IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HURLEY C. JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

19-cv-647-wmc
15-cr-122-wmc

Under 28 U.S.C. § 2255, petitioner Hurley C. Jackson filed a motion to vacate his convictions on one count of conspiracy to distributed over 1,000 grams of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846; and two counts of possession with intent to distribute a substance containing heroin in violation of 21 U.S.C. § 841(a)(1). In particular, Jackson maintains that both his trial and appellate attorneys were ineffective in multiple respects. However, the government's evidence in support of the charges against Jackson was substantial, and Jackson has not shown that his attorneys' representations were legally deficient, much less that he was prejudiced by any arguable deficiency. As such, Jackson has fallen far short of meeting the burden of proof demanded by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1994), to vacate his convictions. Accordingly, his motion must be denied, and this action will be dismissed.

BACKGROUND[1]

A. Background

Jackson is an admitted heroin dealer. In 2013, his brothers Terrance Jackson and Charles Hall, his friend DeWight Williams and he were all dealing heroin. However, on December 11, 2013, when Jackson was arrested in Plover, Wisconsin, he had been the only one distributing heroin in the central Wisconsin communities of Plover, Stevens Point and Wisconsin Rapids. So, after being placed in the Portage County Jail pending trial, Jackson called his brother Hall and told him to retrieve heroin that Jackson had hidden at a hotel where he had been staying. Doing what Jackson asked, Hall retrieved the heroin and took it to Cody Thompson, who showed Hall how to break down and sell it. Also at Jackson's direction, Hall continued to procure heroin through Jackson's contact, his friend Williams, while Jackson remained in jail. Then, after Hall was arrested and incarcerated for driving while intoxicated in February 2014, Jackson recruited Marguerite Tompkins to continue his heroin distribution operation. Further, when Hall was released in the summer of 2014, he visited Tiffany Bell, Jackson's former girlfriend, and facilitated a phone call between Jackson and Bell.

Although Bell did not immediately commit to selling heroin for Jackson during that first phone call, she began selling after he was released from custody in September 2014. At that point, along with money that Hall and Williams gave Jackson, he pooled funds from others involved in the heroin distribution business to purchase larger amounts of

[1] Where most relevant, the court cites to filings in the underlying criminal proceeding in Case No. 19-cr-647, using the designation "CR."

heroin collectively. Jackson also coordinated the delivery of heroin to Central Wisconsin by employing several individuals addicted to heroin to help transport, test and distribute it, including Hannah Hovick, Thompson, Megan Pray-Genett and Tanya Kluck. On December 9, 2014, Jackson also arranged for Bell to sell heroin to Casey Edlebeck, who unbeknownst to Jackson or Bell was then working as a confidential police informant. Specifically, Edlebeck texted Jackson to purchase heroin directly, and he instructed Edlebeck to go to a local McDonald's. When Edlebeck arrived and texted Jackson, he next instructed him to look for a gold Cadillac. When Bell arrived in a gold Cadillac, Edlebeck purchased heroin from her.

On January 27, 2016, a grand jury charged Jackson, Hall, Williams and Terrance Jackson with conspiracy to distribute heroin, as well as heroin possession and distribution. The grand jury also charged Jackson with possessing heroin with intent to distribute and distributing heroin through Tiffany Bell. While Terrance Jackson, Hall and Williams all pleaded guilty to the conspiracy charge, Jackson proceeded to trial.

B. Pretrial Motion

Before trial, Jackson filed a motion in limine to exclude certain testimony from Hannah Hovick. (CR dkt. #269.) Hovick was expected to testify that she made a trip to Chicago in May 2015 to test the quality of the heroin that Jackson, his brother Terrance and Williams were purchasing before they brought it back to Wisconsin. More specifically, Hovick would testify that the night before her trip, while she was in a car with Jackson and his brother Terrance, Jackson put his arm around Hovick's neck, held a gun to her head, and threatened her not to talk to the police. (*See* CR dkt. #362.) Jackson's trial counsel

argued that this testimony was both inadmissible character evidence under Federal Rule of Evidence 404(b) and should also be excluded under Rule 403 because the danger of prejudice substantially outweighed its probative value. (CR dkt. #400, at 5-7.) The court denied the motion, reasoning that a jury could find Jackson wanted to intimidate Hovick in furtherance of the charged conspiracy, and thus, the probative value outweighed any prejudice.

