

## APPENDIX

EXHIBIT A SIXTH CIRCUIT Unpublished Opinion dated July 21, 2023, denying Petitioners Habeas Petition and affirming sentence and conviction.

EXHIBIT B FIRST SUPERSEDING INDICTMENT (Case No. 2:10-cr-20397) and SECOND SUPERSEDING INDICTMENT (Case No. 2:11-cr-20444).

EXHIBIT C Judgement for both Case No. 2:10-cr-20397 and 2:11-cr-20444.

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planned the robberies, provided supplies, and acted as a lookout while his co-conspirators entered the stores. *Id.* He then sold the stolen goods and split the proceeds. *Id.* at 619. Richardson and his co-conspirators were arrested on May 28, 2010, after police observed them robbing a Radio Shack. Richardson was charged with five counts of aiding and abetting Hobbs Act Robbery in violation of 18 U.S.C. § 1951(a); five counts of aiding and abetting the use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).<sup>1</sup>

Richardson's jury trial took place over several days. Richardson's co-conspirators testified that they had entered the stores armed and threatened people. And several victims testified that the robbers had used guns during their crimes. An employee of the first store to be robbed testified that she "saw three guys come into the store holding guns." (R. 216, PageID 2671, Page 461). The men "came in pointing guns and basically they told everybody to get to the back and then, you know, get down on the ground." (*Id.*). At one point, when a customer came in the store, the robber "took the gun off [her] head and he moved it to the lower part of [her] back." (*Id.* at PageID 2676, Page 466).

Other victims offered similar testimony. An employee at the second robbery described having his hands up because the robbers "had a gun pointed at" him. (R. 209, PageID 1413, Page 395). A customer at the third robbery testified that one of the robbers "did have a gun. He was pointing it at the [] people at the back." (*Id.* at PageID 1421, Page 403). An employee at the fourth robbery testified that the robbers pointed weapons at himself and his colleague. And an employee

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<sup>1</sup> Richardson was charged in two separate indictments, though his case was ultimately consolidated.

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at the final robbery testified that he saw one of the robbers point a gun and that the weapon was pressed against the back of his head.

Before the jury deliberated, the court instructed them on the counts charged. As for the use-of-a-firearm charges, the court initially told the jury that Richardson had been charged with the crime of “aiding and abetting the crime of using or carrying a firearm during and in relation to a crime of violence.” (R. 214, PageID 2571, Page 1842). The court then provided the following more detailed instructions to the jury:

For you to find Mr. Richardson guilty of these offenses, you must be convinced that the government has proven each and every one of the following three elements beyond a reasonable doubt. First, that Mr. Richardson aided and abetted a person who used, carried or *possessed* a firearm. Second, that the firearm was used, carried or *possessed* during and in relation to a crime of violence which may be prosecuted in a court of the United States. And finally, that Mr. Richardson acted knowingly when doing this.

(*Id.* (emphases added)).

In doing so, the court added an element that the use-of-a-firearm crime doesn't contain, namely “possession” of a firearm. *See* 18 U.S.C. § 924(c); *infra* Part II.A. But after that, the court continued to instruct the jury and correctly stated the elements of the offense several times. The jury verdict form also correctly listed the elements of the offense.

The court also instructed the jury that if they found Richardson guilty of the use or carrying charges, they would then be required to answer a special interrogatory determining whether a weapon was “brandished” during the crime. (R. 214, PageID 2594, Page 1865). The court instructed the jury that brandishing meant “to display all or part of the firearm or otherwise make the presence of the firearm known to another person in order to intimidate that person, regardless of whether the firearm is directly visible to that person.” (*Id.*).

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The jury found Richardson guilty on all charges. And for each use or carrying offense, it found that a weapon had been brandished. *You can't find on charges because of instruction that a weapon*

After Richardson was sentenced, he appealed his conviction and sentence. The Sixth Circuit affirmed twice, but each time, the case was vacated and remanded by the Supreme Court with instructions that we consider an intervening change in law. *See Richardson*, 793 F.3d at 634, *judgment vacated*, 577 U.S. 1129 (2016) (remanding for consideration of *Johnson v. United States*, 576 U.S. 591 (2015)); *United States v. Richardson*, 906 F.3d 417, 429 (6th Cir. 2018), *judgment vacated*, 139 S. Ct. 2713 (2019) (remanding in light of the First Step Act of 2018). We affirmed his conviction and sentence a third time, and the Supreme Court denied certiorari. *United States v. Richardson*, 948 F.3d 733, 753 (6th Cir.), *cert. denied*, 141 S. Ct. 344 (2020).

Richardson has now moved to vacate his sentence under 28 U.S.C. § 2255. He claims that he was deprived of effective assistance of counsel at both the trial and appellate level when his counsel failed to object to several erroneous jury instructions. The district court acknowledged that the instructions were erroneous but declined to grant Richardson a certificate of appealability on his ineffective-assistance-of-counsel claim, finding that he had failed to show prejudice.

Richardson moved this Court for a certificate of appealability. And we granted it with regard to his claim that his trial and appellate counsel were constitutionally ineffective by failing to challenge the district court's jury instructions about the § 924(c) elements.<sup>2</sup>

<sup>2</sup> Richardson also alleged error based on counsel's failure to challenge the district court's incorrect statement of the predicate offenses of his § 924(c) conviction and the application of a mandatory seven-year sentence for brandishing where he had not been formally charged with brandishing in the indictment. The district court declined to grant a certificate of appealability on these grounds as well. We did not grant Richardson a certificate of appealability on these questions, finding that jurors of reason would conclude that the court's misstatement of the predicate offenses, taken as a whole, did not render the jury instructions confusing or prejudicial. And we found that he had forfeited his claim regarding his mandatory seven-year sentence by failing to seek a certificate of appealability on that issue.

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## II.

We review the denial of a § 2255 motion de novo, while reviewing the district court's factual findings for clear error. *Moss v. United States*, 323 F.3d 445, 454 (6th Cir. 2003). "Ineffective assistance of counsel claims present mixed questions of law and fact and are reviewed de novo." *United States v. Ferguson*, 669 F.3d 756, 761 (6th Cir. 2012).

