No. 20-5090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEREMY BROWN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: CLAY, Circuit Judge.

Jeremy Brown, a pro se federal prisoner, appeals a district court judgment dismissing his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He seeks a certificate of appealability ("COA"), *see* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1)-(2), and in forma pauperis ("IFP") status, both of which the district court denied.

Brown was a convicted felon even before Christmas 2015. In the early morning hours of that day, he and his girlfriend Kimberly Brown (no relation) were having an argument over the phone. She was at her aunt's house. He was in his truck in the aunt's driveway. Kimberly refused to let him in because, she explained, it would set off the house alarm while her aunt was asleep. Kimberly told him to come back the following morning. He demanded that she leave with him. She would not. He continued calling her. They continued arguing. He approached the house, asked her to come out, told her that, if she did not, he was going to "set it off." She refused and hung up. The she heard gunshots from outside, glass breaking, and the alarm going off. He was firing into the house. She called 911. When the police arrived, they did not find him, but they found that the storm-door glass, at the front of the house, was broken. The broken glass had fallen into that space between the storm door and the front door—had fallen *inward*—as though (an officer testified at trial) broken by "[s]omeone trying to enter." Also found there, wedged in that

space between the doors: a gun. It belonged to Kimberly. But (she later testified at trial) she had reported it stolen in September 2014 and, even at the time, had identified Brown as the thief.

A jury convicted Brown of being a felon in possession of a firearm. 18 U.S.C. § 922(g)(1). The district court sentenced him to 109 months in prison. This court affirmed. *United States v. Brown*, 888 F.3d 829 (2018). Brown next filed a § 2255 motion that, as amended, raised eight claims: (1) the prosecutor constructively amended or varied the indictment; (2) the prosecutor presented insufficient evidence of actual possession; (3) the prosecutor committed misconduct; (4) the trial court gave the jury improper instructions; (5) the prosecutor improperly introduced evidence of other crimes, wrongs, or bad acts; (6) counsel rendered ineffective assistance at trial and on direct appeal; (7) the prosecutor did not prove what new Supreme Court caselaw—*Rehaif v. United States*, 139 S. Ct. 2191 (2019)—has now held to be an element of the offense; and (8) the cumulative effect of the foregoing errors denied Brown due process. He moved for summary judgment. The district court denied it, denied and dismissed his § 2255 motion, denied a COA, and denied him IFP status. Brown timely appealed. He applies for a COA on all his claims and on the denial of his summary-judgment motions.

A COA shall issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the habeas petition on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) "whether the petition states a valid claim of the denial of a constitutional right" and (b) "whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

We certify none of Brown's claims for appeal.

No reasonable jurist could deny that Brown defaulted Claims 1 (constructive amendment or variance), 3 (prosecutorial misconduct), and 5 (other bad acts). He did not raise them on direct appeal. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted). Ineffective assistance of counsel may constitute cause. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Brown cites it to excuse his default, but for reasons explained in Claim 6 (below), jurists of reason would not debate the district court's determination that direct-appeal counsel was not ineffective.

In Claim 2, Brown argues that the Government presented insufficient evidence to convict on its theory of actual possession. "[A] § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999). Brown raised on direct appeal the insufficiency of the evidence to support the possession element of his felon-in-possession conviction. *See Brown*, 888 F.3d at 831-35.

Brown contends that direct-appeal counsel raised only a general attack on the possession element, not the precise attack Brown now makes. Possession may be either actual or constructive. According to Brown, the direct-appeal argument failed to focus on the Government's theory of actual possession. He is mistaken. The direct-appeal brief included a discussion of actual possession in its attack on the sufficiency of the evidence of possession. And this court was aware of the distinction between actual and constructive possession. *See id.* at 833. "Actual possession requires that the defendant have 'immediate possession or control' of the firearm." *United States v. Grubbs*, 506 F.3d 434, 439 (6th Cir. 2007) (quoting *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973), *abrogated on other grounds by Scarborough v. United States*, 431 U.S. 563 (1977)). The facts this Court chose to cite when discussing the claim show that it found sufficient evidence of actual possession. *See Brown*, 888 F.3d at 833-34. Reasonable jurists would agree

that this claim is barred and that Brown does not show an exceptional circumstance to get around the bar.

In Claim 4, Brown argues that the trial court erred in instructing the jury on constructive possession when the evidence did not support it. The district court construed this claim to be that trial counsel were ineffective for not objecting to the constructive-possession instruction, denying the claim because there was no prejudice. Reasonable jurists could not deny that there was no prejudice, defeating both the ineffectiveness argument and the underlying claim.

"Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *Craven*, 478 F.2d at 1333. Brown argues that the Government at trial proceeded on an actual-possession theory and presented evidence supporting only that theory, so it was improper to instruct on constructive possession. Even if that were true, there is still no prejudice.

> [W]here a jury is charged that a defendant may be found guilty on a factual theory that is not supported by the evidence and is charged on factual theory that is so supported, and the only claimed error is the lack of evidence to support the first theory, the error is harmless as a matter of law.

United States v. Mari, 47 F.3d 782, 786 (6th Cir. 1995). The jury was charged on both actual and constructive possession. The evidence was sufficient to support the former, as this court has already determined. That leaves the alleged jury-instruction error harmless as a matter of law.

As for trial-counsel ineffectiveness: To prove it, Brown must prove prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). But, for the same reason, Brown has failed to make a substantial showing of prejudice.

In Claim 6, Brown argues that counsel were ineffective in five ways: (a) failing to object at trial and on direct appeal to other-bad-acts evidence, (b) failing to object at trial and on direct appeal to prosecutorial misconduct, (c) failing to argue at trial and on direct appeal that the evidence of actual possession was insufficient, (d) failing to object at trial and on direct appeal to

the amending or varying of the indictment, and (e) failing to put on a defense at trial. Reasonable jurists could not debate the district court's resolution of these subclaims.

To establish ineffective assistance, Brown must show that (1) counsel's performance was deficient—objectively unreasonable under prevailing professional norms—and (2) it prejudiced the defense. *Strickland*, 466 U.S. at 687–88. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Citing Federal Rule of Evidence 404(b), Brown argues in Subclaim 6(a) that counsel were ineffective for failing to object to evidence of other crimes, wrongs, or bad acts—specifically, his stealing the handgun in question, then (more than a year later) shooting it into the house his girlfriend was occupying. Any objection would have failed, so failure to object was neither professionally unreasonable nor prejudicial. Rule 404(b) does not apply "where the challenged evidence is 'inextricably intertwined' with evidence of the crime charged in the indictment." *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995) (quoting *United States v. Torres*, 685 F.2d 921, 924 (5th Cir. 1982)).

> When the other crimes or wrongs occurred at different times and under different circumstances from the offense charged, the deeds are termed "extrinsic." "Intrinsic" acts, on the other hand, are those that are part of a single criminal episode. Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of illegal activity. When that circumstance applies, the government has no duty to disclose the other crimes or wrongs evidence.

Id.

Brown was charged with being a felon in possession of a handgun. Under the facts of this case, firing the gun was intrinsic to that offense. Both occurred at the same time and under the same circumstances. Both were part of a single criminal episode. When Brown fired the gun, he possessed it.

The earlier act of stealing the gun was also intrinsic because there was a "direct connection" between the earlier and later crimes. *See id.* The gun found at the scene belonged to his girlfriend.

That he earlier stole it explains why he, not she, had it when those shots were fired into the house the girlfriend occupied.

Again citing Rule 404(b), Brown in Subclaim 6(b) contends that defense counsel were ineffective in failing to object when the Government in opening and closing argument referenced other, uncharged crimes: again, Brown's stealing the gun and shooting it. But because Rule 404(b) does not apply for the reason already stated, any objection would have been futile. It is neither professionally unreasonable nor prejudicial to refrain from making meritless objections.

In Subclaim 6(c), Brown argues that counsel were ineffective at trial, and was ineffective on direct appeal, for failing to argue that there was insufficient evidence of actual possession. But trial counsel moved "for judgment of acquittal at the close of all the evidence, arguing that there was insufficient evidence to sustain a conviction." *Brown*, 888 F.3d at 832. That was enough to preserve the claim. *See id.* at 832-35 (reaching the merits). And, as already explained, counsel raised that claim on direct appeal. Counsel cannot be ineffective for failing to do what they in fact did.

In Subclaim 6(d), Brown argues that the Government constructively amended and varied his indictment at trial when introducing evidence of other crimes—stealing the gun, shooting it into someone's house—without giving notice pursuant to Rule 404(b). He contends that counsel should have objected and raised the issue on appeal.

Reasonable jurists would agree that raising the issue at trial or on appeal would have been futile because Brown cannot make a substantial showing of prejudice. "[T]he constitutional rights of an accused are violated when a modification at trial acts to broaden the charge contained in an indictment." *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989). Such modifications come in two forms: amendments and variances. *Id.*

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

Id. (quoting *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969)) (footnotes omitted by *Ford*). An amendment is per se prejudicial. Not so a variance. To obtain relief for that, the accused must prove prejudice. *Id.* "Blurring the distinction between amendments and variances is the concept of the constructive amendment which is a variance that is accorded the per se prejudicial treatment of an amendment." *Id.*

> [A] variance rises to the level of a constructive amendment when "the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment."

Id. at 1236 (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986)).

There was no amendment. Neither literally nor effectively was the indictment altered. Brown remained charged with having been a felon in possession of a firearm.

There was also no variance. The facts proved did not materially differ from those the indictment alleged. To prove that Brown fired the gun was to prove that he possessed it. To prove that he had earlier stolen it was to lay the groundwork for then proving that he still possessed it when the incident at issue here occurred.

Nor was there a constructive amendment. The essential elements of the offense charged were not so modified that there is a substantial likelihood that Brown may have been convicted of something else. Again: to prove he fired the gun is to prove he possessed it. That does not alter the indictment. That proves it. As for stealing the gun: proving that, of course, did not in and of itself prove the indictment. It was useful preliminary, a step on the road to proving the charged offense. There is not a substantial likelihood the jurors confused the one with the other.

In Subclaim 6(e), Brown argues that trial counsel erred in failing to put his mother on the stand to provide an alibi. There is some question whether her evidence, if believed, places Brown at her house *while* the incident with the girlfriend occurred. But even if the evidence of Brown's mother directly contradicted the Government's evidence placing Brown at the scene, there is no substantial showing of prejudice. Given the evidence presented at trial, it is not reasonably probable that introduction of this new evidence would have changed the result.

In Claim 7, Brown argues that his conviction should be vacated because the prosecutor did not prove what *Rehaif v. United States* has now held to be an element of the offense: that Brown knew, at the time of the offense, of his status as a felon. Even if it is assumed that *Rehaif* applies retroactively to cases on collateral review, this claim does not deserve encouragement to proceed further. Brown stipulated at trial that he was a convicted felon on the date of this offense, having previously been convicted of two counts of aggravated robbery, for which he was sentenced to eight years in prison. This is sufficient to establish knowledge of his status as a felon. *See United States v. Raymore*, 965 F.3d 475, 485 (6th Cir. 2020); *United States v. Ward*, 957 F.3d 691, 695 (6th Cir. 2020).

In Claim 8, Brown argues that the cumulative effect of the foregoing alleged errors denied him due process. "[T]rial-level errors that would be considered harmless when viewed in isolation might, when considered cumulatively, require reversal of a conviction." *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004). But "the accumulation of non-errors does not warrant a new trial." *Id.* (quoting *United States v. Lumpkin*, 192 F.3d 280, 290 (2d Cr. 1999)). This claim does not deserve encouragement to proceed further.

Finally, Brown argues that the district court should have granted him summary judgment on Claims 1, 2 and 5 because the Government filed inadequate responses. Even if the Government's responses were inadequate, this claim would not warrant a COA. "Default judgments in habeas corpus proceedings are not available as a procedure to empty State prisons without evidentiary hearings." *Allen v. Perini*, 424 F.2d 134, 138 (6th Cir. 1970). "The burden to show that he is in custody in violation of the Constitution of the United States is on the prisoner." *Id.* No matter the quality of the Government's responses, "the District Court was obligated to decide the case on its merits." *Id.*

Brown has failed to make a substantial showing of the denial of a constitutional right. Accordingly, his application for a COA is **DENIED**, and his motion to proceed IFP is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JEREMY BROWN,

Movant,

v.

Cv. No. 2:18-cv-02568-SHM-tmp
Cr. No. 2:16-cr-20143-SHM-01

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING & DISMISSING MOTION PURSUANT TO 28 U.S.C. § 2255
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Before the Court are the amended motion pursuant to 28 U.S.C. § 2255 (§ 2255 motion") filed by Movant Jeremy Brown (ECF No. 35-1), the response of the United States (ECF No. 8), and Brown's amended reply. (ECF No. 24.) For the reasons stated below, the Court **DENIES** the Amended § 2255 motion.

I. PROCEDURAL HISTORY

A. Criminal Case No. 2:16-20143-SHM-01

On June 30, 2016, a federal grand jury in the Western District of Tennessee returned a single count indictment against Brown charging him with possessing a firearm after a felony conviction. (Criminal ("Cr.") ECF No. 1.) From February 28, 2017 through March 3, 2017, this Court presided at a jury trial, at which the jury found Brown guilty as charged. (Cr. ECF Nos. 51-53, 56.) The Court conducted a sentencing hearing on June 22, 2017, and sentenced Brown to 109 months in prison. (Cr. ECF Nos. 72-73.) Brown filed a notice of appeal. (Cr. ECF No.

APPENDIX-B

75.) On appeal, Brown contended that the evidence was insufficient to support the jury's guilty verdict and that the Court erred in admitting proof containing references to previous domestic abuse as *res gestae* evidence. The United States Court of Appeals for the Sixth Circuit affirmed Brown's conviction. *United States v. Brown*, No. 17-5718, 888 F.3d 829 (6th Cir. April 25, 2018). (Cr. ECF No. 83.)

