No. 18-5313

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 04, 2018
DEBORAH S. HUNT, Clerk

JEFFREY S. WINGATE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: KEITH, GRIFFIN, and LARSEN, Circuit Judges.

Jeffrey S. Wingate petitions for rehearing en banc of this court's order entered on July 12, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-5313

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 16, 2018
DEBORAH S. HUNT, Clerk

JEFFREY S. WINGATE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: KEITH, GRIFFIN, and LARSEN, Circuit Judges.

Jeffrey S. Wingate, a pro se federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

D E N

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No. 18-5313

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 12, 2018
DEBORAH S. HUNT, Clerk

JEFFREY S. WINGATE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Jeffrey S. Wingate, federal prisoner proceeding pro se, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Wingate has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2015, Wingate pleaded guilty, pursuant to a plea agreement, to one count of possession with intent to distribute oxycodone in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Wingate to a 150-month term of imprisonment to be followed by three years of supervised release. Wingate filed a notice of appeal, but this court granted the government's motion to dismiss the attempted appeal because the sentencing issues that Wingate sought to raise fell within the terms of the appeal waiver contained in his plea agreement. *United States v. Wingate*, No. 15-5502 (6th Cir. Apr. 5, 2016) (order).

In June 2017, Wingate filed his § 2255 motion, which he later supplemented, raising the following grounds for relief: (1) his trial attorneys were ineffective because they had actual conflicts of interest; (2) ineffective assistance of trial counsel prevented him from knowingly and

voluntarily entering his guilty plea; (3) his plea was involuntary because trial counsel "coerced" him into pleading guilty; and (4) trial counsel's mistakes amounted to cumulative error. A magistrate judge recommended that Wingate's § 2255 motion be denied. The district court adopted the magistrate judge's report and recommendation over Wingate's objections, denied Wingate's § 2255 motion on the merits, and declined to issue a COA.

Wingate now seeks a COA from this court as to each of his claims. 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); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To satisfy this standard, the petitioner must demonstrate "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*, 537 U.S. at 327.

At the outset, Wingate argues within his COA application that the district court overlooked his argument that trial counsel rendered ineffective assistance by not moving to sever him from the indictment that contained several other defendants. However, Wingate has forfeited this argument because he first raised it in his amended objections to the magistrate judge's report and recommendation. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000).

1. Ineffective Assistance Based on Counsel's Actual Conflict of Interest

Wingate first argued that his attorneys, Burl McCoy and Brandon Marshall, were ineffective because they had actual conflicts of interest. Specifically, he argued that McCoy was unconstitutionally conflicted because he had previously represented David Knell, the government's confidential informant in this case, in Knell's 2013 criminal case. Wingate further contended that McCoy and Marshall had actual conflicts of interest because they both represented his son-in-law, Morgan Culberson, in an unrelated criminal investigation at the same time that they were representing him. To warrant relief, Wingate was required to show that his attorneys had a conflict of interest and that the conflict affected their performance. *See Mickens*

v. Taylor, 535 U.S. 162, 172 n.5, 173-74 (2002); *McFarland v. Yukins*, 356 F.3d 688, 705 (6th Cir. 2004).

Reasonable jurists could not debate the district court's denial of this claim. First, Wingate cited *Moss v. United States*, 323 F.3d 445 (6th Cir. 2003), in support of his position that McCoy's prior representation of Knell created an actual conflict of interest in his case. But Wingate's reliance upon *Moss* is misplaced because that case concerned a situation of "[j]oint, or dual, representation" "where a single attorney represents two or more co-defendants in the same proceeding." *Id.* at 455. This is not the case here because McCoy represented Knell and Wingate in separate proceedings that occurred approximately two years apart. (no separation from Knell investigation sentencing of Wingate

Additionally, Wingate did not allege facts showing that McCoy actively represented conflicting interests or that his performance was affected in any way by his prior representation of Knell. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 343 (6th Cir. 2012) ("Merely conclusory allegations of ineffective assistance . . . are insufficient to state a constitutional claim."). Rather, Wingate submitted an affidavit from Knell, in which Knell attested that McCoy represented him in 2013 and "urged [him] to cooperate with the government by recording audio with Jeff Wingate in hopes of obtaining time off [of his] eventual sentence." Knell averred that McCoy referred to Wingate at that time as a "horrible person" and "an evil man who was destroying our community." Wingate also submitted an affidavit from one of Knell's fellow inmates who echoed the substance of Knell's affidavit. But neither affidavit explained how McCoy's representation of Knell in 2013 affected his representation of Wingate in this case. *See Mickens*, 535 U.S. at 172 n.5; *see also McFarland*, 356 F.3d at 705. Knell was not Wingate's co-defendant, and there is no evidence that the government used Knell as a witness in its case against Wingate.

Wingate's assertion that McCoy and Marshall's representation of his son-in-law, Morgan Culberson, constituted an actual conflict of interest is equally conclusory. Indeed, McCoy submitted an affidavit averring that he "did not represent Mr. Morgan Culberson at any time." As the district court properly noted, Culberson was not Wingate's co-defendant and Wingate

provided no evidence showing that Culberson acted as a witness against him. Moreover, Wingate's false dilemma argument—that he was forced to accept a plea agreement containing a two-level sentence enhancement under USSG § 2D1.1(b)(1) because his attorneys allegedly counseled Culberson to deny ownership of the firearm that authorities discovered on his property—is unpersuasive. Wingate failed to cogently explain how Culberson's alleged denial of ownership or possession of the firearm in question directly related to his admission to possessing the firearm. Accordingly, this claim does not deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

2. Ineffective Assistance of Counsel

Wingate also raised several instances where Attorney McCoy allegedly rendered ineffective assistance that prevented him from knowingly and voluntarily accepting the plea agreement. To establish a claim of ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Wingate first argued that trial counsel misunderstood what crime he was charged with and that this misunderstanding prejudiced him during the pretrial, plea, and sentencing phases of his case. Specifically, Wingate contended that trial counsel's actions and statements demonstrated his erroneous belief that Wingate was charged with conspiracy to distribute oxycodone in violation of 21 U.S.C. § 846, rather than possession with intent to distribute oxycodone in violation of § 841(a)(1). As the district court aptly noted, Wingate was actually

charged with conspiracy to distribute heroin. However, pursuant to the terms of the plea agreement, the government moved to dismiss the conspiracy charge once Wingate pleaded guilty to possession with intent to distribute oxycodone in violation of § 841(a)(1). Moreover, Wingate told the police about his role in an oxycodone conspiracy. He also knowingly acknowledged his involvement in that conspiracy in his plea agreement. He thus cannot show that he was prejudiced by trial counsel's alleged misunderstanding. Reasonable jurists therefore could not debate the district court's denial of this claim.

Second, Wingate argued that trial counsel was ineffective for failing to independently investigate the weight of the oxycodone pills that law enforcement discovered in his possession. Wingate argued that trial counsel's failure in this regard caused him to receive a higher sentence that was based on an incorrect drug weight. However, Wingate's plea agreement expressly stated that Wingate "acknowledge[d] that he is responsible for conspiring to distribute approximately 20,000 Oxycodone 30 milligram pills." Wingate stated during his rearraignment hearing that he understood the terms and conditions of his plea agreement. He further acknowledged that the information contained in paragraph three of the plea agreement, which contains the underlying facts of the case, was true and correct to the best of his knowledge and belief. Thus, reasonable jurists could not debate the district court's conclusion that Wingate failed to demonstrate that he was prejudiced by trial counsel's alleged failure to investigate the weight of the confiscated drugs.

Wingate additionally argued that trial counsel rendered ineffective assistance by not seeking to have the amount of drugs that he possessed for personal use deducted from the drug weight that was used to calculate his base offense level. *See United States v. Gill*, 348 F.3d 147, 153 (6th Cir. 2003). However, as the magistrate judge observed, trial counsel prepared Wingate's presentence report, which contained notes of Wingate's personal use of the drugs that he distributed. Trial counsel further submitted an affidavit averring that, contrary to Wingate's assertion, he actually did seek a reduction in Wingate's base offense level under the Sentencing Guidelines based on Wingate's personal use of the drugs. Wingate's conclusory assertion to the

contrary is insufficient to overcome the presumption that trial counsel provided reasonable professional assistance. *See Wogenstahl*, 668 F.3d at 335.