### A.

In order to prevail on an ineffective assistance of counsel claim, a petitioner must show two things: (1) "that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). And (2): "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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* *speculation for some questions as*

As the government concedes, Richardson has a strong argument that the first prong of the *Strickland* test has been met here. We have held that counsel's failure to object to an erroneous jury instruction may fall below the objective standard of reasonableness required by *Strickland*. See *Lucas v. O'Dea*, 179 F.3d 412, 419 (6th Cir. 1999). And the government admits that the instruction was in part erroneous. But we need not resolve whether counsel's failure to object was objectively unreasonable because we may "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," as opposed to first determining whether counsel's performance was deficient. *Strickland*, 466 U.S. at 697. So counsel's failure is not enough for Richardson to prevail on his *Strickland* claim. He must show a reasonable probability that but for the error, the proceeding's result would have been different. *Id.* at 694. This he cannot do. *wrong if*

*counsel would have objected to the branding of the*  
*then whether a 7 year sentence would have been imposed*  
*outside of jury procedure and correct guidelines judge, judge*  
*5*  
*proceeding*

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Taken by themselves, the erroneous instructions give us pause. The district court misstated the law twice. And the government gave the same erroneous statement of the law in its opening and closing statements. At the same time, the court correctly instructed the jury multiple times after the erroneous instruction was given. And the indictments and jury forms correctly stated the law on aiding and abetting the use or carrying of a weapon.

We have found, in cases concerning the identical instructional error regarding the same § 924(c) charges at issue here, that where a court's jury instructions conflict with the indictment, this may so taint the jury's verdict that that verdict must be vacated. See *United States v. Combs*, 369 F.3d 925, 936 (6th Cir. 2004); *United States v. Lowe*, 172 F. App'x 91, 94–95 (6th Cir. 2006). And in the same context as this case, we found that erroneous statements by the government may contribute to erroneous statements by the court, making it more likely a jury convicted a defendant improperly. See *United States v. Savoires*, 430 F.3d 376, 380 (6th Cir. 2005). Still, in the cases where we have vacated defendants' convictions based on erroneous jury instructions, the errors pervaded the entire jury instruction and often affected multiple aspects of the trial. See, e.g., *United States v. Castano*, 543 F.3d at 831–32. Here, the errors by the court were limited to two incorrect statements among multiple correct ones, as well as two erroneous statements by the government. But we need not engage in a line-drawing exercise to determine whether the errors in this case were so extensive that they created a reasonable probability that a properly instructed jury would have reached a different result. We know that they would not.

That's because the jury here answered interrogatories on the question of brandishing. If the jury found Richardson guilty of aiding and abetting a use or carry offense, they were asked to find whether "the government had proved beyond a reasonable doubt that a firearm was brandished" in the offense. (R. 171, PageID 676–81; Page 1–6). And the court defined brandishing

think, or suggest, that the intended indictment charge which was instructed & found by the jury, all in violation of the 6th Amendment's explicit Supreme Court protection of a fair and honest trial. The court's error in this case was not including the brandishing as a separate

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as “to display all or part of the firearm or otherwise make the presence of the firearm known to another person in order to intimidate that person, regardless of whether the firearm is directly visible to that person.” (R. 214, at PageID 2594, Page 1865). Through the special interrogatories, the jury found that for each aiding-and-abetting offense, a firearm had been brandished.

We have suggested in another context that interrogatories indicate the jury’s findings on specific questions and can be used to determine the basis on which a defendant was convicted. *See United States v. Ford*, 761 F.3d 641, 656 (6th Cir. 2014); *see also United States v. Gonzales*, 841 F.3d 339, 353 (5th Cir. 2016) (“[O]nce a special interrogatory is asked, the jury’s answers have legal force.”); *United States v. Dvorak*, 617 F.3d 1017, 1026 (8th Cir. 2010) (“Here, there is no need to guess as to whether a rational jury would have found [the defendant] guilty if the proper instructions were given because a rational jury *did* find that he met the additional element of the statute.”). The jury’s responses allow us “to determine upon what factual and legal basis the jury decided a given question.” *United States v. Najjar*, 300 F.3d 466, 480 n.3 (4th Cir. 2002). And here the jury was specifically instructed that brandishing a weapon was a form of “use.” (R. 214, at PageID 2572, Page 1843).

The jury’s unanimous agreement that a firearm was brandished indicates that they found that a firearm was displayed or made known to another person in order to intimidate them. The court instructed the jury that brandishing was a form of “use.” (*Id.* at PageID 2572, Page 1843). And we have held that “[t]o prove a violation of 18 U.S.C. § 924(c)(1)(A), it is enough for the Government to prove that defendant committed a crime of violence, and that during or in relation to the crime of violence, defendant used, carried, or brandished a firearm.” *United States v. French*, 976 F.3d 744, 748 (6th Cir. 2020); *see also* Sixth Circuit Pattern Jury Instruction 12.02(2)(A) (“To establish ‘use,’ the government must prove active employment of the firearm during and in relation

charge, other than what the grand jury returned with and therefore the indictment was amended when government could not establish cover for brandishing, possibly forced by defendant's actions.

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to the crime charged in Count \_\_\_\_\_. ‘Active employment’ means activities such as brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm.”). So here, the jury convicted Richardson of aiding and abetting the use of a firearm during and in relation to a crime of violence.

And there was certainly overwhelming evidence to support such a conviction. Multiple witnesses, including Richardson’s victims and co-conspirators, had testified that the robbers held weapons in a threatening manner during the robberies. So even if the district court had not misstated the elements of the offense at any point during the jury instructions, there is no reasonable probability that the outcome would have been different. *See Napier v. United States*, 159 F.3d 956, 962 (6th Cir. 1998) (holding that “errors in [jury] instructions d[id] not rise to the level of actual prejudice”).

B.

Richardson argues that in assessing prejudice, we should not rely on the special interrogatories regarding brandishing for two reasons. First, he claims that the answers to the interrogatories somehow constructively amended his indictment, and so we should not use them. Richardson’s claim requires us to find a constructive amendment based on the jury’s findings regarding brandishing. In granting Richardson’s COA, we found that he had forfeited his argument with respect to the brandishing sentencing enhancement. Richardson does not attempt to relitigate his sentence. But he claims that the interrogatories represent a separate violation of his rights and cannot be used to show that counsel’s error did not affect the outcome. It doesn’t appear that Richardson ever objected to or challenged the interrogatories at trial.<sup>3</sup> And he did not raise the

<sup>3</sup> Richardson argued that the interrogatories constructively amended his conviction during his second appeal. 17-2183 Appellant Br. at 34. Because we construed the remand in that case to have been limited to addressing the application of the Supreme Court’s decision in *Johnson*, we

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issue of constructive amendment in his motion for a COA. But we need not decide whether Richardson's forfeiture of the sentencing enhancement argument or other failures to raise the constructive amendment argument bar him because no constructive amendment occurred.

"A constructive amendment results when the terms of an indictment are in effect altered" at trial so that a "defendant may have been convicted of an offense other than the one charged in the indictment." *United States v. Martinez*, 430 F.3d 317, 338 (6th Cir. 2005) (quoting *United States v. Smith*, 320 F.3d 647, 656 (6th Cir. 2003)). Here, the terms of Richardson's indictment line up with the crimes he was convicted of—*none* of which were brandishing a firearm. *Cf. Alleyne v. United States*, 570 U.S. 99, 113–14, 115–16 (2013) ("[B]randishing . . . constitutes an element of a separate, aggravated offense that must be found by the jury[.]"). To be clear, the jury's answers to the special interrogatories (each affirming that a firearm was brandished during the offenses) were *findings*—not convictions in themselves. So no constructive amendment occurred and we may consider the interrogatories.<sup>4</sup>

did not address this argument. *Richardson*, 948 F.3d at 739. But this would not have stopped Richardson from raising the argument in his application for a COA.

This does not mean that Richardson could not raise any arguments regarding the interrogatories. The COA covers ineffective assistance of counsel, which requires looking at prejudice. In its brief, the government argues that Richardson cannot show prejudice because of the special interrogatories. Richardson's challenges to the special interrogatories are responses to the government's prejudice arguments. So we need not decide whether he forfeited these arguments because he is allowed to respond to the government's arguments.

<sup>4</sup> Even if the failure to charge brandishing in the indictment was error, we must consider whether this error was prejudicial. See *United States v. Evans*, 568 F. App'x 368, 369–70 (6th Cir. 2014) ("We have applied harmless error analysis to an indictment's failure to allege an element of a crime."). We have found that where a defendant admits to brandishing in a plea agreement with knowledge of the potential impact on his sentence, no prejudice occurs from the failure to include brandishing in the indictment. *United States v. Yancy*, 725 F.3d 596, 599–600 (6th Cir. 2013). Likewise, no prejudice occurs where the jury finds beyond a reasonable doubt that brandishing occurred. So any error that may have occurred with respect to the indictment does not affect our ability to consider the interrogatories as evidence of the basis of the jury's conviction.

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Second, Richardson argues that the brandishing interrogatories introduced a new form of participation. Specifically, the interrogatories asked the jury if they found beyond a reasonable doubt that “a firearm was brandished . . . in connection with the commission of” each offense. (R. 171 at PageID 677–81; Page 2–6). Richardson argues that the “in connection with the commission of” standard of participation is different from the “during and in furtherance” standard at issue in the use and carry offense.

Richardson cites no caselaw for this proposition. But even if the standards of participation are different, it would not affect the result here. The jury was instructed not to “answer the[] jury interrogatories or questions until [they had] reached a verdict on [the use or carry] counts.” (R. 214, PageID 2593, Page 1864). And “[a] jury is presumed to follow its instructions.” *United States v. Johnson*, 803 F.3d 279, 282 (6th Cir. 2015) (quoting *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012)).

This means that the jury here first determined that the relevant conduct with the firearm occurred “during and in relation to a crime of violence.” And their answers to the interrogatories after clarified what relevant conduct (i.e., brandishing) got them to the “use” of the firearm. So nothing prevents us from looking to the jury’s answers to the special interrogatories. And they show that no prejudice occurred by counsel’s failure to object to the erroneous jury instructions.

### III.

For these reasons, we AFFIRM the district court’s denial of Richardson’s 28 U.S.C. § 2255 motion.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Nos. 22-1687/1688

FRANK RICHARDSON,  
Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,  
Respondent - Appellee.

**FILED**  
Jul 21, 2023  
DEBORAH S. HUNT, Clerk

Before: BATCHELDER, COLE, and NALBANDIAN, Circuit Judges.

**JUDGMENT**

On Appeal from the United States District Court  
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK RICHARDSON,

Defendant.

Case No. 10-cr-20397

Case No. 11-cr-20444

HON. MARK A. GOLDSMITH

**ORDER DENYING DEFENDANT'S MOTION FOR CERTIFICATE OF  
APPEALABILITY (Case No. 10-cr-20397, Dkt. 388; Case No. 11-cr-20444, Dkt. 131)**

Before the Court is a motion filed by Defendant Frank Richardson in each of two actions in identical form: Case No. 10-20397, United States v. D-2 Richardson, and Case No. 11-20444, United States v. D-1 Richardson. Richardson moves for a certificate of appealability (Case No. 10-cr-20397, Dkt. 388; Case No. 11-cr-20444, Dkt. 131) from this Court's opinion and order (Case No. 10-cr-20397, Dkt. 384; Case No. 11-cr-20444, Dkt. 127) denying Richardson's motion to vacate his sentence under 28 U.S.C. § 2255 (Case No. 10-cr-20397, Dkt. 358; Case No. 11-cr-20444, Dkt. 113). The Court denies Richardson's motion for a certificate of appealability.

"A certificate of appealability may issue under [28 U.S.C. § 2253(c)(1)] only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this requirement, an applicant must demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (punctuation modified, citation omitted).

Richardson asserts that his trial and appellate counsel were ineffective for failing to challenge jury instructions on charges brought against Richardson under 18 U.S.C. § 924(c). Def. Mot. for Certificate of Appealability at 2–4. The Court found that Richardson had failed to establish a violation of his constitutional rights. See 7/19/22 Op. & Order. Reasonable jurists could not find this Court’s assessment of his claims debatable, and further litigation of this matter should not be encouraged. See Slack, 529 U.S. at 484. Accordingly, the Court denies Richardson’s motion (Case No. 10-cr-20397, Dkt. 388; Case No. 11-cr-20444, Dkt. 131).

SO ORDERED.

Dated: July 29, 2022  
Detroit, Michigan

s/Mark A. Goldsmith  
MARK A. GOLDSMITH  
United States District Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court’s ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on July 29, 2022.

s/D. Tofil  
Case Manager

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 10-cr-20397

Case No. 11-cr-20444

vs.

HON. MARK A. GOLDSMITH

FRANK RICHARDSON,

Defendant.