The facts underlying Brown's conviction were reviewed by the Sixth Circuit on direct appeal:

> Kimberly Brown and defendant began a romantic relationship in 2011.[1] Ms. Brown testified that in the early morning on Christmas Day 2015, the couple began to argue on the phone about Ms. Brown's whereabouts. Ms. Brown indicated that she was at her aunt's house, and defendant told her that he was coming over. Defendant called Ms. Brown when he arrived; she declined to let him in the house because it would set off her aunt's home alarm system while her aunt was asleep. Ms. Brown told him to come back the following morning. After defendant became agitated, Ms. Brown flipped a light on and off in the kitchen to show that she was, in fact, in the house. Defendant demanded that Ms. Brown leave the house with him, and the couple continued to argue.
>
> Defendant continued to call Ms. Brown and approached the house asking her to come out. He told her that if she did not come out of the house, he was going to "set it off." After hanging up the phone and declining to come out of the house, Ms. Brown heard gunshots, glass breaking, and the security alarm went off. A gun was found between two doors leading to the front of the home, an outer storm door and an inner door, both of which were locked. The glass of the front door was broken. At trial, Ms. Brown's aunt, Claudia Taylor, testified she was awakened by the gunshots. She testified that she did not see who fired the gun but had heard defendant's voice outside.
>
> Ms. Taylor received a phone call from her alarm company, Monitronics, in response to the alarm being triggered. On this phone call, which was admitted in its entirety as an exhibit at trial, Ms. Taylor and Ms. Brown identify defendant as the one who shot at the house. Ms. Brown also identified defendant as "dangerous" and indicated he had a history of domestic violence. The trial court also admitted as evidence two 9-1-1 calls made by Ms. Brown, one simultaneous to the incident and one a few hours later, when she was concerned that defendant

[1]Although Ms. Brown and defendant share a last name, they are not related. For ease of identification, we refer to Kimberly Brown as Ms. Brown and Jeremy Brown as defendant.

had returned to the house. Each of these phone calls also references defendant's history of domestic violence.

The Memphis Police Department arrived, and Officer Phillip Allen testified that he observed glass broken from the storm door and observed a firearm on the ground wedged between the two doors. The police officers did not recover any spent shell casings outside of the home. The recovered gun belonged to Ms. Brown, but she testified that she reported it stolen in September 2014 and, at the time, she identified defendant as the person who stole the gun.

Defendant was arrested in January 2016, and the trial occurred in February 2017. The government submitted testimony by officers from the Memphis Police Department, Ms. Taylor, Ms. Brown, and Peggy Carlson, a custodian of records at Monitronics. Defendant moved for a motion for judgment of acquittal at the close of all the evidence, arguing that there was insufficient evidence to sustain a conviction. The district court denied the motion. After waiting overnight to contemplate his decision on testifying, defendant did not put on any proof. The jury then found defendant guilty of being a felon in possession of a handgun based on the above facts.

United States v. Brown, 888 F.3d at 831-32.

B. Civil Case Number 18-2568-SHM-tmp

On November 8, 2019, Movant filed the amended § 2255 motion alleging that:

1. The indictment was constructively amended by the United States (ECF No. 35-1 at 4);

2. The evidence was insufficient to support Brown's conviction (*id.* at 5);

3. The prosecution engaged in misconduct (*id.* at 7);

4. The district court erred by charging an instruction on constructive possession (*id.* at 8);

5. The district court erred by admitting evidence that was inadmissible under Fed. R. Evid. 404(b) (*id.* at 12);

6. Trial counsel performed deficiently by:

   (a) failing to object to the erroneous admission of evidence in violation of Fed. R. Evid. 404(b) (*id.*),

(b) failing to object to prosecutorial misconduct (*id.*),

(c) failing to argue insufficiency of the evidence during trial and on appeal (*id.*),

(d) failing to object to the constructive amendment and variance of the indictment (*id.*), and

(e) failing to present a defense at trial (*id.*);

7. Brown is entitled to relief under *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (*id.* at 13); and

8. Brown is entitled to relief due to the cumulative effect of all errors. (*Id.*)

(ECF No. 35-1 at 4-5.) Movant acknowledges that Issues One, Three, Four, and Five are barred by procedural default. (Am. Reply, ECF No. 24 at 3.) He clarifies in the amended reply that the ineffective assistance of trial counsel caused his default of Issues One, Three, Four, and Five. Whether Brown has demonstrated sufficient cause to overcome the default of these issues is addressed in Section III(B), Ineffective Assistance of Counsel, *infra* at pp 14-17.

II. LEGAL STANDARDS

Pursuant to 28 U.S.C. § 2255(a),

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

"A prisoner seeking relief under 28 U.S.C. § 2255 must allege either: (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." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (citation and internal quotation marks omitted).

A § 2255 motion is not a substitute for a direct appeal. *See Bousley v. United States*, 523 U.S. 614, 621 (1998). "[N]onconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." *Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976). "Defendants must assert their claims in the ordinary course of trial and direct appeal." *Grant v. United States*, 72 F.3d 503, 506 (6th Cir. 1996). This rule is not absolute:

> If claims have been forfeited by virtue of ineffective assistance of counsel, then relief under § 2255 would be available subject to the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In those rare instances where the defaulted claim is of an error not ordinarily cognizable or constitutional error, but the error is committed in a context that is so positively outrageous as to indicate a "complete miscarriage of justice," it seems to us that what is really being asserted is a violation of due process.

Grant, 72 F.3d at 506.

Even constitutional claims that could have been raised on direct appeal, but were not, will be barred by procedural default unless the defendant demonstrates cause and prejudice sufficient to excuse his failure to raise these issues previously. *El-Nobani v. United States*, 287 F.3d 417, 420 (6th Cir. 2002) (withdrawal of guilty plea); *Peveler v. United States*, 269 F.3d 693, 698-99 (6th Cir. 2001) (new Supreme Court decision issued during pendency of direct appeal); *Phillip v. United States*, 229 F.3d 550, 552 (6th Cir. 2000) (trial errors). Alternatively, a defendant may obtain review of a procedurally defaulted claim by demonstrating his "actual innocence." *Bousley*, 523 U.S. at 622.

After a § 2255 motion is filed, it is reviewed by the Court and, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion . . . ." Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts ("Section 2255 Rules"). "If the motion is not dismissed, the judge must order the United States attorney to file an answer,

motion, or other response within a fixed time, or to take other action the judge may order." *Id.* The movant is entitled to reply to the Government's response. Rule 5(d), Section 2255 Rules. The Court may also direct the parties to provide additional information relating to the motion. Rule 7, Section 2255 Rules.

"In reviewing a § 2255 motion in which a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.'" *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007) (quoting *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999)). "'[N]o hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Id.* (quoting *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999)). Where the judge considering the § 2255 motion also presided over the criminal case, the judge may rely on his or her recollection of the prior case. *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996); *see also Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977) ("[A] motion under § 2255 is ordinarily presented to the judge who presided at the original conviction and sentencing of the prisoner. In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion . . . ."). Defendant has the burden of proving that he is entitled to relief by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006).