C. Trial

Trial began on January 23, 2017. The government called eight witnesses who testified to being a part of Jackson's heroin distribution scheme. Specifically, witnesses testified that (1) Jackson, his brothers Terrance and Hall, and Williams worked together in the heroin trade or that they had directed them to other conspirators to obtain heroin or money to pay for it. (CR dkt. #398 at 5 (Hovick testimony); dkt. #364 at 12, 14-17 (Thompson testimony); dkt. #364 at 53-54 (Pray testimony); dkt. #364 at 87, 90 (Kluck testimony); dkt. #364 at 194 (Edelbeck testimony); dkt. #356 at 18-19, 27, 32, 37-38, dkt. #399 at 15-17 (Bell testimony); dkt. #399 at 32, 38 (Hall testimony)); (2) Jackson coordinated or supervised the distribution scheme (CR dkt. #398 at 51-52 (Hovick); dkt. #364 at 26 (Thompson), 107 (Tompkins); dkt. #356 at 56-57 (Bell); dkt. #399 at 17 (Bell)); or (3) Jackson, Terrance Jackson, Hall and Williams used others who were addicted to heroin to transport, test and distribute heroin (CR dkt. #398 at 32-35, 36-49, 50 (Hovick); dkt. #364 at 13-14, 21 (Thompson), 52 (Pray), 85 (Kluck), 104 (Tompkins); dkt. #356 at 16, 23-26, 29-30 (Bell)). Bell, Hovick and Thompson each also testified that Jackson possessed a handgun in connection with the heroin conspiracy. (CR dkt. #356 at

55-56; dkt. #364 at 22-24; dkt. #398 at 56-57.) Finally, Hovick testified about the specific incident the night before her trip to Chicago, when Jackson threatened her with the handgun, saying "If you ever talk to the police, I will kill you." (CR dkt. # 398, at 55-57.)

Along with the testimony of five law enforcement officers and phone records and business records analysts, the government also offered into the record exhibits that corroborated the existence of the alleged conspirators' heroin distribution scheme, including photographs, cell phone records, text messages, recordings of jail calls, and wire transfers. These were Jackson's recorded conversations with Hall while she was incarcerated; phone record analysis related to the distribution charge involving Bell; and a letter Jackson sent to Bell shortly before trial telling her that if acquitted, he would visit Bell in prison and send her money. In addition, MoneyGram records show that Bell sent Jackson more than $10,000 in what she described as, and what Jackson acknowledged were, heroin proceeds.

Jackson testified in his own defense, admitting he was a heroin dealer but denying the existence of a conspiracy to distribute heroin. To the contrary, Jackson testified that his brothers Terrance and Hall, as well as his friend Williams, were actually his competition. The jury started deliberating on January 25, 2017, and it returned guilty verdicts on three counts the following day for (1) conspiracy to distribute more than 1,000 grams of heroin; (2) possession with intent to distribute heroin; and (3) distribution of heroin. (CR dkt. ##279, 385.)

Jackson filed a *pro se* motion for a new trial on February 28, 2017, raising multiple grounds for relief, including a claimed Speedy Trial Act violation. After Jackson filed that motion, the court granted his trial attorney's motion to withdraw and appointed new counsel for purposes of representing Jackson at sentencing. On May 1, 2017, the court denied Jackson's motion for a new trial, finding that there were periods of time properly excluded because Jackson replaced his original trial attorney and because of Jackson's numerous motions during discovery and leading up to trial. (Dkt. #377, at 8-10.)

D. Sentencing

In advance of sentencing, Jackson's new counsel filed objections to the Probation Office's offense level calculations, including to: an enhancement for possession of a firearm; a four-level increase for his role in the offense; and a two-level increase for obstruction of justice based on Jackson's letter sent to Bell shortly before trial.

On May 16, 2017, the court sentenced Jackson, beginning with his objections to the Probation Office's offense level calculations. The court overruled the first objection because two witnesses had testified to Jackson's purchase and use of the firearm in connection with the heroin trade, while acknowledging that Hovick's testimony and statement to law enforcement was somewhat different. Overall, this court found that the government had certainly proven to a preponderance of the evidence that the firearm was used as part of the conspiracy to distribute heroin. By sentencing, Jackson had withdrawn his second objection, so the court merely noted that numerous witnesses had testified to Jackson's managerial and leadership role in the heroin conspiracy. The court further overruled the third objection regarding obstruction, finding that Jackson's attempt to

explain away his pretrial letter to Bell was incredible, particularly in light of his past treatment of Hovick and Bell, and therefore, the two-level increase was warranted.

Although the court also concluded that Jackson was a career offender, subject to the advisory guideline imprisonment range of 360 months to life, the court found a downward variance appropriate because he had a relatively limited criminal history, no history of violent crime, and the potential to be a productive citizen upon his release from incarceration. Accordingly, the court thus imposed a sentence at the mandatory minimum of 240 months for each of the three counts, to run concurrently.

E. Appeal

The same counsel that represented Jackson at sentencing handled his appeal. Jackson raised two arguments on appeal: (1) the court erred in allowing Hovick to testify about Jackson's threat; and (2) the prosecutor engaged in misconduct during closing argument. The Seventh Circuit rejected both arguments and affirmed Jackson's convictions. *United States v. Jackson*, 898 F.3d 760 (7th Cir. 2018).

OPINION

Habeas "relief under § 2255 is an extraordinary remedy because it asks the district court to essentially reopen the criminal process to a person who already has had an opportunity for full process." *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007). Accordingly, relief is appropriate only for "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Harris v. United States*, 366 F.3d 593, 594 (7th Cir. 2004) (quoting

Borre v. United States, 940 F.2d 215, 217 (7th Cir. 1991)). For the same reason, a motion under § 2255 cannot be used to relitigate matters that were raised on direct appeal. *Varela v. United States*, 481 F.3d 932, 935 (7th Cir. 2007).

Jackson asserts claims of ineffective assistance of counsel against both his trial and appellate attorneys. To prevail on these claims under *Strickland v. Washington*, 466 U.S. 668 (1984), Jackson must demonstrate (1) constitutionally deficient performance on the part of counsel; and (2) actual prejudice because of the alleged deficiency. *Id*. at 687; *see also Williams v. Taylor*, 529 U.S. 362, 390-391 (2000). Under the first step of *Strickland*, a petitioner can only establish a "constitutionally deficient performance" by showing that his "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Moreover, the burden falls squarely on the petitioner to overcome presumptions "that counsel's conduct falls within the wide range of reasonable professional assistance" and his or her decisions were strategic. *Weaver v. Nicholson*, 892 F.3d 878, 885 (7th Cir. 2018) (quoting *Strickland*, 466 U.S. at 689). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91; *Gilbreath v. Winkleski*, 21 F.4th 965, 982 (7th Cir. 2021). If a petitioner establishes that trial counsel's performance was constitutionally deficient, he must also show under the second step of *Strickland*, a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. This probability must be

"sufficient to undermine confidence in the outcome." *Id.* The court addresses petitioner's challenges to his counsels' performances under *Strickland* standard below.

I. Trial Attorney Schwartz

Jackson maintains that Attorney Schwartz's performance at trial was ineffective because: (1) he would have pleaded guilty but for Schwartz's advice that he was a career offender; (2) Schwartz failed to tell him that the government had filed a Section 851 enhancement; and (3) Schwartz failed to investigate and call material defense witnesses. None of these challenges are persuasive under *Strickland*.

A. Career Offender Advice

Jackson contends that he would have pleaded guilty, but Attorney Schwartz advised him that he was a career offender under the United States Sentencing Guidelines. The government points to a number of reasons why Schwartz did not perform deficiently with this advice, but the court need only address one of them. There is no question that Jackson *is* a career offender under USSG § 4B1.1 and subject to a possible career offender enhancement because, as noted by the court at sentencing, Jackson was well over 18 when he committed his crimes of conviction and already had two, prior felony convictions for controlled substance offenses -- a 2006 conviction for possession with intent to distribute crack cocaine and a 2005 conviction for manufacturing/delivering. While the court did not ultimately apply the enhancement at sentencing, Attorney Schwartz could not know this in advance, nor confidentially predict this, particularly given the evidence against him. Indeed, even Jackson's sentencing and appellate counsel, Attorney Otis, did not object to

the presentence report characterizing Jackson as a career offender, and the court saw no error in Otis's decision not to object for the simple reason that Jackson qualified for the career offender enhancement.

Nevertheless, Jackson would challenge his career offender status by arguing that the Wisconsin drug convictions criminalize more conduct than the corollary federal controlled substance offenses. The court takes this to be a challenge under *Mathis v. United States*, 579 U.S. 500 (2016). However, such a challenge is not cognizable under § 2255 when a sentence is imposed within the advisory guidelines. *See United States v. Coleman*, 763 F.3d 706, 708-09 (7th Cir. 2014) (concluding that an error in calculating a guidelines range was not a miscarriage of justice for purposes of a § 2255 motion). Indeed, the Seventh Circuit has more recently rejected *Mathis* challenges under § 2255 for this very reason. *See Hanson v. United States*, 941 F.3d 874, 878 (7th Cir. 2019) (*Mathis* relief is unavailable under § 2255 because the sentence imposed was based on "combined considerations from the advisory Guidelines and the appropriate factors"). Nor has the Seventh Circuit recognized such a claim in circumstances when, as here, any erroneous career offender enhancement did not actually increase the applicable guidelines range. *See Mangine v. Withers*, 39 F.4th 443, 448 (7th Cir. 2022) ("It is undisputed that his designation as a career offender is not what drove [defendant's] sentence . . . With or without the designation, his Guidelines range . . . would have been 360 months to life."). Finally, this court ultimately imposed a 20-year sentence, well below the guideline range of 360-months to life.

To the extent Jackson maintains that he would have entered into a better plea deal with different counsel that would have subjected him to a mandatory minimum of five

years in prison, rather than twenty, that is purely speculative. Certainly, there is nothing in the record suggesting that a plea deal would have guaranteed him a lower term of incarceration from this court. Pleading guilty would only have raised the *possibility* of a shorter sentence. In particular, this court would not have been inclined to impose a five-year sentence given that Jackson's criminal history alone, even without the career offender designation, still placed his guideline range at 360 months to life. Indeed, neither his adjusted offense level nor his criminal history computation was increased because of that status. (CR dkt. #379, ¶¶ 116-19, 138-40.) Thus, not only was the advice given Jackson well within the range of what a reasonable professional might advise, but petitioner has failed to show any real prejudice from the advice received from his trial counsel. For all these reasons, Jackson has failed to show that his trial attorney performed deficiently with respect to advice on his career offender status.

B. Section 851 enhancement

Jackson next contends that he proceeded to trial not knowing that the government had filed a § 851 notice indicating its intent to pursue an enhancement that increased the mandatory minimum. Not only has Jackson failed to show that he was unaware of the government's notice, much less that Attorney Schwartz performed deficiently by failing to notify him of the notice, but the evidence is very much to the contrary. Specifically, in his January 8, 2017, letter to Bell, just thirteen days before his trial, Jackson wrote: "The Prosecutor filed a 851 motion in my case and because I had two prior drug convictions it change my mandatory minimum from 10 to life." (Dkt. #3-2.) Thus, there is *no* question

that Jackson was aware of the enhancement and seemed to believe, or at least wanted Bell to believe, that the § 851 notice subjected him to a much higher sentence.

C. Failure to investigate or call witnesses

Jackson next says that Schwartz should have interviewed and called other witnesses. "A lawyer's decision to call or not to call a witness is a strategic decision generally not subject to review. The Constitution does not oblige counsel to present each and every witness that is suggested to him." *United States v. Williams*, 106 F.3d 1362, 1367 (7th Cir. 1997) (finding counsel's failure to call alibi witnesses where the government had proved all elements of the crime was not deficient performance). Moreover, "[i]f counsel has investigated witnesses and consciously decided not to call them, the decision is probably strategic." *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005). In contrast, "[a]n outright failure to investigate witnesses … is more likely to be a sign of deficient performance." *Id.* "Whether deficient performance occurred, however, depends on factors like counsel's overall diligence, the likely relevance of the witness's testimony, whether alternative ways of proving the point exist, and the strength of the government's case." *Id*.

More broadly, "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary . . . In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Accordingly, a petitioner alleging ineffective assistance of counsel due to failure to investigate must present "a comprehensive showing

as to what the investigation would have produced." *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003).

Here, Jackson has submitted *no* evidence except his own, inadmissible assertions as to what his proposed, additional witnesses would have testified and unsubstantiated information he claims to have provided to Schwartz before trial. Specifically, Jackson now insists he explained to Schwartz before trial that these witnesses would corroborate his defense that he was actually in competition with key witnesses Williams, Terrance and Hall, rather than their coconspirators and in a buyer-seller relationship with charged sub-distributors. However, Jackson does not explain how these supposed witnesses could have called into question the government's substantial and strong corroborating evidence demonstrating that his coconspirators and he were working in concert to maintain a steady distribution of heroin to their downstream users.

