Appendix A

Adams v. United States

United States Court of Appeals for the Sixth Circuit

June 22, 2023, Filed

No. 21-1662

Reporter
2023 U.S. App. LEXIS 15823 *

ERIE ADAMS, aka Michael Johnson, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.

Notice: CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

United States v. Adams, 2019 U.S. Dist. LEXIS 40252 (E.D. Mich., Mar. 13, 2019)

Counsel: ERIE ADAMS, aka Michael Johnson, Petitioner - Appellant, Pro se, Otisville, NY.

For UNITED STATES OF AMERICA, Respondent - Appellee: Steven P. Cares, Assistant U.S. Attorney, Office of the U.S. Attorney, Detroit, MI.

Judges: Before: NORRIS, SILER, and MURPHY, Circuit Judges.

Opinion

ORDER

Erie Adams, a pro se federal prisoner, appeals the district court's judgment dismissing his 28 U.S.C. § 2255 motion. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons set forth below, we affirm.

As part of a Title III wiretap investigation, federal agents in North Carolina recorded Rudolph Coles and Terrance Poindexter arranging to purchase heroin in Detroit, Michigan from their contact, Tyrone Conyers. Conyers, a self-described middleman, then called his supplier, "Dog," and agreed to purchase 300 grams of heroin for resale to Coles and Poindexter. Coles and Poindexter subsequently drove to Michigan, where local agents observed them meeting with Conyers. Coles and Poindexter then returned to North Carolina, where local police intercepted them and discovered [*2] 357 grams of heroin hidden in their vehicle.

Federal agents then confronted Conyers, who admitted to facilitating the heroin deal. Conyers explained that Poindexter had given him $20,000 for the heroin, approximately $4,000 of which Conyers kept as his cut. He gave the rest of the money to "Dog" in exchange for the heroin. Agents searched Conyers's cell phone and

found a phone number for "Dog," which they quickly learned belonged to Adams. The "toll records" from Conyers's phone confirmed that Conyers called "Dog's" phone on the morning of the drug deal, and that Conyers received a return call from "Dog" later that day.

Based on this information, agents obtained and executed a search warrant for Adams's house. Upon entering the house, agents patted Adams down and found four cell phones on his person—including a phone that corresponded to "Dog's" phone number and listed Conyers's phone number in its stored contacts. During their search of the residence, agents discovered a loaded firearm under a couch in the living room, two loaded firearms in the primary bedroom, a block of heroin weighing approximately 1.5 kilograms, more heroin divided for distribution, drug-cutting agents, hydrocodone [*3] and oxycodone pills, a triple-beam scale, a hydraulic-operated press, an electronic money counter, and bundles of cash. Following the search, agents placed Adams under arrest.

Five days after his arrest, Adams called an unknown associate from jail. During the recorded phone call, Adams referred to Conyers as a "snitch" who "just gave [his] name up" to authorities. He also lamented the prospect of serving a lengthy prison sentence. At one point in the conversation, the unknown associate asked Adams if Conyers was "still out here" and Adams responded, "Of course!" The associate then reassured Adams by saying, "Ok, ok. We'll holla at you." One week after this call, police found Conyers dead of gunshot wounds.

Adams was initially indicted on one count of possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1). Acting on the advice of counsel, Adams entered into a proffer agreement with the government that required him to share his knowledge of "matters under investigation." In exchange, the government promised not to use Adams's proffer statements against him in its case-in-chief. But the government expressly reserved the right to test the truthfulness of Adams's statements by subjecting [*4] him to a polygraph examination. If the results of the polygraph examination indicated that Adams had been untruthful, the agreement provided that the government's use of any information provided during the proffer session would be unrestricted.

During his proffer interview, Adams admitted to his involvement in heroin distribution and to a long-term association with Conyers. But Adams denied any knowledge of or involvement in Conyers's death. Following this proffer interview, agents conducted a polygraph exam of Adams. Adams's exam indicated deception in his responses to questions concerning the murder of Conyers. The government filed a superseding indictment that charged Adams with conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. §§ 846 and 841(a)(1); possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1); possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c); and being a felon in possession of a firearm, in violation

of 18 U.S.C. § 922(g)(1). The government also notified Adams of its intent to make unrestricted use of the statements that he gave during his polygraph examination and filed a second superseding indictment, adding charges for possession with intent [*5] to distribute oxycodone and possession with intent to distribute hydrocodone, in violation of 21 U.S.C. § 841(a)(1). Prior to trial, the district court ruled that Adams's proffer statements were admissible because he breached the proffer agreement by failing the polygraph exam. A jury ultimately convicted Adams on all six counts charged in the second superseding indictment, and the district court sentenced him to an aggregate term of 540 months of imprisonment, to be followed by 10 years of supervised release.

On appeal, Adams raised several issues, including a challenge to the district court's conclusion that he had breached the proffer agreement. We rejected all of Adams's arguments and affirmed his convictions and sentence. *United States v. Adams*, 655 F. App'x 312, 322 (6th Cir. 2016) (per curiam).

Adams then filed this § 2255 motion, which he later amended, raising 15 claims of ineffective assistance of counsel. As relevant here, Adams argued in his first claim that trial counsel performed ineffectively by advising him to enter a proffer agreement that hinged on what Adams calls an inherently unreliable polygraph examination procedure. The district court denied the § 2255 motion, concluding in pertinent part that Adams was not prejudiced by counsel's advice to enter into [*6] the proffer agreement given the overwhelming evidence of his guilt that was presented at trial. We granted Adams a certificate of appealability as to his first claim only. *Adams v. United States*, No. 21-1662, slip op. at 5 (6th Cir. Aug. 25, 2022) (referencing *Adams v. United States*, No. 19-1563, slip op. at 3-4, 8 (6th Cir. Nov. 15, 2019)).

When considering a district court's denial of a § 2255 motion, we review factual findings for clear error and legal conclusions de novo. *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018). To prevail on an ineffective-assistance-of-counsel claim, a petitioner must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). To establish prejudice, Adams "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.

Adams cannot prevail on his ineffective assistance claim because he has not shown that he was prejudiced by counsel's advice. Although Adams asserts that his failed polygraph examination motivated the

government to seek the [*7] two superseding indictments in this case, he presents nothing in support of this assertion beyond his mere conjecture. The record contains no evidence indicating that the government's decision to pursue additional charges against Adams was anything other than a proper exercise of its prosecutorial discretion. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). Nothing suggests that the government's charging decisions hinged on Adams's proffer statements rather than the overwhelming evidence of Adams's guilt that the government already possessed at the time Adams entered into the proffer agreement. That evidence included Conyers's admission to federal agents that he had sold 357 grams of heroin to Coles and Poindexter; phone records showing that Conyers had called "Dog's" phone (which was later found in Adams's possession) to orchestrate that drug deal; and the trove of incriminating physical evidence that agents recovered from Adams's house, including [*8] loaded firearms, a large quantity of heroin, hydrocodone and oxycodone pills, and cash. *See Adams*, 655 F. App'x at 314-15. The same goes for Adams's assertion that mentions of the proffer in front of the jury altered his trial's result. In light of the overwhelming evidence before the jury, Adams cannot show that the outcome of his trial would likely have been different but for counsel's advice to enter the proffer agreement. *See Strickland*, 466 U.S. at 694.

We **AFFIRM** the district court's judgment.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff/Respondent,

v.

Erie Adams,

Defendant/Petitioner.

Criminal Case No. 13-20874
Civil Case No. 17-11866

Sean F. Cox
United States District Court Judge

_____/

OPINION & ORDER
ON § 2255 MOTION AFTER LIMITED REMAND

This matter is currently before the Court on Defendant/Petitioner Erie Adams's *pro se* Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255. This Court denied the motion in a prior opinion and order but the United States Court of Appeals for the Sixth Circuit remanded the matter for this Court to consider three claims that it believed were raised by Adams but not addressed by this Court. Thereafter, this Court ordered the parties to file supplemental briefs focusing solely on those three claims. The Court concludes that an evidentiary hearing is not warranted as to any of these three claims and that the matter is ripe for a decision by this Court. For the reasons that follow, the Court finds these additional claims to be without merit and DENIES Adams's § 2255 Motion and declines to issue a certificate of appealability as to these three claims.

BACKGROUND

Defendant/Petitioner Erie Adams ("Adams") has two criminal cases in this district that are relevant to the claims in the pending motion.

Adams's 1992 Criminal Case

In Criminal Case Number 92-81100, Adams was charged with multiple drug and firearm offenses. That case was assigned to the Honorable Robert E. DeMascio. Adams pleaded guilty to six offenses involving drugs and firearms, pursuant to a Rule 11 Plea Agreement. (*See* ECF No. 68 in 92-CR-81100). One of the charges that Adams pleaded guilty to was Count III, Use or Carry of a Firearm, in violation of 18 U.S.C. § 924(c)(1). Adams was sentenced to 147 months imprisonment.[1]

The docket reflects that Adams did not file a direct appeal.

Acting through counsel, on May 23, 1996, Adams filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, Or Correct Sentence. (ECF No. 85). Among other things, Adams's § 2255 Motion challenged his Count III conviction for Use or Carry of a Firearm, in violation of 18 U.S.C. § 924(c)(1), based upon the Supreme Court's decision in *United States v. Bailey*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d (1995).

In an Order issued on August 2, 1996, Judge DeMascio denied Adams's § 2255 Motion. (ECF No. 89). The Order noted that one of the grounds asserted by Adams was "that his conviction and sentence under § 924(c)(1) must be vacated in light of *Bailey v. United States*, 116 S.Ct. 508 (1996)." (*Id.* at PageID.93). Judge DeMascio analyzed and rejected that

[1]In May of 2000, "the district court modified Adams's sentence to time served and four years of supervised release." (*See* ECF No. 133 at PageID.19).

challenge, and ruled that Adams's "conviction and sentence under § 924(c)(1) is valid" even after *Bailey*. (*Id.* at PageID.96).

Adams appealed the district court's denial of his § 2255 Motion (*see* ECF No. 91). On May 20, 1997, the United States Court of Appeals for the Sixth Circuit issued an Order denying Adams a certificate of appealability. (ECF No. 101),

Adams filed a petition for a writ of certiorari. The United States Supreme Court denied Adams's petition on October 22, 1998.

Adams's 2013 Criminal Case

In Criminal Case Number 13-20874, Adams was charged with drug trafficking and firearm offenses. Adams was initially charged via a criminal complaint, after the execution of a search warrant at his home in Roseville, Michigan on November 8, 2013. (ECF No. 1, Criminal Complaint).

On March 13, 2014, a grand jury returned a Superceding Indictment, which included both drug and gun charges, including a violation of 18 U.S.C. § 924(c). (ECF No. 18). The Government also filed a penalty enhancement under 18 U.S.C. § 851. (ECF No. 42).

The Government ultimately charged and tried Adams on a Second Superceding Indictment that included six offenses: (1) conspiracy to distribute heroin; (2)-(4) possession with intent to distribute heroin, oxycodone, and hydrocodone; (5) possession of a firearm in furtherance of drug trafficking; and (6) being a felon in possession of a firearm.

Adams proceeded to a jury trial. After a three-day trial, the jury convicted Adams on all six counts. This Court sentenced Adams to: 240 months for Counts 1 and 2, the mandatory minimum, to run concurrently; 120 months for Counts 3, 4, and 6, concurrent to all other counts;

and the mandatory 300 months for Count 5, which must run consecutive to all other counts.

Adams filed a direct appeal, raising multiple issues and challenges. The United States Court of Appeals for the Sixth Circuit affirmed Adams's convictions and sentence. *United States v. Adams*, 655 F. App'x 312 (6th Cir. 2016).

Thereafter, on June 12, 2017, Adams filed a *pro se* Motion to Vacate, Set Aside or Correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No 106). In it, Adams asserts that he is entitled to relief from his convictions and sentences for drug trafficking and firearm offenses. Adams claims that both his trial counsel and his appellate counsel provided ineffective assistance of counsel to him and raised a litany of issues.

After full briefing by the parties, in an Opinion and Order issued on March 13, 2019, this Court denied the motion and declined to issue a certificate of appealability. (ECF No. 145).

Thereafter, Adams filed a Notice of Appeal and sought a certificate of appealability from the United States Court of Appeals for the Sixth Circuit.