Movant did not raise Issue One, Issue Three, Issue Four and Issue Five on direct appeal. He attempts to demonstrate cause and prejudice for his default of these issues by alleging that counsel was ineffective for failing to raise the issues on appeal. "Attorney error that amounts to ineffective assistance of counsel can constitute 'cause' under the cause and prejudice test." *Hinkle v. Randle*, 271 F.3d 239, 245 (6th Cir. 2001), quoting *Lucas v. O'Dea*, 179 F.3d 412, 418

(6th Cir. 1999), citing *Coleman v. Thompson*, 501 U.S. 722, 754 (1991). To constitute "cause" to excuse default, the attorney error must satisfy the standards stated in *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

> A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. [*Strickland*, 466 U.S.] at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

Harrington v. Richter, 562 U.S. 86, 104 (2011).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[2] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

> It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." [*Strickland*, 466 U.S.] at 693, 104 S. Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687, 104 S. Ct. 2052.

Richter, 562 U.S. at 104; *see also id.* at 111-12 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just

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[2]"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.*

conceivable." (citations omitted)); *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." (citing *Strickland*, 466 U.S. at 694)).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052.

Richter, 562 U.S. at 105.

III. ANALYSIS

A. Sufficiency of the Evidence (Issue Two) and *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (Issue Seven)

Movant contends that the evidence presented by the United States at trial was insufficient to support his conviction for violating 18 U.S.C. § 922(g). (ECF No. 35-1 at 5, 33-35.) The United States responds that Brown litigated this issue on direct appeal and may not relitigate it in a § 2255 motion absent exceptional circumstances. (ECF No. 8 at 10.)

The Sixth Circuit reviewed the evidence presented at trial and opined:

Defendant challenges the sufficiency of the evidence to support his conviction under § 922(g). This Court will uphold a jury verdict in a criminal case if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Soto*, 794 F.3d 635, 657 (6th Cir. 2015) (quoting *United States v. Lutz*, 154 F.3d 581, 587 (6th Cir. 1998)). We review the evidence in the light most favorable to the government. *Id.* A defendant bears a "heavy burden" when claiming insufficiency of the evidence, and we will uphold a conviction based on circumstantial evidence alone. *United States v. Fekete*, 535 F.3d 471, 476 (6th Cir. 2008) (citing *United States v. Abboud*, 438 F.3d 554, 589 (6th Cir. 2006); *United States v. Clark*, 928 F.2d 733, 736 (6th Cir. 1991)). "[W]e will reverse a judgment for insufficiency of the evidence only if, viewing the record as a whole, the judgment is not supported by substantial and competent evidence." *United States v. Grubbs*, 506 F.3d 434, 438 (6th Cir. 2007) (quoting *United States v. Blakeney*, 942 F.2d 1001, 1010 (6th Cir. 1991)). We resolve all issues of credibility "in favor of the jury's verdict." *Fekete*, 535 F.3d at 476 (citing *United States v. Paulette*, 457 F.3d 601, 606 (6th Cir. 2006)).

To obtain a conviction under § 922(g), the government must prove three elements: "(1) the defendant had a previous felony conviction; (2) the defendant knowingly possessed the firearm specified in the indictment; and (3) the firearm traveled in or affected interstate commerce." *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008) (citing *United States v. Schreane*, 331 F.3d 548, 560 (6th Cir. 2003)). In this case, only the element of possession is disputed. A conviction under § 922(g) may be based on actual or constructive possession, *id.*, and circumstantial evidence is alone sufficient for this Court to sustain a conviction, *United States v. Garcia*, 758 F.3d 714, 718 (6th Cir. 2014).

Defendant contends that there is a reasonable probability that Ms. Brown possessed the gun at issue inside the home, and that "it was equally probable that Ms. Brown fired the gun from inside the home and dropped it between the doors before the police arrived." (Appellant's Br. at 20.) It is true that there is no direct evidence as to who possessed the gun at any given time. Ms. Brown reported the gun as stolen in September 2014. At the time, she identified defendant to the police as the individual who stole the gun but was unable to offer any evidence to that effect. Yet, there was circumstantial evidence that defendant possessed the gun during the incident at issue here. As defendant submitted no testimony or evidence, the question is only whether substantial and competent evidence supports that the government met its burden of proof.

Circumstantial evidence sufficiently supports the jury's finding that defendant possessed the gun on December 25, 2015. Ms. Brown testified that she saw defendant sitting in his truck in the driveway of her aunt's home. Defendant threatened to "set it off" if Ms. Brown did not come outside. (R. 80, PageID # 815.) Ms. Brown refused, and after she hung up, she heard a gunshot, glass

breaking, and the alarm going off. Ms. Brown's aunt, Ms. Taylor, was awakened by the sound of gunshots. (*Id.* at PageID # 761 ("And he kept shooting. It was another shot through the door. Then a few seconds he came right back down to the back of the house and shot through the side of the house.").) Ms. Taylor asked Ms. Brown what was going on and Ms. Brown responded: "It's Jeremy out there. He's angry with me." (*Id.* at PageID # 762.) Ms. Taylor then heard defendant outside asking Ms. Brown, "Are you coming out now?" (*Id.* at PageID # 762, 779–80.) Because Ms. Taylor was familiar with defendant, she recognized his voice.

Ms. Brown also identified defendant as the perpetrator in a 9-1-1 call. When the dispatcher asked Ms. Brown to explain the reason for her call, Ms. Brown responded that her boyfriend had been on the phone trying to get her to come outside, and then she heard a gunshot and glass breaking and she did not know whether he was still outside. She told the dispatcher that his name was Jeremy Brown and he was responsible for the shooting. She relayed the same information to the alarm company.[3] Officer Allen testified that he observed that the glass of the doors had been broken as if "someone was trying to enter . . . the residence," and the gun was lodged between the two locked doors. (R. 80-1, PageID # 934–35.) Both Ms. Brown and Ms. Taylor testified that the gunshot came from outside the home.

Recorded jail calls also support the jury's conviction. Defendant repeatedly stated that he did not want Ms. Brown to answer calls from authorities, which the jury could have reasonably construed as defendant's attempt to avoid

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[3] Dispatcher: Do you know the name of the boyfriend?

Ms. Brown: Jeremy Brown.

Dispatcher: Jeremy Brown. Okay. And um . . . he is your boyfriend?

Ms. Brown: Yes. He wasn't in the house. He was outside.

Dispatcher: Oh, okay. Outside the house. Did he break the glass?

Ms. Brown: Yes.

Dispatcher: Okay. He is not allowed to be there?

Ms. Brown: No.

Dispatcher: Okay. Is he dangerous?

Ms. Brown: He can be.

(Ex. 3, Monitronics Phone Call.)

prosecution for the incident. For instance, in one call he referred to his father, saying, "[a]ny number he don't know, he don't answer." (Ex. 2, Audio File "Clip23Redacted," Timestamp 1:23–1:27.) Defendant then explained that his father "told uh his sister, which is . . . my aunt, that he don't . . . let nobody know where he was so, that [INAUDIBLE] be really beneficial for him, you get it?" (*Id.* at Timestamp 1:36–1:50.) In another call, defendant directed Ms. Brown to "just keep doing what you've been doing . . . if it ain't nobody you know, don't even answer." (*Id.*, Audio File "Clip36Redacted," Timestamp 1:47–1:53.) "As far as our auntie go, you know, [INAUDIBLE] one or two things we can do is don't . . . answer until [INAUDIBLE] next week or just go ahead and be honest and tell her that you don't . . . want to go forward with it." (*Id.*, Timestamp 2:05–2:20.) In another call, defendant called Ms. Brown to find out if anyone had contacted her and if she planned on coming to his "preliminary." (*Id.*, Audio File "Clip51Redacted," Timestamp 1:48–2:10.) He then stated: "folks gonna be calling you, I don't know how this is going to play out . . . it's either one of two things . . . do not answer the phone or if you do have to just tell them folks you don't want to press charges on me." (*Id.*, Timestamp 2:13–2:35.) He then stated: "you don't answer and don't come, then they gonna dismiss this shit . . . and we can just go from there." (*Id.*, Timestamp 2:53–3:00.) In another call, defendant explained that he had been told by someone that "his gal told the prosecutor . . . quote that she didn't want to testify . . . when they gave her a subpoena, she called them and told them that." (Ex. 1, Timestamp 7:23–7:55.)