Third, Wingate argued that trial counsel was ineffective for failing to seek suppression of wiretap evidence. But a defendant, like Wingate, who enters an unconditional guilty plea waives all "claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Because Wingate's claim that his counsel was ineffective for failing to file a suppression motion is based on an alleged pre-plea constitutional violation that has been waived, it does not deserve encouragement to proceed further. *See United States v. Stiger*, 20 F. App'x 307, 308-09 (6th Cir. 2001).

Finally, Wingate argued that trial counsel was ineffective for failing to object to the leadership enhancement under USSG § 3B1.1(a). But Wingate's plea agreement expressly recommended that Wingate's offense level be increased "by four levels because [Wingate] was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The plea agreement further detailed how Wingate

> would consign to [his coconspirator] 100 Oxycodone 30 milligram pills at a time. Wingate charged [his coconspirator] $30 per pill. [The coconspirator], and others working for him, . . . would distribute the pills to their customers. [The coconspirator] would collect the money, pay Wingate for the consigned pills, and obtain more pills for distribution.

Wingate explicitly stated at his rearraignment hearing that he understood the terms and conditions of the plea agreement. And, as discussed in greater detail below, Wingate voluntarily pleaded guilty. Wingate has not explained how trial counsel performed unreasonably or how he was prejudiced by trial counsel's failure to object to the leadership enhancement. Accordingly, reasonable jurists could not debate the district court's resolution of this claim.

3. Voluntary Plea

In his third ground for relief, Wingate argued that he entered his guilty plea involuntarily. To that end, Wingate argued that he was confused about the nature of the charged offense and that his trial counsel "coerced" him into pleading guilty by both misrepresenting "the elements of the plea agreement, including the sentencing level and collateral consequences" of his plea. He

further argued that trial counsel falsely promised him that he would be permitted to serve his sentence at a minimum-security prison and qualify for time off of his sentence if he pleaded guilty. In order for a guilty plea to be constitutional it must be knowingly, intelligent, voluntary, and made with sufficient awareness of the relevant circumstances and likely consequences. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). Courts evaluate the voluntariness of a guilty plea in light of all relevant circumstances surrounding the plea, and threats or misrepresentations that induce a plea also render that plea involuntary. *Brady v. United States*, 397 U.S. 742, 755 (1970). The record of a plea colloquy outweighs a petitioner's "alleged subjective impression." *Ramos v. Rogers*, 170 F.3d 560, 566 (6th Cir. 1999) (original emphasis removed).

The record belies Wingate's contention that his plea was either unknowing, unintelligent, or involuntary. The transcript from Wingate's rearraignment hearing reflects that Wingate explicitly stated that he understood the charges against him and understood the terms and conditions of his plea agreement. He also stated that he was satisfied with his attorney's advice and representation. The record reflects that the prosecutor then summarized the "essential parts" of the plea agreement, with Wingate subsequently acknowledging that the prosecutor's summary was accurate. Wingate further stated that nobody had promised him anything in exchange for him either signing the plea agreement or pleading guilty. He expressly stated that nobody had threatened him or forced him to plead guilty.

Wingate also acknowledged during the hearing that he possessed oxycodone pills that he intended to distribute to other individuals on the day of his arrest. The district court then explained to Wingate that if his case were to proceed to trial, the government would have to prove beyond a reasonable doubt that he: (1) "possessed a quantity of pills containing oxycodone, which is a Schedule II controlled substance"; (2) "possessed the pills with the intent to distribute"; and (3) acted "knowingly and intentionally." The district court asked Wingate whether he believed that the government could prove these three elements beyond a reasonable doubt if the matter went to trial, to which Wingate responded, "Yes, sir." Wingate stated that he was pleading guilty for no reason other than because he was, in fact, guilty of the charged

offense. When the district court asked Wingate whether there were any questions asked of him that he did not fully understand, Wingate responded, "[n]o, sir, you were very clear." Based on the foregoing, reasonable jurists could not disagree with the district court's resolution of this claim.

4. Cumulative Error

Finally, Wingate contended that he was prejudiced by the cumulative effect of trial counsel's errors alleged in the previous grounds. Reasonable jurists could not disagree with the district court's denial of this claim, however, because cumulative error does not provide an independent ground for federal post-conviction relief. *See Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011) (28 U.S.C. § 2254 case); *Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010) (same); *see also United States v. Brown*, 528 F.3d 1030, 1034 (8th Cir. 2008) (§ 2255 case, rejecting the "cumulative error theory of post-conviction relief").

Accordingly, Wingate's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY S. WINGATE, Movant/Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION
2018 U.S. Dist. LEXIS 41873
Criminal Action No. 5: 14-74-DCRandCivil Action No. 5: 17-253-DCR
March 14, 2018, Decided
March 14, 2018, Filed

Editorial Information: Prior History

United States v. **Wingate**, 2018 U.S. Dist. LEXIS 42742 (E.D. Ky., Jan. 25, 2018)

Counsel For Jan **Wingate**, Claimant (5:14-cr-00074-DCR-REW): Ned Pillersdorf, LEAD ATTORNEY, Pillersdorf, DeRossett & Lane - Prestonsburg, Prestonsburg, KY.

For USA Plaintiff (5:14-cr-00074-DCR-REW): Robert M. Duncan, Jr., LEAD ATTORNEY, David Y. Olinger, Jr., U.S. Attorney's Office, EDKY, Lexington, KY.

Jeffrey S. **Wingate**, Petitioner (5:17-cv-00253-DCR-EBA), Pro se, BUTNER, NC.

Judges: Danny C. Reeves, United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM OPINION AND ORDER

This matter is pending for consideration of Movant/Defendant Jeffrey Wingate's motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. [Record No. 447] The motion was referred to United States Magistrate Judge Edward B. Atkins for review and issuance of a Report and Recommendation ("R&R") pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Atkins issued a R&R on January 25, 2018, recommending that the motion be denied. [Record No. 474] **Wingate** filed his amended objections to the R&R on February 20, 2018.1 [Record No. 480]

Although this Court must make a *de novo* determination of those portions of the Magistrate Judge's recommendations to which objections are made, 28 U.S.C. § 636(b)(1)(C), "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings." *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Nevertheless, the Court has examined the record and, having conducted a *de novo* review of the matter, agrees with the Magistrate Judge.

I.

Law enforcement officers conducted a traffic stop on June 12, 2014, and found Defendant **Wingate** in possession of three ounces of heroin and approximately 1,100 Oxycodone 30 milligram pills. [Record No. 296] They subsequently found 2,500 Oxycodone 30 milligram pills and a .38 caliber revolver in a pool house on Wingate's property. The officers also found firearms and approximately $200,000 inside the main residence. [*Id.*] **Wingate** was arrested and admitted to conspiring to distribute Oxycodone pills and heroin during a *Mirandized* interview. [*Id.*] He was charged with one count of conspiring to distribute heroin, three counts of possessing with intent to distribute heroin and Oxycodone, and one count of being a felon in possession of a firearm. [Record No. 9] Because **Wingate** "had already confessed to his involvement with the drugs," and "stated [that] it was his desire to cooperate with law enforcement to possibly reduce his sentence," Wingate's attorney recommended entering into a plea agreement. [Record No. 466-1, ¶¶ 4-5]

Wingate pleaded guilty to one count of possessing Oxycodone pills with intent to distribute in violation of 21 U.S.C. § 841(a)(1). [Record No. 296] **Wingate** admitted in the plea agreement that he conspired with others to distribute Oxycodone and heroin by obtaining the drugs from an out-of-state supplier and then selling them to his co-conspirators, who in turn sold them to customers. [*Id.*] The plea agreement also recommended the following guidelines calculations: a base offense level of 32 under United States Sentencing Guideline ("U.S.S.G.") § 2D1.1(c)(4), based on the marijuana equivalency for the amount of Oxycodone pills and heroin attributable to **Wingate**; a two-level offense level increase under U.S.S.G. § 2D1.1(b)(1), based on Wingate's possession of a dangerous weapon; a four-level offense level increase under U.S.S.G. § 3B1.1(a), because **Wingate** was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive; and a two or three-level offense level decrease under U.S.S.G. § 3E1.1, based on Wingate's acceptance of responsibility. [*Id.*]

Consistent with the recommendations in the plea agreement, the Presentence Investigation Report ("PSR") prepared in advance of Wingate's sentencing hearing provided for a base offense level of 32 based on the marijuana equivalency for the amount of Oxycodone pills and heroin attributable to **Wingate**. It also recommended a two-level increase for possession of a dangerous weapon, a four-level increase for being the organizer or leader of criminal activity involving five or more participants, and a three-level reduction for acceptance of responsibility. [Record No. 305, ¶¶ 50-58] The resulting total offense level was 35. [*Id.* ¶ 58] When combined with Wingate's criminal history (Category I), this produced a guideline imprisonment range of 168 to 210 months. [*Id.* ¶ 99]

The parties did not object to the PSR, and the Court adopted its findings and guidelines calculations at the sentencing hearing. [Record No. 338, p. 3] The Court also noted that the enhancements the PSR applied were well supported. [*Id.* at 8] A sentence in the middle of the guideline range would have been 189 months imprisonment. [*Id.*] However, the Court sustained the government's motion for a 20 percent reduction, and reduced the sentence by 39 months to 150 months imprisonment. [*Id.* at 18-19, 27-28]

Wingate now moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. [Record No. 447] He makes the following three arguments in support of his motion: (i) his counsel was conflicted due to prior representation; (ii) his counsel's ineffective assistance and coercion prevented him from entering into a knowing and voluntary plea agreement; and (iii) his counsel's many mistakes resulted in cumulative error. [*Id.*] For the reasons that follow, and those stated by the Magistrate Judge, the Court finds each argument to be unpersuasive. Accordingly, Wingate's § 2255 motion will be denied.

II.

Wingate's first argument is that his counsel was unconstitutionally conflicted based on (i) his prior representation of government informant David Knell during a separate action in 2013, and (ii) legal advice he allegedly gave to Morgan Culberson (Wingate's son-in-law) during the criminal investigation. [Record No. 447-1, p. 3, 5-6] **Wingate** also contends that attorney Brandon Marshall, who assisted him at sentencing, was unconstitutionally conflicted based on his representation of Culberson during the criminal investigation. [*Id.* at 7] In particular, **Wingate** alleges that his attorney and Marshall told Culberson to deny possession of the firearm found in the pool house and instructed **Wingate** to admit possession of that same gun. [*Id.* at 5-8]

"[T]o prevail on a claim of ineffective assistance of counsel as a result of a conflict of interest, a petitioner who has entered a guilty plea must establish: '(1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea entered by the defendants.'" *Moss v. United States*, 323 F.3d 445, 467 (6th Cir. 2003) (quoting *Thomas v. Foltz*, 818 F.2d 476, 480 (6th Cir. 1987)). To show an actual conflict of interest, a defendant "must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Thomas*, 818 F.2d at 481 (quotation marks and citations omitted). To show an adverse interest, a defendant must demonstrate that "counsel was influenced in his basic strategic decisions by the interests of the former client as where the conflict prevents an attorney from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other." *Id.* at 466. "Joint, or dual, representation occurs where a single attorney represents two or more co-defendants *in the same proceeding*." *Id.* at 455 (emphasis added). "Successive representation occurs where defense counsel has previously represented *a co-defendant or trial witness*." *Id.* at 459 (emphasis added).

Knell and Culberson were not co-defendants or witnesses in this action. Wingate's attorney (McCoy) did not represent Culberson, and **Wingate** has not shown that McCoy's prior representation of Knell several years before the instant action affected any strategic decisions. Further, Wingate's claim that his attorneys pressured him to admit possession of the gun so they could contend that Culberson did not possess the gun fails because possession is not an exclusive concept. In other words, whether or not Culberson possessed the gun would have no conclusive effect on whether or not **Wingate** possessed the gun. *See United States v. Chesney*, 86 F.3d 564, 573 (6th Cir. 1996) ("[T]wo or more persons may share possession of an item."). As a result, the Magistrate Judge correctly determined that **Wingate** failed to show either an actual conflict or adverse effect, and Wingate's claim that his attorneys were unconstitutionally conflicted is unavailing.

III.

Next, **Wingate** argues that his counsel's ineffective assistance and coercion prevented him from entering into a knowing and voluntary plea agreement. [Record No. 447-1, pp. 8-21] In support, **Wingate** alleges that his counsel failed to (i) understand the crimes with which he was charged; (ii) investigate the evidence and challenge the amount of drugs attributed to him; (iii) challenge the use of wiretap evidence; and (iv) object to the leadership role enhancement to his offense level. [*Id.*]

Wingate's claim that his counsel misunderstood the crime with which he was charged is based primarily on his counsel's statement at sentencing that **Wingate** became addicted to OxyContin after it was prescribed for his medical conditions, and "it blossomed into this criminal conspiracy," creating "a terrible, terrible situation." [Record No. 338, pp. 11-12] **Wingate** argues that this statement demonstrates that his counsel mistakenly believed that he was "charged with 21 U.S.C. § 846: Conspiracy to distribute Oxycodone." [Record No. 447-1, p. 8] However, as the Magistrate Judge correctly noted, **Wingate** *was* charged with a conspiracy offense: conspiracy to distribute heroin.

[*See* Record No. 9, Count 2] As a result, his counsel's reference to a "criminal conspiracy" at the sentencing hearing does not demonstrate that his counsel misunderstood the charges **Wingate** was facing.

Wingate also contends that his counsel's misunderstanding of the charges against him is evidenced by his counsel's failure to object to the following statement in the plea agreement:

> The Defendant acknowledges that he is responsible for conspiring to distribute approximately 20,000 Oxycodone 30 milligram pills. This number is based on the Defendant acquiring approximately 1,000 pills every two weeks (approximately 2,000 pills per month) from September 2013 through May 2014, and includes the Oxycodone pills found in the Defendant's possession during the traffic stop on June 12, 2014, and the Oxycodone pills found during the execution of the search warrant on his residence the same day.[Record No. 296, ¶ 3] The drug types and weights contained in this statement were used in determining the amount of drugs attributable to **Wingate** for purposes of calculating his base offense level under U.S.S.G. § 2D1.1(c)(4). [*See id.* ¶ 5(b); Record No. 305, ¶¶ 36, 50.]

Wingate's attorney stated in a sworn affidavit that **Wingate** "agreed with [the] type, number[,] and weight" of the drugs listed in his plea agreement, and that in fact "most of the information concerning weights and amounts [i]n the plea agreement [came] from him." [Record No. 446-1, ¶ 5] Further, "**Wingate** admitted to the number and weight of pills and capsules in the interviews, plea agreement[,] and PSR." [*Id.* ¶ 7]

Nonetheless, **Wingate** now contends that, because he pled guilty to possession with intent to distribute Oxycodone and was not charged with conspiracy to distribute Oxycodone, his attorney should have challenged any drug weight beyond the amount he was actually found to possess. [Record No. 447-1, p. 10 ("Seeing that § 841 is based upon actual possession, McCoy should have argued that Wingate's drug weight could not exceed 1,000 pills retrieved from his vehicle upon his arrest, and the 2,400 pills recovered from Wingate's pool house.")] He further argues that it was improper for the Court to base his sentence in part on the larger amount of Oxycodone he admitted to conspiring to distribute in his plea agreement. [*Id.*]

However, the fact that **Wingate** was not charged with conspiracy to distribute Oxycodone does not mean that it was improper to consider the amount of Oxycodone pills he admitted to conspiring to distribute in determining his sentence. "Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." U.S.S.G. § 1B1.3, Background. And "in a drug distribution case," such as this one, "quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." *Id.*

Wingate admitted in his plea agreement that he was "responsible for conspiring to distribute approximately 20,000 Oxycodone 30 milligram pills" and that "he conspired to distribute 5 ounces of heroin." [Record No. 296, ¶ 3] It is abundantly clear from the plea agreement that these drugs and quantities were "part of the same course of conduct or part of a common scheme or plan as the count of conviction." [*See id.*] Further, the plea agreement and PSR, to which **Wingate** did not object, contained recommended guidelines calculations based on these admissions. [*See id.* ¶ 5(b); Record No. 305, ¶¶ 36, 50] And **Wingate** attested under oath that he had reviewed the factual statements contained in his plea agreement and agreed that they were correct. [Record No. 337, pp. 29-30] Thus, there was no error in using the drug weights contained in the plea agreement at Wingate's sentencing hearing, and Wingate's attorney's failure to object to the factual statement in the plea agreement does not demonstrate that he misunderstood the offense of conviction.

Adverse

Wingate argues for the first time in his objections to the R&R that the Court did not conduct an adequate Rule 11 colloquy to ensure that the factual statements in his plea agreement were made knowingly and voluntarily. [Record No. 480-1, pp. 6-8, 14-20] Under Rule 11, the Court is required to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises" before accepting a guilty plea, and to "determine that there is a factual basis for the plea" before entering judgment on a guilty plea. Fed. R. Crim. Pro. 11(b)(2)-(3). To that end, the Court established that **Wingate** understood the terms of his plea agreement and the consequences of pleading guilty, and that no one had made any promises to him or threatened or forced him to enter into the agreement, during the change of plea hearing. [Record No. 337, pp. 10-18] At the conclusion of the hearing, the Court determined that **Wingate** was "fully competent and capable of entering an informed plea" and that Wingate's plea of guilty was a "knowing and a voluntary plea . . . supported by an independent basis in fact." [*Id.* at 32] The Court also conducted the following colloquy regarding the factual statement contained in the plea agreement:

> THE COURT: Your plea agreement has a factual statement that's contained, I believe, in paragraph 3, which is set forth in your plea agreement on pages 2 and then on the top of page 3 as well. I know you've had the opportunity to review that factual statement with your attorney.
>
> Is the information that's contained in paragraph 3 of your plea agreement true and correct to the best of your knowledge and belief? You can take a moment to look over that again, if you'd like.
>
> MR. McCOY: If the Court please, we agree with the statement.
>
> DEFENDANT **WINGATE**: Yeah, I agree.
>
> THE COURT: Is that correct, Mr. **Wingate**?
>
> DEFENDANT **WINGATE**: Yes, sir.[*Id.* at 29-30]

Wingate now contends that, because his attorney answered for him, the colloquy conducted by the Court was insufficient to ensure that his stipulation to the type and amount of drugs attributable to him was knowing and voluntary. [Record No. 480-1, pp. 6-7] However, **Wingate** overlooks the fact that he *personally* stated that he agreed with the factual statement in his plea agreement, and again *confirmed* that the information was correct after the Court renewed the question and cured any alleged error resulting from his counsel's brief interjection. To the extent that **Wingate** contends that the statement "Yes, sir," was spoken by his attorney and not him personally, his assertion is incorrect and inconsistent with the sentencing transcript. As a result, Wingate's belated attempt to argue that he did not knowingly and voluntarily make the factual statement in his plea agreement fails.

Further, as the Magistrate Judge explained, Wingate's statements at his change of plea hearing undermine his assertion that his attorneys made additional promises to him and coerced him into pleading guilty to avoid trial. [Record No. 474, pp. 14-18] **Wingate** stated at his change of plea that no one had made any promises to him and no one had threatened or forced him to enter into the agreement. [Record No. 337, p. 15] And Wingate's counsel's sworn affidavit represents that no such promises were made. [Record No. 446-1, ¶¶ 5-6]

The Magistrate Judge also adequately addressed Wingate's arguments that his counsel provided ineffective assistance by failing to investigate the amount of drugs attributed to **Wingate**, object to the leadership enhancement, and challenge the use of wiretap evidence. [Record No. 474, pp. 10-14] Wingate's attorney stated that he "did not personally investigate the drug weights or number of the oxycodone or heroin involved in Mr. Wingate's case . . . because Mr. **Wingate** admitted to the number and weight of pills and capsules in the interviews, plea agreement and PSR." [Record No.

466-1, ¶ 7] Similarly, Wingate's attorney "did not challenge the leadership role because Mr. **Wingate** was clearly the leader and organizer of the drug ring," and had admitted as much "[i]n numerous interviews with law enforcement." [*Id.* ¶ 6] And he did not move to suppress the wiretap evidence because in his "professional opinion," the affidavit through which the wiretaps were permitted established probable cause. [*Id.* ¶ 4]

The Magistrate Judge correctly found that **Wingate** was unable to produce any evidence that his counsel should have further investigated the amount of drugs attributed to **Wingate**, objected to the leadership enhancement, or challenged the wiretap evidence. [Record No. 474, pp. 10-14] As a result, **Wingate** was either unable to rebut the presumption that his counsel's conduct was reasonable or to establish prejudice. *See Strickland v. Washington*, 466 U.S. 668, 689, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

IV.

Finally, **Wingate** argues that his counsel's failures cumulatively amounted to ineffective assistance of counsel, even if none of them did individually. [Record No. 447-1, p. 21] But as the Magistrate Judge explained, Wingate's reliance on the cumulative doctrine is misplaced because "[w]here, as here, no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal." *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012).

V.

Wingate has failed to demonstrate that his counsel was conflicted, provided ineffective assistance which prevented him from knowingly and voluntarily entering into the plea agreement, coerced him into entering into the plea agreement, or committed cumulative error. Reasonable jurists would not debate the denial of Wingate's § 2255 motion or conclude that the issues presented are adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). Accordingly, A Certificate of Appealability shall not issue.

For the foregoing reasons, it is hereby

ORDERED as follows:

1. Movant/Defendant Jeffrey Wingate's first motion to amend his initial objections to the R&R [Record No. 477] is **GRANTED**. His second motion to amend his initial objections to the R&R [Record No. 480] is **DENIED**, as moot.

2. The Magistrate Judge's Report and Recommendation [Record No. 474] is **ADOPTED** and **INCORPORATED** by reference.

3. Movant/Defendant Jeffrey Wingate's motion to vacate, set aside or correct her sentence under 28 U.S.C. § 2255 [Record No. 447] is **DENIED**. His claims are **DISMISSED**, with prejudice, and **STRICKEN** from the Court's docket.

4. A Certificate of Appealability is **DENIED**.

5. A Judgment in favor of the United States shall issue this date.

This 14th day of March, 2018.

Signed By:

Danny C. Reeves

United States District Judge

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this date, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Judgment is entered in favor of Plaintiff United States of America with respect to all issues raised in this collateral proceeding.

2. The claims asserted in this collateral proceeding by Movant/Defendant Jeffrey **Wingate** are **DISMISSED**, with prejudice.

3. This action is **DISMISSED** and **STRICKEN** from the Court's docket.

4. A Certificate of Appealability shall not issue with respect to any matter raised herein.

5. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

This 14th day of March, 2018.

Signed By:

Danny C. Reeves

United States District Judge

Footnotes

UNITED STATES OF AMERICA, PLAINTIFF, v. JEFFREY S. WINGATE, DEFENDANT.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION
2018 U.S. Dist. LEXIS 42742
CRIMINAL ACTION NO. 5:14-CR-74-DCR-EBA-2
January 25, 2018, Decided
January 25, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Post-conviction relief denied at, Motion granted by, Motion denied by, As moot, Dismissed by, Certificate of appealability denied, Judgment entered by United States v. **Wingate**, 2018 U.S. Dist. LEXIS 41873 (E.D. Ky., Mar. 14, 2018)

Editorial Information: Prior History

United States v. Swartz, 2016 U.S. Dist. LEXIS 153862 (E.D. Ky., Nov. 7, 2016)

Counsel For Jan **Wingate**, Claimant: Ned Pillersdorf, LEAD ATTORNEY, Pillersdorf, DeRossett & Lane - Prestonsburg, Prestonsburg, KY.

For USA, Plaintiff: Robert M. Duncan, Jr., LEAD ATTORNEY, David Y. Olinger, Jr., U.S. Attorney's Office, EDKY, Lexington, KY.

Judges: Edward B. Atkins, United States Magistrate Judge.

Opinion

Opinion by: Edward B. Atkins

Opinion

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

INTRODUCTION

Defendant Jeffrey S. **Wingate** pled guilty and was convicted under 21 U.S.C. § 841 for possession with intent to distribute oxycodone. [R. 162; R. 298]. Defendant was sentenced to one-hundred fifty (150) months of imprisonment to be followed by three (3) years of supervised release. [R. 298]. Defendant now challenges the imposition of that sentence in his *pro se* Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. [R. 447]. Defendant makes three primary arguments. First, Defendant alleges his counsel was conflicted due to his prior representation of a government informant. [R. 447 at 4]. Second, Defendant alleges his counsel's ineffective assistance prevented him from entering a knowing and voluntary plea agreement. [*Id.* at 5]. Third, Defendant alleges his counsel coerced him into signing his plea agreement in order to avoid trial. [*Id.* at 6]. In addition, Defendant articulates a fourth argument: that the many mistakes of his counsel throughout his representation amounted to cumulative error resulting in prejudice. [*Id.* at 8]. The United States,

however, refutes all of Defendant's arguments.

First, the United States notes that Defendant's counsel was not unlawfully conflicted. Defendant has failed to show that his counsel "was influenced in his basic strategic decisions by the interests of the former client." [R. 466 at 5 (quoting *United States v. Taylor*, 489 F. App'x 34, 43 (6th Cir. 2012))]. Second, the United States notes that any deficient performance by Defendant's counsel could not have precluded him from entering a knowing and voluntary plea agreement because "[t]he change-of-plea colloquy here included all the elements needed to establish a voluntary and knowing plea." [*Id.* at 10 (quoting *United States v. Powell*, 798 F.3d 431, 434 (6th Cir. 2015))]. Third, the United States notes that Defendant's new claims of coercion by his attorney to enter a plea agreement go "against his own statements at his rearraignment hearing." [*Id.* at 9]. "**Wingate** stated that no one had made any promises to him and no one had threatened or forced him to enter in the agreement." [*Id.* (citing R. 337 at 15 ¶¶ 12-20)]. Finally, the United States undermines Defendants' argument of cumulative error: "Where, as here, no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal." [*Id.* at 11 (quoting *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012)].

The matter is ripe for decision, following the submission the of Defendant's Reply, [R. 472]. For the reasons set forth below, the undersigned recommends that Defendant's Motion to Vacate, [R. 447], be **DENIED**.

ANALYSIS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Defendant brings his Motion to Vacate under 28 U.S.C. § 2255. Section 2255(a) provides that a prisoner in custody under a sentence of a United States Court may petition that court to amend his or her sentence upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, that the court imposing the sentence lacked jurisdiction to do so, that the sentence is excessive, or that the sentence is otherwise subject to collateral attack. Such a defendant must sustain any allegation by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) ("Defendants seeking to set aside their sentences pursuant to 28 U.S.C. § 2255 have the burden of sustaining their contentions by a preponderance of the evidence."); *see also Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). If alleging a constitutional error, such a defendant must show the error "had a substantial and injurious effect or influence on the proceedings." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). Alternately, if alleging a non-constitutional error, such a defendant must establish "a fundamental defect which inherently results in a complete miscarriage of justice . . . an error so egregious that it amounts to a violation of due process." *Watson*, 165 F.3d at 488 (citing *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990)).

Ineffective assistance of counsel is a constitutional ground on which a sentence may be challenged under Section 2255. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001). In evaluating such a challenge, the Sixth Circuit applies the two-prong test established in *Strickland. Parrish Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005); *see also Strickland*, 466 U.S. at 687. Under *Strickland*, a defendant first must show his or her counsel was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Second, a defendant must show the deficient performance *actually* prejudiced the defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id. Both* elements must be shown. Thus, not only must the attorney's performance have been deficient, but that specific

deficiency must also have been the antecedent without which the Defendant's sentence would not have been imposed. *Id.*

It is true that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Nonetheless, an attorney representing a criminal defendant does have some specific, articulable duties. All attorneys owe their clients a duty of loyalty; a duty to avoid conflicts; a duty to advocate, inform, and consult; and counsel has a duty "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* In evaluating an attorney's duties to his or her client and the sufficiency of an attorney's performance of them, however, courts must be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." *Id.*; *see also Engle v. Isaac*, 456 U.S. 107, 133-34, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009); *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2009). Indeed, there is a *presumption* of adequate representation. "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002) (quotation and citation omitted).

I. Whether Defendant's Counsel was Subject to a Conflict

Defendant alleges his counsel, Burl McCoy, was unconstitutionally conflicted through his prior representation of David Knell during a separate action in 2013. Defendant alleges Knell, who acted as a confidential informant for the United States, sought to obtain evidence of Defendant's misdeeds. [R. 447-1 at 3]. Defendant asserts his counsel's prior representation of Knell constitutes an actual conflict of interest under *Moss v. United States*, 323 F.3d 445 (6th Cir. 2003). In support of his argument, Defendant has submitted an affidavit, executed by Knell, wherein Knell attests that Defendant's counsel considered Defendant to be a "horrible" man. [R. 447-2 at 4]. Further, Defendant's counsel "urged [Knell] to cooperate with the government by recording audio with Jeff **Wingate** in hopes of obtaining time off my eventual sentence." [*Id.*]. In sum, Defendant alleges that his counsel's representation and statements to Knell in a separate action two years prior to his representation of Defendant created an unconstitutional conflict, resulting in a valid claim of ineffective assistance. [R. 447-1 at 3-5].

"Joint, or dual, representation occurs where a single attorney represents two or more co-defendants in the *same* proceeding." *Moss v. United States*, 323 F.3d 445, 455 (6th Cir. 2003) (emphasis added). "Successive representation occurs where defense counsel has previously represented a *co-defendant or trial witness*." *Id.* at 459. Joint or successive representation of co-defendants, however, although suspect, "does not per se constitute ineffective assistance of counsel." *Id.* at 445. Further, "[i]t is more difficult for a defendant to show that counsel actively represented conflicting interests in cases of successive rather than simultaneous representation." *Id.* at 459. Nonetheless, there remains a risk of an unconstitutional conflict, especially in cases "where an attorney's former client serves as a government witness against the attorney's current client." [*Id.* at 460 (citing *United States v. McCutcheon*, 86 F.3d 187, 189 (11th Cir.1996); *United States v. Flynn*, 87 F.3d 996 (8th Cir.1996); *Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir.1995); *United States v. Malpiedi*, 62 F.3d 465 (2d Cir.1995); *Takacs v. Engle*, 768 F.2d 122, 125 (6th Cir.1985))].

"[I]n order to prevail on a claim of ineffective assistance of counsel as a result of a conflict of interest, a petitioner who has entered a guilty plea must establish: '(1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea entered by the defendants.'" *Moss*, 323 F.3d at 467 (quoting *Thomas v. Foltz*, 818 F.2d 476, 480 (6th Cir. 1987)); *see also Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333

(1980). To show an actual conflict of interest, a defendant "must point to specific instances in the record that suggest an actual conflict or impairment of [his or her] interests." *Thomas*, 818 F.2d at 481. A defendant further "must make a factual showing of inconsistent interests and demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Id.* "But until a defendant shows that his counsel *actively* represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler*, 446 U.S. at 350 (emphasis added). If a defendant establishes an actual conflict, he or she must also establish an adverse effect. To do so, a defendant must show "that 'counsel was influenced in his basic strategic decisions by the interests [of the former client],' as where the conflict 'prevents an attorney . . . from arguing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing the other.'" *Moss*, 323 F.3d at 446.

Although Defendant has succeeded in showing that some form of succeeding representation of criminal defendants exists here, [R. 447-2, *Exhibits 1 and 2*; R. 466-1 at 1 ¶ 2], Defendant has failed to show the presence of an "actual conflict of interest," that counsel was "influenced in his basic strategic decisions," or that counsel prevented Defendant from entering a knowing and voluntary guilty plea.1 In fact, Defendant makes no specific claim of adverse effect anywhere in his Motion to Vacate, [*See, e.g.*, R. 447 at 3-5], other than his broad argument for the existence of a conflict. Further, the affidavit of David Knell is not grounds for finding either an actual conflict or an adverse effect. None of the claims of Knell bear on counsel's direct representation of Defendant in his own criminal proceeding, which was a separate action that occurred a full two years following counsel's representation of Knell. [R. 447-2 at 4; *compare* R. 447-2 at 2 (case terminated May 2013), *with* R. 298 (judgment entered April 2015)]. Knell and Defendant's proceedings were separate actions, separated by years. Knell was not a co-defendant of Defendant's in any case. Similarly, no evidence has been produced that Knell acted as a witness in Defendant's case. As such, there is no evidence of an actual conflict of interest in this case. Defendant's argument of unconstitutionally conflicted representation fails.

Nonetheless, in passing, Defendant makes two subsidiary arguments. First, Defendant argues counsel represented Defendant's son-in-law, Morgan Culberson, throughout a criminal investigation simultaneously with counsel's representation of Defendant, thus presenting an unconstitutional conflict through joint representation. [R. 447-1 at 5-6]. Culberson, however, was not a co-defendant in Defendant's case, and Defendant has put forward no evidence that Culberson acted as a witness against Defendant. Defendant has produced no evidence of a conflict beyond his accusations. For that reason, this Court finds that there are insufficient facts in the record to find a conflict of interest in this case. *See Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (there must be evidence that counsel actively represented conflicting interests).

Second, Defendant argues one of his attorneys, Brandon Marshall, who aided Defendant with sentencing, [R. 287], was engaged in the representation of both Defendant and his son-in-law, Culberson. [R. 447-1 at 7]. Here, Defendant attempts to make a connection between his admission to possessing a gun, [R. 296 at 1-2 ¶ 3], and Culberson's alleged denial of possession of that same gun, [R. 447-1 at 7]. Again, Culberson was never Defendant's co-defendant and Defendant has produced no evidence that Culberson acted as a witness against Defendant for the United States. [R. 466 at 7]. Defendant, however, argues that this representation lead to the imposition of a sentencing enhancement under the United States Sentencing Guidelines for Defendant's possession of a gun.2 [R. 447-1 at 7; R. 296 at 3 ¶ 5(c)]. Defendant, however, forgets that he admitted to possessing the gun at issue in the execution of his Plea Agreement, to which he attested his assent under oath at his Rearraignment. [R. 337 at 11 ¶ 15-15 ¶ 11, 15 ¶ 6-11 (THE COURT: "Mr. **Wingate**, were you able to

hear Mr. Duncan as he was reviewing your plea agreement?" DEFENDANT: "Yes, sir." THE COURT: "Did he accurately summarize it as you understand it?" DEFENDANT: "Yes, sir.")]. It also unclear how Defendant's admission to possessing a gun is directly related to Culberson's alleged denial of possession of a gun. Further, possession is not an exclusive concept, and even if Culberson had admitted to possession the gun, that would not preclude Defendant from constructively possessing it as well.

"Possession may be either actual or constructive and it need not be exclusive but may be joint." *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973), *abrogated on other grounds by Scarborough v. United States*, 431 U.S. 563, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977) (citing *United States v. Black*, 472 F.2d 130 (6th Cir. 1972); *United States v. Holt*, 427 F.2d 1114 (8th Cir. 1970)). Constructive possession exists "when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *Id.* "Proof that 'the person has dominion over the premises where the firearm is located' is sufficient to establish constructive possession." *United States v. Kincaide*, 145 F.3d 771, 782 (6th Cir. 1998) (quoting *United States v. Clemis*, 11 F.3d 597, 601 (6th Cir. 1993) (per curiam)). Joint possession exists when two or more people share actual or constructive possession over an object. *United States v. Chesney*, 86 F.3d 564, 573 (6th Cir. 1996) ("[T]wo or more persons may share possession of an item.").

The firearm at issue was discovered inside Defendant's residence, along with 2,500 oxycodone pills, and $200,000.00 cash. [R. 296 at 2 ¶ 3]. Defendant stipulated his possession of all of those items. [R. 296 at 2 ¶ 3]. Even if Defendant had denied possession of those items and the gun, however, Defendant also stipulated that the United States could prove beyond a reasonable doubt his possession of those items and the gun. [*Id.*]. Further, even if Culberson had admitted possession of the gun, that would not preclude Defendant's joint possession of that same gun with Culberson, as the gun was found in Defendant's residence, as he stipulated. [*Id.*].

Defendant has provided this Court with no factual evidence of an actual conflict. Likewise, Defendant has failed to produce evidence of a connection between Culberson's denial of possession of a gun, and Defendant's admission to possession of a gun, or even that a connection between the two would be relevant. Thus, there are insufficient facts to find an adverse effect as well, even assuming the presence of a conflict. Further, no case was ever brought against Culberson, Culberson and Defendant were not co-defendants, and Defendant has produced no evidence that Culberson acted as a witness against Defendant. There are simply insufficient facts to support a claim of an unconstitutional conflict of interest in this case.

II. Whether Defendant Knowingly and Voluntarily Entered his Plea

Defendant's second and third arguments are that counsel's ineffective assistance prevented him from knowingly and voluntarily entering his guilty plea, and that Defendant's counsel misrepresented the crime and plea agreement to Defendant, coercing him to enter a guilty plea to avoid trial. [R. 447-1 at 8-21]. Defendant makes a variety of claims in support of these two assertions. In sum, Defendant argues his counsel failed to understand the crimes with which Defendant was charged, [*Id.* at 8-11]; failed to investigate the evidence against Defendant and failed to challenge the amount of drugs attributed to Defendant, [*Id.* at 11-12, 16-18]; failed to challenge the use of unlawfully obtained evidence against Defendant, [*Id.* at 12-15]; failed to object to Defendant's leadership enhancement, [*Id.* at 18-19]; and coerced Defendant into entering a plea agreement, rather than proceed to trial, [*Id.* at 19-21]. Each of these arguments-all of which fail-shall be addressed in turn.

A. Whether Counsel Misunderstood the Nature of the Offense

Defendant alleges his counsel mistook the 21 U.S.C. § 841 offense (possession with intent to distribute) to which Defendant plead for an offense under 21 U.S.C. § 846 (conspiracy). [*Id.* at 8-11]. Defendant did plead guilty to an offense under 21 U.S.C. § 841. [R. 298]. Nonetheless, "[c]ounsel McCoy believes that **Wingate** is instead charged with 21 U.S.C. § 846." [R. 447-1 at 8]. Defendant alleges this "confusion" resulted in prejudice. [*Id.*]. Here, however, there was no mistake: Defendant *was* charged with an offense under 21 U.S.C. § 846. [R. 9 at 2, *Count 2*].3 That charge was in addition to the charge Defendant plead to under 21 U.S.C. § 841. [R. 9 at 7, *Count 17*]. Therefore Defendant's counsel was exactly right in believing Defendant had been charged with an offense under 21 U.S.C. § 846. There was no mistake. Defendant's counsel cannot be ineffective for being correct about his client's charges.

B. Whether Counsel Adequately Investigated and Challenged the Evidence

Defendant alleges his counsel failed to independently investigate the drug weight attributed to Defendant, resulting in prejudice. [R. 447-1 at 11-12]. This accusation, however, neglects to acknowledge the fact that Defendant-cooperating with the United States-stipulated being "responsible for conspiring to distribute approximately 20,000 Oxycodone 30 milligram pills." [R. 296 at 1-3 ¶ 3]. Similarly, Defendant's counsel attests that Defendant "was in fact cooperating with law enforcement with most of the information concerning weights and amounts on the plea agreement coming from him." [R. 466-1 at 4 ¶ 5; *see also* R. 296 at 1-3 ¶ 3]. Defendant approved of his stipulation to the type and weight of the drugs he distributed at his Rearraignment as well. [R. 337 at 29 ¶ 24-30 ¶ 8 (THE COURT: "Is the information that's contained in paragraph 3 of your plea agreement true and correct to the best of your knowledge and belief? You can take a moment to look over that again, if you'd like." [] DEFENDANT: "Yeah, I agree." THE COURT: "Is that correct, Mr. **Wingate**?" DEFENDANT: "Yes, sir.")]. Defendant has failed to produce evidence that his counsel failed to independently investigate his drug weight. Further, the only evidence in the record reflects Defendant's own admission to the type and weight of the drugs he distributed. Thus, no prejudice could be inferred, even if deficient performance were presumed.

Defendant also alleges his counsel failed to seek a reduction in the quantity of drugs attributed to Defendant for his self-use of those drugs. [R. 447-1 at 16-18]. Defendant produces no evidence that he requested his counsel to seek such a reduction. Defendant's counsel attests, however, that he did seek a reduction in Defendant's base offense level under the United States Sentencing Guidelines for Defendant's personal use of the drugs. [R. 466-1 at 4 ¶ 5]. In any event, notes of Defendant's personal use of the drugs he distributed appear throughout his Presentence Report and his Sentencing Memorandum, which was prepared by his counsel. [*See, e.g.*, R. 287 at 3 ("Paragraph 86's reference [in Defendant's Presentence Report] to '25 to 30 oxycodone 80 milligram tablets per day' naturally sounds impossible to anyone familiar with the drug's potency. Yet Jeff knows, sadly, that it is possible, particularly when one suffers pain so steadily that it makes one ponder suicide."); R. 305, *Defendant's Presentence Report*, ¶¶ 36, 78, 82, 86]. Defendant has produced no evidence to prove his claim. The only evidence in the record negates his claim. Counsel made direct reference to Defendant's self-use in Defendant's Sentencing Memorandum. In the absence of evidence to support it, Defendant's claim fails. *Strickland*, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Defendant also argues his counsel failed to challenge the consideration of evidence unlawfully obtained against Defendant. [R. 447-1 at 12-15]. Specifically, Defendant argues his counsel should have objected to the consideration of wire-tap evidence he believes was obtained without probable cause by filing a motion to suppress. [*But see* R. 466-1 at 3 ¶ 4 (counsel attesting that, in his "professional opinion," the affidavit through which the wire taps were permitted established probable

cause.)]. This "[C]ourt must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Aside from his statements, Defendant has put forth no evidence that a motion to suppress was called for. Similarly, Defendant has put forth no evidence that he requested his counsel to file a motion to suppress at any point during the criminal proceedings of his case. [R. 447-1 at 12-15]. And Defendant stipulated his guilt not only through his Plea Agreement but in open court at his Rearraignment. [*See generally* R. 269; R. 337]. In the absence of evidence to support of his claims, Defendant fails to rebut the presumption that his counsel's conduct was reasonable. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

C. Whether Counsel was Ineffective for Failing to Object to Defendant's Leadership Role

Defendant argues that his counsel was ineffective for failing to object to the leadership enhancement recommended under the United States Sentencing Guidelines, [R. 305 at 10 ¶ 53], and his Plea Agreement, [R. 296 at 3 ¶ 5(d)]. Defendant is insistent that the United States' evidence of his leadership role is nothing more than evidence of a buyer-seller relationship. [R. 447-1 at 18-19]. Defendant, who plead guilty to possession and intent to distribute oxycodone under 21 U.S.C. § 841, believes his counsel's "failure to object to the leadership role serves as further proof that McCoy was confused as to what crime with which **Wingate** was charged." [*Id.* at 19]. Defendant forgets, however, that he stipulated sufficient facts in his Plea Agreement and at his Rearraignment to justify a leadership enhancement under U.S.S.G. § 3B1.1(a) (requiring a four-level enhancement because the Defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive). [R. 296 at 2 ¶ 3; *id.* at 3 ¶ 5(d); *see generally* R. 337]. Defendant, in his Plea Agreement, specifically stipulated that, after obtaining oxycodone and heroin from out of state suppliers, "he would consign to Gonzalez 100 Oxycodone 30 milligram pills at a time. . . . Gonzalez, and others working for him, including Spence, would distribute the pills to their customers. Gonzalez would collect the money, pay **Wingate** for the consigned pills, and obtain more pills for distribution." [R. 296 at 2 ¶ 3].

It is true that Defendant's counsel did not object to Defendant's leadership role. [R. 466-1 at 4 ¶ 6]. But this is because, in counsel's professional judgment, "Mr. **Wingate** was clearly the leader and organizer of the drug ring to distribute oxycodone and heroin in Montgomery County, Kentucky." [*Id.*]. Further, as counsel explains, "[i]n numerous interviews with law enforcement, he admitted his leadership. In telephone conversations by various co-defendants, he was referred to as 'Big Dog.'" [*Id.*]. And, "[i]n paragraph 5(d) of the plea agreement, **Wingate** admitted being a leader." [*Id.*; R. 296 at 3 ¶ 5(d)]. "By definition," counsel cannot be ineffective for a failure to raise an issue that lacks merit. *Greer v. Mitchell*, 264 F.3d 663, 677 (6th Cir. 2001). In addition to all of the above, Defendant specifically stated his guilt, and the fact that the United States could prove his guilt if required, at his Rearraignment:

> THE COURT: If the case proceeded to trial, the government would be required to prove two elements to obtain a conviction under Count 17. First, that you possessed a quantity of pills containing oxycodone, which is a Scheduled II controlled substance; and, second, that you possessed the pills with the intent to distribute. I said there were two. There are actually three. And, third, you did so knowingly and intentionally. If this case proceeded to trial, do you believe the government could prove those three elements to obtain a conviction and could do so by the standard that's required, which is beyond a reasonable doubt?
>
> DEFENDANT: Yes, sir.[R. 337 at 30 ¶ 9-22]. Defendant's argument here is misplaced. He puts forward no affirmative evidence in support of his claim, and the only evidence in the record with regard to his leadership role is his own admission of being a leader in his Plea Agreement and

Rearraignment. [*See, e.g., id.*; R. 296 at 3 ¶ 5(d)]. Defendant's argument fails as misplaced and for an absence of evidence to support it.

Defendant's "buyer-seller" argument is similarly unsuccessful. The "buyer-seller" rule is an exception to the general conspiracy rule, criminalized by 21 U.S.C. § 846, which provides that where the purchaser of illicit substances is also the ultimate user of those substances, and there is an absence of evidence tending to show an agreement to distribute with others, conspiracy will not be found. *See United States v. Anderson*, 89 F.3d 1306, 1310-11 (6th Cir. 1996); *United States v. Cole*, 59 F. App'x 696, 699 (6th Cir. 2003); *United States v. Deitz*, 577 F.3d 672, 680-81 (6th Cir. 2009). This rule, however, has no application in this case. Defendant, although *charged* with conspiracy under 21 U.S.C. § 846, was not *convicted* of that crime. [R. 296; R. 298]. Rather, Defendant plead guilty and was convicted for possession and intent to distribute oxycodone under 21 U.S.C. § 841, [R. 296; R. 298]. The United States moved to dismiss Defendant's conspiracy charge, [R. 296], and he was not convicted of that crime, [R. 298]. As such, the buyer-seller rule does not apply. Defendant's argument is misplaced.

D. Whether Defendant was Coerced into Entering his Plea Agreement

Defendant's final argument in support of his position is that his counsel coerced him into signing his Plea Agreement, rather than proceed to trial, [R. 447-1 at 19-21]. Defendant also alleges his counsel promised him a minimum security camp and other accoutrements of a low-risk prisoner. [*Id.*]. The transcript of Defendant's Rearraignment, however, leads to the conclusion that Defendant's decision to plead guilty to possession and intent to distribute oxycodone under 21 U.S.C. § 841 was entirely his own. First, Defendant was fully apprised of the charges against him. Defendant, under oath, affirmed his understanding of the charges against him, the accuracy of the factual statements in his Plea Agreement, and affirmed his guilt:

> THE COURT: Count 17 alleges that on or about June 12th, 2014, in Madison County, in the Eastern District of Kentucky, you did knowingly and intentionally possess with intent to distribute a quantity of pills containing oxycodone, a Schedule II controlled substance, in violation of Title 21 of the United States Code, Section 841(a)(1). . . . Mr. **Wingate**[,] I would like for you to tell me at this time, if you can, in your own words what it was that you did to be guilty of the substantive charge.
>
> DEFENDANT: I had been to Westin, Florida, to go to Cleveland Clinic to have a Rituxan infusion. And while I was there, I met a guy that I had met through a pain clinic situation, not exactly him, but I met somebody at pain clinic situation a year or so ago that introduced me to this guy. And I had picked up the oxycodone pills from him after I went to the hospital there in Westin, Florida. Then on the way home I got pulled over in a traffic stop.
>
> THE COURT: Alright. Did this occur, the incident that you're telling me about, on or about June 12th of 2014?
>
> DEFENDANT: Yes, sir. I think it was June 12th.
>
> THE COURT: All right. Did the traffic stop occur in Madison County, which is in the Eastern District of Kentucky?
>
> DEFENDANT: Yes, it did.
>
> THE COURT: And the pills that you had were, in fact, oxycodone pills; is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Was it your intention to distribute a quantity of those pills-

DEFENDANT: Yes, sir.

THE COURT: -to other individuals? Your plea agreement has a factual statement that's contained, I believe, in paragraph 3, which is set forth in your plea agreement on pages 2 and then on the top of page 3 as well. I know you've had the opportunity to review that factual statement with your attorney. Is the information that's contained in paragraph 3 of your plea agreement true and correct to the best of your knowledge and belief? You can take a moment to look over that again, if you'd like.

COUNSEL: If the Court please, we agree with the statement.

DEFENDANT: Yeah, I agree.

THE COURT: Is that correct, Mr. **Wingate**?

DEFENDANT: Yes, sir.

THE COURT: If the case proceeded to trial, the government would be required to prove two elements to obtain a conviction under Count 17. First, that you possessed a quantity of pills containing oxycodone, which is a Scheduled II controlled substance; and, second, that you possessed the pills with the intent to distribute. I said there were two. There are actually three. And, third, you did so knowingly and intentionally. If this case proceeded to trial, do you believe the government could prove those three elements to obtain a conviction and could do so by the standard that's required, which is beyond a reasonable doubt?

DEFENDANT **WINGATE**: Yes, sir.

THE COURT: And is it your intention to enter a plea of guilty to Count 17 because you are, in fact, guilty of that charge and for no other reason?

DEFENDANT: Yes, sir.

. . .

THE COURT: Mr. **Wingate**, what is your plea to Count 17 and to the forfeiture allegation?

DEFENDANT: Guilty.[R. 337 at 26 ¶ 20-27 ¶ 1, 28 ¶ 14-17; *id.* at 28 ¶ 18-29 ¶ 2; *id.* at 29 ¶ 3-5; *id.* at 29 ¶ 6-31 ¶ 1; *id.* at 31 ¶ 20-22]. Defendant was also fully apprised of the potential penalties against him, the factors to be considered by the court in determining his penalties, and the fact that the penalties recommended in his Plea Agreement were not binding on the court. [*Id.* at 15 ¶ 21-20 ¶ 16, *see, e.g., id.* at 23 ¶ 10-17 (THE COURT: "[I]f the sentence that's imposed in your case would be more severe than you expect, while you might be able to appeal the sentence under the circumstances that we discussed, generally that would not be a reason to withdraw from the plea agreement itself, that this would still be binding [on you]. You do understand that?" DEFENDANT: "Yes, sir."].

Finally, Defendant assured the court he had not been coerced, and that the Plea Agreement was entirely his own. [*Id.* at 15 ¶ 12-20].

Defendant, under oath, assured the court that he had not been threatened, coerced, or otherwise forced to enter his plea agreement:

THE COURT: Other than what's contained in the plea agreement and the supplement, has anyone else made any promises to you that have caused you to either sign these documents or to enter a guilty plea this morning?

DEFEDANT: No, sir.

THE COURT: Has anyone made any threats or in any way forced you to either sign the documents or to enter a guilty plea?

DEFENDANT: No, sir.[*Id.*]. Rather than proceed to trial, Defendant voluntarily and informedly chose to openly plead guilty to possession and intent to distribute oxycodone. [*Id.*]. Now, Defendant seeks to refute his previous statements with this Motion to Vacate. Based on the evidence contained in the Record, however, it does not appear Defendant's counsel was deficient in any way. Nowhere does Defendant provide evidence that his decisions were involuntary, [*See generally* R. 447-1; R. 447-2; R. 472], and the transcript of Defendant's Rearraignment belies his claims, [*See generally* R. 337]. This Court cannot find that counsel coerced Defendant into signing his Plea Agreement, when there is zero evidence to support such a finding, and the only evidence in the record belies the claim.

This Court, assuming for sake of argument the deficient performance of Defendant's attorney, also can find no prejudice here. The court ensured Defendant understood the consequences of his statements, his potential sentence, and ensured Defendant was voluntarily and knowingly entering his plea. [*See generally* R. 337, *Transcript of Rearraignment*]. "The established general rule is that where an adequate guilty plea hearing has been conducted, an erroneous prediction or assurance by defense counsel regarding the likely sentence does not constitute grounds for invalidating a guilty plea on grounds of ineffective assistance of counsel." *Sepulveda v. United States*, 69 F. Supp. 2d 633, 641 (D.N.J. 1999) (holding that an adequate Fed. R. Crim. P. 11 colloquy "eliminates any arguable prejudice" in an ineffective assistance of counsel claim with regard to the outcome of a guilty plea); *see also United States v. Stephens*, 906 F.2d 251, 253 (6th Cir. 1990). For "[t]he question, of course, is not whether counsel was topnotch, but whether he or she functioned at the level required by the Sixth Amendment." *Greer v. Mitchell*, 264 F.3d 663, 673 (6th Cir. 2001). Defendant has failed to produce any evidence sufficient to overcome the presumption of adequate counsel at plea negotiation. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And, even assuming inadequate counsel, no prejudice can be said to have resulted, because of the court's Fed. R. Crim. P. 11 colloquy. *Sepulveda*, 69 F. Supp. 2d 633. Thus, Defendant's counsel was not ineffective. His second and third arguments fail.

III. Whether Defendant's Attorney was Ineffective for Cumulative Error

Defendant's final argument is one of cumulative error. [R. 447-1 at 21]. Under that doctrine, "[t]he cumulative effect of errors that are harmless by themselves can be so prejudicial as to warrant a new trial." *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012). In order for the doctrine to apply, however, the cumulative effect of the errors must be so severe as to deprive the defendant the fundamental guarantees of due process. *Id.* This doctrine has no application in this case. "Where, as here, no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal." *Id.* (citing *United States v. Deitz*, 577 F.3d 672, 697 (6th Cir. 2009)). Defendant's fourth and final argument fails.

CONCLUSION

Although it is the duty of this Court to review Defendant's *pro se* Motion to Vacate, according to "less stringent standards than formal pleadings drafted by lawyers," there is no question that Defendant has failed to state a basis on which his Motion to Vacate should be granted. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *see also Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant has failed to support his allegation of ineffective assistance of counsel. Accordingly, the undersigned recommends that Defendant's Motion

to Vacate, [R. 447], be DENIED. Likewise, the undersigned also recommends that this action be dismissed with prejudice and stricken from the court's active docket.

Particularized objections to this Report and Recommendation must be filed within fourteen (14) days of the date of service of the same or further appeal is waived. 28 U.S.C. § 636(b)(1); *United States v. Campbell*, 261 F.3d 628, 632 (6th Cir. 2001); *Bituminous Cas. Corp. v. Combs Contracting Inc.*, 236 F. Supp. 2d 737, 749-50 (E.D. Ky. 2002). Generalized objections or objections that require a judge's interpretation are insufficient to preserve the right to appeal. *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995). A party may file a response to another party's objections within fourteen (14) days after being served with a copy thereof. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

This the 25th of January, 2018.

Signed By:

/s/ Edward B. Atkins

Edward B. Atkins

United States Magistrate Judge

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeff Wingate

Date: 11-13-18