**OPINION & ORDER**

**(1) DENYING DEFENDANT'S MOTION TO VACATE HIS SENTENCE (Case No. 10-cr-20397, Dkt. 358; Case No. 11-cr-20444, Dkt. 113);**

**(2) DENYING DEFENDANT'S MOTION TO MODIFY HIS JUDGMENT (Case No. 10-cr-20397, Dkt. 372; Case No. 11-cr-20444, Dkt. 122); AND**

**(3) DENYING DEFENDANT'S MOTION TO APPOINT COUNSEL (Case No. 10-cr-20397, Dkt. 373; Case No. 11-cr-20444, Dkt. 123)**

Before the Court are three motions filed by Defendant Frank Richardson in each of two actions: Case No. 10-20397, United States v. D-2 Richardson, and Case No. 11-20444, United States v. D-1 Richardson. In each action, Richardson filed (i) a motion to vacate his sentence under 28 U.S.C. § 2255 (Case No. 10-cr-20397, Dkt. 358; Case No. 11-cr-20444, Dkt. 113); (ii) a motion to modify his judgment for fines and restitution (Case No. 10-cr-20397, Dkt. 372; Case No. 11-cr-20444, Dkt. 122); and (iii) a motion to appoint counsel (Case No. 10-cr-20397, Dkt. 373; Case No. 11-cr-20444, Dkt. 123). For the reasons that follow, the Court denies all of Richardson's motions.<sup>1</sup>

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<sup>1</sup> Because oral argument will not aid the Court's decisional process, the motion will be decided based on the parties' briefing. See E.D. Mich. LR 7.1(f)(2). The briefing includes the Government's response to Richardson's motion to vacate (Case No. 10-cr-20397, Dkt. 365; Case No. 11-cr-20444, Dkt. 118), Richardson's reply (Case No. 10-cr-20397, Dkt. 366; Case No. 11-cr-20444, Dkt. 119), the Government's response to Richardson's motion to modify his judgment

## I. BACKGROUND

Richardson was charged with eleven counts for his leadership role in a series of five robberies. He was indicted separately for his involvement in (i) four of the robberies, which occurred on February 22, March 3, May 8, and May 28, 2010, see Superseding Indictment (Case No. 10-cr-20397, Dkt. 13), and (ii) the one other robbery, which occurred on April 3, 2010, see Indictment (Case No. 11-cr-20444, Dkt. 1). For each of the five robberies, Richardson was charged with aiding and abetting (i) armed robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a); and (ii) “us[ing] and carry[ing] a firearm[] during and relation to a crime of violence” in violation of 18 U.S.C. § 924(c). See Superseding Indictment; Indictment; Jury Instructions (Case No. 10-cr-20397, Dkt. 173; Case No. 11-cr-20444, Dkt. 56). Richardson was also charged with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) in Case No. 10-cr-20397. See Superseding Indictment.

The dockets for the two actions were consolidated for jury trial. Evidence presented during trial demonstrated that Richardson organized robberies targeting retail stores selling cellular telephones. Richardson did not enter the stores himself, but he chose the locations, assembled the team members, provided the firearms, and served as a lookout during the robberies. See, e.g., 6/25/13 Trial Tr. at 23–26 (Case No. 10-cr-20397, Dkt. 211) (February 22 robbery); id. at 36–37,

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for fines and restitution (Case No. 10-cr-20397, Dkt. 377; Case No. 11-cr-20444, Dkt. 125), and Richardson’s reply (Case No. 10-cr-20397, Dkt. 378; Case No. 11-cr-20444, Dkt. 126). The relevant filings in the two actions are identical or nearly identical, so unless otherwise indicated, the citations to filings in this opinion and order refer to those filings in both actions.

These cases were originally assigned to the Honorable Gerald Rosen, who presided over Richardson’s jury trial. The cases were reassigned to the Honorable John Corbett O’Meara on February 1, 2017, and to the undersigned on June 5, 2020.

195–197 (March 3 robbery); id. at 203–205 (April 3 robbery); id. at 213–218 (May 8 robbery); id. at 226–232 (May 28 robbery).

In each of the five robberies, at least one member of the team was armed, and testimony reflected that the robbers used their firearms to ensure store employees and customers’ submission to the robbers’ demands.<sup>2</sup> After the robberies, Richardson sold the stolen electronics and split the proceeds among the group. See, e.g., 6/25/13 Trial Tr. at 22–23, 49, 63, 203.

The jury found Richardson guilty of all eleven counts. Verdict Form (Case No. 10-cr-20397, Dkt. 171; Case No. 11-cr-20444, Dkt. 54). The trial judge sentenced Richardson to 1,494 months in prison. See Case No. 10-cr-20397 Judgment (Dkt. 193); Case No. 11-cr-20444 Judgment (Dkt. 62).

Twice on appeal, the United States Court of Appeals for the Sixth Circuit affirmed Richardson’s conviction and sentence, and both times, the Supreme Court vacated and instructed the Sixth Circuit to consider whether an intervening Supreme Court decision or new legislation

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<sup>2</sup> See 6/25/13 Trial Tr. at 193 (containing co-defendant Derrick Bivens’s statement regarding the February 28 robbery that “I held the gun and told everybody get back to the storage room while my brother looked out the door and Jerome collected the phones”); id. at 30–31 (providing testimony that Bivens was armed with semi-automatic firearm during February 22 robbery); id. 189–190 (explaining that Richardson provided firearms that were “used” during the February 28 robbery); id. at 199–200 (containing Bivens’s testimony that he was armed with a firearm provided by Richardson during the March 3 robbery, that “the manager and the elderly woman” complied when told to “get to the back of the store,” and that Bivens’s role during robberies was to “always go in first with the gun and make sure nobody ran out”); 6/14/2013 Trial Tr. at 81–82 (Case No. 10-20397, Dkt. 216) (containing testimony of victim Michael Johnson that robbers who threw him to the ground and then forced employees and customers to the back of the store and stole wallets were armed with at least one semi-automatic pistol during April 3 robbery); 6/25/13 Trial Tr. at 56–59 (explaining that participants were armed during April 3 robbery); id. at 208–211 (containing Bivens’s testimony that he was armed with a firearm provided by Richardson during the April 3 robbery and that “[o]nce [the participants] got inside, [Bivens] told the customers get back to the storage”); id. at 220 (containing Bivens testimony that he was armed during May 8 robbery); 6/24/13 Trial Tr. at 114–117 (Case No. 10-20397, Dkt. 210) (containing Co-defendant Derick Shirley’s testimony that participants were armed during the May 8 robbery); 6/25/13 Trial Tr. at 83–84, 87 (explaining that Bivens was armed during May 28 robbery).

affected his conviction.<sup>3</sup> The Sixth Circuit then affirmed Richardson's conviction and sentence for a third time, after which the Supreme Court denied certiorari. See United States v. Richardson, 948 F.3d 733, 753 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020).

Richardson now moves pursuant to 28 U.S.C. § 2255 to modify or vacate his conviction based on ineffective assistance of both trial and appellate counsel. See Mot. to Vacate. He also requests that the Court modify his judgment for fines and restitution, see Mot. to Modify J., and appoint counsel to represent him, see Mot. to Appoint Counsel.

## II. ANALYSIS

In his motion to vacate his sentence, Richardson presents three arguments that his attorneys were unconstitutionally deficient.<sup>4</sup> The Court addresses each argument in turn, and it then considers Richardson's requests that the Court modify his judgment and appoint him counsel.

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<sup>3</sup> See United States v. Richardson, 793 F.3d 612, 634 (6th Cir. 2015), judgment vacated, 577 U.S. 1129 (2016) (remanding for further consideration in light of Johnson v. United States, 576 U.S. 591 (2015)); United States v. Richardson, 906 F.3d 417, 429 (6th Cir. 2018), judgment vacated, 139 S. Ct. 2713 (2019) (remanding for further consideration in light of the First Step Act of 2018, Pub. L. No. 115–391 (2018)).

<sup>4</sup> In order to prevail on a § 2255 motion, a defendant “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.” Mallett v. United States, 334 F.3d 491, 496–497 (6th Cir. 2003) (punctuation modified, citation omitted).

To establish a claim of ineffective assistance of counsel, a defendant must show both that (i) “counsel’s ‘representation fell below an objective reasonableness standard’” and (ii) “‘there is a reasonable probability that, but for counsel’s unprofessional error, the proceeding’s result would have been different.’” Bell v. Cone, 535 U.S. 685, 695 (2002) (quoting Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)). In other words, a defendant must demonstrate “proof of both deficient performance and prejudice to the defense.” Id. Claims for ineffective assistance of appellate counsel and for ineffective assistance of trial counsel are both subject to the same Strickland test. Mahdi v. Bagley, 522 F.3d 631, 636 (6th Cir. 2008). Erroneous jury instructions result in prejudice to the defense “only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.” United States v. Harrod, 168 F.3d 887, 892 (6th Cir. 1999) (punctuation modified, citation omitted).

**A. Jury Instructions Combined Elements of Separate “Use and Carry” and “Possess” Provisions of § 924(c)**

Richardson argues that jury instructions “erroneously cross-matched elements” between two distinct crimes under § 924(c) to create one non-existent crime, and that the failure of trial counsel or appellate counsel to object to these instructions constituted ineffective assistance of counsel. See Def. Mot. to Vacate at 5. Section 924(c) “criminalizes two separate and distinct offenses: (1) using or carrying a firearm during and in relation to a drug trafficking crime, and (2) possessing a firearm in furtherance of a drug trafficking crime.” United States v. Savoires, 430 F.3d 376, 377 (6th Cir. 2005) (punctuation modified, citation omitted, emphasis in original). Richardson was charged under only the “use and carry” provision. Superseding Indictment; Indictment.

In the instructions with which Richardson takes issue, the court told the jury that it could convict Richardson for aiding and abetting the crime of using or carrying a firearm during and in relation to a crime of violence if it found both that (i) “Mr. Richardson aided and abetted a person who used, carried or possessed a firearm” and (ii) “the firearm was used, carried or possessed during and in relation to a crime of violence.” 6/28/13 Trial Tr. at 40 (Case No. 10-cr-20397, Dkt. 214) (emphasis added); see also Jury Instructions at 21. Richardson is correct that the inclusion of the word “possessed” in these instructions was improper because it introduced an element absent from the “use and carry” provision under which Richardson was charged. See Savoires, 430 F.3d at 377.

Arguing that his trial and appellate counsel rendered deficient performance that affected Richardson’s substantial rights by failing to challenge the instructions as erroneous, Richardson relies on three cases from the Sixth Circuit. Def. Mot. to Vacate at 7–10. These cases all overturned convictions where jury instructions and other communications to the jury misstated the

elements of a § 924(c) offense.<sup>5</sup> Richardson concludes that, just like the jury instructions in Castano, Savoires, and Lowe were erroneous, the jury instructions in his case were erroneous, and his counsel's deficient failure to raise this issue resulted in prejudice. Def. Mot. to Vacate at 10–11 (citing Strickland).

The Government contends that, when considered in the context of all communications to the jury, the jury instructions' isolated use of the term “possessed” along with the terms “used” and “carried” could not have confused the jurors to such an extent that they improperly convicted Richardson of an uncharged crime. Gov't Resp. to Mot. to Vacate at 12. As the Government correctly observes, outside of the isolated errors identified by Richardson, the jury instructions correctly identified in multiple places the elements of the § 924(c) counts with which Richardson was charged.<sup>6</sup>

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<sup>5</sup> See United States v. Castano, 543 F.3d 826, 831–832 (6th Cir. 2008) (reversing conviction of defendant charged under “use and carry” provision of § 924(c) where three statements in the jury instructions, the verdict form used by the jury, and the Government's closing argument referred to the count as “the crime of possession of a firearm during a drug trafficking crime”) (punctuation modified, emphasis in original); Savoires, 430 F.3d at 378–379 (reversing conviction where jury instructions and Government's closing argument charged that the defendant “did knowingly carry and possess [a described shotgun] during and in relation to and in furtherance of a drug trafficking crime” and thus borrowed elements from both § 924(c) provisions to create the “crime of using, carrying, or possessing a firearm during and in relation to a drug trafficking crime”) (punctuation modified, emphasis in original); United States v. Lowe, 172 F. App'x 91, 95 (6th Cir. 2006) (reversing conviction where jury instructions charged that the defendant “did knowingly carry and possess firearms, during and in furtherance of a drug trafficking crime” under § 924(c) and incorrectly stated that the § 924(c) charge required a finding that “during and in relation to the commission of that crime, Defendant Lee Lowe knowingly possessed a firearm in furtherance of that crime”) (punctuation modified, emphasis in original).

<sup>6</sup> Specifically:

- The § 924(c) instructions were correctly titled, “USING OR CARRYING A FIREARM DURING FEDERAL CRIME OF VIOLENCE.” 6/28/13 Trial Tr. at 41–42; Jury Instructions at 21.
- The instructions stated that Richardson was charged with violating § 924(c) by “aiding and abetting the crime of using or carrying a firearm during and in relation to a federal crime of

The Government suggests that United States v. Harper provides a better comparison to the present case than the cases cited by Richardson. See Gov't Resp. to Mot. to Vacate at 13 (citing United States v. Harper, No. 11-20188, 2018 WL 783100, at \*4–5 (E.D. Mich. Feb. 8, 2018), aff'd, 792 F. App'x 385 (6th Cir. 2019)). The Harper court found that there was no ineffective assistance of counsel for failure to challenge jury instructions even though the jury was improperly “instructed that for the § 924(c) ‘using or carrying’ offenses, they had to find that the defendant used or carried or knowingly possessed a firearm.” 2018 WL 783100, at \*4–5 (emphasis added). In Harper, multiple factors indicated that—notwithstanding the error in the jury instructions—the jury had properly understood and convicted only on the “carry and use” charge. Id. at \*5.

The Court agrees with the Government that Richardson has failed to show that either the errors in the jury instructions or his attorneys’ failure to object to those errors resulted in prejudice to Richardson, which defeats his claim for ineffective assistance of counsel. Bell, 535 U.S. at 695. When read “as a whole,” the jury instructions were not “so clearly erroneous as to likely produce a grave miscarriage of justice,” Castano, 543 F.3d at 833 (punctuation modified, citation omitted),

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violence.” Jury Instructions at 21.

- The Court defined “use” to require that the Government “prove active employment of the firearm during and in relation to” the underlying bank robbery counts and “more than mere possession or storage.” 6/28/13 Trial Tr. at 40–41 (emphasis added); Jury Instructions at 21–22 (emphasis added).
- The Court also delivered instructions on aiding and abetting the use or carrying of a firearm during a crime of violence, and these instructions repeatedly and correctly referred to the § 924(c) charge as “using or carrying a firearm during and in relation to a federal crime of violence” without mentioning “possession.” 6/28/13 Trial Tr. at 42–44; Jury Instructions at 23.
- Further, the indictments and jury form accurately stated the charges. See Superseding Indictment at 2–8; Indictment at 2; Verdict Form at 1–7.

or so “confusing, misleading, or prejudicial” that Richardson’s attorneys rendered ineffective counsel by failing to object, Noble v. United States, No. 2:10-CR-51-JRG, 2018 WL 4441240, at \*8 (E.D. Tenn. Sept. 17, 2018) (punctuation modified, citation omitted). Very similar factors to those that counseled the Harper court to find that there was no ineffective assistance of counsel are present here. In particular:

- The Harper instructions improperly used the word “possession” only twice, 2018 WL 783100, at \*5, and there are only two improper instances of the word “possessed” in the Richardson instructions, see 6/28/13 Trial Tr. at 40; Jury Instructions at 21.
- The references to “possession” in Harper’s definitions for “use” and “carrying” “indicated that something more [than possession] was required, not something less,” 2018 WL 783100, at \*5 (emphasis added); similarly, this Court defined “use” to require that the Government “prove active employment of the firearm” and “more than mere possession or storage,” 6/28/13 Trial Tr. at 40–41; Jury Instructions at 21–22.
- The Harper court found persuasive the fact that “the jury verdict form was correct” and that evidence and arguments at trial did not reinforce the error in the instructions. 2018 WL 783100, at \*5. Here, too, the jury verdict form was accurate, and Richardson has not identified any errors in the evidence or argument pertaining to the elements of the § 924(c) charges. In contrast, the miscommunications to the jury were more extensive in Castano and Savoires. See Castano, 543 F.3d at 831–832 (identifying three misstatements in jury instructions and additional misstatements in jury verdict form and Government’s closing argument); Savoires, 430 F.3d at 379 (identifying misstatements in jury instructions and Government’s closing argument).

As the Government correctly argues, see Gov't Resp. at 15–16, the cases cited by Richardson are further distinguishable because the instructions in those cases misstated the “during and in relation to” standard or conflated it with the “in furtherance” standard. See Castano, 543 F.3d at 831 (reviewing charge of “possession of a firearm during a drug trafficking crime”) (punctuation modified, emphasis modified); Savoires, 430 F.3d at 378 (reviewing charge that the defendant “did knowingly carry and possess [a firearm] during and in relation to and in furtherance of a drug trafficking crime”) (punctuation modified, emphasis added); Lowe, 172 F. App'x at 95 (reviewing charge that “during and in relation to the commission of that crime, [the defendant] knowingly possessed a firearm in furtherance of that crime”) (emphasis modified). In contrast, the jury in Richardson's case was properly instructed that they could convict Richardson only under the “during and in relation to” standard. 6/28/13 Trial Tr. at 40; Jury Instructions at 21.

The fact that the jury twice heard the word “possessing” amid the larger context of clear and accurate instructions—including the Court's clarification that “more than mere possession” was required for conviction, 6/28/13 Trial Tr. at 40–41 (emphasis added); Jury Instructions at 21–22 (emphasis added)—fails to cast doubt on the understanding that the jury knowingly convicted Richardson of the charged § 924(c) offenses. Richardson cannot show “a reasonable probability” that any objections from his counsel on this point would have led to a different result. Bell, 535 U.S. at 695 (punctuation modified, citation omitted). Thus, Richardson's first claim for ineffective assistance of counsel fails. Id.

#### **B. Jury Instructions Misidentified the Count Numbers of the Predicate Offenses**

Richardson argues that his trial and appellate counsel deficiently failed to challenge erroneous jury instructions that inadvertently identified the Hobbs Act robbery crimes—which were predicate offenses of the § 924(c) charges—as even-numbered counts rather than odd-

numbered counts. Def. Mot. to Vacate at 11–15. The parties stipulated that the Hobbs Act robbery counts would appear as Counts 1, 3, 5, 7, 9 in both the jury instructions and on the verdict form, while the § 924(c) counts would appear as Counts 2, 4, 6, 8, 10. See Stipulation Regarding Counts at 1–2 (Case No. 10-20397, Dkt 169). However, instead of instructing the jury that it must find that the firearm facilitated or furthered the robbery crimes in Counts 1, 3, 5, 7, 9, the trial court erroneously instructed the jury that it could convict on the § 924(c) counts (Counts 2, 4, 6, 8, and 10) if the firearm facilitated or furthered “Counts two, four, six, eight, and ten[.]” 6/28/13 Trial Tr. at 41–42; see also Jury Instructions at 21–22.<sup>7</sup>

The Government argues that “a review of the entire jury instructions and verdict [] form reveals that the Court’s instructions accurately conveyed the applicable charges and legal principles.” Gov’t Resp. to Mot. to Vacate at 18. When reading the verdict form, the Court used the correct count number for each count—including, for example, by referring to the first armed robbery charge as “Count One.” Id. (citing 6/28/13 Trial Tr. at 65). The verdict form lists the charges in order by number, and so each count for “Robbery Affecting Interstate Commerce” is followed by a correctly-numbered count for “Use and Carrying of a Firearm During and Relation to A Crime of Violence.” Verdict Form at 1–7. The jury instructions—as read out loud and as written—clearly state that the jury could convict on the § 924(c) only if there was “a crime of violence which may be prosecuted in a court of the United States,” and the Court instructed that

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<sup>7</sup> Following delivery of the instructions to the jury, the Government brought this error to the attention of the Court. 6/28/13 Trial Tr. at 75–76. The parties dispute whether the jury ever saw corrected instructions. Gov’t Resp. to Mot. to Vacate at 16–20 (arguing that the Court, counsel for the Government, and defense counsel all agreed to write the correct count numbers for the armed robbery charges into the jury instructions); Def. Reply in Supp. Mot. to Vacate at 4 (expressing doubt that the jury ever saw the corrected instructions). The Court need not resolve this factual dispute because, for the reasons that follow, it finds that Richardson cannot prevail on this claim, regardless of whether or not the jury was re-instructed.

“Robbery Affecting Interstate Commerce” is one such crime. Jury Instructions at 21; see also 6/28/13 Trial Tr. at 39–41. The Court’s instructions also correctly identify the predicate robberies as the odd-numbered counts in certain places. See, e.g., id. at 40–41.

The Court agrees with the Government that, when “viewed as whole,” the jury instructions were not “confusing, misleading, or prejudicial” as to the necessity of finding guilt for the predicate robberies before convicting on the § 924(c) counts. Harrod, 168 F.3d at 892 (punctuation modified, citation omitted). The jury instructions in their entirety and the verdict form provided the jury with a strong basis for understanding that finding guilt on the robbery counts was a necessary predicate for finding guilt on the § 924(c) counts. A minor slip in reference to the particular numbers associated with the counts does not render the entire body of communications to the jury “confusing, misleading, or prejudicial.” Noble, 2018 WL 4441240 at \*8 (punctuation modified). Therefore, Richardson’s ineffective counsel claim on this count fails. See id.

### **C. Seven-Year Sentencing Minimum Based on “Brandishing” A Firearm**

Section 924(c)(1)(A) provides that, “if [a] firearm is brandished” during a crime of violence, then the defendant shall be sentenced “to a term of imprisonment of not less than 7 years.” Richardson argues that he received this sentencing minimum due to brandishing without Richardson ever having been charged with brandishing in any indictment, and so the seven-year mandatory sentence he received was improper, and his counsel’s performance was deficient for not challenging it. Mot. to Vacate at 15–17. Richardson submits that “brandishing constitutes an element of a separate offense and [] the government needed to charge that crime in the indictment” for § 924(c)(1)(A) to apply. Id. at 16 (quoting United States v. Yancy, 725 F.3d 596, 602 (6th Cir. 2013)); see also Alleyne v. United States, 570 U.S. 99, 115 (2013) (“[B]ecause the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury . . .”).

The Government argues that, for the Court to impose a seven-year sentence under § 924(c), the jury—not the Court—must have found that brandishing of a firearm occurred during and in relation to a crime of violence. The Government argues that the jury did find that Richardson brandished a firearm during a crime of violence in the present case. Gov’t Resp. at 20–22. In the Court’s verdict form, the jury was specifically asked to determine whether a “firearm was brandished” in jury interrogatories following the armed robbery and § 924(c) counts for each of the five robberies. Verdict Form at 1–7. In the Government’s view, cases where courts found sentencing errors under Alleyne are distinguishable on this basis. See, e.g., United States v. Mack, 729 F.3d 594, 606–607 (6th Cir. 2013) (finding error with the district court’s imposition of a seven-year sentence under § 924(c) where the indictment charged the defendant with using, carrying, and brandishing a firearm, but “[t]he jury verdict form . . . did not require the jurors to make a specific finding about whether the defendant brandished a firearm,” and instead the district court made this finding) (citing Alleyne, 570 U.S. 99).

The jury’s specific finding that brandishing had occurred is dispositive, and it defeats Richardson’s claim. Alleyne reinforces the understanding that a jury finding is sufficient to allow a brandishing-based sentencing enhancement, even without a charge in the indictment. See 570 U.S. at 117.<sup>8</sup> Although Yancy stated that “the government needed to charge [brandishing] in the

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<sup>8</sup> The Supreme Court of the United States in Alleyne found that a seven-year sentencing enhancement was improper where the defendant—like Richardson—was charged only under the “use or carry” provision without mention of brandishing, and where—unlike in the case of Richardson—the jury’s verdict form made no mention of brandishing. 570 U.S. at 114–115. The Supreme Court explained its rationale by referencing the “well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment.” Id. at 109–110 (emphasis added). The Supreme Court’s holding, however, focused on the importance not of the indictment but of the jury finding:

Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt. The judge, rather than the jury, found brandishing, thus violating

indictment,” 725 F.3d at 602, the Yancy court also affirmed the defendant’s seven-year sentencing judgment under § 924(c) because Yancy “voluntarily pleaded guilty, admitting that he did in fact brandish the weapon during the carjacking,” id. Thus, the fact that brandishing had occurred was not in dispute—nor can it be disputed here, given that the jury made that specific finding. The seven-year sentencing minimum based on the element of brandishing was, therefore, proper, and Richardson’s counsel made no error in not challenging it. Counsel was thus not deficient, and Richardson’s claim fails. See Bell, 535 U.S. at 695.

#### **D. Motion to Modify Judgment for Fines and Restitutions**

Richardson was ordered to pay fines and restitution to the victims of his criminal activity in each of the two cases in which he was convicted. See Case No. 10-cr-20397 Am. Judgment (Dkt. 275); Case No. 11-cr-20444 Am. Judgment at PageID.358 (Dkt. 84). The Court ordered that payment was due “during the period of imprisonment.” Case No. 10-cr-20397, Am. Judgment at PageID.3197; Case No. 11-cr-20444, Am. Judgment at PageID.358.

Richardson requests that the Court either “set a scheduled payment of \$25.00 quarterly to be imposed,” or “enter an order waiving any further payments to be made by him.” Def. Mot. to Modify J. at 3. Richardson explains that “[t]he reasoning for this Motion . . . is because staff here at the BOP [(Bureau of Prisons)] has now been threatening Movant with sanctions and other punishments if he does not sign a new agreement for increased pay to FRP [(Financial Responsibility Program)] at institution.” Id. at 4. Richardson argues that the BOP does not have

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petitioner’s Sixth Amendment rights. Accordingly, we vacate the Fourth Circuit’s judgment with respect to Alleyne’s sentence on the § 924(c)(1)(A) conviction and remand the case for resentencing consistent with the jury’s verdict.

Id. at 117–118 (emphasis added).

the authority to impose IFRP (Inmate FRP) payment plans, asserting that “only a sentencing court (Judge)[] has the authority to set the amount and time in which restitution or fines may be paid and types of payment for same.” Id. at 2. Richardson states that the “Inmate Financial Responsibility Program cannot collect pay from prisoners’ accounts unless the Judge orders the doing of the same.” Id. (emphasis in original).

The Government notes that the Sixth Circuit has rejected the position that the setting of terms of restitution and scheduling of payments are core judicial functions that cannot be delegated to probation officers. See Gov’t Resp. to Mot. to Modify J. at 4–5 (citing Weinberger v. United States, 268 F.3d 346, 361 (6th Cir. 2001)). The Government further argues that this Court does not even have “jurisdiction to consider Richardson’s request to set a specific payment schedule for his participation in the IFRP.” Id. at 6. Indeed, “it is not clear that this Court has the authority to delegate a different payment schedule for [Richardson] while he is participating in the IFRP.” United States v. Bivins, No. 10-CR-20397, 2019 WL 11593066, at \*1 (E.D. Mich. Feb. 1, 2019) (citing United States v. Callan, 96 F. App’x 299, 301 (6th Cir. 2004)).

The Government is correct that the Court may properly defer to the BOP and IFRP to determine the details of Richardson’s payment schedule, as this Court held when denying a similar motion for clarification and modification of judgment filed by one of Richardson’s co-defendants. See Bivins, 2019 WL 11593066, at \*1 (“The Bureau of Prisons is better suited [than the Court] to assess Bivins’ financial position and determine an appropriate schedule for payment.”). Because “[t]he BOP has the professional capacity and responsibility to consider Defendant’s financial circumstances,” United States v. Austin, No. 15-20609, 2021 WL 2935248, at \*2 (E.D. Mich. July 13, 2021), the Court declines to intrude on decision-making properly delegated to the BOP. To

the extent that Richardson wishes to modify his payment schedule, he can work with his BOP counselor to do so. See 28 C.F.R. § 545.11(b).

Richardson makes additional arguments, all of which misstate the law.<sup>9</sup> Richardson's motion to modify his judgment has no merit. It is denied.

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<sup>9</sup> Specifically:

- Richardson argues that 18 U.S.C. §§ 3663–3664 “require Judges to establish exact amount and timing of installment payments on fines and restitution; and these statutes trump B.O.P. regulations and policies and place a strict five (5) year limit on collections.” Mot. to Modify J. at 4 (emphasis in original). Richardson appears to refer to § 3664(f)(2), which provides that “the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid . . . .” However, as the Government notes, § 3664(f)(2) does not apply here because the Court never established a payment schedule as contemplated by § 3572. See Resp. to Mot. to Modify J. at 6–7. Rather, the Court directed that Richardson complete payments due “during the period of imprisonment.” Case No. 10-cr-20397, Am. Judgment at PageID.3197; Case No. 11-cr-20444, Am. Judgment at PageID.358.
- Richardson cites to § 3664(k), which allows for adjustment of a payment schedule upon a showing of “a material change in the defendant’s economic circumstances.” Richardson has not argued or provided any factual basis for the proposition that his economic circumstances have changed, and so—even if the Court had established a payment schedule rather than delegate that duty to BOP—§ 3664(k) provides no grounds for making modifications to Richardson’s payment schedule.
- Richardson asserts that there is a five-year limit on collection of restitution. He appears to refer to an older version of Title 18. Following the 1996 amendments to the Mandatory Victims Restitution Act, liability for paying fines “terminate[s] the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined.” 18 U.S.C.A. § 3613(b) (emphasis added).
- Richardson also notes that three of his co-defendants have been released from prison, which Richardson states “would leave [the] bulk and burden of restitution on Movant, while they are free of the obligation.” Mot. to Modify J. at 3. Richardson submits that his three co-defendants who are still incarcerated have not been on schedule with their payments. Id. at 3–4. Richardson’s assertions that his co-defendants should bear a greater share of their collective burden do not relieve him of his restitution obligations, for which all Defendants are jointly and severally liable. See 18 U.S.C. § 3664(h); United States v. Osborne, No. 1:06-CR-00006-R, 2010 WL 4788169, at \*1 (W.D. Ky. Nov. 17, 2010).

### **E. Motion to Appoint Counsel**

Richardson requested that the Court appoint his previous counsel, Michael Dezsi, “to represent [him] in the issues that are addressed in the petition . . . ,” apparently referring to the motion to modify his judgment for fines and restitution, filed on the same day as his motion to appoint counsel. Def. Mot. to Appoint Counsel at PageID.3932.

“The decision to appoint counsel for federal habeas motion proceedings is within the discretion of the court and is required only where the interests of justice or due process so require.” United States v. Boyd, No. 04-80391, 2011 WL 318112, at \*1 (E.D. Mich. Jan. 31, 2011). This Court already granted Richardson’s motion to appoint Dezsi as counsel in connection with his § 2255 motion (Case No. 10-20397, Dkt. 356; Case No. 11-20444, Dkt. 111). The Court has no basis for finding that justice or due process require the “extraordinary measure” of appointing counsel for Richardson for his meritless motion to modify his judgment. Boyd, 2011 WL 318112, at \*1. The Court denies Richardson’s motion.

### **III. CONCLUSION**

For the foregoing reasons, the Court denies (i) Richardson’s motion to vacate his sentence under 28 U.S.C. § 2255 (Case No. 10-cr-20397, Dkt. 358; Case No. 11-cr-20444, Dkt. 113); (ii) Richardson’s motion to modify his judgment for fines and restitution (Case No. 10-cr-20397, Dkt. 372; Case No. 11-cr-20444, Dkt. 122); and (iii) Richardson’s motion to appoint counsel (Case No. 10-cr-20397, Dkt. 373; Case No. 11-cr-20444, Dkt. 123).

SO ORDERED.

Dated: July 19, 2022  
Detroit, Michigan

s/Mark A. Goldsmith  
MARK A. GOLDSMITH  
United States District Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First-Class U.S. mail addresses disclosed on the Notice of Electronic Filing on July 19, 2022.

s/Kelly Winslow  
Case Manager

Nos. 22-1687/1688

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Aug 23, 2023  
DEBORAH S. HUNT, Clerk

FRANK RICHARDSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

**ORDER**

**BEFORE:** BATCHELDER, COLE, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.\* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**



Deborah S. Hunt, Clerk

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\* Judge Davis recused herself from participation in this ruling.

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt  
Clerk

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Filed: August 23, 2023

Mr. Michael R. Dezsi  
Law Office  
1523 N. Main Street  
Royal Oak, MI 48067

Re: Case No. 22-1687/22-1688, Frank Richardson v. USA  
Originating Case No.: 2:10-cr-20397-2; 2:21-cv-10605

Dear Mr. Dezsi,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris  
En Banc Coordinator  
Direct Dial No. 513-564-7077

cc: Ms. Erin S. Shaw

Enclosure

**Additional material  
from this filing is  
available in the  
Clerk's Office.**