One month before the trial, defendant again tried to convince Ms. Brown not to testify. He sent her a text message with a link to a website and told her to "[r]ead the part where it says witnesses can plead the fifth. Without accepting the subpoena, you are under no obligation to the courts." (Appellant App'x at 14–15.) He then told her that if she was "going to do it, [she would] have to stop answering the phone for them." (*Id.* at 16.) M[s]. Brown responded: "It[ ] says I can do that if I feel I'm going to say something to incriminate myself. . . . You reading it wrong, it want [sic] work for me cause I don't have anything to say that would incriminate me. Stop trying to make it seem like I filed a false report. That's what I see you trying to say in your defense against me and that's not right." (*Id.* at 16–18.) In response, defendant asked Ms. Brown to "sacrifice a little in exchange for [his] freedom." (*Id.* at 22.) Ms. Brown responded: "you say you willing to die for me hell you could have took life from me and my aunt." (*Id.* at 24.) Defendant did not deny the accusation.

Viewing the evidence in the light most favorable to the government, there was sufficient evidence for the jury to convict defendant. Significantly, most of defendant's challenges to the evidence question Ms. Brown's credibility. This Court will not overturn a verdict by re-assessing a witness' credibility. *Grubbs*, 506 F.3d at 438–39. There is sufficient evidence that defendant was in possession of the handgun in the early morning hours of Christmas Day, 2015. *See id.* at 439. ("We have defined substantial evidence as . . . 'such relevant evidence as a

> reasonable mind might accept to support a conclusion . . . affording a substantial basis of fact from which the fact in issue can be reasonably inferred.'" (quoting *United States v. Martin*, 375 F.2d 956, 957 (6th Cir. 1967))). A reasonable mind could accept that evidence as support for the conclusion that defendant was in possession of the gun.
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> At trial, defendant argued that there could have been a gun fired inside the house, seizing on the fact that no shell casings were found outside the home, and maintained that the government failed to produce direct evidence that defendant stole Ms. Brown's gun.[4] However, the jury considered these arguments and concluded that defendant was guilty of the instant offense. The evidence was sufficient to sustain the conviction.

United States v. Brown, 888 F.3d at 833-35.

A federal prisoner cannot use § 2255 to relitigate a claim that has been decided on direct review, absent "highly exceptional circumstances." *See DuPont v. United States*, 76 F.3d 108, 110-11 (6th Cir. 1996) (citation omitted). The relitigation doctrine is an extension of the law-of-the- case doctrine to the collateral review context. *See White v. United States*, 371 F.3d 900, 902

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[4]Defendant also argues on appeal that Officer Allen's testimony about whether the gun was fired from the outside was inconsistent:

> Officer Allen took a photo of a bullet hole left in the ceiling. He first testified twice that the bullet that made the hole would have had to have traveled from the left. When it was pointed out that this trajectory would have been more consistent with a bullet being fired from inside the home, his testimony suddenly became evasive, and he retreated from his prior position by stating that he could not recall his own orientation when he took the photo.

(Appellant's Br. at 28.) However, without any expert testimony, defendant's theory about the trajectory of the bullet is only argument. And without the photographic evidence on which defendant relies, which was not made part of the appellate record, we cannot properly assess defendant's argument. The trial transcripts are also unhelpful. Defendant's counsel focused on the location of the entry of the bullet while trying to undermine the Officer's account of what happened, and pointed out various details in the photographs taken by the Officer. However, the transcript only contains references to "there," "here," and "this," (*see, e.g.*, R. 80-1, PageID # 962–63), which is meaningless without a properly preserved representation of what those words refer to or describe. And, in any case, the jury believed Officer Allen's account and "for the court of appeals to assess witness credibility would be to impermissibly 'invade the province of the jury as the sole finder of fact in a jury trial.'" *United States v. Henderson*, 626 F.3d 326, 341 (6th Cir. 2010) (citation omitted).

(7th Cir. 2004); *see also United States v. Moored*, 38 F.3d 1419, 1421-22 (6th Cir. 1994); *cf. Stoufflet v. United States*, 757 F.3d 1236, 1239-42 (11th Cir. 2014) (explaining that the procedural bar against relitigation in the § 2255 context is even more stringent than the law- of-the-case doctrine).

The exception for "extraordinary circumstances" is limited to those situations where there has been an intervening change in the law, usually a new judicial decision narrowly construing the statute of conviction. *See Davis v. United States*, 417 U.S. 333, 345-47 (1974) (where § 2255 petitioner claimed that, due to a change in law, he was convicted "for an act that the law does not make criminal"); *Jones v. United States*, 178 F. 3d 790, 796 (6th Cir. 1999).

Brown repeats his argument that no direct evidence was presented that demonstrated that he possessed the gun. (ECF No. 35-1 at 32-34.) Brown may not raise issues that were unsuccessfully challenged on appeal in a § 2255 motion. *See DuPont*, 76 F.3d at 111 (where the claim asserted in a habeas petition is substantively identical to an issue presented on direct appeal after conviction, "no exceptional circumstances exist").

Brown also contends that *Rehaif v. United States*, 139 S. Ct. 2191 (2019) constitutes an intervening change in the law. (*Id.* at 34.) He contends that, under *Rehaif*, the United States was required to prove that Brown knew he was a felon. (*Id.*) The Court has not required the United States to respond to Brown's *Rehaif* argument.

In *Rehaif*, the Supreme Court held that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. Rehaif was an immigrant who overstayed his visa, not a felon.

Brown is not similarly situated. Here, Brown stipulated that he was a convicted felon and did not require the United States to prove that element of his crime. (Cr. ECF No. 80-1 at 157-58.)

Further, *Rehaif* did not announce a new rule of constitutional law made retroactive to cases on collateral review. *See In re Palacios*, 931 F.3d 1314, 1315 (11th Cir. 2019); *see United States v. Grigsby*, No. 12-10174-JTM, 2019 WL 3302322, at *1 (D. Kan. July 23, 2019 (*Rehaif* is a question of statutory interpretation, rather than constitutional right. Its holding is not retroactively applicable on collateral review).

Rehaif does not provide Brown with any relief in this collateral proceeding, and he may not raise issues that were unsuccessfully challenged on appeal in a § 2255 motion. Issues Two and Seven are **DENIED**.

B. Ineffective Assistance of Counsel (Issue Six) and Related Issues Five, Three, and One

1. Counsel's failure to object to the admission of inadmissible evidence (Issue Six(a) and Issue Five)

Brown contends that trial counsel performed deficiently by failing to object to the admission of evidence that violated Fed. R. Evid. 404(b), specifically the earlier theft of the victim's gun and the shots fired into the house on December 25, 2015. (ECF No. 35-1 at 46-48.) The United States has provided the affidavit of trial counsel, Unam Peter Oh, who responds that he did not object because he determined there was no good faith basis supporting an objection. (ECF No. 8 at 8, ECF No. 8-1 at 2, ¶ 5.)

"Broad discretion is given to district courts in determinations of admissibility based on considerations of relevance and prejudice, and those decisions will not be lightly overturned." *United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008) (quoting *United States v. Chambers*, 441 F.3d 438, 455 (6th Cir. 2006). The evidence was probative of Brown's possession of the firearm

and was admissible. Counsel had no duty to raise objections that lacked a legal basis. Counsel does not perform deficiently by failing to raise a frivolous issue or objection. Brown has failed to demonstrate that counsel's performance was deficient. Because counsel was not ineffective Brown cannot establish cause to excuse the procedural default of Issue Five. Issue Five is barred by procedural default and is **DENIED**. Issue Six(a) is without merit and is **DENIED**.

2. Counsel's failure to object to prosecutorial misconduct (Issue Six(b) and Issue Three)

Brown contends that trial counsel failed to object when the prosecution referred to uncharged conduct during the opening statement and closing argument, specifically the earlier theft of the victim's gun and the shots fired into the house on December 25, 2015. (ECF No. 35-1 at 48-52.) Attorney Oh responds that there was no good faith basis to object to the prosecutor's statements. (ECF No. 8-1 at 2, ¶ 7.)

Under federal law, any prosecutorial comment or argument that induces the jury to accept the prosecutor's opinion to the detriment of the facts of the case is improper. *United States v. Young*, 470 U.S. 1, 18-19 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context . . . ."). The prosecution is entitled to characterize or "summarize[ ] the evidence, although subject to conflicting inferences, in a manner that support[s] its theory of the case." *United States v. Kuehne*, 547 F.3d 667, 690 (6th Cir. 2008). Prosecutors may not misstate the evidence, *United States v. Carter*, 236 F. 3d 777, 784 (6th Cir. 2001), or argue facts not in evidence, *Abela v. Martin*, 380 F.3d 915, 929 (6th Cir. 2004), but they have "leeway to argue reasonable inferences from the evidence during closing arguments." *United States v. Crosgrove*, 637 F.3d 646, 664 (6th Cir. 2011).

The prosecutor's remarks were not objectionable. The prosecutor's opening statement provided a preview of the evidence that would be presented during trial. (Cr. ECF No. 80 at 22-24.) The prosecutor's closing argument was an accurate review and summary of the proof elicited at trial. (Cr. ECF No. 81 at 28-37, 63-72.) The prosecutor's argument made reasonable inferences from the testimony and proof and was not improper. (*Id.*) Counsel did not provide ineffective assistance by failing to raise frivolous objections. Counsel was not ineffective. Therefore, Brown cannot establish cause to excuse the procedural default of Issue Three. Issue Three is barred by procedural default and is **DENIED**. Issue Six(b) is without merit and is **DENIED**.

3. Counsel's failure to argue insufficiency of the evidence during trial and on appeal (Issue Six(c))

Brown alleges that counsel failed to argue that the United States did not demonstrate Brown's actual possession of the weapon.[5] (ECF No. 35-1 at 53-55.) The United States responds that counsel made this argument during direct appeal and it was rejected by the Sixth Circuit. (ECF No. 8 at 9.) Attorney Oh responds that, at the conclusion of the United States' proof, he moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 and that he also raised the sufficiency of the evidence on direct appeal. (ECF No. 8-1 at 3, ¶¶ 9, 11.)

The record demonstrates that the Court denied the motion for judgment of acquittal stating, in pertinent part:

> As to the third element, knowing possession of a firearm, there's proof of which the jury could actually conclude that the defendant was in either actual or constructive possession of the firearm. There was proof that there were shots fired, that the defendant was heard or seen outside the house at the time roughly

[5]Brown includes an abbreviated reference to *Rehaif* in this issue. The applicability of *Rehaif* to this collateral proceeding was discussed in Section III(A), *supra* at pp. 13-14, and need not be repeated.

> contemporaneously. There was proof of his stealing the firearm that was found between the two doors on the side of the house.
>
> In any event I believe the proof taken as a whole would be sufficient to sustain a conviction as to possession. As to knowing possession, I think that could be inferred by the jury based on the record. So, for those reasons the motion's denied.

(Cr. ECF No. 80-1 at 165.)

On appeal, Attorney Oh contended that "[n]o rational trier of fact could have found that Mr. Brown possessed the firearm beyond a reasonable doubt based upon the evidence presented at trial" and that "[t]he circumstantial evidence presented did not go beyond reasonable speculation. . ." (*United States v. Brown,* No. 17-5718, Appellant's Brief, ECF No. 17 at 28.) The Sixth Circuit agreed "that there was no direct evidence as to who possessed the gun at any given time" but determined that "there was circumstantial evidence that defendant possessed the gun during the incident at issue here." *United States v. Brown*, 888 F.3d at 833.

The record establishes that trial counsel raised the issue of the absence of direct evidence to establish actual possession of the weapon during trial and on appeal. The Sixth Circuit's characterization of the argument as an attack on the victim's credibility does not alter its determination that the circumstantial evidence was sufficient for the jury to convict Brown. Brown's recharacterization of the sufficiency issue as a claim of ineffective assistance is unavailing. He does not articulate any argument by counsel that would have changed the outcome of his trial or appeal. Brown has failed to demonstrate deficient performance by counsel. Issue Six(c) is **DENIED**.

4. Counsel's failure to object to the constructive amendment and variance of the indictment (Issue Six(d) and Issue One)

Brown alleges that the United States amended his indictment by introducing evidence of the earlier theft of the victim's gun and the shots fired into the house on December 25, 2015. (ECF No. 35-1 at 56-57.) He contends that counsel should have objected because the "other crime evidence altered [his] indictment [ ] and increased the likelihood of his conviction." (*Id.* at 57.) The United States responds that "the element of possession [of the firearm] was not altered by the presentation of evidence nor did the evidence at trial prove any facts materially different from that alleged in the indictment" and that Brown has not shown prejudice to his ability to defend himself at trial. (ECF No. 8 at 11-12.) Attorney Oh replies that he did not raise this objection at trial because he did not find a good faith basis to assert constructive amendment or object to the admissibility of the evidence. (ECF No. 8-1 at 4, ¶ 14.)

It is well-established "that the constitutional rights of an accused are violated when a modification at trial acts to broaden the charge contained in an indictment." *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989) (citing *Stirone v. United States*, 361 U.S. 212, 215-16 (1960)). The Sixth Circuit recognizes two forms of modification of indictments: amendments and variances. Amendments occur "when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed on them." *Ford*, 872 F.2d at 1235 (citations and quotation marks omitted). An amendment that alters the terms of the indictment is considered per se prejudicial and warrants reversal of a conviction, because it "directly infringe[s] upon the fifth amendment guarantee" that a defendant is held answerable only for charges levied by a grand jury. *Id.*

Variances occur "when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Id.* *See also United States v. Hathaway*, 798 F.2d 902, 910 11 (6th Cir. 1986). Based on a

defendant's Sixth Amendment right to be informed of the nature of an accusation against him or her, *Ford*, 872 F.2d at 1235, a variance does not constitute reversible error, unless the defendant can prove it affected his "substantial rights," because it either prejudiced his defense, the fairness of the trial, or the sufficiency of the indictment to bar subsequent prosecutions. *Hathaway*, 798 F.2d at 910.

"Blurring the distinction between amendments and variances is the concept of the constructive amendment[,] which is a variance that is accorded the per se prejudicial treatment of an amendment." *Ford*, 872 F.2d at 1235. "[A] variance rises to the level of a constructive amendment when": (1) "the terms of an indictment are in effect altered by the presentation of evidence and jury instructions," and the "essential elements of the offense charged" are modified (2) such "that there is a substantial likelihood the defendant may have been convicted of an offense other than that charged in the indictment." *Id.* (citation and quotation marks removed). *See also United States v. Beeler*, 587 F.2d 340, 342 (6th Cir. 1978). The Sixth Circuit has called the line between constructive amendments and variances "sketchy," *United States v. Chilingirian*, 280 F. 3d 704, 712 (6th Cir. 2002), and "shadowy," Hathaway, 798 F.2d at 910 (citation omitted), and has stated that the difference may not be one of kind, but of degree, *United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007).

The evidence presented did not alter or broaden the scope of the indictment. The facts proven were not materially different from those alleged in the indictment. Brown has not shown that the evidence presented and instructions given resulted in a constructive amendment of the indictment. No likelihood exists that Brown was convicted of a crime other than possessing a weapon after he had been convicted of a felony and his ability to defend himself at trial was not impaired. *See United States v. Hynes*, 467 F.3d 951, 965 (6th Cir. 2006). Brown cannot

demonstrate any prejudice resulting from trial counsel's failure to object. Issue One is barred by procedural default. Issue Six(d) is *DENIED*.

5. Counsel's failure to present a defense at trial (Issue Six(e))

Brown alleges that counsel provided ineffective assistance by failing to present Brown's alibi defense. (ECF No. 35-1 at 60.) Brown contends that he was at his mother's house when the shots were fired into the victim's house. (*Id.*) He has provided an affidavit from his mother, Ann Smith, as an exhibit. (*Id.* at 15-16.) Smith's affidavit, signed on October 31, 2018, states, in pertinent part:

> I spoke with Mr. Oh shortly after he became my son [sic] counsel. Mr. Oh asked me about my recollections on December 24 and 25 of 2015. I told him the same statements referenced here, perhaps not precisely, but certainly in essence. Mr. Oh asked me would I be willing to testify at trial regarding my recollections, and I informed him that I would. . . . When the trial begin [sic] to its end, I was there ready to testify. For whatever reasons, Mr. Oh did not call me to testify. Unfortunately my son was convicted for a crime he did not commit.
>
> In the case of any event, I'm more than willing to testify to the facts stated here. My son was home with me in his room sleep [sic] during the incident he was accused of doing. I saw him with my own eyes. I also saw him that same morning still resting. If my son would have left my house while I was resting, I would have known because he would have needed my door key to get out, which means he would have had to awake me.

(*Id.*)

Trial counsel's affidavit addresses this issue. Attorney Oh states:

> I therefore called Ann Smith on January 10, 2017. I took contemporaneous notes of my conversation with Ms. Smith.
>
> According to my notes, I asked Ms. Smith if she remembered Christmas Eve 2014. Ms. Smith recalled that she was at home. She recalled that Mr. Brown spent part of Christmas Eve with her, and then Mr. Brown went to see his father, and then Mr. Brown came back to her apartment and "went to his room."

> Ms. Smith meanwhile "stayed up cooking" to prepare for Christmas. According to my notes, Ms. Smith recalled that she eventually "went to bed sometime between 1 & 2 a.m., maybe even 3 a.m., but she can't be sure." Ms. Smith then "woke up [the] next day after sunrise" and "saw [Mr. Brown] that morning."
>
> After interviewing Ann Smith, I also called Mr. Brown's father, James Brown, to assess Ms. Smith's recollection of Christmas Eve 2015.
>
> I spoke with James Brown on January 11, 2017. I took contemporaneous notes of my conversation with him.
>
> According to my notes, James Brown recalled that Mr. Brown "came over on Christmas Eve 2015, around 7:30 p.m. or so, left around 11:00 p.m. or so." James Brown then did not see Mr. Brown until "next Christmas Day, about 1 or 2 p.m."
>
> I advised Mr. Brown of his mother and father's recollection. I advised Mr. Brown that his mother could not provide a persuasive alibi. Ann Smith's recollection was that she "went to bed sometime between 1 & 2:30 a.m., maybe even 3 a.m., but she can't be sure," on Christmas morning 2015. According to my review of the discovery, however the alleged incident at Claudia Taylor's house did not occur until later in the morning before dawn. The alarm company's records showed that the alarm at Claudia Taylor's house went off at approximately 4:08 a.m. Kimberly Brown then spoke with 911 dispatch at approximately 4:08 a.m. after several police officers had come and gone from Claudia Taylor's residence. That was the end of the alleged incident at Claudia Taylor's house on December 25, 2015.

(ECF No. 8-1 at 5-6, ¶¶ 17-24.) The United States responds that counsel determined that neither of Brown's parents could provide a persuasive alibi and made a strategic decision that is entitled to great deference. (ECF No. 8 at 13.)

The Court recalls that when Brown was voir dired about his decision not to testify, he stated under oath that Attorney Oh had reviewed all discovery with him, written and recorded and had discussed all possible options for trial. (Cr. ECF No. 81 at 6.) When Attorney Oh announced, without presenting any witness testimony, that the defense rested, Brown did not

protest or express any concern. (*Id.* at 10.) Brown offers no explanation for his silence during trial and the delay in obtaining his mother's affidavit. (ECF No. 35-1 at 59-61.)

Ms. Smith's affidavit lacks specificity about the time she believes the "incident" occurred and the time she "saw [Brown sleeping] with [her] own eyes" (ECF No. 35-1 at 15-16) and fails to convince the Court that, when considered in light of all the evidence presented at trial, the affidavit makes it more likely than not any reasonable juror would have reasonable doubt. Smith admits that the statements in her affidavit may not be precisely what she told defense counsel. (*Id.*)

Defense counsel's notes were made contemporaneously with his conversation with Ms. Smith and demonstrate that Ms. Smith was unable to account for Brown's whereabouts from the time he returned from his father's house and "went to his room" until "after sunrise". (ECF No. 8-1 at 5, ¶¶ 19, 20.) Ms. Smith does not explain why she did not tell defense counsel that Brown would have needed a key to leave the residence and does not address whether Brown requested and used the key before she finished cooking or went to bed. Ms. Smith does not explain why she did not protest or approach trial counsel when the defense rested without calling her as a witness.