In particular, the jury *heard* Jackson on tape discussing with Hall their heroin distribution scheme, including active sub-distributors, saw Jackson's text communications with Casey Edelbeck and a discussion of Cody Thompson about drug distribution, and reviewed an analysis of Jackson's phone calls that the government argued showed how he set up heroin distribution to Edelback, forming the basis of the heroin distribution charge in Count 3. Bell's testimony about Jackson's behavior was also corroborated by his text messages to her related to heroin and debt collection. (*See* CR dkt. #365 at 14-20.) Bell's testimony about both Jackson's threats and involvement in the heroin distribution scheme was further corroborated by the pre-trial letter he sent her, as well as MoneyGram records

showing that she sent him over $10,000 that he conceded were proceeds from her heroin distribution. (*See* CR dkt. #356, at 32-35; dkt. #401 at 39.)

In contrast, Jackson has not begun to make a showing, much less a "comprehensive" one, that any of his desired, additional witnesses could have seriously undermined this evidence of Jackson's degree of involvement in the heroin distribution scheme. For example, Jackson faults Attorney Schwartz for failing to call Crystal Domka to testify about Bell's involvement in heroin sales, who he contends would have testified Bell told her that Jackson did not trust Bell with money and never "fronted" Bell heroin. While this testimony might have discredited some of Bell's testimony, the government would also have been in a position to discredit Domka with MoneyGram records showing that Bell sent him heroin proceeds and Jackson's own text messages to Bell about her repayments. Regardless, Domka would have at minimum corroborated Bell's role in heroin distribution.

Jackson also faults Attorney Schwartz for failing to interview or call two other men, David Block and Mr. Brown, who he represents would have testified that Hall traveled to Milwaukee in December 2013 to purchase heroin. However, Jackson fails to explain how this testimony would have buttressed his defense that he was not working in concert with Hall, but rather in competition, especially give: (1) Hall's testimony that *Jackson* sent him on that particular trip; and (2) the government's corroborating evidence that Jackson had called Hall from jail after his arrest on December 11, 2013, not exactly the act of a competitor. (CR dkt. #398 at 84, 87-90; CR dkt. #399, at 23-26.) More broadly, Hall testified that he had traveled to Milwaukee many times after taking over Jackson's role in the distribution scheme during his subsequent incarceration. Accordingly, the testimony

of these two men appears to neither undermine Hall's explanation for traveling to Milwaukee nor call into question the reason for Jackson and Hall's repeated phone conversations in and around December 2013.

Jackson's argument as to now-deceased Earl Jones also fails. Jones's testimony allegedly would have shown that Jackson was not involved in the Bell/Edelbeck transaction that formed the basis for Count 3, and that Bell had other heroin sources, not Jackson. Jackson does not elaborate on the substance of Jones's testimony, so his argument as to Jones fails for that reason. But even assuming Jones's testimony would have related to those two issues, Jackson does not begin to explain how this person's testimony could have undermined the government's text-message evidence showing Jackson arranged for the Bell/Edelbeck exchange or Bell's and Jackson's communications and exchanges about heroin.

Finally, Jackson faults Attorney Schwartz for failing to pursue testimony from Melissa Dennison, DeWight Williams or Terrance Jackson, who he maintains would have all testified that Jackson, his brothers Terrance and Hall, and Williams were competitors, not members of a larger conspiracy.

Accordingly, none of these individuals were likely to provide any credible testimony calling into question the government's evidence that Jackson and his coconspirators were working together. Neither has he submitted evidence that any of these individuals would have voluntarily testified on his behalf, nor provided the court with sworn statements from any of these individuals. Again, to the contrary, both Williams and Terrance Jackson had an obvious reason *not* to testify on Jackson's behalf: at the time of his trial, they were both

awaiting sentencing after pleading guilty to the conspiracy charge for heroin distribution as managed by Jackson, making it essentially inconceivable that either would be willing to disavow their membership in the heroin distribution scheme with Jackson. Even if the court were to assume that Williams would abandon his prior testimony and plea agreement, he would not be credible in light of the evidence of Williams' ongoing coordination with Jackson, including his traveling with Jackson to obtain heroin in Chicago. (*See* CR dkt. #364, 21, 52, 54, 59; dkt. #398 at 37-40, 51, 65; dkt. #399, at 27, 48.)

