleton's claims conclusively fail. Reasonable jurists would not find the Court's determinations debatable. Accordingly, the Court recommends that the District Court entirely deny a Certificate of Appealability.

V. RECOMMENDATION

For all of Singleton's raised smoke, the Court sees no fire. The motion is meritless. For the reasons discussed, the Court **RECOMMENDS** that the District Judge wholly **DENY** § 2255 relief (DE #409) and issue **NO** Certificate of Appealability.

* * * * *

The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Recommended Disposition, issued under sub-section (B) of the statute. *See also* Rule 8(b), Rules Governing Section 2255 Proceedings for the United States District Courts. Within fourteen days after being served with a copy of this

decision, any party may serve and file specific written objections to any or all findings or recommendations for determination, *de novo*, by the District Court. Failure to make a timely objection consistent with the statute and rule may, and usually does, result in waiver of further appeal to or review by the District Court and Court of Appeals. *See Thomas v. Arn*, 106 S. Ct. 466, 475 (1985); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981).

The Court allowed Singleton extended briefing in support of the § 2255. More pages did not mean more merit. His memorandum was repetitive and largely cumulative. As a result, to be clear, in any objections, the Court limits Singleton to 40 total pages of briefing. He has fully voiced his nearly innumerable complaints. The Court cabins objection briefing to the limits stated. This does not restrict the number of objections Singleton may raise but does limit the briefing as to such objections.

This the 20th day of March, 2018.

Signed By:
Robert E. Wier
United States Magistrate Judge

APPENDICES E

Nos. 18-6120/6254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 18, 2019
DEBORAH S. HUNT, Clerk

ERNEST WILLIAM SINGLETON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, COOK, and READLER, Circuit Judges.

Ernest William Singleton, a federal prisoner proceeding pro se, petitions for panel rehearing of this court's order of August 14, 2019, denying his application for a certificate of appealability. Singleton's motion for a certificate of appealability arose from the district court's judgment denying his motion to vacate, set side, or correct his sentence filed under 28 U.S.C. § 2255. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying Singleton's application for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** Singleton's petition for panel rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk