

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20477

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DARREN LAVALD BOWIE,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

ORDER:

Darren Lavalld Bowie, federal prisoner # 30091-379, pleaded guilty to conspiracy to commit mail fraud, mail fraud, and aggravated identity theft, and he received an aggregate 108-month sentence. The district court denied Bowie's 28 U.S.C. § 2255 motion challenging these convictions and the sentence, concluding that the motion was barred by the waiver provision in Bowie's plea agreement. Bowie now seeks a certificate of appealability (COA) to challenge this denial. He maintains that his motion should not be dismissed as untimely. In addition, Bowie asserts that he did not knowingly waive his right to file a § 2255 motion. He briefs arguments that the Government breached the plea agreement by requesting an 84-month sentence and by not seeking a departure for his substantial assistance, that the term of supervised release exceeded the statutory maximum sentence, that the indictment alleged

bank fraud rather than mail fraud, that no evidence supported the restitution order, and that the Statement of Reasons contains an error regarding the district court's rationale for imposing the sentence.

To obtain a COA, Bowie must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). He will satisfy this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Because the district court dismissed Bowie's claims on their merits, he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 338. Bowie has not made the requisite showing. To the extent that Bowie is attempting to present claims for the first time in his COA motion, we decline to consider them. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003). Accordingly, the motion for a COA is DENIED.



A True Copy
Certified order issued Jul 31, 2019

Lyfe W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**ENTERED**

November 07, 2017

David J. Bradley, Clerk

UNITED STATES OF AMERICA

VS.

DARREN LAVALD BOWIE

§
§
§
§
§

CRIMINAL NO. 4:13-CR-50

MEMORANDUM AND ORDER

Darren Lavalld Bowie pled guilty to one count of conspiracy to commit mail fraud, one count of mail fraud, and one count of aggravated identity theft. This Court sentenced him to a 108 month term of imprisonment, five years of supervised release, a \$300 special assessment, and ordered him to pay \$41,836.43 in restitution. *See* Judgment (Doc. # 57). This case is before the Court on Bowie's motion to vacate, set aside, or correct his sentence (Doc. # 83), the government's motion to dismiss Bowie's motion (Doc. # 87), and Bowie's response (Doc. # 88). Having carefully considered the motions and Bowie's response, all the arguments and authorities submitted by the parties, and the entire record, the Court is of the opinion that the government's motion should be granted, and Bowie's motion should be denied.

I. Background

Bowie was indicted on nine counts pertaining to a scheme to purchase stolen account card numbers and identifying information, such as birth dates and social security numbers, use the information to impersonate cardholders, order new debit cards in the cardholders' names, and use the cards to steal money from the victims' accounts. Presentence Report ("PSR") at 3-5, Indictment (Doc. # 11). More than 1,700 bank accounts were compromised by the scheme. Law enforcement agents seized from Bowie's home computers and storage devices containing more than 26,000 social security numbers, and more than 136,000 credit card numbers, as well as

equipment that can be used to create counterfeit cards. Bowie admitted to purchasing information from overseas co-conspirators, fraudulently applying for new credit cards, taking over existing accounts, and programming counterfeit cards. PSR at 5-6.

II. Applicable Legal Standards

Bowie brings this motion under 28 U.S.C. § 2255, which provides for relief “for errors that occurred at trial or sentencing.” *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001). A movant may obtain relief by showing

that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack

28 U.S.C.A. § 2255(a).

III. Analysis

Bowie’s guilty plea contains appellate and postconviction waivers. He contends that the waivers are invalid because he did not understand the rights he was waiving due to ineffective assistance of counsel, and that his plea was induced by an unkept promise to drop an additional count. He further contends that Court erred in its determination of his sentence, that counsel was ineffective for failing to raise objections to the loss amount and number of victims, that appellate counsel was ineffective and that the government breached the plea agreement.

Bowie’s plea agreement contained waivers of his right to appeal and to pursue collateral relief. The right to challenge a conviction or sentence on appeal or in postconviction proceedings is waivable. *See, e.g., United States v. Burns*, 433 F.3d 442, 446 (5th Cir. 2005); *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2005). To determine if the waiver is valid and binding, this court must determine whether the waiver was knowing and voluntary, and

whether the waiver applies to this proceeding. *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

Although Bowie's plea agreement contained an express waiver of his right to appeal, Bowie filed a notice of appeal. Appointed counsel filed a brief pursuant to *Anders v. California*, 368 U.S. 738 (1967), stating that counsel could find no non-frivolous issues to raise on appeal. Counsel specifically stated that he believed, based on the record, that Bowie's plea was knowing and voluntary, and was based on an adequate factual basis. Appellate Brief (attached as Exhibit A to the government's motion to dismiss), at 9-10. Counsel further found no basis to circumvent the appellate waiver, no error in the application of the sentencing guidelines, and no basis for arguing that the government breached the plea agreement. *Id.* at 10-17. Bowie filed two *pro se* briefs raising the same claims raised in this section 2255 motion.

The Fifth Circuit issued an order stating that it had reviewed the briefs submitted by counsel and by Bowie, as well as relevant portions of the record, and concluded that there were no non-frivolous issues for review. The Fifth Circuit dismissed the appeal. *Bowie v. United States*, 638 F. App'x 398 (5th Cir. 2016). The dismissal is also dispositive of Bowie's 2255 motion.

The issue of the knowing and voluntary nature of Bowie's plea, including the waivers and the alleged breach of the agreement by the government, was presented in Bowie's direct appeal, in both the *Anders* brief and Bowie's *pro se* briefs. See *Anders* brief at 9-10, 14-17; Bowie's *Pro Se* Brief (Exhibit B to the government's motion to dismiss), at 2-4. In dismissing the appeal because the court found no non-frivolous grounds for appeal, the Fifth Circuit necessarily found that Bowie's current claims were frivolous. This ruling constitutes the law of the case, and is binding on this Court. See, e.g., *United States v. Goudeau*, 512 F. App'x 390,

393 (5th Cir. 2013). Because Bowie's waiver has already been adjudicated as valid, Bowie has waived his right to bring this motion, and the government's motion to dismiss must be granted.

IV. Certificate Of Appealability

Bowie has not requested a certificate of appealability ("COA"), but this court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court[]s to deny COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A defendant may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does.").

A certificate may issue only if the defendant has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A defendant "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). Jurists of reason would not disagree that Bowie waived his right to bring this challenge, and that his claim that the waiver is invalid has already been decided against him. Bowie therefore has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and he is not entitled to a certificate of appealability.

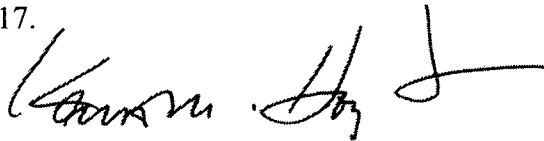
V. **Conclusion And Order**

For the foregoing reasons, it is ORDERED as follows:

- A. Darren Lavalld Bowie's motion to vacate, set aside, or correct sentence (Doc. # 79) is DENIED;
- B. The government's motion to dismiss (Doc. # 87) is GRANTED; and
- C. No certificate of appealability shall issue.

The Clerk shall notify all parties and provide them with a true copy of this Memorandum and Order.

SIGNED on this 6th day of November, 2017.

A handwritten signature in black ink, appearing to read "Kenneth M. Hoyt", written over a horizontal line.

Kenneth M. Hoyt
United States District Judge