II. Sentencing and Appellate Attorney Otis

Jackson further contends that Attorney Otis was ineffective in failing to: (1) pursue a Speedy Trial Act violation on appeal; (2) act on an allegation that a juror's stepdaughter was incarcerated with a government witness; and (3) act on an allegation that some jurors deliberated prematurely. When evaluating claims that appellate counsel provided ineffective assistance, courts continue to evaluate those claims under the *Strickland* standard. *Winters v. Miller*, 274 F.3d 1161, 1168 (7th Cir. 2001); *Howard v. Gramley*, 225 F.3d 784, 790-91 (7th Cir. 2000). The court also recognizes as a matter of effective advocacy that appellate attorneys must winnow out weaker arguments and instead focus on those most likely to succeed, as opposed to addressing all non-frivolous issues. *Knox v. United States*, 400 F.3d 519, 521 (7th Cir. 2005); *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989). Therefore, courts evaluate appellate counsel's strategic choices, ultimately asking whether there is a reasonable probability that raising other issue(s) would have affected the outcome of the appeal. *Gramley*, 255 F.3d at 791. "Generally, only when

ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). For the reasons explained below, Jackson has also not made that showing with respect to any of his three challenges to Attorney Otis's performance.

A. Speedy Trial Act

Jackson argues that Attorney Otis performed deficiently by failing to raise a Speedy Trial Act claim on appeal. Specifically, he contends that such a claim would have had merit because the government's delays were unjustified. However, Jackson raised this very issue in a post-trial motion seeking a new trial, which the court denied because the periods of delay Jackson identified were all plainly excludable, having been attributable to (1) appointing Jackson a new attorney at his request, (2) relatedly resetting the trial schedule, and (3) meeting the government's scheduling needs during a period when Jackson's own motions were still pending. (Dkt. #377, at 9.) Nevertheless, Jackson asks that the court reconsider its analysis, and in particular, scrutinize the government's justifications for its requests for extensions more closely. Again, however, Jackson has submitted no evidence calling into question the government's reasons for its extension requests, nor does he address the fact that his own motions were pending during that same period. Most importantly, Jackson has not begun to show that his attorney could have presented a Speedy Trial Act claim on appeal in a different, stronger way than did Attorney Otis. Accordingly, this ground for relief would be frivolous but for the fact that Jackson is now representing himself.

B. Juror's stepdaughter

Jackson next argues that Attorney Otis mishandled a supposed jury problem during trial. Jackson contends that a stepdaughter of one of the jurors was in jail with, as well as friends with, Tiffany Bell, a connection that same juror made during trial. To begin, Jackson does not offer evidence as to state when the juror made this supposed connection, nor has he submitted evidence about any impact on the juror after making this connection, much less the jury as a whole, if any, except to contend generally with an equal lack of evidence, that the same juror had indicated the jury determined early in the trial that he was guilty.

Importantly, Jackson also does *not* claim that he told *Attorney Otis* about this alleged juror's connection to Bell, much less when he told Otis, nor even how or when Jackson learned about their connection. Instead, Jackson merely claims to have received a letter from Bell explaining that the juror's stepdaughter was actually in prison and friends with her, without saying when he received the letter or what he told Attorney Otis about it, if anything. As a result, there is *no* basis to find that Attorney Otis performed deficiently in failing to pursue this issue, either in a post-trial motion before this court on sentencing or the Seventh Circuit on appeal, much less to do so under a plain error standard.

To the extent Jackson is raising this issue with the juror as new evidence, the court could frame it as a motion for new trial under Federal Rule of Criminal Procedure 33, but would still summary reject it.[2] The court may grant Jackson a new trial based on new

[2] A Rule 33 motion for a new trial based on new evidence must be filed within three years of the verdict. Fed. R. Crim. P. 33(b). Since the jury reached its verdict on January 26, 2017, and Jackson filed his § 2255 motion on August 6, 2019, the motion would be timely.

evidence *provided* he shows that the evidence (1) was discovered after trial, (2) could not have been discovered sooner through the exercise of due diligence (3) is material, rather than merely impeaching or cumulative, and (4) would probably lead to an acquittal in the event of a new trial. *United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016). Although Jackson satisfies the first two elements, he cannot meet the third or fourth.