Ms. Smith's lack of specificity supports the legitimate concern of counsel that her testimony, even if potentially helpful, exposed Brown to an unacceptable risk of inconsistency. Defense counsel has no obligation to present evidence or testimony that would not have exculpated the defendant. *See Millender v. Adams*, 376 F.3d 520, 527 (6th Cir. 2004). The failure to present a proposed alibi witness whose testimony would not lead to a defendant's acquittal does not amount to the ineffective assistance of counsel. *Id.*

Most importantly, defense counsel consulted with Brown before resting the case, and Brown concurred, as he had in other matters of strategy. Counsel's strategy was reasonable. Brown cannot establish that the strategic decisions by experienced, capable counsel were deficient. Issue Six(e) is **DENIED**.

C. Counsel's failure to object to the Court's instruction on constructive possession (Issue Four)

Movant argues that the Court "instructed the jury to an unsupported theory of constructive possession" and the "essential elements needed to sustain a conviction for actual possession are significantly different from the essential elements needed to sustain a conviction for constructive possession." (ECF No. 35-1 at 38-40.) This issue was not raised on direct appeal. The Court construes the issue to be that trial counsel was ineffective for failing to object to the Court's instruction.

It is well established that boilerplate instructions "should not be used without careful consideration being given to their applicability to the facts and theories of the specific case being tried." *United States v. Hughes*, 134 Fed. App'x 72, 76–77 (6th Cir. 2005) (quoting *United States v. Wolak*, 923 F.2d 1193, 1198 (6th Cir. 1991) (admonishing the district court for giving instructions on joint and constructive possession where only actual possession was at issue in the case); *see also* Sixth Circuit Criminal Pattern Jury Instructions Use Note to § 2.10A ("Actual Possession") ("This instruction should be given if the government's only theory of possession is actual possession."). The opposite is also true—the district court may reasonably give instructions on multiple theories of possession if they are supported by the evidence. *See* Sixth Circuit Criminal Pattern Jury Instructions Use Note to § 2.10 ("Actual and Constructive

Possession") ("If the government's theory of possession is that it was actual or constructive, give all paragraphs of this instruction.").

As explained in *United States v. Gardner*, "[c]onstructive possession exists when a person does not have possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." 488 F.3d 700, 713 (6th Cir. 2007). Actual possession exists "where the defendant has physical contact with a firearm-e.g., he holds it, holsters it, or keeps it in a place where it is immediately accessible." *United States v. Grubbs*, 506 F.3d 434, 439 (6th Cir. 2007). "Other incriminating evidence must supplement a defendant's proximity to a firearm in order to tip the scale in favor of constructive possession." *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008).

"Where one of two grounds for conviction is unsupported by the evidence and sufficient evidence supports the other ground for conviction, an error claimed as to the unsupported charge is harmless as a matter of law." *Hughes*, 134 Fed. App'x at 77 (citing *United States v. Mari*, 47 F.3d 782, 786 (6th Cir. 1995)). Courts can assume that jurors are able to analyze the evidence and discard factually inadequate theories. *Mari*, 47 F.3d at 786.

The Sixth Circuit has held that giving an unwarranted constructive possession instruction, in addition to a supported actual possession instruction, amounted to harmless error where facts in evidence could not have led the jury to discard an actual possession theory while instead returning an unsupported conviction for constructive possession. *See United States v. Smith*, 419 Fed. App'x 619, 620–22 (6th Cir. 2011) (finding harmless error in giving a constructive possession jury instruction because the government's only theory was that the defendant actually possessed a gun upon arrest, the defendant's theory was that the police returned to his home after his arrest and found a gun there that did not belong to him, and the defendant's theory, which

was the basis of the constructive possession jury instruction, did not support a theory of constructive possession, but only that the gun did not belong to the defendant); *Hughes*, 134 Fed. Appx. at 76–77 (finding harmless error in giving a constructive possession instruction where no record evidence supported a theory of constructive possession, both parties agreed defendant actually possessed ammunition, no evidence suggested that at any time when the defendant did not possess ammunition she had effective control of it, and the district court only wrongfully gave constructive possession instruction because there was testimony that the ammunition in the defendant's actual possession really belonged to someone else); *United States v. Bowman*, 126 Fed. App'x 251, 254–55 (6th Cir. 2005) (finding constructive possession instruction was harmless error because neither the defendant nor the government suggested that the defendant had constructive possession of the gun police found on the ground, the officer testified that he saw the defendant while running from police throw a gun on the ground, and although the defendant admitted he owned a gun the prosecutor never argued that the defendant should be convicted for possession of a gun other than the one found on the ground that the officer saw the defendant discard).

Where, as in this case, the evidence conformed to one of the two instructions given, Brown cannot establish that his attorney's performance was deficient or that he was prejudiced as a result of the deficient performance. Because Brown was not prejudiced by his attorney's failure to object to the instruction, he cannot establish that counsel's assistance was constitutionally ineffective. Issue Four is **DENIED**.

D. Cumulative Effect of All Errors (Issue Eight)

Brown contends that the combined effect of all errors resulted in prejudice that rendered his trial unfair. (ECF No. 35-1 at 64.) The United States responds that Brown's allegations of

error are groundless and that there is no need to apply the cumulative error doctrine. (ECF No. 8 at 14.)

Because all issues raised by the Amended § 2255 motion are without merit, there is no cumulative effect of errors for the Court to consider. Issue Eight is meritless and is **DENIED**.

IV. CONCLUSION

The motion, together with the files and record in this case "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Movant's conviction and sentence are valid and, therefore, his motion is **DENIED**. Judgment shall be entered for the United States.

V. APPELLATE ISSUES

Pursuant to 28 U.S.C. § 2253(c)(1), the district court is required to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate. The COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. § 2253(c)(2), (3). A "substantial showing" is made when the movant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citation and internal quotation marks omitted); *see also Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005) (quoting *Miller-El*, 537 U.S. at 337). In this case, for the reasons

previously stated, Movant's claim lacks substantive merit and, therefore, he cannot present a question of some substance about which reasonable jurists could differ. The Court therefore **DENIES** a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(a)-(b), does not apply to appeals of orders denying § 2255 motions. *Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal *in forma pauperis* in a § 2255 case, and thereby avoid the appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must obtain pauper status pursuant to Fed. R. App. P. 24(a). *Kincade*, 117 F.3d at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**. If Movant files a notice of appeal, he must also pay the full $505 appellate filing fee (*see* 28 U.S.C. §§ 1913, 1917) or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days (*see* Fed. R. App. P. 24(a) (4)-(5)).

IT IS SO ORDERED, this 18th day of December 2019.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JEREMY BROWN,

Movant,

v.

Cv. No. 18-2568-SHM
Cr. No. 16-20143-SHM

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Order Denying & Dismissing Motion Pursuant to 28 U.S.C. § 2255, docketed December 18, 2019. The issuance of a certificate of appealability under amended 28 U.S.C. § 2253 is denied. Any appeal in this matter by Movant proceeding in forma pauperis is not taken in good faith.

APPROVED:

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

December 18, 2019
DATE

THOMAS M. GOULD
CLERK

s/ Jairo Mendez
(By) DEPUTY CLERK