UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 08-20384
Hon. Victoria A. Roberts

D-1 JONATHONE J. JOHNSON,

Defendant.

ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

I. Introduction

Jonathone J. Johnson filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255, asserting that his Sixth Amendment constitutional right to effective assistance of counsel was violated. Johnson pled guilty to wire fraud in violation of 18 U.S.C. § 1343.

Johnson claims that counsel was ineffective in arguing the loss amount because he: (1) failed to request an evidentiary hearing regarding the loss amount; (2) failed to object to the basis for the loss estimate; (3) knowingly submitted an unclear sentencing memorandum and; (4) failed to argue the different interpretations of loss. He also claims that counsel was ineffective: (5) during the "pre-plea" stage, rendering his Rule 11 Plea Agreement ("Rule 11") unknowing and involuntary and; (6) in negotiating an appeal waiver.

Finally, Johnson argues that appellate counsel was ineffective because he: (7) failed to appreciate the waiver and led Johnson to believe that he had a right to appeal his sentence and; (8) failed to notify him of the Government's motion for increased restitution and failed to investigate the Federal Deposit Insurance Corporation's ("FDIC") loss claim.

The court sentenced Johnson to 87 months in prison and 3 years of supervised release. He was also ordered to pay restitution in the amount of $90,000 to various banks and mortgage lenders. The Government filed a motion to increase the restitution amount to $678,000; it was granted on February 28, 2012.

Johnson seeks to set aside his sentence and have the Court impose a sentence in accord with the "gain" proceeds ($912,717.30), with a sentencing guideline of 46-57 months. He also seeks to correct his restitution amount to $70,250, to be paid to the FDIC.

For the reasons stated, Johnson's motion is denied.

II. Statement of Facts

Following his conviction, Johnson filed a Notice of Appeal challenging the loss amount. Johnson says the Rule 11 preserved his right to appeal the Court's loss calculations. The Government filed a motion to dismiss the appeal based on the appeal waiver provision in the Rule 11. Johnson said he unknowingly entered into the Rule 11 due to: (1) ineffective assistance of counsel and (2) the Court's failure to explain his rights to him.

The Sixth Circuit granted the Government's motion to dismiss on July 16, 2013. Johnson requested a rehearing en banc; the Sixth Circuit denied it on August 19, 2013. On November 15, 2013, Johnson filed a petition for a *writ of certiorari* to the United States Supreme Court, which was denied on January 14, 2014. Johnson then filed the pending habeas petition.

III. Standard of Review

Under 28 U.S.C. § 2255, a federal prisoner may move to vacate his sentence "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." 28 U.S.C. § 2255.

"A prisoner seeking relief under [§] 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 fundamental as to render the entire proceeding invalid.'" *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006). Johnson alleges an error of constitutional magnitude; he claims his Sixth Amendment right to effective assistance of counsel was violated by trial and appellate counsel.

IV. Analysis

A. Johnson's Petition is Timely Under 28 U.S.C. § 2255(f)(1)

The Government challenges the timeliness of Johnson's petition. The argument is unavailing.

Under 28 U.S.C. § 2255(f)(1), "[a] 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of – (1) the date on which the judgment of conviction becomes final…" "[A] conviction becomes final at the conclusion of direct review… As a general rule, direct review for a federal prisoner who files a petition for certiorari with the Supreme Court concludes when the Court either denies the petition or decides the case on the merits." *Johnson v. United States*, 246 F.3d 655, 657 (6th Cir. 2011) (citing *United States v. Torres*, 211 F.3d 836, 839 (4th Cir.2000)).

Johnson's habeas petition is timely; he had one year from January 14, 2014 to file it; he filed on December 18, 2014.

The Government ignores the fact that Johnson filed a timely petition for rehearing en banc. According to the Government, Johnson's 90 day limit to file a timely petition for writ of certiorari began tolling when the Sixth Circuit first denied Johnson's direct appeal of his sentence, not when he filed a petition for rehearing en banc. This is incorrect. According to Rule 41(d)(1) of the Federal Rules of Appellate Procedure, "The timely filing of a petition…for rehearing en

banc…stays the mandate until disposition of the petition…" *See, e.g., Mason v. Mitchell*, 729 F.3d 545, 550 (6th Cir. 2013) (cert. denied sub nom. *Mason v. Johnson*, 134 S.Ct. 1937, 188 L.Ed. 2d 964 (2014) (a timely filing for rehearing stays the court's mandate until after the denial of the petition for rehearing).

Because Johnson filed a timely petition for rehearing en banc and then a timely petition for *writ of certiorari* in the Supreme Court, he had until January 15, 2015 to file his habeas petition. By filing it on December 18, 2014, Johnson was well within the one year statute of limitations period.

B. Ineffective Assistance of Counsel claim is dismissed with respect to appeal waiver; Johnson has not demonstrated that Trial Counsel prejudiced him.

Johnson says his trial counsel was ineffective for negotiating an appeal waiver in the Rule 11 without notifying him; forfeiting his right to appeal his sentence; and, misguiding him on his forfeited appeal rights. He also alleges that since trial counsel failed to effectively advise him during the pre-plea stage, the Rule 11 was unknowingly and involuntarily signed.

To prevail on a claim of ineffective assistance of counsel, Johnson must show that (1) his counsel's performance was so deficient that it was not in accord with Sixth Amendment standards, and (2) he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The Proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

To show prejudice, Johnson must establish a "reasonable probability" that the outcome of the proceedings would have been different but for his attorney's alleged mistake. *Id.* at 694. "The standard demands that [Johnson] show that his Trial Counsel's deficiency is 'sufficient to undermine confidence in the outcome.'" *Id.*

The Court rejects Johnson's assertion that he unknowingly and involuntarily agreed to the

Rule 11. Johnson says that he was misled by his trial counsel throughout his "pre-plea and sentencing phases as it relates to his ability to challenge his sentence."

The Sixth Circuit holds "even if [a] [p]etitioner was mistaken or misadvised about his plea, he is not entitled to habeas relief." *Riley v. Rapelje*, No. 2:08-CV-11574, 2010 WL 1848853, at *5 (E.D. Mich. May 7, 2010)(not reported)(*citing Ramos v. Rogers*, 170 F.3d 560, 565)). "A trial court's proper plea colloquy cures any misunderstandings that a defendant may have about the consequences of a plea." *Id.* The Sixth Circuit also notes that "[i]f we were to rely on [the petitioner's] alleged subjective impression rather than the record, we would be rendering the plea colloquy process meaningless…" *Ramos*, 170 F.3d at 566. The plea colloquy process exists to prevent petitioners from asserting that they unknowingly and involuntarily agreed to a plea agreement. *Id.* "[W]here the court has scrupulously followed the required procedure, the defendant is bound by his statements in response to that court's inquiry." *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986).

At the Johnson plea hearing, he acknowledged he read and understood the terms of the appeal waiver. The Court also complied with Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure, "which requires that, before a guilty plea is accepted, the court must inform the defendant of, and determine that the defendant understands, the terms of any appellate-waiver provision in the plea agreement." *In re Acosta*, 480 F.3d 421, 422 (6th Cir. 2007)(*quoting United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005)). The Rule 11 stated that "[i]f the sentence imposed does not exceed the maximum penalties allowed by Part 3 of this agreement, defendant waives any right he has to appeal his conviction or sentence." Johnson "affirmed, under oath, that he read his agreement with his lawyers… and… fully understood its terms." *United States v. Johnson*, No. 12-1699, Order Dismissing Appeal, at 5 (6th Cir. July 16, 2013). "Johnson and his lawyer signed the Rule 11, which clearly articulated the limited instances in which Johnson would

retain his right to appeal his sentence." *Id.*

Johnson knowingly and voluntarily agreed to the Rule 11 containing the appeal waiver provision.

C. Ineffective Assistance of Counsel claim with respect to loss calculation is dismissed; Johnson fails to demonstrate prejudice.

Johnson alleges that his attorney was ineffective based on a number of decisions related to the loss calculation. Johnson claims that counsel was ineffective because he: (1) failed to request an evidentiary hearing regarding the loss amount; (2) failed to object to the basis of the loss estimate; (3) knowingly submitted an unclear sentencing memorandum and; (4) failed to argue the different interpretations of loss. Johnson argues that had his attorney undertaken these actions, the Court more likely than not would have calculated Johnson's loss below $2.5 million. The sentencing guidelines prescribe an 18 level enhancement for a loss between $2.5 and $7 million. This enhancement contributed to Johnson's 87 month sentence. However, since the Court reasonably calculated that the loss amount was more than $2.5 million, Johnson fails to demonstrate prejudice under *Strickland*.

The Court does not know what Johnson is talking about when he says his attorney submitted an unclear sentencing memorandum. More importantly, even if it was, it certainly was not a constitutional violation. And, Johnson fails to demonstrate that had his counsel requested an evidentiary hearing, or argued the different interpretations of loss, the outcome would have been different. Most importantly, the Court reasonably calculated Johnson's loss.

In mortgage fraud cases, the Sixth Circuit sanctions a two-step approach to determine loss. *United States v. Wendlandt*, 714 F.3d 388, 393-94 (6th Cir. 2013). First, under U.S.S.G. § 2B1.1, the court must use the greater of actual or intended loss. *Id*. at 393 (citing U.S.S.G. § 2B1.1 cmt. N. 3(A)). "Actual loss will usually be the appropriate measure in mortgage fraud cases

involving straw buyers." *U.S. v. Kerley*, 784 F.3d 327, 347. Second, " ' the district court must reduce the loss by the amount of money the victim recovered by selling the collateral, or the fair market value of the property at the time of sentencing if the victim has not disposed of the collateral. ' " *Id*. (quoting *Wendlandt*, 714 F.3d at 394).

Under U.S.S.G. § 2B1.1 App. Note 3(A)(i) " 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense." In its sentencing memorandum, the Government based its loss calculation, in part, on *United States v. Washington*, 643 F.3d 1180, 1184 (10th Cir. 2011), which stated "[w]here a lender has foreclosed and sold the collateral, the net loss should be determined by subtracting the sales price from the outstanding balance on the loan." Using this formula, the Government calculated loss at $4,933,542, well above the $2.5 million threshold.

Johnson argues that the loss amount would have been below $2.5 million had his counsel taken other steps. First, Johnson argues that his counsel ineffectively argued that the Court should have calculated his loss by subtracting the loan amount from the foreclosure sales price, rather than from the price at which the property actually sold. While the argument failed to persuade the Court, "an ineffective assistance of counsel claim cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken." *Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002). Trial counsel made a reasonable argument; it simply failed to persuade the Court.

Second, Johnson takes issue with his counsel's failure to argue that the properties were not disposed of in a reasonable time. Johnson relies on *Robers v. United States*, 143 S.Ct. 1854, 1860 (2014) (Sotomayor, J., concurring), which says "if a victim chooses to hold the collateral rather than to reduce it to cash within a reasonable time, then the victim must bear the risk of any subsequent decline in the value of the collateral, because the defendant is not the proximate cause of the decline." Here, although some of the properties were held for months – and in some

instances for years – Johnson's claim lacks merit because he provides no evidence that the owners acted unreasonably in not selling until they did. Johnson relies on his own conclusory allegations. *Robers* held that "real property is not a liquid asset, which means that converting it to cash often takes time," and that "such delays are foreseeable." *Id.* Johnson fails to demonstrate that the owners unreasonably held on to the property.

Johnson's remaining claims fail. Even if the Court concedes that it improperly calculated the loss, the loss amount would still total over $2.5 million. Johnson claims that the Government did not credit any value to many of the properties, and in addition, used "nominal fees" for many others. He also claims that the Court failed to credit mortgage payments that he or others made on the properties. But, removing these properties from the total loss calculation and using Johnson's estimate of credit, the loss amount is still above $2.5 million. Therefore, the failure of Johnson's attorney to address these aspects of the loss calculation did not prejudice Johnson.

In the context of calculating loss from mortgage fraud, "[r]easonableness does not require exact computation." *United States v. VanderZwaag*, 467 App'x 402, 412 (6th Cir. 2012). Rather, the Court must only make a reasonable estimate. Here, the Court reasonably calculated the loss by subtracting the loan amount from the amount of collateral received by selling the properties. Because the Court made a reasonably foreseeable loss calculation, Johnson's claim that his attorney was ineffective with respect to calculating the loss amount fails.

D. Ineffective Assistance of Counsel claim is dismissed: Johnson has not demonstrated that he suffered prejudice from Appellate Counsel.

Johnson makes a totally convoluted argument concerning appellate counsel, that since he had hired this lawyer to handle an appeal, counsel could not "accomplish an effective appeal of 'all' possible issues by an Appellate Counsel if they simply 'rely wholeheartedly' on trial counsel's filings and briefs without review for error or to assess any case on their own and with

their own perceptions and perspectives." (Doc. 209 at 23).

Boiled to its essence, Johnson says appellate counsel did not know of the Rule 11 appeal waiver, that trial counsel filed a Notice of Appeal despite the waiver, and that once that was done, appellate counsel could not file a Rule 35 motion under the Federal Rules of Criminal Procedure Johnson wanted him to file concerning loss amount.

Johnson is correct: the significance of the filing of the Notice of Appeal was that it deprived this Court of jurisdiction to consider a Rule 35 motion under the Federal Rules of Criminal Procedure. On April 4, 2012, Johnson's trial counsel filed a Notice of Appeal. On April 13, 2012, Johnson's appellate counsel filed a motion under Rule 35(a) to correct sentence, but the pending Notice of Appeal precluded the Court from considering the Rule 35(a) motion.

"It is well settled that the filing of the notice of appeal with the district court clerk deprives the district court of jurisdiction to act in matters involving the merits of the appeal." *United States v. Holloway*, 740 F.2d 1373, 1382 (6th Cir. 1984). "It is thus clear that the district court lack[s] jurisdiction to consider or act upon [a] Rule 35 motion after [a] Notice of Appeal had been filed." *Id.* at 1382.

But, even if the Notice of Appeal had not been filed and this Court had been in a position to consider Johnson's Rule 35(a) motion, the Court would have denied it. The purpose of a Rule 35(a) motion is to "correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35. Johnson only wanted to rehash a matter already disposed of by the Court at sentencing; his "proposed loss amount was already rejected by the Court and cannot be corrected or amended under a Rule 35(a) motion." (Doc. 170 at 1). Thus, Johnson has not demonstrated he was prejudiced by his appellate counsel's failure to figure out there was an appeal waiver, and somehow withdraw the Notice of Appeal; Johnson would have gotten no relief through a Rule 35 motion.

E. Ineffective Assistance of Counsel claim is dismissed: Johnson has not demonstrated that he suffered prejudice from Appellate Counsel because Counsel Failed to notify him about the Government's Motion for Restitution.

Johnson argues he was denied effective assistance of appellate counsel because counsel failed to notify him of the Government's Motion for Restitution. Johnson says because of this failure, he was not afforded the opportunity to present information to the Court to reduce the restitution amount. Johnson has not demonstrated that he was prejudiced by appellate counsel's actions.

18 U.S.C. § 3663, the Mandatory Victim Restitution Act (MVRA), forces certain defendants to pay restitution. 18 U.S.C. § 3664 is the procedural mechanism for enforcing § 3663. The purpose of the MVRA is to compensate victims for their losses. Section 3664(f)(1)(a) states "[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664. The Supreme Court, however, held that "the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." *Hughey v. United States*, 495 U.S. 411, 420 (1990).

Where parties dispute the amount of restitution, § 3664(e) places the burden on the Government to prove that it has correctly calculated the figures:

> [a]ny dispute as to the proper amount of type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of loss sustained by a victim of the offense shall be on the attorney for the Government.

Id. When calculating loss, "[a] sentencing court may resolve restitution uncertainties with a view towards achieving fairness to the victim, so long as it still makes a reasonable determination of appropriate restitution rooted in a calculation of actual loss." *United States v. James*, 564 F.3d 1237, 1246 (10th Cir. 2009). The Sixth Circuit notes that "loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." *United States v. White*, 492 F.3d. 380, 416 (6th Cir. 2007). A court must certify that restitution is reasonably calculated to only compensate victims for actual losses.

Many circuits courts use the "net loss" or "off set" method to determine victim's losses. The Tenth Circuit notes that "[w]here a lender has foreclosed and sold the collateral, the net loss should be determined by subtracting the sales price from the outstanding balance on the loan." *United States v. Washington*, 634 F.3d 1180, 1184 (10th Cir. 2011). Therefore, "when calculating loss for restitution purposes, a court must subtract any recouped losses from the original loan to obtain the loss figure." (Doc. 189 at 3). This guarantees that victims are only compensated for what it loss as a result of defendant's actions.

The Government must prove by a preponderance of the evidence that the restitution amount is accurate. The Government met its burden. First, the Government established a reliable and accurate method to calculate the loss figure. Second, the Government appropriately used the foreclosure sale price to identify the value of the property that was recouped.

The Court accepted the Government's method of calculating the loss figure, and the use of foreclosure sale price to identify the value of property that was recouped. The

Government explained that it calculated its figures by using the methods detailed in *Washington*:

> The banks provided loans totaling $5,898,550 to straw buyers involved in the scheme, after each home involved in this scheme went into foreclosure, the sales of the homes only recouped $965,008, leaving a total loss account of $4,933,542 *** [U]suing the calculations approved by the Tenth Circuit in the *Washington* case – a case that is cited with approval by Johnson in his memorandum – the loss amount is nearly $5 million.

(Doc. 155 at 3-6).

Johnson says that he was not credited for payments made to the six properties in question before entering foreclosure. The Second Circuit held this in *United States v Boccagna*, 450 F.3d 107, 114 (2nd Cir. 2006):

> The statute [3663] is silent… on the question of how the referenced property is to be valued… the law recognizes a number of reasonable measures of property value,… we construe "value as used in the MVRA to be a flexible concept to be calculated by a district court by the measure that best serves Congress's statutory purpose… Notwithstanding the general reliability of fair market value as a measure of property value, in some circumstances other measures of value may more accurately serve the statutory purpose to ensure a crime victim's recovery of he full amount of his loss.

Id.

Accordingly, the Court has discretion to determine the appropriate measure of value of a victim's loss for restitution purposes. Because the court reasonably calculated Johnson's restitution, Johnson has not satisfied the prejudice prong of *Strickland.*

V. Certificate of Appealability and *In Forma Pauperis* Status on Appeal

Petitioner may not appeal this Court's decision unless a district or circuit judge issues a certificate of appealability, 28 U.S.C. § 2253 (c)(1)(A); Fed. R. App. P. 22(b)(1), and a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

Reasonable jurists would not disagree with the Court's resolution of Petitioner's claims, nor conclude that the issues deserve encouragement to proceed further. The Court declines to issue a certificate of appealability Nevertheless, Petitioner may proceed *in forma pauperis* on appeal if he chooses to appeal this decision. 28 U.S.C. § 1915(a)(3).

The Court **DENIES** Johnson a certificate of appealability.

VI. Conclusion

Johnson's ineffective assistance of counsel claim is **DENIED**; Johnson cannot demonstrate that he suffered any prejudice.

IT IS ORDERED.

S/Victoria A. Roberts
United States District Judge

Dated: 7/30/2015

No. 15-2032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JONATHONE J. JOHNSON,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

Jonathone J. Johnson, a federal prisoner proceeding pro se, appeals a district court order denying his motion to vacate his sentence under 28 U.S.C. § 2255. Johnson has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2011, Johnson pleaded guilty to wire fraud, in violation of 18 U.S.C. § 1343. The district court sentenced him to 87 months of imprisonment and three years of supervised release and ordered him to pay $90,100 in restitution, increased by $678,000 upon the government's motion. As part of the plea agreement, Johnson waived his right to pursue a direct appeal. Nonetheless, retained counsel filed a notice of appeal. Thereafter, counsel filed a Federal Rule of Criminal Procedure 35 motion challenging the amount of loss attributed to Johnson. The district court concluded that it lacked jurisdiction to consider the motion because of Johnson's pending criminal appeal. This court rejected Johnson's argument that his waiver of his appellate rights was invalid and dismissed his direct appeal. *United States v. Johnson*, No. 12-1699 (6th Cir. July 16, 2013).

In December 2014, Johnson filed a § 2255 motion, which the district court denied as being without merit.

Johnson seeks a COA, reasserting claims presented in his § 2255 motion. He argues that: (1) trial counsel improperly advised him about whether he would be able to continue to challenge the amount of loss, rendering his guilty plea and the waiver of his appellate rights invalid; (2) trial counsel was ineffective for failing to adequately challenge the district court's determination of the amount of loss; (3) appellate counsel was ineffective for filing a notice of appeal despite the plea-waiver, and depriving the district court of jurisdiction to rule on his Rule 35 motion; (4) appellate counsel failed to advise Johnson about the government's restitution motion; (5) the district court arbitrarily determined the amount of loss without considering Johnson's sentencing memorandum or engaging in its own fact-finding; and (6) the district court failed to award Johnson proper credits against the loss amount.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court's denial is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

In his §2255 motion, Johnson raised his last two arguments in the context of his counsel's ineffectiveness, not as independent claims. Those arguments therefore will be considered only in relation to his ineffective assistance of counsel claims. *See Lay v. United States*, 623 F. App'x 790, 795 n.5 (6th Cir. 2015) (finding arguments not raised in the § 2255 motion waived on appeal).

As to his first three claims, Johnson failed to make a substantial showing that counsel's performance was deficient or that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Johnson argues that the appellate waiver is invalid because counsel misadvised him concerning whether he would be able to challenge the amount of loss attributed to him and because the district court's improper calculation of the amount of loss resulted in a sentence that exceeded the maximum penalties allowed by the

agreement. The district court rejected Johnson's claim because the record reflects that Johnson entered a valid waiver of his appellate rights. The district court noted that Johnson acknowledged that he had reviewed the terms of the plea agreement with his attorney and that he fully understood it. In addition, the prosecutor explained that the plea agreement provided that, "if the sentence imposed does not exceed the maximum penalties allowed by Part Three of this Agreement [87 months], Defendant waives any right to appeal his conviction or his sentence." The district court concluded that, even if trial counsel had misadvised Johnson about whether he would be able to continue to challenge his sentence, any error was cured at the plea hearing when the trial court reviewed the terms of the plea agreement and explained the waiver language, and when Johnson acknowledged that he understood the waiver. *See Ramos v. Rogers*, 170 F.3d 560, 565 (6th Cir. 1999). Reasonable jurists would not debate the district court's ruling on this issue.

Next, the district court concluded that counsel was not ineffective with respect to the amount of loss attributed to Johnson. Johnson argues that counsel failed to adequately argue for a lower loss amount by submitting an "unclear" sentencing memorandum, not recommending a specific dollar-amount of loss below $2.5 million, failing to request an evidentiary hearing, and failing to investigate and argue a different interpretation of "loss." The district court rejected Johnson's arguments, noting that it had reasonably estimated the amount of loss using the "two-step" approach for determining loss in mortgage fraud cases outlined in *United States v. Wendlandt*, 714 F.3d 388, 393-94 (6th Cir. 2013). The district court considered the actual loss suffered by the mortgage lenders (i.e., the loan proceeds that Johnson received) and reduced that amount by the amount of money that the lenders recouped through foreclosure sales of the properties. This calculation resulted in a total loss of more than $4.9 million dollars, well above the $2.5 million threshold used to determine Johnson's offense level. In addition, the district court acknowledged Johnson's argument that he was not given credit for mortgage payments that he had made on some of the properties and that the government failed to credit any value to some of the properties. But the court concluded that the amount of loss was still above $2.5 million even if those properties were not considered as part of the loss calculation and even accepting

Johnson's estimate of mortgage payments. In rejecting Johnson's ineffective-assistance-of-counsel claim, the district court reasoned that, although counsel's attempts to challenge the loss calculation were unpersuasive, they did not rise to the level of a constitutional violation. The court rejected Johnson's remaining claims, concluding that there was no evidence that the final loss determination would have been different had counsel requested an evidentiary hearing or set forth a specific dollar-amount for the district court to consider. Reasonable jurists would not debate the district court's ruling on these issues.

Next, the district court rejected Johnson's argument that appellate counsel was ineffective. Johnson argues that appellate counsel failed to recognize the appellate waiver and filed a notice of appeal that precluded the district court from considering his subsequent Rule 35 motion. The district court reasoned that counsel's performance did not prejudice Johnson because it would have denied the Rule 35 motion even if the notice of appeal had not been filed. Rule 35 provides that: "Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." The district court concluded that Johnson's Rule 35 arguments constituted an attempt to address issues that had already been rejected during the sentencing proceedings and, therefore, did not warrant relief. Thus, appellate counsel's pursuit of a direct criminal appeal did not prejudice Johnson's ability to obtain Rule 35 relief because his Rule 35 claims lacked merit. Reasonable jurists would not debate the district court's ruling on this issue.

Finally, the district court concluded that appellate counsel was not ineffective for failing to notify Johnson of the government's motion seeking an increase of $678,000 in restitution. Johnson argues that counsel's failure to advise him of the government's motion prevented him from presenting arguments for reducing the restitution amount. First, Johnson argues that his attorney should have challenged the restitution amount as inflated because the mortgages had been transferred through intermediary lenders. But his counsel *did make* this argument, which the district court rejected because "the Government clearly states that it only seeks restitution for

properties which remained with the original lender until foreclosure." Thus, reasonable jurists would not debate whether counsel was ineffective in this regard.

Second, Johnson complains that his counsel should have argued that mortgage payments made to the victim bank should have been deducted from the loan amount before calculating restitution. The district court rejected his argument by concluding that counsel's performance did not prejudice Johnson because the court reasonably estimated restitution.

But Johnson is correct that if mortgage payments were made to the bank prior to foreclosure, those payments should have been omitted from the restitution calculation. *See United States v. Kamadeen Idowu Oladimeji*, 463 F.3d 152, 160 (2d Cir. 2006) ("[H]ad Household Finance recouped some part of the $ 30,000—whether by receipt of loan payments or by foreclosure—it would have been error to require restitution in the full amount of the loan."); *see also United States v. White*, 492 F.3d 380, 418 (6th Cir. 2007) ("[T]he loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." (quoting *Hughey v. United States*, 495 U.S. 411, 420 (1990))). Thus, reasonable jurists would debate whether counsel's failure to make the mortgage-payment argument prejudiced Johnson.

Johnson contends that had his attorney notified him about the government's motion for restitution, Johnson would have pressed his counsel to make the mortgage-payment-setoff argument in support of adjusting the government's calculation. To provide effective assistance, an attorney must "consult with the defendant on important decisions and . . . keep the defendant informed of important developments in the course of the prosecution." *Strickland v. Washington*, 466 U.S. 668 (1984). Reasonable minds would debate whether counsel's failure to notify his client that the government requested an 850% increase in the restitution amount constitutes deficient performance.

Moreover, the government's failure to include any loan payments in its calculations is apparent from the exhibits attached to its motion for restitution. The government's spreadsheets include a footnote reading: "Due to the time between the original loan and foreclosure and the failure of the bank, the FDIC is not able to obtain the payment histories in the timeframe needed

for sentencing." The government bears the burden of demonstrating the restitution amount by a preponderance of the evidence. *White*, 492 F.3d at 418 (citing 18 U.S.C. § 3664(e)). Thus, reasonable jurists would debate whether Johnson's appellate counsel provided ineffective assistance in failing to raise the payments-made argument in response to the government's motion to increase restitution.

Accordingly, the court grants a COA only as to this claim.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 15-2032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 16, 2017
DEBORAH S. HUNT, Clerk

JONATHONE J. JOHNSON,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
UNITED STATES OF AMERICA,	)	THE EASTERN DISTRICT OF
	)	MICHIGAN
Defendant-Appellee.	)	
	)	
	)	

O R D E R

Before: GUY, ROGERS, and DONALD, Circuit Judges.

Jonathone Johnson, a federal prisoner, appeals a district court order denying his motion to vacate his sentence under 28 U.S.C. § 2255. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2011, Johnson pleaded guilty to wire fraud, in violation of 18 U.S.C. § 1343. The district court sentenced him to 87 months of imprisonment and three years of supervised release and ordered him to pay $90,100 in restitution. Upon the government's subsequent motion, the district court increased the amount of restitution by $678,000. This court dismissed the appeal based on Johnson's waiver of his appellate rights. *United States v. Johnson*, No. 12-1699 (6th Cir. July 16, 2013).

In December 2014, Johnson filed a § 2255 motion, arguing that: (1) trial counsel was ineffective for (a) negotiating a waiver of Johnson's right to file a direct criminal appeal and

improperly advising him about the waiver, rendering his guilty plea involuntary; and (b) failing to properly challenge the district court's loss calculation; and (2) appellate counsel was ineffective for failing to (a) notify him of the government's motion to increase the amount of restitution, (b) investigate and challenge the claimed amount of loss, and (c) request a reduction in the amount of loss based on payments made on the loans. The district court denied the § 2255 motion as being without merit. This court granted Johnson a certificate of appealability ("COA") with respect to whether his appellate counsel provided ineffective assistance for failing to raise the payments-made argument in response to the government's motion to increase restitution. *United States v. Johnson*, No. 15-2032 (6th Cir. Mar. 24, 2016).

On appeal, Johnson reasserts that appellate counsel was ineffective for failing to challenge the government's request for additional restitution, arguing that: (1) the restitution amount is inaccurate because the mortgages had been transferred through intermediary lenders such as MERS; and (2) potential mortgage payments made to the victim bank should have been deducted from the loan amount before calculating restitution. Johnson's claim that counsel was ineffective for failing to challenge MERS's involvement in the loans is not properly before us because he was not granted a COA as to that issue.

When considering a district court's denial of a § 2255 motion, we review factual findings for clear error and legal conclusions de novo. *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016). To obtain relief under § 2255, a prisoner "must show '(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.'" *McPhearson v. United States*, 675 F.3d 553, 558-59 (6th Cir. 2012) (quoting *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003)).

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "Where ineffective assistance at sentencing is asserted, prejudice is established if the movant demonstrates that his sentence was increased by

the deficient performance of his attorney." *Spencer v. Booker*, 254 F. App'x 520, 525 (6th Cir. 2007) (citing *Glover v. United States*, 531 U.S. 198, 200 (2001)).

Johnson argues that counsel was ineffective for failing to notify him of the government's intent to seek an increase in restitution or argue that the loss amount should have been reduced by the amount of payments made on the fraudulently obtained loans. First, he contends that counsel should have been alerted to the need to present such an argument because the spreadsheet attached to the government's victim impact statement, which purportedly set forth the total loss, did not contain any entries for loan payments made by Johnson or others. In addition, the attached Worksheet for Criminal Restitutions expressly notes that the FDIC was unable to obtain the payment histories for the loans. Johnson also notes that Exhibit A to the government's sentencing memorandum incorrectly lists the "contract price" as the loan amount. Second, Johnson argues that counsel should have asserted a payments-made argument because it would have allowed him to present evidence that he was entitled to approximately $140,752 in reduced restitution based on the government's failure to consider the amounts paid on the loans ($96,500), PMI insurance ($12,492), homeowners' insurance ($7,802), and property taxes ($23,958).

The government acknowledges the above errors, conceding that it did not have time to obtain the loan payment histories and that it is unclear whether Johnson was credited for pre-default loan payments. Nonetheless, the government contends that Johnson was not prejudiced by counsel's allegedly deficient performance because, after correcting the amount of victim loss to $847,930 and the potential recovery to $144,820, the remaining victim loss of $703,110 exceeds the $678,000 of restitution imposed by the district court. However, because the district court was unaware of the errors contained in the government's worksheets and the government concedes that it is unclear whether Johnson was credited for pre-default loan payments the case will be remanded to the district court to consider these issues in the first instance.