As for the third element, the court considers "the context of the allegations, including the seriousness and likelihood of the alleged bias, and the credibility of the source." *United States v. Perez*, 841 F. Supp. 250, 253 (N.D. Ind. 1993) (citing *United States v. Jones*, 707 F.2d 1169, 1173 (10th Cir. 1983)). To that point, the government directs the court to an analogous case -- *United States v. Cephus*, No 2:09-cr-43, 2015 WL 470450 (N.D. Ind. Feb. 4, 2015). Cephus, like Jackson, raised numerous grounds for relief, including juror misconduct. In rejecting his juror misconduct claim in particular, the court deemed Cephus an incredible source, given that his claims were unsworn and unsigned, and he had an obvious basis. This court must reach the same conclusion as to Jackson: without underestimating the seriousness of Jackson's claim that one of the jurors had a personal tie to an important witness in Bell (albeit once removed and a stepdaughter) and therefore an arguable reason to find him guilty assuming the juror were aware of this connection, the court will not order a new trial based on Jackson's unsubstantiated assertion alone.

More specifically, Jackson represents that he received a letter from Bell, in which she wrote that she and a juror's stepdaughter realized that the latter's stepmother might end up serving on the jury in this case before his trial, *and* that the stepdaughter explained

the case to her stepmother ahead of time. (*See* dkt. #1 at 28.) Jackson does not say when Bell sent him this letter, nor has he filed the letter with the court. In reply, Jackson now also claims that his own mother told him that Charles Hall had a conversation with Bell about the same juror, but like Bell, Jackson has submitted no declaration from either Hall or his mother in support (*see* dkt. #7 at 20), nor offered any reason that he could not have obtained such a sworn statement.

Moreover, Jackson identifies the juror in question as Brenda Phillips, who was questioned under oath during *voir dire* about *any* connection or previous knowledge of the defendant, key witnesses including Bell, or the case generally, chosen as an alternate juror, instructed and swore not to discuss the case with anyone, even her fellow jurors, until deliberations, *and* released from the jury before deliberations began. (*See* Tr. 3d day of trial, CR dkt. #401 at 3-B-142.) Therefore, it is highly unlikely she ever had a conversation with her stepdaughter before trial *and* even more unlikely that she would have shared the conversation with anyone on the jury. Nor was she involved in the deliberations or the verdict. Jackson does not even contend that Phillips may have influenced deliberations. Rather, he says that after the first day of trial, Phillips called her stepdaughter and told her that she and other members of the jury discussed the evidence early on and decided he was guilty. (*Id.* at 29.) Again, however, Jackson submits no evidence in support of that assertion. So, Jackson's evidence of juror misconduct is limited to his conclusory assertions, and the court finds him incredible, considering his motivation to lie and insistence of innocence despite the mountain of evidence supporting each of the charges against him.

In any event, the fourth element also forecloses the possibility of a new trial based on an assertion of jury misconduct, given that "[t]he court must determine if the bias or prejudice amounted to a deprivation of Fifth Amendment (due process) or Sixth Amendment (impartial jury) guarantees. Said another way, the test is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." *United States v. Perez*, 841 F. Supp. 250, 253 (N.D. Ind. 1993) (citations omitted). The answer is "no." As the Seventh Circuit commented, "the evidence against Mr. Jackson was substantial." *Jackson*, 898 F.3d at 762. First, the court has no basis to conclude that any impropriety occurred. Second, even if Jackson had come forward with some evidence that an alternate juror had a personal bias *and* an inappropriate discussion among some jurors occurred early in the trial, the government's evidence was still overwhelming and persuasive. Therefore, Jackson is neither entitled to a new trial nor any other relief under § 2255.

III. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2255 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to petitioner. A certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), meaning that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong[.]" *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)). The government's evidence in this case was robust and strong,

Jackson's numerous ineffective assistance of counsel claims lack both evidence and merit. For that reason, the court must deny Jackson a certificate of appealability.

ORDER

IT IS ORDERED that:

1. Hurley Jackson's motion to vacate under 28 U.S.C. § 2255 is DENIED, and this matter is DISMISSED.

2. No certificate of appealability shall issue.

Entered this 5th day of January, 2024.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge