A P P E N D I X A-1

1. ORDER DENYING EN BANC REQUEST DATED DECEMBER 12, 2018; ORDER DENYING CERTIFICATE OF APPEALABILITY FROM A PANEL OF JUDGE'S DATED NOVEMBER 27, 2018; PETITIONER'S PETITION FOR PANEL REHEARING EN BANC.

No. 18-5432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 12, 2018
DEBORAH S. HUNT, Clerk

CALVIN J. REID,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: CLAY, GILMAN, and WHITE, Circuit Judges.

Calvin J. Reid petitions for rehearing en banc of this court's order entered on August 28, 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. 18-5432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 27, 2018
DEBORAH S. HUNT, Clerk

CALVIN J. REID,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: CLAY, GILMAN, and WHITE, Circuit Judges.

Calvin J. Reid, a 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

A P P E N D I X A-2

1. ORDEROF DENIAL FROM THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT, DATED AUGUST 28, 2018

No. 18-5432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CALVIN J. REID,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Calvin J. Reid, a pro se federal prisoner, appeals the judgment of the district court denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Reid has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He has also filed a motion to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In November 2012, Reid was convicted of two counts of knowingly transporting a thirteen-year-old in interstate commerce with intent that the minor engage in illegal sexual activity, in violation of 18 U.S.C. § 2423(a). Reid represented himself at trial without standby counsel but was represented by counsel at sentencing. The district court imposed a term of imprisonment of 198 months. This court affirmed. *United States v. Reid*, 751 F.3d 763 (6th Cir. 2014).

In February 2015, Reid filed a 28 U.S.C. § 2255 motion to vacate, raising the following claims: (1) he was denied the right to counsel at a critical stage when the district court denied his motion for a new trial without appointing counsel for him; (2) appellate counsel was ineffective by failing to raise the issue regarding the denial of his motion for a new trial; (3) he was denied

the effective assistance of counsel at sentencing where counsel failed to provide the court with crucial documents regarding Reid's criminal history; (4) appellate counsel was ineffective by providing the appellate court with inaccurate information regarding Reid's sentence and the voir dire proceedings; (5) he was denied the right to a fair trial when the district court had ex parte communications with the government regarding the admission of evidence under Federal Rule of Evidence 404(b); (6) he was denied the right to a fair trial where the charges contained in the indictment were materially different than the facts presented at trial; and (7) he was denied due process when the government failed to provide him with exculpatory evidence that was material to his innocence. Reid later filed a motion to amend his § 2255 motion by adding additional claims that appellate counsel was ineffective for failing to: (8) argue that the government's presentation of "simulated facts" to the grand jury denied Reid a fair trial; (9) argue that the district court erred by denying Reid's pre-trial motions to dismiss the indictment; (10) effectively present the issue of the denial of Reid's motion for a new trial; and (11) effectively present the issue of Reid's right to counsel at the hearing on his motion for a new trial. The district court determined that claims (8) and (9) were new and did not relate back to Reid's original § 2255 motion and denied him permission to add those claims. The court determined that claims (10) and (11) supplemented or clarified the second claim raised in Reid's original motion and agreed to consider those claims in the court's analysis of the second claim in its dispositive order.

In that dispositive order, the district court concluded that: (1) Reid was not denied counsel at a critical stage because his waiver of counsel was valid and there is no clearly established federal right to counsel at a hearing on a motion for new trial; (2) as the result of the court's conclusion with respect to issue (1), appellate counsel was not ineffective for failing to raise an issue on appeal regarding the denial of counsel at the motion for a new trial; (3) appellate counsel was not ineffective for failing to present documents on appeal that Reid did not request to be presented and which would not have altered the outcome of the appeal; (4) there was no support for his allegation that appellate counsel provided the court with inaccurate information; (5) there was no ex parte hearing with the government; (6) the proof at

trial did not alter or broaden the scope of the indictment; and (7) Reid was aware of the existence of the documents that he asserts the prosecution failed to provide to him, and Reid failed to demonstrate they were material or exculpatory. Because the district court determined that Reid's claims lacked merit, it denied his § 2255 motion and declined to issue a COA.

In his application to this court, Reid requests a COA on all issues presented below. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "[A] COA does not require a showing that the appeal will succeed," *id.* at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

In his first and second claims, Reid argued that he was denied the right to counsel at a critical stage when the district court denied his motion for a new trial without first appointing him counsel, and appellate counsel was ineffective by failing to raise the issue on direct appeal. The Supreme Court has never held that a hearing on a motion for a new trial is a critical stage of a criminal proceeding, however, and specifically declined to do so in *Marshall v. Rodgers*, stating that "[t]he Court expresses no view on the merits of the underlying Sixth Amendment principle" that a "post-trial, preappeal motion for a new trial is a critical stage of the prosecution." 569 U.S. 58, 61, 64 (2013). Further, because the motion for a new trial was not a critical stage, Reid has not made a substantial showing that appellate counsel was ineffective for failing to challenge the district court's failure to appoint counsel. *See Coleman v. Bergh*, 804 F.3d 816, 819 (6th Cir. 2015). These claims do not deserve encouragement to proceed further.

In his third claim, Reid argued that counsel was ineffective at sentencing for failing to provide the court with crucial information regarding his criminal history. An ineffective assistance claim has two components: a petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S.

668, 687 (1984). To establish deficient performance Reid "must demonstrate that counsel's representation fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). It is Reid's burden to make this showing by "identify[ing] the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Phillips v. Bradshaw*, 607 F.3d 199, 209 (6th Cir. 2010) (internal citations omitted).

The record establishes that counsel filed an objection to Reid's criminal history score at sentencing, which was overruled. Although Reid continues to assert that his criminal history score should have been calculated differently, there is no indication that counsel performed unreasonably at sentencing. Rather, counsel challenged the points that Reid believed were assessed in error and the district court determined—after consulting documentation from the Michigan courts—that counsel's position was not the correct interpretation of the Sentencing Guidelines. That finding was upheld on direct appeal. *Reid*, 751 F.3d at 768-69. Reid failed to make a substantial showing that any additional documentation would have changed the district court's ruling, and thus reasonable jurists would not disagree that counsel was not ineffective. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). This claim does not deserve encouragement to proceed further.

Reid's fourth claim relates to his third claim in that he argued that appellate counsel was ineffective by providing the appellate court with inaccurate information regarding his sentence and preemptory challenges during the voir dire proceedings. He also argued that appellate counsel raised only claims that he was told to raise by the judge and could have presented the arguments on appeal more clearly and with better authority. Reasonable jurists would not debate the district court's conclusion that the record did not support a finding that counsel provided inaccurate information to this court on appeal. Regarding's Reid's assertion that, essentially, appellate counsel should have done a better job on appeal, Reid's conclusory allegation of ineffective assistance does not deserve encouragement to proceed further.

In his fifth claim, Reid alleged that he was denied the right to a fair trial when the district court had ex parte communications with the government regarding the admission of evidence

under Federal Rule of Evidence 404(b). There is no indication that any such contact occurred, however. This claim does not deserve encouragement to proceed further.

In Reid's sixth claim, he argued that he was denied the right to a fair trial where the charges contained in the indictment were materially different than the facts presented at trial. In his seventh claim, he argued that he was denied due process when the government failed to provide him with exculpatory evidence that was material to his innocence. Reid did not raise these arguments on direct appeal, and it is well-established that a § 2255 motion "is not a substitute for a direct appeal." *Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). Claims that could have been raised on direct appeal, but were not, will not be entertained via a motion under § 2255 unless the petitioner shows: (1) cause and actual prejudice to excuse his failure to raise the claims previously; or (2) that he is "actually innocent" of the crime. *Bousley v. United States*, 523 U.S. 614, 622 (1998). Reid has not attempted to make either showing. These claims do not deserve encouragement to proceed further.

Reid's application for a COA is **DENIED**. His motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

A P P E N D I X A-3

1. ORDER OF DENIAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE DATED MARCH 26, 2018.

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

CALVIN JAMES REID,

Movant,

v.

Cv. No. 2:15-cv-02118-JPM-tmp
Cr. No. 2:12-cr-20029-JPM-1

UNITED STATES,

Respondent.

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

Before the Court is the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion") filed by Movant, Calvin James Reid, Bureau of Prisons ("BOP") register number 25278-076, an inmate at the Federal Correctional Institution ("FCI") in Coleman, Florida. (§ 2255 Motion, ECF No. 1.) The United States has filed a Response contending that Reid's § 2255 Motion is without merit. (Response, ECF No. 28.) Reid has filed a Reply. (Reply, ECF No. 34.) For the reasons stated below, the Court has determined that a hearing is not necessary. The § 2255 Motion lacks merit and is DENIED.

I. BACKGROUND

A. Criminal Case Number 2:12-cr-20029-JPM-1

On February 22, 2012, a federal grand jury in the Western District of Tennessee returned a three-count indictment against Reid, charging him with two counts of transportation of a minor

with intent to engage in criminal sexual activity, in violation of 18 U.S.C. §§ 2423 and 2 (Counts One and Two), and one count of production of child pornography, in violation of 18 U.S.C. §§ 251(a) and 2 (Count Three). (Indictment, Criminal ("Cr.") Case No. 2:12-cr-20029-JPM-1, Cr. ECF No. 1.) The factual basis for the charges is stated in the presentence report ("PSR"):

> 4. According to the investigative report, on December 13, 2011, Teresa Harper, mother of victim/J.H., went to the Memphis Police Department Sex Crimes Bureau (MPDSCB) Memphis, Tennessee, and reported that on December 2, 2011, Calvin James Reid took her 13 year old daughter, J.H., to Las Vegas, Nevada. Subsequently, the MPDSCB initiated an investigation with the assistance of the Federal Bureau of Investigation (FBI). The investigation revealed that Calvin James Reid, who was 48 years old at the time, was a friend of J.H.'s family. In November 2011, shortly after J.H.'s thirteenth birthday, she began spending time with another family friend, Alicia, whose sister, Beverly Matthews, was dating Reid. Alicia and J.H. frequently went to Beverly's house and Reid would be there. Reid eventually sent J.H. a text message telling her that he had a crush on her. From that time on, J.H. and Reid talked on the phone every day.
>
> 5. In November 2011, J.H. spent the night at Beverly's house and slept on the sofa. During the night, Reid went to J.H. and had intercourse with her. J.H. had not had sexual intercourse with anyone prior to that time. Reid did not use a condom, and he told her not to tell anyone because he would get in trouble. J.H. and Reid had sex another time in Matthews' house and on another occasion in Reid's truck.
>
> 6. On November 12, 2011, Reid told J.H. that he was going to a worksite in Mississippi, and J.H. asked to go along. Instead of going to the worksite, Reid took J.H. to a Sleep Inn motel in Horn Lake, Mississippi, and they had sex. Reid paid for the motel room and registered the room for two adults. J.H. advised that Reid used his cell phone camera and took a picture of her walking around naked in the room.
>
> 7. On December 2, 2011, J.H. decided she wanted to run away from home. She was aware that Reid was planning to break-up with Beverly Matthews and leave Memphis. J.H. asked Reid to take her with him, although she did not know where he was going. Reid and J.H. left Memphis and drove to somewhere near New Mexico where they spent the night. Reid and J.H. performed oral sex on each other, but J.H. did not want to. They drove to Reid's niece's home in Las Vegas, and Reid introduced J.H. as his daughter. During the trip, Reid took J.H.'s cell phone and restricted her use of his cell phone. Reid returned J.H.'s cell phone to her when they arrived in Las Vegas.

8. On approximately December 4, 2011, J.H. decided that she wanted to return to Memphis. J.H. managed to contact her sister, Jasmine Harper, in Memphis from a bathroom in a grocery store, and she also walked to a nearby restaurant to contact her mother. J.H.'s family instructed her to contact the police. The Las Vegas police department arrived at the restaurant and took J.H. to Reid's niece's home to get her belongings. Reid was not at the residence. Reid later sent J.H. a text message stating that he knew she was with the police and that he was leaving. After obtaining her belongings, the Las Vegas Police took J.H. to a facility called Westcare where she remained until she returned to Memphis.

9. On December 12, 2011, J.H. and her mother went to the MPDSCB. J.H. gave a statement in which she referred to Reid as her "boyfriend." J.H. stated that Reid did not force her to have sex with him, but he did make her perform oral sex, which she did not want to do.

10. There have been no sexual images or pictures found of J.H.

(PSR ¶¶ 4-10.)

The Court presided over a jury trial from November 13, 2012, to November 15, 2012. (Minutes ("Min.") Entry, Cr. ECF Nos. 55, 59, & 60.) Defendant Reid's motion for judgment of acquittal was heard and granted on Count Three. (Min. Entry, Cr. ECF No. 60.) On November 15, 2012, the jury found Reid guilty of Counts One and Two. (Order on Jury Verdict, Cr. ECF No. 62.) On May 31, 2013, the Court presided over a sentencing hearing and imposed a sentence of 198 months on each count, to be served concurrently. (Judgment, Cr. ECF No. 98.) Reid appealed. (Notice of Appeal, Cr. ECF No. 100.) The Sixth Circuit affirmed the judgment. United States v. Reid, 751 F.3d 763 (6th Cir. 2014).

B. Case Number 2:15-cv-2188-JPM-tmp

On February 18, 2015, Reid filed the § 2255 Motion alleging:

1. His Sixth Amendment right to counsel was infringed when the Court denied his pro se motion for new trial (ECF No. 1 at 4);

2. Appellate counsel provided ineffective assistance by failing to appeal the "denial of Defendant's motion for new trial" and "denial of counsel" (id. at 5);

3. Sentencing counsel provided ineffective assistance by failing to provide the Court with crucial documents about Reid's prior convictions (id. at 7);

4. Appellate counsel provided ineffective assistance by providing "inaccurate information, conced[ing] to convictions," "misrepresent[ing]" the issues, and failing to brief issues with "arguably more contrary authority" (id. at 8);

5. Reid was denied his right to a fair trial when the Court had ex parte communications with the government about allowing the admission of Fed. R. of Evidence 404(b) material (id. at 12);

6. The indictment was subject to dismissal because of a material variance in the proof (id. at 13); and

7. Reid was denied his right to a fair trial when the United States failed to provide him with exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2255(a),

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

"A prisoner seeking relief under 28 U.S.C. § 2255 must allege either: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." Short v. United States, 471 F.3d 686, 691 (6th Cir. 2006) (citation and internal quotation marks omitted).

A § 2255 motion is not a substitute for a direct appeal. See Ray v. United States, 421 Fed. 3d 686, 691 (6th Cir. 2006) (internal quotation marks omitted). "[N]onconstitutional claims

that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." Stone v. Powell, 428 U.S. 465, 477 n.10 (1976). "Defendants must assert their claims in the ordinary course of trial and direct appeal." Grant v. United States, 72 F.3d 503, 506 (6th Cir. 1996). This rule is not absolute:

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

Id.

Even constitutional claims that could have been raised on direct appeal, but were not, will be barred by procedural default unless the defendant demonstrates cause and prejudice sufficient to excuse his failure to raise these issues previously. El-Nobani v. United States, 287 F.3d 417, 420 (6th Cir. 2002) (withdrawal of guilty plea); Peveler v. United States, 269 F.3d 693, 698-99 (6th Cir. 2001) (new Supreme Court decision issued during pendency of direct appeal); Phillip v. United States, 229 F.3d 550, 552 (6th Cir. 2000) (trial errors). Alternatively, a defendant may obtain review of a procedurally defaulted claim by demonstrating his "actual innocence." Bousley v. United States, 523 U.S. 614, 622 (1998).

"In reviewing a § 2255 motion in which a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.'" Valentine v. United States, 488 F.3d 325, 333 (6th Cir. 2007) (quoting Turner v. United States, 183 F.3d 474, 477 (6th Cir. 1999)). "'[N]o hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" Id. (quoting Arredondo v. United States, 178 F.3d 778, 782 (6th Cir.

1999)). A defendant has the burden of proving that he is entitled to relief by a preponderance of the evidence. Pough v. United States, 442 F.3d 959, 964 (6th Cir. 2006).

A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in Strickland v. Washington, 466 U.S. 668 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 688.

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

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

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.[1] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

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

Richter, 562 U.S. at 104; see also id. at 111-12 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the

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

outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable." (citations omitted)); Wong v. Belmontes, 558 U.S. 15, 27 (2009) (per curiam) ("But Strickland does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." (citing Strickland, 466 U.S. at 694)).

A criminal defendant is entitled to the effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 396 (1985). The failure to raise a nonfrivolous issue on appeal does not constitute *per se* ineffective assistance of counsel, as "[t]his process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (internal quotation marks and citation omitted). Claims of ineffective assistance of appellate counsel are evaluated using the Strickland standards. Smith v. Robbins, 528 U.S. 259, 285-86 (2000) (applying Strickland to claim that appellate counsel rendered ineffective assistance by failing to file a merits brief); Smith v. Murray, 477 U.S. at 535-36 (failure to raise issue on appeal). To establish that appellate counsel was ineffective, a prisoner

> must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [the prisoner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Smith v. Robbins, 528 U.S. at 285 (citation omitted).[2]

[2]The Sixth Circuit has identified a nonexclusive list of factors to consider when assessing claims of ineffective assistance of appellate counsel:

An appellate counsel's ability to choose those arguments that are more likely to succeed is "the hallmark of effective appellate advocacy." Matthews v. Parker, 651 F.3d 489, 523 (6th Cir. 2011) (quoting Caver v. Straub, 349 F.3d 340, 348 (6th Cir. 2003)). It is difficult to show that appellate counsel was deficient for raising one issue, rather than another, on appeal. See id. "In such cases, the petitioner must demonstrate that the issue not presented was clearly stronger than issues that counsel did present." Id. Defendant must show that "there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." McFarland v. Yukins, 356 F.3d 688, 699 (6th Cir. 2004).

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

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's

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1. Were the omitted issues "significant and obvious?"
2. Was there arguably contrary authority on the omitted issues?
3. Were the omitted issues clearly stronger than those presented?
4. Were the omitted issues objected to at trial?
5. Were the trial court's rulings subject to deference on appeal?
6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
7. What was the appellate counsel's level of experience and expertise?
8. Did the petitioner and appellate counsel meet and go over possible issues?
9. Is there evidence that counsel reviewed all the facts?
10. Were the omitted issues dealt with in other assignments of error?
11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Franklin v. Anderson, 434 F.3d 412, 429 (6th Cir. 2006) (citation omitted).

> assistance after conviction or adverse sentence." Id., at 689, 104 S. Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S., at 690, 104 S. Ct. 2052.

Richter, 562 U.S. at 105.

III. ANALYSIS

A. Issue One

Reid alleges that his Sixth Amendment right to counsel was infringed when the Court denied his pro se motion for new trial without appointing counsel. (§ 2255 Mot., ECF No. 1 at 4.) Reid alleges that he was incompetent and requested the appointment of counsel. (Id.) The United States responds that this issue should be denied because Reid knowingly, voluntarily, and repeatedly waived his right to counsel and the time between the filing of a motion for new trial and sentencing was not a "critical stage" of criminal proceedings that necessitated the appointment of counsel. (Response, ECF No. 28 at 7.)

Reid does not contend that his waiver of the right to counsel at trial was not knowing or voluntary. Reid's knowing and voluntary election to proceed to trial pro se under Faretta v. California, 422 U.S. 806 (1975), is chronicled in the United States' record citations. (See Response, ECF No. 28 at 7-11.) Reid also reaffirmed his right to act as his own counsel at sentencing. (Sentencing Transcript ("Tr."), Cr. ECF No. 87 at 5, 28.) Reid later acquiesced to the Court's suggestion and asked for the appointment of counsel at a later stage of sentencing, basing his request on indigence and "complications in sentencing," not incompetence or mental illness. (Cr. ECF No. 78.) Although Reid contends that the Court should have been aware that he had "a well-documented history of mental illness, specifically, '[p]aranoia-[s]chizophrenic'"

(§ 2255 Motion, Affidavit ("Aff."), ECF No. 1-1 at 3), he testified during his detention hearing that he had not "taken medication for over nine years" and was not required to take medication. (Detention Hearing Tr., Cr. ECF No. 31 at 47, 55.) Reid also swore to the undersigned judge that he was not on any drugs, had not been certified paranoid schizophrenic, and had never been sent for a mental evaluation with the exception of when he was five years old. (Report Date Tr., ECF No. 127 at 25.) Further, Reid did not advise the Probation Office of any mental disability other than anxiety during the preparation of the presentence report. (PSR ¶¶ 65-67.)

In the order denying Reid's motion for a new trial, this Court determined that:

> . . . Defendant voluntarily and knowingly made the decision to proceed to trial without counsel . . . and was not incompetent to represent himself.
>
> Defendant's waiver of counsel was effective. On multiple occasions this Court counseled Defendant on the risks of proceeding without counsel. (See ECF No. 12; ECF No. 20; ECF No. 22; ECF No. 33.) The Court also gave Defendant time to speak with his family about his choice to dismiss his counsel, and to give serious consideration as to whether he wanted to proceed pro se. (See ECF No. 22; ECF No. 24.) Defendant consistently reiterated his wish to proceed pro se and the record demonstrates that "[Defendant knew] what he [was] doing and his choice [was] made with eyes open." Moore [v. Haviland], 531 F.3d [393] at 402 [6th Cir. 2008] (quoting Faretta, 422 U.S. at 835) (internal quotation marks omitted).
>
> Additionally, while the Court notes that the right to self-representation is not absolute when the defendant is not mentally competent, see Indiana v. Edwards, 554 U.S. 164 (2008), the Court finds that Defendant's alleged mental condition did not interfere with his ability to represent himself. Defendant's motions and actions demonstrate a familiarity and knowledge of trial process and procedure that refute the contention that the government should not have allowed Defendant to represent himself.

(Order Denying Motion for New Trial, Cr. ECF No. 68 at 5-6.)

"The Supreme Court has told us repeatedly that the Sixth Amendment right to counsel attaches only to "critical stages" of a criminal prosecution and trial. See, e.g., Iowa v. Tovar, 541 U.S. 77, 80–81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Acknowledging that the dispositive

question is whether the hearing on a motion for a new trial is a "critical stage" of a criminal prosecution, the Sixth Circuit has opined:

> As it turns out, the Supreme Court has never held that a hearing on a motion for a new trial is a critical stage of a criminal proceeding. Indeed, in Marshall, the Supreme Court was presented with the opportunity to rule that such a "post-trial, preappeal motion for a new trial is a critical stage of the prosecution" but specifically declined to do so, saying that "[t]he Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges," *i.e.*, that the motion for a new trial constitutes a critical stage of the proceedings. 133 S. Ct. at 1449, 1451.
>
> As a result, for purposes of a prisoner's request for habeas relief under § 2254(d)(1), there is no "clearly established Federal law, as determined by the Supreme Court," creating a right to counsel at a hearing on a motion for a new trial and, thus, no basis on which Coleman's appellate attorney could have argued before the Michigan Court of Appeals that a violation of the Sixth Amendment had occurred when Coleman was allowed to appear without counsel in the absence of a valid waiver. It follows that there could be no finding of ineffective assistance of counsel in this regard and, therefore, no arguable basis for the issuance of a certificate of appealability, which we now VACATE as improvidently granted.

Coleman v. Bergh, 804 F.3d 816 at 818-19 (6th Cir. 2015).

In the instant case, Reid's waiver of counsel was valid, and most importantly, there is no clearly established federal right to counsel at a hearing on a motion for new trial. Issue One provides no basis for relief and is DENIED.

B. Issue Two

Reid alleges that appellate counsel provided ineffective assistance by failing to appeal the "denial of [his] motion for new trial" and "denial of counsel" (§ 2255 Mot., ECF No. 1 at 5.) Reid contends that counsel did not properly frame and present the issue and failed to read the pertinent record. (Supplement to § 2255 Mot., ECF No. 45-1 at 27-28.) The United States replies that appellate counsel was not ineffective by failing to raise this issue because, in the

Sixth Circuit, there is no clearly established federal right to counsel at a hearing on a motion for new trial. (Response, ECF No. 28 at 15.)

The Court's analysis and disposition of Issue One, supra at 9-11, demonstrates that Reid cannot establish a reasonable probability that, if appellate counsel had raised this issue, the outcome of his appeal would have been different. Counsel does not perform deficiently by failing to raise frivolous issues. Reid fails to establish any prejudice from appellate counsel's performance. Issue Two is DENIED.

C. Issue Three

Reid contends that sentencing counsel performed deficiently by failing to provide the Court with "crucial documents" about Reid's prior convictions, specifically, the Michigan Department of Corrections ("MIDOC") Policy Directive 03.01.135. (§ 2255 Mot., ECF No. 1 at 7, Exhibit B, ECF No. 1-5.) The United States responds that this issue provides no basis for relief because it was raised and denied on appeal. (Response, ECF No. 28 at 16.)

The PSR used the following convictions to calculate Reid's criminal history score of nine:

30.	09/13/1986 (Age 23)	Larceny over $100 17th Circuit Court; Grand Rapids, MI; Case No. 86-40416-FH	07/30/1987: 2 to 5 years custody; concurrent with #86-40143-FH and 87-401506-FH. 08/21/1988: Escaped. 09/29/1988: Returned to custody. 04/15/1991; Paroled. 05/08/1992; Parole revoked. 03/30/1993; Paroled. 08/22/1994;	4A1.1(a) 4A1.2(k)

			Parole revoked. 09/29/1999; Released from custody. Expiration of sentence (Per MIDOC).	
31.	02/18/1987 (Age 23)	Possession of Cocaine 17th Circuit Court; Grand Rapids, MI; Case No. 87-41506-FH	07/30/1987: 2 to 4 years custody; concurrent with #86-40143-FH and 86-40416-FH. 08/21/1988: Escaped. 09/29/1988: Returned to custody. 04/15/1991; Paroled. 05/08/1992; Parole revoked. 03/30/1993; Paroled. 08/22/1994; Parole revoked. 12/13/1996; Expiration of sentence (Per MIDOC).	4A1.1(a) 4A1.2(k)
32.	09/29/1988 (Age 25)	Felony Escape from Prison; 17th Circuit Court; Grand Rapids, MI; Case No. 88-46116FH	12/08/1988: 18 months to 90 months custody. 04/15/1991; Paroled. 05/08/1992: Parole revoked. 03/30/1993: Paroled. 08/22/1994; Parole revoked. 09/29/1999; Released from custody. Expiration of sentence (Per MIDOC).	4A1.1(a)

(PSR ¶¶ 30-32.)

Reid filed a pro se objection to the calculation of the criminal history score during the sentencing hearing. (Sentencing Tr., Cr. ECF No. 87 at 5.) Reid contended that only one conviction should be used to calculate his criminal history score, the escape conviction. (Id. at 6.) The Court overruled Reid's objection, stating that "it's not the date of the conviction that's controlling . . . you have to complete the sentence. The sentence also included a period of supervision. . . . I think that [Reid's argument] is not the correct analysis, Mr. Reid." (*Id.* at 14-15.) Upon appointment, sentencing counsel challenged the assessment of points for the larceny and escape convictions. (Id., Cr., ECF No. 106 at 7.) After conferring with Reid in open court, sentencing counsel advised the Court that the pro se matters should be considered withdrawn. (Id. at 9.) After hearing argument, the Court agreed with the government's position and adopted the calculation of the criminal history score contained in the PSR. (Id. at 58.)

The Sixth Circuit addressed the issue as raised by appellate counsel:

> The Sentencing Guidelines set forth a formula to convert a defendant's prior crimes into a criminal history score (which in turn plays a lead role when the court fixes the defendant's sentence). See U.S.S.G. § 4A1.2. In this case the district court plugged three of Reid's prior crimes into this formula: cocaine possession, larceny, and escape from prison. Reid accepts the district court's consideration of cocaine possession but says that it should not have counted larceny and escape.
>
> The dispute turns on U.S.S.G. § 4A1.2(e)(1), which says that a crime counts toward the criminal history score only if it resulted in the defendant's imprisonment "during any part" of the fifteen years preceding the start of the present offense. Under that rule, larceny and escape count only if they resulted in Reid's imprisonment at some moment after November 11, 1996. The trial court concluded that they did, and its finding must stand unless clearly wrong.
>
> No clear error occurred. Both sides agree that Michigan's records of Reid's numerous convictions, paroles and sentences "[are] not as complete as we would like," R. 106 at 51, but even so two pieces of evidence support the district court's decision. First, Reid received a Certificate of Termination of his cocaine possession sentence in December 1996. The certificate says that, although Reid's cocaine possession sentence had ended, his larceny and escape sentences had not.

> That shows Reid's imprisonment for larceny and escape continued after November 11, 1996. Second, other records say that the larceny and escape sentences both expired, and that Reid as a result went free, on September 29, 1999. That too shows that Reid's imprisonment for larceny and escape continued after November 11, 1996.
>
> Reid has no evidence that his imprisonment for larceny and escape stopped before the cutoff date. He instead attacks the evidence on the other side, homing in on an alleged contradiction between the prison records (which say that the larceny and escape sentences expired on September 29, 1999) and the court records (which say the larceny and escape sentences ran consecutively). How, he asks, could consecutive sentences expire on the same day? The answer, we suspect, lies in the Corrections Department's policy: "If a prisoner is serving . . . consecutive sentences, none of the sentences which are part of the consecutive string shall be terminated until all sentences in that consecutive string have been served." Mich. Dep't of Corr., Policy Directive 03.01.135; see also Lickfeldt v. Dep't of Corr., 247 Mich. App. 299, 636 N.W.2d 272 (2001). Besides, the alleged inconsistency casts doubt on at most one piece of evidence—prison records showing Reid's discharge date. It leaves unscathed another part of the evidence—the Certificate of Termination showing that Reid's imprisonment for larceny and escape continued after the cutoff date. This kind of disparity does not make a district court's decision clearly erroneous. It takes more than a "conflict in the [evidence]" to overturn a factual finding. Harrison v. Monumental Life Ins. Co., 333 F.3d 717, 722 (6th Cir. 2003).

United States v. Reid, 751 F.3d at 768-69.

Reid contends that the Sixth Circuit, although considering policy directive, focused on the wrong paragraph to determine there was a "consecutive string." (Reply, ECF No. 34 at 12.) Reid alleges that paragraph MM supports his argument:

> If an offender is serving a sentence that precedes a consecutive escape sentence for a violation of MCL 750.193 ("Prison Escape"), the preceding sentence is to be terminated when the offender has completed serving the maximum sentence imposed, plus any dead time, instead of waiting to terminate it until the offender has discharged on the escape consecutive string. This terminated sentence shall be considered inactive and treated the same as any other terminated sentence, except that good time/disciplinary credits earned on the sentence can and will continue to be subject to disciplinary time.

(MIDOC Policy Directive 03.01.135 ¶ MM, Exhibit B, ECF No. 1-5.)

Reid's pro se objection to the assessment of three points for the cocaine conviction did not rely on ¶ MM. Instead, Reid contended that he had a Certificate of Discharge from the MIDOC on or around September 9, 1991. The objection was addressed in the Second Addendum to the PSR:

> Pursuant to §4A1.1(a) Application Note 1, three points are added for each prior sentence of imprisonment exceeding one year and one month. A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. Pursuant to §4A1.2(k)(2), revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)).

(Id.)

Sentencing/appellate counsel's affidavit addresses this issue, stating:

> Mr. Reid wrote me on March 31, 2014 (Exhibit G) to discuss his thoughts on the criminal history category issue then pending on appeal. He had the brief, was aware of what had been presented in writing to the Sixth Circuit and made no mention of asking me to rely upon MIDOC regulations outside the record.

(Response, Stengel's Aff., ECF No. 28-1 at 7.) Sentencing counsel admits that "Reid provided [him] with many case cites and documents to consider and/or use during the representation" and that he is "uncertain whether or not [he] ever received, [saw], or reviewed the MIDOC regulations attached to [Reid's] petition." (Id. at 6.) Counsel states that, while he conceded that Reid had prior convictions, "none of the concessions [he] made in that regard were erroneous." (Id. at 8.)

Reid's letter of March 31, 2014, states:

> This letter will be focused mainly on the issue regarding the nine criminal history points which placed me in category IV for sentencing purposes. My

complaint with the issue you raised is it doesn't show how the government reached its 9 point assessment.

Breakdown

3 points for possession of cocaine, conviction – 87-41506 (2 to 4 year sentence) served concurrent with larceny

3 points for larceny conviction – 86-40416

3 points for felony escape – 88-46116

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9 points

Now, if the United States has failed to meet its burden that U.S.S.G. § 4A1.2(e)(1) requires, because they failed to provide proof that I was incarcerated after November 11, 1996. [sic] (Under Michigan law parole violators are entitled to a parole revocation hearing, and if found guilty of any violations, the board can give you a FLOP of either 6, 9, or 12 months.) So with saying that, the parole board could have reparoled me . . . without proof that I was incarcerated, I will have a criminal history of zero points. That's my position! The inconsistencies in the MIDOC records, "alone", they shouldn't be able to use any of my convictions. This is very important I believe, the gun conviction, which created all the bad paper work the MIDOC has while I was on parole for the escape sentence, I was arrested for carrying a con weapon in automobile. I was sentence to serve a consecutive term of one to five years . . . MIDOC did not violate me as prescribed by law. The Michigan Court of Appeals vacated the gun sentence of 1 to 5 years and ordered that the Circuit Court resentence me. The Circuit Court on December 17, 1992 resentenced me to the time I spent in the county jail (time served) NO prison time (see commitment papers). So they sent me back to the MIDOC and paroled me out on the gun conviction (I gave you a copy of that parole order (Look at it and the dates). When I was violated in July of 1994, the paper work began to get real messy – I was filing legal action against them – so the paper work is completely inaccurate and cannot be relied on, therefore, I have zero points.

Thank you very much Mr. Stengel, I believe you will crush them in the oral argument. P.S. I am being transferred to Coleman in Florida on the 7th of April – so check your computer before you write or send something.

(Response, Exhibit G, ECF No. 28-1 at 20-22.)

Counsel's argument on appeal focused on the inconsistencies in the record. The Sixth Circuit determined that the record disparities were insufficient to overturn the district court's

factual findings. Counsel states that he "did not see any need to seek to supplement the record for purposes of the appeal, a process allowed by Fed. R. App. P. 10(e)" and that he "is familiar with this rule and [has] relied upon it as needed in [his] practice." (Id. at 7.) Counsel states: "in my professional opinion, I did not fail to raise an arguably meritorious issue on appeal." (Id. at 8.) The record fails to demonstrate that Reid requested that counsel supplement the record with the MIDOC policy, however, the appellate decision demonstrates that the Court of Appeals had access to and reviewed the policy in its determination.

Reid has also failed to demonstrate a reasonable probability that, had sentencing counsel provided the MIDOC policy to the Court or argued the issue further, this Court would have altered its determination of Reid's criminal history score. To the extent Reid faults appellate counsel for not raising the issue on appeal, the claim is meritless and appellate counsel cannot be deemed ineffective for failing to raise it. Issue Three is without merit and is DENIED.

D. Issue Four

Reid alleges that appellate counsel provided ineffective assistance by providing "inaccurate information, conced[ing] to convictions," "misrepresent[ing]" the issues, and failing to brief issues with "arguably more contrary authority." (§ 2255 Mot., ECF No. 1at 8.) Reid contends that appellate counsel "briefed the issue[s] that the judge asked him to brief." (*Id.*) The United States responds that his issue provides no basis for relief because differing perceptions of "alleged factual discrepancies do not amount to providing 'the Court of Appeals with inaccurate information'." (Response, ECF No. 28 at 17.)

The majority of these allegations were discussed in the foregoing issue (supra at 12-18) and found to be without merit. Trial counsel has replied to the contentions that he furnished the

Sixth Circuit with inaccurate information and briefed only the issues that the judge asked him to brief, stating:

> I deny having furnished the Sixth Circuit inaccurate information. With respect to the preemptory challenge issue, for a period of time while he didn't have full access to the transcript Mr. Reid was wrong about the challenges. He acknowledged his error and my correct presentation of the record to the Sixth Circuit after my June 5, 2014 letter of explanation. (Exhibit H). . . . [T]he allegation that I briefed issues "that the judge asked [me] to brief" is preposterous. I have never discussed the potential issues to raise on appeal with anyone except Mr. Reid.

(Response, Stengel Aff., ECF No. 28-1 at 8.)

Reid's letter of June 10, 2014, stated:

> First of all, I would like to apologize to you for my unprofessional behavior and statements I made. I received your letter dated June 5, 2014 and the enclosed relevant transcripts. You are right about the count, but I need the full voir dire transcript in order to figure out why I didn't use that challenge. . . . As for you representing me . . . please continue to represent me.

(Response, Exhibit I, ECF No. 28-1 at 26.) The voir dire issue was raised during the appeal and the Sixth Circuit determined that the trial court's mistake caused Reid no harm because at the end of jury selection, he had either one or two challenges remaining - one by the court's tally, two by the right tally. United States v. Reid, 751 F.3d at 766.

Reid's conclusory allegations are not supported by the record. He has failed to establish any prejudice from appellate counsel's performance. Issue Four is DENIED.

E. Issue Five

Reid contends that he was denied his right to a fair trial because the Court had ex parte communications with the government about the admission of Fed. R. of Evid. 404(b) material. (§ 2255 Mot., ECF No. 1 at 12.) The United States replies that this issue should be denied because there was no ex parte hearing or discussion. (Response, ECF No. 28 at 17-18.)

The Court's recollection confirms that the United States' reply is correct. The record demonstrates that this issue is without factual foundation or merit. Issue Five is DENIED.

F. Issue Six

Reid alleges that the indictment should have been dismissed because of a material variance in the proof. (§ 2255 Mot., ECF No. 1 at 13.) Reid contends that the United States provided the grand jury with "simulated facts in order to obtain a federal charge against" him. (Id.) Reid complains that "other events [ ] introduced for the purpose of demonstrating intent," uncharged crimes, and conflicting dates left him unable to prepare a proper defense. (Id. at 13-14.) The United States responds that this issue provides no basis for relief because inconsistencies and differences in witnesses' recollections do not equate to simulated facts or a material variance and Reid establishes no reason for relitigating an issue raised on direct appeal.[3] (Response, ECF No. 28 at 18-19.)

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[3]On appeal, Reid contended that the trial court erred by admitting evidence of his in-State sexual encounters with J.H. The Sixth Circuit opined:

> Under Rule 404(b), evidence of other crimes may not come in to show that the defendant acted "on a particular occasion" as he acted before, but it may come in "for another purpose, such as proving . . . intent." That exception defeats Reid's claim, because the trial court admitted the evidence to prove his intent, and permissibly so. The government charged Reid with transporting a minor to another State with intent to engage in criminal sexual activity. 18 U.S.C. § 2423(a). Evidence that Reid had a long-running sexual relationship with the victim helps prove this element of the crime. It blunts the possibility that Reid first took J.H. to another State and only later decided to have sex with her, and it bolsters the possibility that he had sex on his mind all along. More, the trial court admitted this evidence only to prove intent. It warned the jury that it could consider in-State sex "only on the issue of whether the defendant had the necessary specific intent," not "to decide whether the defendant carried out the acts involved in the crimes." R. 86 at 112.
>
> To be sure, evidence of other crimes, even if admissible under Rule 404(b), must stay out under Rule 403 if "its probative value is substantially outweighed by a danger of . . . unfair prejudice." But the district court did not

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

By contrast, variances occur "when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." Id. See also United States v. Hathaway, 798 F.2d 902, 910–11 (6th Cir. 1986). Based on a defendant's Sixth Amendment right to be informed of the nature of an accusation against him or her, Ford, 872 F.2d at 1235, a variance does not constitute reversible error, unless the defendant can prove it affected his "substantial rights," because it either prejudiced his defense, the fairness of trial, or the indictment's sufficiency to bar subsequent prosecutions. Hathaway, 798 F.2d at 910.

"Blurring the distinction between amendments and variances is the concept of the constructive amendment[,] which is a variance that is accorded the per se prejudicial treatment of an amendment." Ford, 872 F.2d at 1235. "[A] variance rises to the level of a constructive

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abuse its discretion by ruling that the balance in this case favored letting the evidence in.

amendment when": (1) "the terms of an indictment are in effect altered by the presentation of evidence and jury instructions," and the "essential elements of the offense charged" are modified[4] (2) such "that there is a substantial likelihood the defendant may have been convicted of an offense other than that charged in the indictment." Id. (citation and quotation marks removed). See also United States v. Beeler, 587 F.2d 340, 342 (6th Cir. 1978). The Sixth Circuit has called the line between constructive amendments and variances "sketchy," United States v. Chilingirian, 280 F.3d 704, 712 (6th Cir. 2002), and "shadowy," Hathaway, 798 F.2d at 910 (citation omitted), and has stated that the difference may not be one of kind, but of degree. See United States v. Budd, 496 F.3d 517, 521 (2007).[5]

The evidence presented did not alter or broaden the scope of the indictment. The facts proven were not materially different from those alleged in the indictment. Despite any inconsistencies in the testimony, the jury credited the testimony of the prosecution witnesses. Reid has not shown that the evidence presented and instructions given resulted in a constructive amendment of the indictment. No likelihood exists that Reid was convicted of a crime other than transportation of a minor with the intent to engage in criminal sexual activity. He was not

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[4]In other words, "the rule prohibiting judicial amendment of indictments is inapplicable to matters of form or surplusage." Hathaway, 798 F.2d at 911 (citations omitted). This would include part "of the indictment unnecessary to and independent of the allegations of the offense proved" may normally be treated as 'a useless averment' that 'may be ignored.'" United States v. Miller, 471 U.S. 130, 136 (1985) (citing Ford v. United States, 273 U.S. 593, 602 (1927) (indictment language was "merely surplusage and may be rejected")).

[5]In United States v. Hynes, the Sixth Circuit noted one "key difference" between a constructive amendment and variance is that—while a "defendant[] can establish a variance by referring exclusively to the evidence presented at trial"—he "can prove a constructive amendment only by pointing to a combination of evidence and jury instructions," such that he "may well have been convicted of a crime other than the one set forth in the indictment." 467 F.3d 951, 962 (2006) (citing United States v. Suarez, 263 F.3d 468, 478 (6th Cir. 2001)). See Budd, 496 F.3d at 522.

convicted of production of child pornography. That charge was dismissed upon his motion for acquittal. Reid's ability to defend himself at trial was not impaired. See United States v. Hynes, 467 F.3d 951, 965 (6th Cir. 2006). Issue Six is without merit and is DENIED.

G. Issue Seven

Reid alleges that the United States failed to provide him with exculpatory evidence in violation of Brady. (§ 2255 Mot., ECF No. 1 at 15.) He references Las Vegas police reports and Westcare reports. (Id.) The United States responds that, while Reid identifies documents that he wanted to receive, the prosecution did not use those documents as exhibits or call any witnesses who possessed or prepared those documents. (Response, ECF No. 28 at 22-23.) The United States contends that Reid's unsupported assertion that the evidence was exculpatory is insufficient grounds to provide relief. (Id.)

The Due Process Clause is violated when prosecutors withhold from the defense evidence favorable to the accused where the evidence is material either to guilt or punishment. This duty to disclose "is applicable even though there has been no request by the accused . . . , and . . . the duty encompasses impeachment evidence as well as exculpatory evidence." Strickler v. Greene, 527 U.S. 263, 280 (1999) (citation omitted). Brady is inapplicable where, as here, the information at issue is known to the defendant. "[W]here the defendant was 'aware of the essential facts that would enable him to take advantage of the exculpatory evidence,' the government's failure to disclose it did not violate Brady." Spirko v. Mitchell, 368 F.3d 603, 610 (6th Cir. 2004) (quoting United States v. Todd, 920 F.2d 399, 405 (6th Cir. 1990)).

A Brady violation has three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."

Id. at 281-82. A showing of prejudice requires that the suppressed evidence be material. Evidence is "material" for Brady purposes if "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." Strickler, 527 U.S. at 289 (internal quotation marks omitted); see also United States v. Bagley, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.") (internal quotation marks omitted).

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). Bagley's touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (internal quotation marks and citations omitted).[6] This standard is similar to the "prejudice" component of an ineffective assistance of counsel claim. Id. at 436; Bagley, 473 U.S. at 682; cf. United States v. Agurs, 427 U.S. 97, 112-13 (1976) ("The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a

[6]The Supreme Court emphasized, however, that this standard is not satisfied by a showing that the suppressed evidence "might" have changed the outcome of the trial. Strickler, 527 U.S. at 289; see also id. at 291 (a petitioner must establish a reasonable probability, rather than a reasonable possibility, of a different result).

reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is not justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.") (footnotes omitted).

Even assuming the documents were exculpatory, Reid has failed to demonstrate that they were suppressed. He was aware that the documents existed. No witnesses from the Las Vegas Police Department or Westcare were presented. The documents were not used by the prosecution. Reid has also failed to demonstrate that the documents were material to his guilt or that they were exculpatory. This verdict was not of questionable validity; the evidence of Reid's guilt was overwhelming. Issue Seven is DENIED.

IV. CONCLUSION

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

V. APPELLATE ISSUES

Pursuant to 28 U.S.C. § 2253(c)(1), the district court is required to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate.

The COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. § 2253(c)(2), (3). A "substantial showing" is made when the movant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (citation and internal quotation marks omitted); see also Henley v. Bell, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. Miller-El, 537 U.S. at 337; Caldwell v. Lewis, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. Bradley v. Birkett, 156 F. App'x 771, 773 (6th Cir. 2005) (quoting Miller-El, 537 U.S. at 337).

In this case, for the reasons stated, Defendant's claims lack substantive merit and, therefore, he cannot present a question of some substance about which reasonable jurists could differ. The Court therefore DENIES a certificate of appealability.

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

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

IT IS SO ORDERED, this 26th day of March, 2018.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	2:12-cr-20029-JPM
CALVIN JAMES REID,	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Before the Court is Defendant's pro se Motion for New Trial, filed November 21, 2012. (ECF No. 66.) The government filed its Response in Opposition on November 27, 2012. (ECF No. 67.)

For the following reasons Defendant's Motion for New Trial is DENIED.

I. BACKGROUND

This case was commenced by indictment on February 22, 2012. (ECF No. 1.) In the Indictment Defendant was charged with two counts of knowingly transporting a minor in interstate commerce between two states with the intent to engage in sexual activity in violation of 18 U.S.C. §§ 2, 2423(a), and one count for knowingly using a minor female to engage in sexually explicit conduct, for the purpose of producing a visual depiction of the conduct, knowing that the visual depiction would be transported

in interstate commerce in violation of 18 U.S.C. §§ 2, 2251(a). (Id.)

On June 11, 2012, Defendant was arrested and after a hearing before Magistrate Judge Bryant, was appointed a federal public defender. (ECF No. 6; ECF No. 7; ECF No. 8.) On June 13, 2012, before Magistrate Judge Pham, Defendant requested to proceed pro se. (ECF No. 12.) On June 20, 2012, Defendant pled not guilty on all counts. (ECF No. 14.) On August 6, 2012, Defendant made an Oral Motion To Dismiss Counsel and Proceed pro se and on August 7, 2012, Defendant's federal public defender was allowed to withdraw. (ECF No. 20; ECF No. 22.) The Court held a hearing on October 2, 2012, on Defendant's Oral Motion To Proceed pro se. (ECF No. 33.) Defendant was informed of his right to counsel and his right to proceed pro se. (Id.) The Court then found that Defendant knowingly and voluntarily waived his right to counsel and granted Defendant's Oral Motion To Proceed pro se. (Id.) During the pre-trial period, Defendant filed various pro se motions including motions to dismiss the counts in the Indictment (ECF No. 36; ECF No. 37; ECF No. 38), and a motion in limine to suppress certain statements, (ECF No. 51).

On November 13, 2012, the jury trial commenced. (See ECF No. 55.) At the close of the government's proof, the Court granted Defendant's motion pursuant to Criminal Rule 29(a) and dismissed Count 3 of the Indictment. (ECF No. 60.) On November 15, 2012, Defendant was convicted of the remaining two counts of

knowingly transporting a minor in interstate commerce between two states with the intent to engage in sexual activity in violation of 18 U.S.C. §§ 2, 2423(a). (ECF No. 64; see also ECF No. 1.) After the jury returned the verdict, the Court asked Defendant if he wished to be assigned counsel for his sentencing. Defendant reiterated that he wished to proceed pro se.

Defendant now moves the Court to vacate the jury verdict entered on November 15, 2012, and grant Defendant a new trial for the following reasons: (1) Defendant was incompetent to represent himself due to his mental condition which became evident during the trial and rendered him ineffective as counsel; (2) the government failed to object to Defendant representing himself despite having knowledge of Defendant's mental illness; (3) the government was aware of Defendant's mental condition when they moved for his bond to be denied on June 13, 2012; (4) the Court had serious questions about Defendant's mental state but failed to raise the issue at a hearing regarding Defendant's Motion to Proceed pro se; and (5) the Court should have ordered a competency examination and by failing to do so, "affected the fairness, integrity or public reputation of the judicial proceedings." (ECF No. 66 at 2.)

II. ANALYSIS

Defendant asserts that he is entitled to "a new trial in the interest of justice" based on the previously stated assertions. Defendant's contentions raise two bases for relief:

(1) ineffective assistance of counsel at trial; and (2) lack of mental competency to represent himself at trial.

A. Ineffective Assistance of Counsel

Defendant asserts that he should receive a new trial because he was incompetent to represent himself at trial because of his mental condition and was thus rendered ineffective as counsel. (ECF No. 66 at 1.)

The government asserts that ineffective assistance of counsel arguments are not properly raised in a motion for a new trial, but must instead be brought pursuant to a claim under 28 U.S.C. § 2255. (ECF No. 67 at 1-2.)

The Court finds that Defendant's claim for ineffective assistance of counsel is not properly raised in this motion. Under the Sixth Circuit's holding in United States v. Sypher, 684 F.3d 622, 626 (6th Cir. 2012), the Court cannot review Defendant's ineffective assistance of counsel claim until Defendant asserts such a claim under 28 U.S.C. § 2255.

B. Mental Competency

Defendant asserts that he should receive a new trial for because he has a mental condition that rendered him incompetent to represent himself at trial.

Under the Fifth and Fourteenth Amendments, a defendant has a constitutional right to proceed to trial without counsel so long as the choice is made voluntarily and intelligently. See Faretta v. California, 422 U.S. 806 (1975); Moore v. Haviland, 531 F.3d 393 (6th Cir 2008).

The government asserts that Defendant voluntarily and knowingly insisted on representing himself as evidenced by Defendant's insistence on proceeding pro se despite the Court counseling Defendant on the risks of self-representation four times before trial. (ECF No. 67 at 2.) Additionally, the United States asserts that Defendant was competent to represent himself, filing numerous motions related to his case and demonstrating a knowledge of trial and criminal procedure. (Id. at 4.)

The Court finds that Defendant voluntarily and knowingly made the decision to proceed to trial without counsel and that Defendant was not incompetent to represent himself.

Defendant's waiver of counsel was effective. On multiple occasions this Court counseled Defendant on the risks of proceeding without counsel. (See ECF No. 12; ECF No. 20; ECF No. 22; ECF No. 33.) The Court also gave Defendant time to speak with his family about his choice to dismiss his counsel, and to give serious consideration as to whether he wanted to proceed pro se. (See ECF No. 22; ECF No. 24.) Defendant consistently reiterated his wish to proceed pro se and the record demonstrates that "[Defendant knew] what he [was] doing and his choice [was] made with eyes open." Moore, 531 F.3d at 402 (quoting Faretta, 422 U.S. at 835) (internal quotation marks omitted).

Additionally, while the Court notes that the right to self-representation is not absolute when the defendant is not

mentally competent, see Indiana v. Edwards, 554 U.S. 164 (2008), the Court finds that Defendant's alleged mental condition did not interfere with his ability to represent himself. Defendant's motions and actions demonstrate a familiarity and knowledge of trial process and procedure that refute the contention that the government should not have allowed Defendant to represent himself.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for New Trial is DENIED.

SO ORDERED, this 5th day of December, 2012.

s/ Jon P. McCalla
JON P. McCALLA
CHIEF U.S. DISTRICT JUDGE

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Western District of Tennessee

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Docket Text:
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2:12-cr-20029-JPM-1 Notice has been electronically mailed to:
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