On November 15, 2019, the Sixth Circuit issued an Order on Adams's application for a certificate of appealability, which granted it in part and denied it in part. (ECF No. 153, Nov. 15, 2019 Order). The Sixth Circuit declined to issue a certificate of appealability as to all of the following claims, that were rejected by this Court in its March 13, 2019 Opinion and Order: whether trial counsel was ineffective for failing to challenge the presentence report's determination that Adams faced a mandatory minimum sentence of 25 years; whether trial counsel was ineffective for failing to convey an offer to plead guilty in exchange for a prison sentence of 25 years; whether trial counsel was ineffective for failing to challenge unqualified expert testimony; whether trial counsel was ineffective for failing to move for a judgment of

acquittal on the § 922(g) charge because the government failed to establish an interstate nexus; whether the testimony of an agent, Curtis Brunson, should have been excluded because that witness was not certified as an expert; whether trial counsel was in effective for failing to challenge the jury pool composition; whether trial counsel was ineffective for failing to challenge the jury selection process; whether trial counsel was ineffective for failing to raise a *Batson* challenge to the government's dismissal of two African American female jurors; whether trial counsel was ineffective for failing to challenge the government's notice of enhancement under § 851; whether trial counsel was ineffective for allowing a homicide detective (Moises Jimenez) to testify; and whether trial counsel was ineffective for cross-examining Jimenz.

The Sixth Circuit granted Adams's certificate of appealability application in part. As to the issue of whether Adams's trial counsel provided ineffective assistance of counsel by advising him to enter a proffer agreement, the Court concluded that "reasonable jurists could debate the district court's rejection" of that claim.

As to three assertions by Adams, the Sixth Circuit stated those issues were not addressed by this Court, "and it would exceed the scope of the COA inquiry for this court to do so in the first instance here. These claims therefore deserve encouragement to proceed further." (*Id.* at 4-5). Those claims are that Adams was provided ineffective assistance when his trial counsel failed: 1) to move for a judgment of acquittal on the § 924(c) charge; 2) to file a petition for a writ of error coram nobis challenging his prior §924(c) conviction; and 3) to request an informant jury instruction. The November 15, 2019 Order directed the clerk's office "to issue a briefing schedule on Adams's certified claims."

On March 10, 2021, however, the Sixth Circuit issued an Order (ECF No. 170) wherein it

dismissed the appeal as interlocutory and remanded the matter to this Court "for consideration of Adams's unresolved claims." The Sixth Circuit denied Adams's request for the appointment of counsel.

Accordingly, this matter was remanded to this Court for the limited purpose of addressing the following ineffective-assistance-of-counsel claims: 1) that Adams's trial counsel failed to move for a judgment of acquittal on the § 924(c) charge; 2) that Adam's trial counsel failed to file a petition for a writ of error coram nobis challenging his prior § 924(c) conviction; and 3) that Adams's trial counsel failed to request an informant jury instruction. To aid the Court in doing so, the Court ordered the parties to file supplemental briefs devoted to the above issues. Both parties have since filed supplemental briefs. (ECF Nos. 177 & 178).

ANALYSIS

The familiar United States Supreme Court decision in *Strickland v. Washington*, 466 U.S.688 (1984) governs this Court's analysis of ineffective assistance of counsel claims. "In *Strickland*, the Supreme Court articulated a two-component test that must be satisfied for a defendant to demonstrate that a counsel's performance was so defective as to require reversal of a conviction .. . ." *Lint v. Preselnik*, 542 F. App'x 472, 475 (6th Cir. 2013). "First, the defendant must show that counsel's performance was deficient." *Strickland,* 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

To establish deficient performance, the defendant must show that "counsel's representation fell below the objective standard of reasonableness." *Lint*, 542 F. App'x at 475 (citing *Strickland*,466 U.S.at 688). Judicial scrutiny of counsel's performance is highly deferential, and this Court must apply the strong presumption that counsel's representation

fell within the wide range of reasonable professional conduct. *Lint*, 542 F. App'x at 475-76 (citing *Strickland*, 466 U.S.at 689). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Thus, Petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Bell v. Cone*, 535 U.S. 685, 698 (2002) (citation and internal quotations omitted).

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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The likelihood of a different result "must be substantial, not just conceivable." *Lint,* 542 F. App'x at 476 (citing *Harrington v. Richter,* 131 S.Ct. 770, 792 (2011)).

Pursuant to the Sixth Circuit's limited remand, this Court is to consider the following three ineffective-assistance-of-counsel claims: 1) that Adams's trial counsel failed to move for a judgment of acquittal on the § 924(c) charge; 2) that Adam's trial counsel failed to file a petition for a writ of error coram nobis challenging his prior § 924(c) conviction; and 3) that Adams's trial counsel failed to request an informant jury instruction.

I. Failure To Move For Judgment Of Acquittal On § 924(c) Charge

First, Adams contends that his trial counsel was ineffective for "failing to move" for judgment of acquittal on the § 924(c) count based on insufficient evidence.(ECF No. 177 at 3). Adams contends that the Government failed to establish the elements of Count Five of the Indictment, which charged him with Possession of a Firearm in Furtherance of Drug Trafficking

Crime, in violation of 18 U.S.C. § 924(c)(1)(C). Thus, he contends that his trial counsel should have made a motion for judgment of acquittal as to that count.

This claim fails for a simple reason – Adams's trial counsel *did make* an oral motion for judgment of acquittal, pursuant to Fed. R. Crim. P. 29, *as to all counts*, on June 23, 2014. (*See* 6/23/14 docket entry). This Court denied that motion in its June 23, 2014 "Order Denying Defendant's Motion For Judgment Of Acquittal." (ECF No. 71). In that order, this Court noted that "Defendant seeks acquittal as to all six counts but focuses his arguments as to Count One." *Id.*

To the extent that Adams contends that his trial counsel was deficient as to the manner in which she presented the motion in relation to Count Five, that claim also fails. In order to prevail on this claim, Adams must show that there is a reasonable probability that the trial judge would have granted a motion based on the insufficiency of the evidence as to Count Five if his counsel had focused on that charge. *United States v. Brown*, 56 F.3d 65 (6th Cir. 1995); *Maupin v. Smith*, 785 F.2d 135, 140 (6th Cir. 1986).

In this case, a review of the record demonstrates that this Court would not have granted a Rule 29 motion for a judgment of acquittal on the § 924(c) charge even if Adams's counsel had focused on that charge.

In considering a motion for judgment of acquittal under Rule 29, the trial court must determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the elements of the crime beyond a reasonable doubt. *United States v. Abner*, 35 F.3d 251, 253 (6th Cir. 1994); *United States v. Meyer*, 359 F.3d 820, 826 (6th Cir. 1979). In doing so, the trial court does not weigh the evidence, consider the credibility of

witnesses, or substitute its judgment for that of the jury. *Id.* A defendant raising such a motion "bears a very heavy burden." *Abner,* 35 F.3d at 253. On review, all evidence must be construed in a manner most favorable to the Government. Moreover, circumstantial evidence alone is sufficient to sustain a conviction. *Id.*

Count Five charged Adams with Possession of a Firearm in Furtherance of Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(C). "By requiring that the possession be 'in furtherance of' the crime, Congress intended a specific nexus between the gun and the crime charged." *United States v. Mackey,* 265 F.3d 457, 462 (6th Cir. 2001). It is this nexus that Adams contends was lacking at his trial. (*See* ECF No. 177 at 4, arguing the "nexus to the firearm and the drugs was non-existent.").

But the record contains more than enough evidence for a rational trier of fact to find Adams guilty, beyond a reasonable doubt, for having violated § 924(c).

To prove the "in furtherance element," the government must show a specific nexus between the gun and the crime charged. *United States v. Brown,* 732 F.3d 569, 576 (6th Cir. 2013). To determine if this nexus exists, the Sixth Circuit considers "six factors – the *Mackey factors* – first adopted in *United States v. Mackey.*" *Id.*

Under *Mackey,* this Court first considers whether the gun was "strategically located so as to be quickly and easily available" for use during a drug transaction. As the government notes, the jury heard testimony that the guns were found in multiple locations of Adams's small, ranch-style home. When the officers entered the home to execute the search warrant, they asked Adams if he had any weapons and Adams stated he had a handgun under the couch in the living room. Detective Sergeant Brian Shock then went to that couch, and found a loaded handgun

under the couch. The jury also heard witness testimony that two more guns, one of which was loaded, were found in the master bedroom. They also heard testimony that a large amount of cash was found right outside the bedroom and that pill bottles filled with hydrocodone were found in the master bedroom. From this evidence, a jury could reasonably infer that the guns were strategically located to be quickly and easily used during a drug deal. *Brown*, 732 F.3d at 576-77 (noting that house was small enough such that the gun could be located from another floor in a matter of ten to fifteen seconds).

Second, the Court considers whether the gun was loaded. *Brown,* 732 F.3d at 577. The jury heard testimony that two of the guns were loaded.

Third, the Court considers the type of weapon. *Brown*, 732 F.3d at 577. The jury heard testimony that the types of guns found in Adams's home included a .357 revolver with an obliterated serial number, a 9mm semi-automatic pistol, and a .45 caliber semi-automatic pistol.

Fourth, the Court considers the legality of the weapon's possession. *Brown*, 732 F.3d at 577. The government offered a certified conviction as to Adams's 1992 criminal case, showing that Adams was a convicted felon, who may not possess firearms.

Fifth, the Court considers the type of drug activity conducted. *Brown*, 732 F.3d at 577. Here, the evidence presented was that the drug activity was significant, involving more than a kilogram of heroin. They also heard testimony that pills, a scale, a money counter, and other items associated with drug trafficking were found in the house.

Sixth, the Court considers the time and circumstances under which the firearms were found. As in *Brown*, the jury heard testimony that law enforcement found the guns during the same search in which they found the drugs.

Accordingly, there was more than enough evidence for a rational trier of fact to find Adams guilty beyond a reasonable doubt of this offense. Adams has therefore failed to demonstrate prejudice from this alleged error.

II. Failure to File Petition For A Writ Of Error *Coram Nobis*

Second, Adams contends that his trial counsel rendered ineffective assistance to him in his 2013 case by "failing to file a petition for a writ of error *coram nobis* challenging his prior § 924(c) conviction" in the 1992 case, based upon the Supreme Court's decision in *United States v. Bailey*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d (1995). (ECF No. 177 at 4). Adams notes that *Bailey* was decided in 1995. He contends that "[o]nce this case was initiated in 2013, counsel should have immediately filed a writ of *coram nobis* challenging the prior (1992) case on the prior 924(c) conviction thus causing the instant (2013) conviction on the 924(c) count to be considered a 'first conviction' and not a second or successive 924(c)." (*Id.* at 6).

In order to prevail on this claim, Adams must show that there is a reasonable probability that such a petition would have been granted, if his trial counsel had filed one. He cannot do so.

"The writ of *coram nobis* 'provides a way to collaterally attack a criminal conviction for a person . . . who is no longer 'in custody' and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or § 2241.'" *United States v. Castano,* 906 F.3d 458, 462 (6th Cir. 2018) (quoting *Chaidez v. United States,* 568 U.S. 342, 345 n.1, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013)).

"*Coram nobis* petitioners face a high burden." *United States v. Castano*, 906 F.3d at 462; *see also Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) ("The bar for *coram nobis* relief is high."). "Because *coram nobis* is an extraordinary remedy, there are several limitations on its use." *United States v. Castano*, 906 F.3d at 463. Among other things, "the writ is

appropriate only when there is *and was* no other available avenue of relief." *Alikhani v. United States*, 200 F.3d at 734 (emphasis added).

Here, Adams could *and did* pursue habeas relief challenging his § 924(c) conviction in his 1992 criminal case based upon the Supreme Court's decision in *Bailey*. That is, Adams's filed a § 2255 Motion in his 1992 case wherein he raised that challenge. Judge DeMascio addressed and rejected Adams's challenge based upon *Bailey* in his August 2, 1996 Order. "A petition for a writ of *coram nobis* does not provide him an opportunity to *reassert failed claims* or to bring claims he neglected to bring in available proceedings." *Hatten v. United States*, 787 F. App'x 589, 591 (11th Cir. 2019) (emphasis added).

Accordingly, Adams's trial counsel in his 2013 case did not provide ineffective assistance of counsel by failing to file a petition for *coram nobis* that would have been denied.

II. Failure To Request An Informant Jury Instruction

Third, Adams claims that his trial counsel provided ineffective assistance to him in that he failed to request "an informant jury instruction for the jury['s] consideration." (ECF No. 177 at 7). Adams discusses case law relating to credibility instructions being given pertaining to paid informants who testify at trial. (*Id.* at 7-8). Adams contends that a "trial court should instruct the jury on the special reliability considerations involved when a witness derives personal benefit, such as compensation or immunity from prosecution, in exchange for their testimony." (*Id.* at 7). But Adams has not identified any informants (paid or unpaid), or any witness that was given immunity, who testified at *his trial*.

As the Government notes in response to this challenge, "no cooperator (e.g., informant or co-defendant) testified" at trial. (Govt's Br., ECF No. 178, at 13).

Rather, as the trial transcripts reflect (ECF Nos. 92-95), the only witnesses that testified at trial were law enforcement officers and persons employed by the laboratories of the Drug Enforcement Administration. Because no informants testified at Adams's trial, a jury instruction regarding the credibility of informant witnesses would not have been appropriate. Adams's trial counsel did not render ineffective assistance of counsel by failing to request a jury instruction that had no relevance to his trial.

CERTIFICATE OF APPEALABILITY

A certificate of appealability must issue before a petitioner may appeal the district court's denial of his § 2255 Motion. 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b).

Section 2253 provides that a certificate of appealability may issue only if a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If a certificate of appealability is issued by a district court, it must indicate which specific issue or issues satisfy the required showing. 28 U.S.C. § 2253(c)(3).

Here, the Court concludes that reasonable jurists would not find the Court's assessment of Adams's three above claims debatable or wrong. The Court shall therefore decline to issue a certificate of appealability.

CONCLUSION & ORDER

For the reasons set forth above, IT IS ORDERED that the three remaining claims in

Adams's § 2255 Motion are DENIED.

IT IS FURTHER ORDERED that this Court DECLINES to issue a certificate of appealability as to these claims.

IT IS SO ORDERED.

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: September 23, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff/Respondent,

v.

Erie Adams,

Defendant/Petitioner.

_____/

Criminal Case No. 13-20874
Civil Case No. 17-11866

Sean F. Cox
United States District Court Judge

JUDGMENT

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant/Petitioner's Motion to Vacate Sentence is **DENIED.**

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: September 23, 2021

Appendix B

United States v. Adams

United States District Court for the Eastern District of Michigan, Southern Division

March 13, 2019, Decided; March 13, 2019, Filed

Criminal Case No. 13-20874; Civil Case No. 17-11866

Reporter

2019 U.S. Dist. LEXIS 40252 *; 2019 WL 1170347

United States of America, Plaintiff/Respondent, v. Erie Adams, Defendant/Petitioner.

Subsequent History: Appeal dismissed by, Motion denied by, Remanded by Adams v. United States, 2021 U.S. App. LEXIS 7014, 2021 WL 1984896 (6th Cir. Mich., Mar. 10, 2021)

Certificate of appealability denied Adams v. United States, 2022 U.S. App. LEXIS 24022 (6th Cir., Aug. 25, 2022)

Post-conviction relief denied at Adams v. United States, 2023 U.S. App. LEXIS 15823 (6th Cir. Mich., June 22, 2023)

Prior History: United States v. Adams, 655 Fed. Appx. 312, 2016 U.S. App. LEXIS 12793, 2016 WL 3613394 (6th Cir. Mich., July 5, 2016)

Counsel: [*1] Erie Adams, Petitioner (2:17-cv-11866-SFC), Pro se, FLORENCE, CO.

For United States of America, Plaintiff (2:13-cr-20874-SFC-DRG-1): Steven P. Cares, LEAD ATTORNEY, U.S. Attorney's Office, Detroit, MI.

Judges: Sean F. Cox, United States District Judge.

Opinion by: Sean F. Cox

Opinion

OPINION & ORDER DENYING MOTION TO VACATE UNDER 28 U.S.C. § 2255

This is a habeas petition made pursuant to 28 U.S.C. § 2255. Petitioner Erie Adams ("Adams") filed his habeas petition acting *pro se*, asserting that he is entitled to relief from his convictions and sentences for drug trafficking and firearm offenses. Adams claims that both his trial counsel and his appellate counsel provided ineffective assistance of counsel to him. The motion was fully briefed by the parties. Because the files and records of the case conclusively show that Adams is entitled to no relief as to the claims in this § 2255 motion, an evidentiary hearing is not necessary and the matter is ripe for a decision by this Court. For the reasons set forth below, the Court denies the motion and declines to issue a certificate of appealability.

BACKGROUND

In Criminal Case Number 13-20874, Adams

was charged with drug trafficking and firearm offenses.

Adams was initially charged via a criminal complaint, after [*2] the execution of a search warrant at his home in Roseville, Michigan on November 8, 2013. (ECF No. 1, Criminal Complaint).

Following his arrest, Adams sat down with his counsel, Suzanna Kostrovski, and investigators for a proffer session on January 10, 2014. (ECF No. 59-2). During the proffer, Adams discussed the drugs found in his home and that he had received drugs from a man named Tyrone Conyers. (ECF No. 59-3). Counsel for the Government advised that Conyers had recently been murdered and asked if Adams knew anything about that. Adams denied any knowledge or involvement in the murder. The proffer agreement allowed the Government to test the truthfulness of Adams's statement made during the proffer through a polygraph examination and provided the Government could use Adams's statements against him if he failed that examination. (ECF No. 59-4).

On January 17, 2014, Adams was given a polygraph examination and he was asked if he knew who killed or participated in the killing of Conyers. Adams failed the examination.

On March 13, 2014, a grand jury returned a Superceding Indictment, which included both drug and gun charges, including a violation of 18 U.S.C. § 924(c). (ECF No. 18). The Government also filed [*3] a penalty enhancement under 18 U.S.C. § 851. (ECF No. 42).

The Government ultimately charged and tried Adams on a Second Superceding Indictment that included six offenses: (1) conspiracy to distribute heroin; (2)-(4) possession with intent to distribute heroin, oxycodone, and hydrocodone; (5) possession of a firearm in furtherance of drug trafficking; and (6) being a felon in possession of a firearm.

Adams proceeded to a jury trial. After a three-day trial, the jury convicted Adams on all six counts.

This Court sentenced Adams to: 240 months for Counts 1 and 2, the mandatory minimum, to run concurrently; 120 months for Counts 3, 4, and 6, concurrent to all other counts; and the mandatory 300 months for Count 5, which must run consecutive to all other counts.

Adams filed a direct appeal, raising multiple issues and challenges. The United States Court of Appeals for the Sixth Circuit affirmed Adams's convictions and sentence. *United States v. Adams*, 655 F. App'x 312 (6th Cir. 2016).

Thereafter, on June 12, 2017, Adams filed a *pro se* Motion to Vacate, Set Aside or Correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No 106).

Because Adams was seeking to assert a claim that his trial counsel provided ineffective assistance of counsel by virtue of not having made a *Batson* challenge [*4] during jury selection, Adams filed a motion seeking to obtain a transcript of jury selection. This Court granted that request and the Government provided Adams with

the requested transcript. (*See, eg.*, ECF No. 137).

Adams also requested that he be able to raise additional claims that were not in his original brief. The Court granted that request and ordered Adams to include all claims he wished to raise in a new § 2255 brief of no more than twenty-five pages. Adams filed that brief on March 1, 2018. (ECF No. 134). Adams filed a Reply Brief on January 2, 2019. (ECF No. 144).

Despite having been provided the transcript of jury selection, Adams has not identified the name of any prospective black juror who was excused by the Government via a peremptory challenge.

The transcript of jury selection reflects that, after the jury had been selected, Adams's counsel placed an objection on the record regarding the composition of the jury venire:

> MS. KOSTOVSKI: May I just make a quick record about the jury selection and the prospective jury pool.
>
> > What I noticed, Your Honor, is there were only two African-Americans that were in the large pool and then there was one African-American potential juror that was [*5] seated as a potential juror, and Mr. Cares used a peremptory challenge and she was removed from the jury. So I just want the record to reflect that what Mr. Adams has here is an all Caucasian or white jury.
>
> THE COURT: Okay. The selection process is random. I don't know how I am supposed to react.
>
> MS. KOSTOVSKI: Well, I'm not sure I'm looking for reaction judge, except I'm just trying to make a record that a jury of his peers should at least reflect some — at least one, maybe more African-American. And I only noticed there were only two that were in a large pool to begin with, and then only one was seated and that one was excused by Mr. Cares. I'm not making any accusations that he excused her based on race or other inappropriate factors. I'm just making a record that there really is not a jury of his peers in the sense that there was no African-Americans selected and there were only two potential candidates.
>
> MR. CARES: Your Honor, just to briefly respond if I may. It doesn't sound that the defense is making a direct challenge to the jury pool. Just making a record. But I just note for purposes of the record as well that the jury selection process, the collection of jurors that sat in [*6] the gallery today has been approved by the Sixth Circuit as being constitutional.
>
> THE COURT: Right.
>
> > All right. So the motions in limine we are going to argue at say 11:00 — 10:30 on Monday. Will that work for everybody?

(ECF No. 97 at PageID. 1816-1818).

In his updated brief, Adams asserts that both his trial and appellate counsel provided ineffective assistance of counsel to him.

STANDARD OF REVIEW

Petitioner's motion is brought pursuant to 28 U.S.C. § 2255, which provides:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence imposed was in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255. To prevail on a § 2255 motion, "a petitioner must demonstrate the existence of an error of constitutional magnitude which has a substantial and injurious effect or influence on the guilty plea or the jury's verdict." *Humphress v. United States*, 398 F.3d 855, 858 (6th Cir. 2005). A movant can prevail on a § 2255 [*7] motion alleging non-constitutional error only by establishing 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." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999).

Defendants seeking to set aside their sentences pursuant to 28 U.S.C. section 2255 have the burden of establishing their case by a preponderance of the evidence. *McQueen v. U.S.*, 58 Fed. App'x 73, 76 (6th Cir. 2003). It is well established that when a defendant files a section 2255 motion, he or she must set forth facts establishing entitlement to relief. *Green v. Wingo*, 454 F.2d 52, 53 (6th Cir. 1972); *O'Malley v. United States*, 285 F.2d 733, 735 (6th Cir. 1961). "Conclusions, not substantiated by allegations of fact with some probability of verity, are not sufficient to warrant a hearing." *Green*, 454 F.2d at 53; *O'Malley*, 285 F.2d at 735 (citations omitted).

ANALYSIS

The familiar United States Supreme Court decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) governs this Court's analysis of ineffective assistance of counsel claims. "In *Strickland*, the Supreme Court articulated a two-component test that must be satisfied for a defendant to demonstrate that a counsel's performance was so defective as to require reversal of a conviction . . . ." *Lint v. Prelesnik*, 542 Fed. Appx. 472, 475 (6th Cir. 2013). "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

To establish deficient performance, [*8] the defendant must show that "counsel's representation fell below the objective standard of reasonableness." *Lint*, 542 F. App'x at 475 (citing *Strickland*, 466 U.S. at 688). Judicial scrutiny of counsel's performance is highly deferential, and this Court must apply the strong presumption that counsel's representation fell within the wide range of reasonable professional conduct. *Lint*, 542 F. App'x at 475-76 (citing *Strickland*, 466 U.S. at 689).

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Thus, Petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Bell v. Cone*, 535 U.S. 685, 698, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (citation and internal quotations omitted).

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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The likelihood of a different result "must be substantial, not just conceivable." *Lint*, 542 F. App'x at 476 (citing *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792, 178 L. Ed. 2d 624 (2011)).

In his § 2255 Motion, Adams asserts that both his trial and appellate counsel provided ineffective assistance of counsel to him, raising a litany of issues.

Trial [*9] **Counsel's Alleged Failure To Convey A Plea Offer**

Adams contends that his trial counsel provided ineffective assistance of counsel by not conveying the Government's plea offer to him.

As stated on the record at the plea cutoff conference, however, the Government did not offer Adams a Rule 11 Agreement. The only option that the Government gave Adams was to plead as charged in the indictment, which was rejected by Adams in open court:

> THE COURT: Good morning. This is final pretrial — pleas cutoff conference.
>
> It's my understanding that there's going to be no plea, is that correct?
>
> MR. CARES: That's correct, Your Honor.
>
> MS. KOSTOVSKI: That's correct.
>
> THE COURT: Do we wish to put the offer, the last offer that was made to the defendant and reject it on the record?
>
> MR. CARES: Your Honor, there's been no offer made, other than to the charges in the indictment, so the offer is essentially to plead as charged.
>
> THE COURT: Okay. And that request has been rejected, is that correct?
>
> MS. KOSTOVSKI: That's correct.
>
> THE COURT: Is that true, sir?
>
> DEFENDANT ADAMS: Yes, sir.

(ECF No. 89 at PageID.990-991). Accordingly, this claim fails.

Trial Counsel Allowing Adams To Enter Into Proffer Agreement

Adams also faults his trial [*10] counsel for allowing him to enter into the proffer agreement with the Government, asserting that no reasonable attorney would have agreed to such an agreement. Adams assert that is so because there is "way too much room for severe errors in taking a polygraph." (ECF No. 134 at PageID.2072).

Adams does not dispute, however, that he

signed and agreed to the proffer agreement. Moreover, in light of all of the other evidence that was presented at trial, Adams has not established that he suffered prejudice in any event.

Trial Counsel's Failure To Object During Jury Selection

Adams faults his trial counsel for not having objected during jury selection, raising two different claims.

First, he asserts that his counsel rendered deficient performance by not having objected to the racial composition of his jury venire, which he asserts only contained two black individuals.

The Sixth Amendment protects a criminal defendant's right to a jury selected from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 526-27, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). To establish a violation of this right, a defendant such as Adams must show: 1) the group allegedly excluded is a distinctive group within the community; 2) the representation of the group in venires from which juries are [*11] selected is not fair and reasonable in relation to the number of persons in the community; and 3) the under-representation is because of systemic exclusion of the group in the jury selection process. *United States v. Allen*, 160 F.3d 1096, 1103 (6th Cir. 1998). A criminal defendant does not establish the second prong of the test by pointing to a lack of representation of the distinctive group in his or her jury panel. *See, e.g., Allen*, 160 F.3d at 1103 (the defendant "must show more than that [his] particular panel was unrepresentative."); *United States v. Suggs*, 531 F. App'x 609, 619 (6th Cir. 2013) (citing *United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008)).

Here, Adams has not established that his trial counsel was ineffective for failing to challenge the jury pool. In support of the second and third elements of his Sixth Amendment challenge, Adams simply asserts that there were only two black individuals in his particular jury venire. That is insufficient. *Id.*

Second, Adams faults his trial counsel for not having raised a *Batson* challenge during jury selection.

The Equal Protection Clause precludes a party from using a peremptory challenge to exclude members of the jury venire on account on their race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The Supreme Court has articulated a three-step analysis to be applied to an equal protection claim that purposeful discrimination occurred in jury selection (ie., a "*Batson* challenge"). *Rice v. White*, 660 F.3d 242, 253 (6th Cir. 2011).

First, the party opposing [*12] the strike must make out a *prima facie* case of race discrimination by showing: 1) that he/she is a member of a cognizable racial group; 2) that the proponent of the strike has used peremptory challenges to remove from the venire members of the strike opponent's race; and 3) that these facts and any other relevant circumstances raise an inference that the proponent of the strike excluded prospective jurors from the jury because of

their race. *United States v. Watford*, 468 F.3d 891, 911-12 (6th Cir. 2006); *Rice v. White*, 660 F.3d 242, 253 (6th Cir. 2011).

Second, once the opponent of the strike has established a *prima facie* case, the burden shifts to the strike proponent to come forward with a neutral explanation for his or her use of peremptory challenge. *United States v. Watford*, 468 F.3d at 912; *Rice v. White*, 660 F.3d at 254. "Like the defendant's initial burden, the prosecutor's burden on step two is 'extremely light'; the prosecutor's proffered reason 'need not be particularly persuasive, or even plausible, so long as it is neutral.'" *Rice v. White*, 660 F.3d at 254.

Third, if the prosecutor tenders a race-neutral reason, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. In doing so, the district court has the responsibility to assess the strike proponent's credibility under all of the pertinent circumstances, and then to weigh [*13] the asserted justification against the strength of the strike opponent's *prima facie* case under the totality of the circumstances. *United States v. Watford*, 468 F.3d at 912; *United States v. McAllister*, 693 F.3d 572, 580 (6th Cir. Sept. 6, 2012).

Here, Adams claims his counsel was ineffective by not having raised a *Batson* challenge during jury selection, alleging that the Government struck two female jurors who were the only black persons in the jury venire.

The record, however, reflects that: 1) there were two black females in the entire jury venire; 2) only one of those two women was seated as a prospective juror; and 3) the Government used a peremptory challenge to remove that one black woman from the jury. (ECF No. 97 at PageID.1816-18).

Moreover, as the Government notes, the transcript reflects that the Government used two peremptory challenges on two potential female jurors. The Government has provided race-neutral reasons why it struck both of those two potential jurors. One of the potential jurors stated that her son and brother-in-law had been convicted of drug crimes. (ECF No. 97 at PageID.1738-39 & 1769). As to the second women, she stated that he had previously served as a juror. This Court's standard practice during jury selection is to ask such individuals if they reached a verdict, [*14] instructing them not to state what the verdict was that was reached. As to this second woman, she responded that she had previously served as a juror, and then on her own, offered that the criminal defendant was acquitted in that matter. (*Id.* at PageID.1792 & 1797).

This Court concludes that Adams's claim that his trial counsel rendered ineffective assistance of counsel by not raising a *Batson* challenge fails. Even if both of the female jurors stricken by the Government were black, the Government has offered race-neutral reasons, supported in the record, as to why the Government used peremptory challenges as to those two women. Under the totality of the circumstances, the Court concludes there was no purposeful discrimination.

Trial Counsel's Alleged Failure To Request Sequestration Of Witnesses

Adams asserts that his trial counsel was "ineffective for failing to invoke The Rule Of Evidence 615 which disallows one witness from hearing the other witnesses' testimony during the trial." (ECF No. 134 at PageID.2086). Adams makes this argument in a very cursory and conclusory manner, without identifying any witness who was allegedly present in courtroom during trial while another witness was [*15] testifying, and without specifying how that prejudiced him. All he states is:

> Rule 615 of the Federal Rules of Evidence was never invoked by Kostovski and this allowed other witnesses to be present while witnesses testified allowing for collusion, amongst other things to occur prejudicing Adams trial. Adams was denied a fair trial and his defense was prejudiced by this act.

(*Id.*)

The Court finds this claim without merit. This Court routinely sequesters the witnesses during criminal cases without the need for a motion or request from Counsel and did so here.

Moreover, even if that were not the case, Adams has not established either deficient performance or prejudice as he failed to identify any witness who was allegedly present in the courtroom while another witness was testifying or how that prejudiced him.

Trial Counsel's Failure To Challenge 18 U.S.C. § 924(c) Enhancement

Adams claims that his trial counsel rendered ineffective assistance of counsel for not objecting to the sentencing enhancement under Count 5, arguing that he should have only received a consecutive 5 year sentence under the law.

As the Government notes, Adams's trial counsel had a good reason not to argue for a sentence less than 25 years on Count Five — she would have lost.

It [*16] is undisputed that Adams had a prior conviction of 18 U.S.C. § 924(c), in Criminal Case Number 92-81100-01 in this Court. (*See* ECF No. 78-3). Adams had a second conviction of § 924(c) when the jury found him guilty in this case. Accordingly, because this was his second conviction, § 924(c)(1)(C) *required* that Adams receive a 25-year sentence as to Count 5. Indeed, in affirming Adams's sentence on direct appeal, the Sixth Circuit noted that Adams received "the mandatory 300 months [(25 years)] for Count 5, which must run consecutive to all other counts." *United States v. Adams*, 655 F. App'x at 316.

Trial Counsel's Failure To Object To The Fact That Experts That Testified Were Never Admitted By The Court As Experts During Trial, And Appellate Counsel's Failure To Raise Same On Appeal

Adams asserts that "[d]uring the direct testimony of all experts that testified in the criminal trial, none were qualified and admitted by the Court as experts." (ECF No.

134 at PageID.2079). Adams faults his trial counsel for failing to object to that at trial, and faults his appellate counsel for failing to raise the issue on appeal. This claim fails, for the reason concisely explained by the Government in its brief:

> Adams claims that this attorney should have objected to [the testimony [*17] of several witnesses at trial] because they were not "qualified and admitted . . . as experts." But under *United States v. Johnson*, 488 F.3d 690 (6th Cir. 2007), [a] district court "should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion" or certify the witness's expertise in front of a jury. *Id.* at 697. In other words, the Sixth Circuit explicitly forbids the process that Adams suggests his attorney should have followed. And each of these witnesses possessed requisite background to testify about their opinions on drug make-up, fingerprint analysis, and firearms production. In other words, these witnesses were appropriately qualified.

(ECF No. 127 at Pg ID 2040).

Trial And/Or Appellate Counsel's Failure To Challenge Interstate Nexus For Felon-In-Possession Charge

Adams also faults his trial counsel for not moving for acquittal on the felon-in-possession charge, on the ground that the Government failed to prove the interstate nexus requirement.

To the extent that Adams faults his trial counsel, or appellate counsel, for not having challenged the § 922(g) interstate nexus element, the claim fails. The Sixth Circuit has held that the interstate commerce nexus may be established at trial by simply [*18] showing that a firearm was manufactured somewhere other than the state in which it was possessed by the Defendant. *See, e.g., United States v. Pedigo*, 879 F.2d 1315, 1319-20 (6th Cir. 1989).

At trial, ATF Special Agent Curtis Brunson testified that the firearms at issue in this case were manufactured in Massachusetts, and therefore, crossed states lines. (ECF No. 93 at PageID. 1374-77). As such, the interstate commerce element was met and counsel did not provide deficient performance by failing to object.

Trial Counsel's Failure To Object To The § 851 Notice

Adams also faults his trial counsel for not having objected to the 21 U.S.C. § 851 Notice filed by the Government. (ECF No. 134 at PageID.2085).

On direct appeal, Adams argued that "the government should not have been permitted to file an information enhancing his minimum sentence under 21 U.S.C. § 851." *United States v. Adams*, 655 F. App'x at 322. The Sixth Circuit considered, and rejected, that argument.

Accordingly, Adams's trial counsel did not provide ineffective assistance of counsel by virtue of not having raised that objection at trial.

Trial Counsel's Alleged Opening Of The Door To The Conyer Murder Coming Out At Trial During A Detective's Testimony

Adams argues that his trial counsel was ineffective for "opening the door to the Conyers murder coming out at trial [*19] by conceding to allowing this homicide detective to testify at the trial knowing it would be inflammatory just to have a homicide detective testifying in a drug case." (ECF No. 134 at PageID.2085). In support of this argument, Adams states:

> Had Kostovski not stipulated to this "Homicide Detective" being allowed to testify in a drug conspiracy trial then the prejudicial and inflammatory nature of his presence would have never been put before the jury. There were other agents who could have testified to this information put on that would suffice the Homicide Detectives presence and testimony. In addition, Kostovski could have passed on any cross examination of this witness to not bring any other attention to him.

(*Id.* at PageID.2086). Thus, Adams faults his trial counsel in two respects: 1) by not seeking to preclude this detective from testifying at trial; and 2) by cross-examining him during trial.

The detective at issue was present at Adams's proffer and testified about statements that Adams made, including about heroin that he allegedly got from and sold back to Conyers. (ECF No. 93 at PageID. 1378-1380). Because this witness had very relevant testimony to offer regarding the crimes [*20] with which Adams was charged, his trial counsel would have been unsuccessful had she moved to preclude this witness from testifying at trial simple by virtue of his being a homicide detective.

Second, Adams's trial counsel did not render deficient performance by virtue of cross-examining this witness, as that was a reasonable strategic decision. At the trial transcripts reflect, this witness was expressly instructed by the Government not to mention the Conyers homicide at trial, and that was discussed in chambers with Adams's counsel. Thus, Adams's counsel proceeded to cross-examine this witness with the knowledge that he had been so instructed. And nothing about her cross-examination elicited or "opened to the door" to the detective having spontaneously stated that he was not at the interview "for the dope thing. I'm there for the homicide thing. Mr. Tyrone Conyers is dead." (*Id.* at PageID.1382).

Moreover, after the detective made that reference, Adams's trial counsel promptly moved for a mistrial at a side bar conference with the Court, but it was denied. The Court did, however, give a curative instruction. On direct appeal, the Sixth Circuit rejected Adams's claim that the curative [*21] instruction was insufficient to curb potential prejudice." *United States v. Adams*, 655 F. App'x at 320.

Accordingly, the Court rejects this claim as Adams has not established deficient performance or prejudice.

Trial And Appellate Counsel's Failure To Object To The Sentence For The § 924(c) Charge Running Consecutively With The Other

Finally, Adams faults his trial counsel for not objecting to his "illegal sentence" for the § 924(c) charge (Count 5) running concurrently with his sentences on the remaining charges. He also faults his appellate counsel for failing to raise this issue on appeal.

These claims fail, as a sentence under 18 U.S.C. § 924(c) must not "run concurrently with any other terms of imprisonment." 18 U.S.C. § 924(c)(1)(D); *see also United States v. Adams*, 655 F. App'x at 316 (noting that Adams's "mandatory 300 months for Count 5" "must run consecutive to all other counts.").

CONCLUSION & ORDER

For the reasons set forth above, the Court concludes that Adams is not entitled to habeas relief. The Court ORDERS that Adams's Motion to Vacate under 28 U.S.C. § 2255 is DENIED.

A certificate of appealability must issue before a petitioner such as Adams may appeal the district court's denial of his § 2255 Motion. 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b).

Section 2253 provides that a certificate of appealability may issue only if a petitioner makes a substantial showing of the denial of a constitutional [*22] right. 28 U.S.C. § 2253(c)(2). As the United States Supreme Court has explained this standard:

> . . . the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). As the Court stated, "[w]here a district court has rejected the constitutional claim on the merits, the showing required to satisfy 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

If a certificate of appealability is issued by a district court, it must indicate which specific issue or issues satisfy the required showing. 28 U.S.C. § 2253(c)(3).

Here, Adams's § 2255 Motion raised several arguments. After careful consideration, the Court concludes that reasonable jurists would not find the Court's assessment of those claims debatable or wrong. The Court shall therefore decline to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: March 13, 2019

/s/ Sean F. Cox