Accordingly, we **VACATE** the district court's order and **REMAND** the case for further proceedings on that issue.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 08-20384
District Judge Victoria A. Roberts

JONATHONE J. JOHNSON,

Defendant.
_____/

ORDER ON RESTITUTION ISSUE ON REMAND FROM THE SIXTH CIRCUIT

Jonathone Johnson ("Johnson") pled guilty to one count of wire fraud in connection with a mortgage fraud scheme in October 2011. On March 30, 2012, he was sentenced to 87 months' imprisonment and 3 years' supervised release, and was ordered to pay $90,100 in restitution to Bank of America. The Court granted the Government leave to submit additional information on restitution. After the Government submitted additional information from the FDIC, the Court ordered Johnson to pay $678,000 more in restitution to the FDIC, as the receiver of mortgages loaned by NetBank. This information was provided on a spreadsheet and six worksheets, one for each of the six mortgage loans in question.

On December 24, 2014, Johnson filed a 28 U.S.C. § 2255 motion to vacate his sentence; the Court denied it. Johnson appealed. On March 24, 2016, the Sixth Circuit granted a certificate of appealability on one issue: whether defense counsel was ineffective in failing to raise a "payments-made" argument in response to the Government's motion to increase restitution to include the NetBank mortgages. Following briefing, the Sixth Circuit issued an order remanding the case for further

proceedings on the restitution issue. Specifically, the Sixth Circuit noted that "because the district court was unaware of the errors contained in the government's worksheets and the government concedes that it is unclear whether Johnson was credited for pre-default loan payments the case will be remanded to the district court to consider these issues in the first instance." *Johnson v. United States*, 2017 U.S. App. LEXIS 17705, *5 (6th Cir. Mar. 16, 2017).

The parties fully briefed the restitution issue on remand. The Court held a hearing on March 13, 2018. The Court, ruling from the bench, held that: 1) the remand from the Sixth Circuit was limited to the errors in the Government's worksheet, and was not a general remand; 2) the Government's inclusion of the loan advance and potential recovery dollar amounts of the property at 156 Lawrence Street in calculating restitution was proper, because doing so corrected a spreadsheet error; and 3) Johnson was not prejudiced by counsel's failure to raise a "payments-made" argument, because when such payments are taken into consideration, the restitution Johnson was ordered to pay is less than the corrected amount. For the reasons stated on the record, the restitution stands.

At the March 13, 2018 hearing, Johnson requested that this Court grant a certificate of appealability on whether all thirteen NetBank properties should be taken into consideration when calculating restitution, not just the six properties the Government initially sought restitution for. The Court denied issuing a certificate of appealability. Such a certificate may be issued only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Johnson failed to raise this issue in his § 2255 petition, and it was never presented to the Sixth Circuit. He therefore

cannot show a substantial denial of a constitutional right, or that reasonable jurists could differ on this issue. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Finally, Johnson requested that the Court write a letter to the Bureau of Prisons, recommending that he be placed on home confinement for the remainder of his sentence. The Court agreed to do so. A letter will be written by the Probation Department making this recommendation, which the Court will sign.

IT IS ORDERED.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: March 16, 2018

No. 18-1363

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 22, 2018
DEBORAH S. HUNT, Clerk

JONATHONE J. JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

O R D E R

Jonathone J. Johnson, a federal prisoner represented by counsel, appeals a district court order denying his motion to vacate his sentence under 28 U.S.C. § 2255 following remand. Johnson has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2011, Johnson pleaded guilty to wire fraud, in violation of 18 U.S.C. § 1343. The district court sentenced him to 87 months of imprisonment and three years of supervised release and ordered him to pay $90,100 in restitution for loans originating with the Bank of America. Upon the government's subsequent motion, the district court imposed an additional $678,000 in restitution for loans originating with NetBank. Thereafter, this court dismissed Johnson's direct appeal based on the plea agreement's appellate waiver provision. *United States v. Johnson*, 530 F. App'x 406 (6th Cir. 2013).

In December 2014, Johnson filed a § 2255 motion, arguing, among other things, that appellate counsel was ineffective for failing to (a) notify him of the government's motion to seek additional restitution for the NetBank loans, (b) investigate and challenge the claimed amount of loss, and (c) request a reduction in the amount of loss based on payments made on the loans.

The district court denied the § 2255 motion as being without merit. This court granted Johnson a COA with respect to whether appellate counsel was ineffective for failing to raise the payments-made argument in response to the government's request for an additional $678,000 in restitution. *United States v. Johnson*, No. 15-2032 (6th Cir. Mar. 24, 2016) (order).

On appeal, Johnson argued, in relevant part, that appellate counsel was ineffective for failing to challenge the government's request for additional restitution because potential mortgage payments made to NetBank should have been deducted from the loan amount before calculating restitution. He maintained that the restitution amount should have been reduced by a total of approximately $140,752 based on sixty-six loan payments made prior to default, private mortgage insurance premiums paid, homeowners' insurance premiums paid, and real estate taxes paid. This court vacated the district court's judgment and remanded the case for the district court to consider (1) the government's acknowledged errors (i.e., that the Federal Deposit Insurance Corporation ("FDIC") loss calculation spreadsheet did not contain any entries for loan payments made to NetBank and incorrectly listed the "contract price" as the loan amount), and (2) whether Johnson was credited for any pre-default loan payments. *United States v. Johnson*, No. 15-2032 (6th Cir. Mar. 16, 2017).

On remand, the district court conducted a hearing, during which the parties disagreed as to the scope of this court's remand order. Before the hearing, the government submitted a memorandum arguing that the FDIC's loss calculation spreadsheet contained mathematical errors because the loan advance and potential recovery amounts for the property at 156 Lawrence Street were inadvertently left out of the net loss calculations, even though the figures were listed on the spreadsheet. The government also corrected the loan advance column of the spreadsheet to reflect "loan advances" as opposed to loan contract prices. These corrections increased the "net loss" figure from $678,000 to $847,930. However, the government credited Johnson with pre-default loan payments, resulting in a corrected restitution amount of $751,430. The government argued that Johnson was not entitled to credit for private mortgage insurance premiums paid, homeowners' insurance premiums paid, and real estate taxes paid. For these

reasons, the government argued that counsel's allegedly deficient performance did not prejudice Johnson because the corrected restitution amount was still higher than the $678,000 in restitution originally imposed.

In response, Johnson argued that the government was barred from attempting to belatedly include the loan advance amount for the 156 Lawrence Street property. *See* 18 U.S.C. § 3663(d)(5). He maintained that the government should be limited to the loan amounts listed for the remaining five properties listed on the spreadsheet, which would result in a corrected loan advance amount of $745,750, a potential recovery of $95,000, and a net loss of $650,750. Johnson argued that counsel's performance prejudiced him because the corrected net loss figure was lower than the $678,000 restitution amount originally imposed. He also argued that the restitution amount should have been reduced by: (1) $428,355.60, which includes private mortgage insurance premiums paid, homeowners' insurance premiums paid, and real estate taxes paid for all thirteen NetBank properties, not just the six properties that were listed on the spreadsheet; and (2) $79,550, which represents the missing loan sales from the seven NetBank properties not included on the government's spreadsheet. He maintained that this would result in a corrected net loss of $142,844.40. Johnson reasserted his argument that he was entitled to credit for private mortgage insurance premiums paid, homeowners' insurance premiums paid, and real estate taxes paid. Johnson also challenged the district court's order that he pay $90,000 in restitution to Bank of America. Johnson argued that the district court was free to consider these additional issues because this court issued a general remand to the district court, not a limited remand. *See United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999).

The district court rejected Johnson's arguments, concluding that, in light of the corrections to the net loss spreadsheet and the government's concession that Johnson was entitled to credit for pre-default loan payments, counsel's performance did not prejudice Johnson because the corrected restitution amount of $751,430 was still higher than the $678,000 of restitution imposed. The district court concluded that Johnson's remaining arguments were beyond the scope of this court's remand order.

In his COA application, Johnson reasserts the claims he raised before the district court. He also reasserts his argument that the district court could consider new arguments de novo in order to arrive at the correct restitution amount for purposes of resentencing, including the loan payment figures associated with all thirteen of the NetBank properties.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court's denial is on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court's denial is based on a procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Johnson has not met this burden.

Johnson failed to make a substantial showing that counsel's performance was deficient or that he suffered prejudice based on counsel's alleged errors. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). As explained above, the district court determined that counsel's performance did not prejudice Johnson because the government's corrected restitution amount of $751,430 was still higher than the $678,000 restitution imposed. In making this determination, the district court considered the government's explanation for the newly calculated net loss amount. First, the government argued that the "net loss" figure should be corrected from $678,000 to $847,930 because of mathematical errors and the improper use of the loan contract price instead of the loan advance amounts. Specifically, the government noted that the $773,000 "loan advance" sum should be corrected to $1,020,000, in order to include the $247,000 loan advance for 156 Lawrence Street. Next, the government explained that the $95,000 "potential recovery" figure should be corrected to $144,820, in order to include the listed $49,820 potential recovery for the Lawrence Street property, which inadvertently was not included in the total. Thus, the corrected loss would be $875,180. However, the government acknowledged that it

erroneously used the contract sales price instead of the loan advance amounts to calculate the net loss, and that the difference in these figures was $27,250. Therefore, the actual corrected net loss should be reduced from $875,180 to $847,930. The government then conceded that Johnson was entitled to the requested credit for $96,500 in pre-default loan principal payments. This results in a corrected restitution amount of $751,430. Reasonable jurists would not debate the district court's ruling that counsel's performance did not prejudice Johnson because the corrected restitution amount is still higher than the $678,000 restitution amount imposed.

Reasonable jurists would not debate the district court's procedural ruling that Johnson's arguments concerning additional NetBank properties and his challenge to the restitution amount imposed in favor of Bank of America were beyond the scope of this court's remand. The district court noted that this court did not grant a COA with respect to the issue of whether all thirteen NetBank properties should have been considered in the net loss calculation. Furthermore, the case was not remanded for resentencing purposes. Rather, the case was remanded for the district court to consider whether the government's acknowledged errors in calculating the amount of restitution and failure to grant Johnson credit for pre-default loan payments made on the six NetBank loans established that counsel's failure to assert a payments-made argument had prejudiced his defense. Johnson's attempt to amend his claim to include new arguments concerning additional NetBank properties and the restitution amount imposed in favor of Bank of America is improper because those issues were not asserted in his § 2255 motion or on appeal. Contrary to Johnson's arguments, the district court properly considered the figures for the 156 Lawrence Street address because those figures were listed as part of the six loans set forth on the FDIC's net loss spreadsheet. Therefore, the government was not barred from noting the mathematical errors and requesting that those figures be included in the corrected net loss calculations and the amount of restitution. Under these circumstances, reasonable jurists would not debate the district court's decision not to address his new arguments.

Accordingly, Johnson's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk