No. 18-5733

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 17, 2019
DEBORAH S. HUNT, Clerk

ARNOLD EUGENE FOX, JR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: BATCHELDER, STRANCH, and LARSEN, Circuit Judges.

Arnold Eugene Fox, Jr., a federal prisoner proceeding pro se, petitions for rehearing of this court's February 7, 2019, order denying his application for a certificate of appealability. Fox requests oral argument in his petition for rehearing and has filed an objection to the clerk's signature on the order denying a certificate of appealability and a motion for appointment of counsel.

On careful consideration, the court concludes that it did not overlook or misapprehend any "point of law or fact" when it issued its order. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing, request for oral argument, objection to the clerk's signature on the order denying a certificate of appealability, and motion for appointment of counsel are **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-5733

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FOR THE SIXTH CIRCUIT

ARNOLD EUGENE FOX, JR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Arnold Eugene Fox, Jr., a federal prisoner proceeding pro se, appeals a district court judgment denying his motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255. Fox requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He has also filed a motion to proceed in forma pauperis.

A jury found Fox guilty of using a cellular device to attempt to persuade, induce, entice, or coerce a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). He was sentenced to serve 188 months of imprisonment followed by ten years of supervised release. This court affirmed the district court's judgment. *United States v. Fox*, 600 F. App'x 414 (6th Cir. 2015).

In his motion to vacate, Fox asserted that: (1) he was denied effective assistance of trial and appellate counsel; (2) he has been convicted for "conduct that is not criminalized by any single federal statute"; (3) his sentence is "based upon false information that was not found by a jury"; and (4) "government officials and court officers have engaged in outrageous government conduct." The district court denied Fox's motion to vacate and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability analysis is not the same as "a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the certificate of appealability analysis is limited "to a threshold inquiry into the underlying merit of [the] claims," and whether "the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348). When a motion to vacate is denied on procedural grounds, the movant must show "that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In his first ground for relief, Fox asserted that each of his trial and appellate attorneys was ineffective. Fox asserted that appellate counsel Paul L. Nelson was ineffective because he did not present the following claims on appeal: subject-matter jurisdiction and essential-elements claims; ineffective-assistance-of-counsel claims based on counsel's "failure to investigate [his] case to determine the essential elements of the charged offense" and any other possible defenses; a denial-of-allocution claim; an improper-jury-instruction claim based on the failure to instruct "on the essential elements of the charged offense"; and "[Fifth] and [Sixth] Amendment" claims.

Fox asserted that trial counsel Bryan R. Huffman was ineffective because he failed to: "memorialize witness statements and testimony"; subpoena exculpatory evidence; challenge the denial of his right to allocute; present subject-matter jurisdiction and essential-elements claims on appeal; present "[Fifth] and [Sixth] Amendment issues" on appeal; present ineffective-assistance-of-trial-counsel claims "against himself for failure to investigate [the] case to determine the essential elements of the charged offense" and any other possible defenses; object to obvious "[Fourth] Amendment issues"; and investigate the "victim's criminal history[] and

present that evidence at the [] trial." He also asserted that Huffman "coerced [him] not to testify."

Fox asserted that trial counsel Andre B. Mathis was ineffective because he did not "memorialize witness statements and testimony"; subpoena exculpatory evidence; object to obvious "[Fourth] Amendment issues"; and investigate the "victim's criminal history."

Fox asserted that all of his attorneys were ineffective because they failed to "require the government to prove subject-matter jurisdiction concerning rape, statutory rape and/or other conduct that lacked as an essential element an economic nexus"; "investigate the case for possible defenses"; and "investigate the essential elements of the charged offense."

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice inquiry requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Strategic decisions made after a thorough investigation by counsel "are virtually unchallengeable." *Id.* at 690.

An attorney is not required "to raise every non-frivolous issue on appeal." *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). Indeed, "'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) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). Where, as here, appellate counsel "presents one argument on appeal rather than another . . . the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present'" to establish ineffective assistance of appellate counsel. *Caver*, 349 F.3d at 348 (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)).

The district court concluded that Fox's first ground for relief did not warrant § 2255 relief. Regarding Attorney Nelson, the district court concluded that Fox did not show deficient

performance and resulting prejudice. Nelson represented Fox on appeal after this court affirmed the district court's judgment. Nelson filed a petition for en banc rehearing, and after the petition was denied, he sought to withdraw, stating that he found no meritorious issues to pursue to the United States Supreme Court and advising Fox how to file a pro se petition for a writ of certiorari.

The district court considered each claim asserted against Nelson and found that they were either unsupported or meritless. The district court noted that Fox did not identify "any non-frivolous issues that should have been presented to the Supreme Court" and concluded that Nelson was not ineffective for failing to challenge the district court's grooming instruction because that issue had been considered and rejected by this court on appeal. *See Fox*, 600 F. App'x at 419-20.

Regarding Attorney Huffman, the district court concluded that Fox's claims were unsupported, meritless, and conclusory. Huffman represented Fox during trial, sentencing, and on appeal before this court. The district court considered each claim asserted against Huffman and found that none established deficient performance and resulting prejudice. The district court found that: Fox failed to show that "any potential witnesses" were not interviewed or called to testify; counsel was not ineffective for failing to subpoena and investigate evidence related to "the victim's sexual predisposition" and criminal history because that evidence was inadmissible, impeachment evidence would have been cumulative because "the victim's credibility had already been severely damaged during trial," and counsel's multiple "attempts to raise this issue" were denied; Fox admitted, on record, that counsel informed him of his right to testify, that it was his decision not to do so, and that his decision had not been coerced; Fox was afforded an opportunity for allocution and took advantage of that opportunity; Fox failed to show that counsel had grounds to challenge subject-matter jurisdiction and the essential elements of the § 2422(b) offense in light of "case law of this Circuit"; the record did not support Fox's conclusory assertion that counsel was ineffective for failing to argue Fifth and Sixth Amendment claims; Fox did not support his claim that counsel should have asserted ineffective-assistance-of-

counsel claims against himself with any evidence of record; and the record did not support Fox's ineffective-assistance-of-counsel claim based on the failure to raise Fourth Amendment issues.

Regarding Attorney Mathis, the district court concluded that Fox failed to show deficient performance and resulting prejudice for the same reasons pertaining to Huffman. Mathis represented Fox before trial. The district court noted that Fox's assertions related to the minor victim's sexual predisposition and criminal history did not support an ineffective-assistance-of-counsel claim because that evidence was inadmissible and that the record did not support an ineffective-assistance-of-counsel claim based on counsel's failure to raise Fourth Amendment issues.

The district court concluded that Fox's ineffective-assistance-of-counsel claims asserted against all of the attorneys were baseless. The district court reviewed the record and found "no evidence that any of the associated attorneys' representation of Fox fell below the objective professional standards to provide effective counsel."

Reasonable jurists would not debate the district court's rejection of Fox's first ground for relief. *See Miller-El*, 537 U.S. at 327. The district court's findings and conclusions are supported by the record and Fox has not presented any basis for debate.

In his second ground for relief, Fox asserted that he was convicted for "conduct that is not criminalized by any single federal statute." He asserted that his indictment and the federal criminal statute, § 2422(b), speak of "any sexual activity" and that the district court instructed the jury on "aggravated statutory rape," a state offense, which was not identified or charged in the indictment and is not an element of § 2422(b). Fox's third ground for relief challenged enhancements to his sentence for "use of a computer," "obstruction of justice," and "statements made by Whitney Fox." He also challenged several conditions of his supervised release. Fox's fourth ground for relief asserted outrageous conduct on the part of "government officials and court officers."

The district court concluded that Fox forfeited his second through fourth grounds for relief because he did not raise them on appeal, and that he did not show cause and prejudice or

actual innocence in order to excuse the default. Even if not forfeited, the district court concluded that these claims were meritless, conclusory, and unfounded. Regarding the second claim, the district court concluded that "the indictment provides [Fox] with notice of what he was charged with" and that Fox was charged with attempt "to persuade a minor to engage in unlawful sexual activity," that "[t]he definition of unlawful sexual activity contains the elements of the state offense of aggravated statutory rape," and that the "jury was so instructed." Regarding the third claim, the district court found that Fox's below-guidelines sentence was not erroneous, that counsel objected to the presentence report on many bases, some of which were successful, and that Fox was ultimately sentenced to serve 188 months of imprisonment—below the 262-to-327-month advisory sentencing guidelines range. Regarding the fourth claim, the district court pointed out that this court determined on direct appeal that sufficient evidence was presented to prove Fox's guilt of the charged offense beyond a reasonable doubt. *See Fox*, 600 F. App'x at 417-19.

"[T]he general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003); *see also Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999) ("It is well settled that an argument not raised on direct appeal is waived."). "Sentencing challenges generally cannot be made for the first time in a post-conviction § 2255 motion" because they "must be made on direct appeal or they are waived." *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted).

Reasonable jurists would not debate the district court's rejection of Fox's second through fourth grounds for relief as procedurally defaulted. *See Slack*, 529 U.S. at 484. Fox did not raise these claims on direct appeal and failed to demonstrate the necessary cause and prejudice for his failure to do so. *See Massaro*, 538 U.S. at 504. Moreover, Fox did not assert his actual

innocence in an effort to excuse his procedural default. *See Bousley*, 523 U.S. at 623-24. Additionally, reasonable jurists would not debate the district court's alternative determination that Fox's grounds for relief are meritless.

The district court determined that, within his second ground for relief, Fox asserted that § 2422(b) was unconstitutional. The district court rejected Fox's argument, concluding that Congress had authority under the Commerce Clause to regulate sex offenses. Fox argues that the district court erroneously construed his argument. He argues that he challenged § 2422(b) and "subject-matter jurisdiction," not "interstate commerce and the Congress' ability to regulate it." Nevertheless, Fox's subject-matter jurisdiction argument lacks merit and does not "deserve encouragement to proceed further." *See Miller-El*, 537 U.S. at 327. Federal courts have subject-matter jurisdiction over prosecutions alleging violations of federal criminal laws. Fox was charged with violating § 2422(b), which is a federal criminal statute.

Accordingly, the application for a certificate of appealability is **DENIED** and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

ARNOLD EUGENE FOX, JR.,	)	
	)	
Movant,	)	
	)	Cv. No. 2:16-cv-02017-JTF-cgc
v.	)	Cr. No. 2:11-cr-20302-JTF-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

ORDER DENYING MOTION FOR RELIEF PURSUANT TO 28 U.S.C. § 2255; (ECF NO. 1); ORDER DENYING MOTION TO AMEND PETITION, (ECF NO. 32); ORDER RENDERING REMAINING MOTIONS MOOT; ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH; ORDER DENYING CERTIFICATE OF APPEALABILITY; AND ORDER DENYING PERMISSION TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On January 7, 2016, Movant, Arnold Eugene Fox, Jr., Bureau of Prisons register number 24886-076, an inmate at the Federal Medical Institution in Oakdale, Louisiana, filed a *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (ECF No. 1.) On March 11, 2016, the Court directed the United States to file a response. (ECF No. 8.) Accordingly, the Government filed a Response to the § 2255 motion on April 22, 2016, to which Fox filed a Reply on May 23, 2016. (ECF Nos. 15 & 18.) Upon review, the Court finds that the motion for § 2255 relief should be Denied.

I. UNDERLYING CRIMINAL PROCEEDINGS

On December 12, 2011, a criminal complaint was filed by the United States against Arnold E. Fox which charged him with knowingly using a means of interstate commerce, a cellular device, to persuade, induce, entice and coerce a minor female to engage in sexual activity, or

sexual intercourse, in violation of Tenn. Code Ann. § 39-131-506 and 18 U.S.C. § 2422(b). (ECF No. 1.) Subsequently, on January 5, 2012, a federal grand jury sitting in the Western District of Tennessee returned an indictment, charging Fox in Count 1 with using a facility or a means of commerce, a cellular telephone, in an attempt to knowingly persuade, induce, entice, and coerce a minor female to engage in sexual activity which would comprise statutory rape, an offense proscribed in Tenn. Code. Ann. § 39-13-506, in violation of 18 U.S.C. § 2422(b) and § 2. (*See United States v. Fox*, 2:11-cr-20302 (W.D. Tenn.) (ECF No. 16.)

The case proceeded to trial, and a jury returned a verdict finding Fox guilty as charged on December 12, 2013. (ECF Nos. 118 & 121.) The undersigned Court subsequently denied Fox's request for judgment of acquittal, motion for new trial and amended motion for new trial. (ECF Nos. 123, 124, & 127.) On April 9, 2014, the undersigned Court sentenced Fox to serve 188 months of imprisonment and ten years of supervised release. On April 21, 2014, Fox appealed his conviction and sentence, asserting that the conviction lacked sufficient evidence; that the undersigned Court's instructions to the jury were insufficient; and that the United States had withheld exculpatory *Brady* material. (ECF No. 1, 2 ¶ 9.) Although represented by counsel, Fox filed additional motions *pro se* with the appeals court that challenged the constitutionality of the underlying criminal statute, 18 U.S.C. § 2422(b), and the Criminal Justice Act, 18 U.S.C. § 3006A. (ECF No. 152.)

On January 28, 2015, the Sixth Circuit issued an opinion affirming the conviction, finding (1) that the Government had presented sufficient evidence to support the conviction; (2) the modified jury instruction regarding "grooming" was adequate and within the court's discretion; and (3) Fox's *Brady* claim lacked merit as the minor's involvement in another criminal matter was "marginally relevant to Fox's defense" or, in the alternative, could have been excluded

under Fed. R. Evid. 403 & Fed. R. Evid. 611. (ECF No. 175, 1-15.) Finally, the *pro se* motions were not addressed. (*Id.* at 13; ECF No. 152 & *United States v. Arnold E. Fox*, 600 F. App'x 414 (6th Cir. Jan 28, 2015)).

On January 7, 2016, Fox filed the instant Motion for § 2255 habeas relief. (ECF No. 1.) Upon review, the Court finds that Fox's Motion for § 2255 relief should be Denied for the reasons provided below.

II. LEGAL STANDARD

Title 28 U.S.C. § 2255(a) provides:

> [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.

See 28 U.S.C. § 2255(a). "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) (quotations omitted). A § 2255 motion is not a substitute for a direct appeal and unconstitutional claims that could have been brought on appeal, but were not, may not be asserted in the motion. *Berry v. United States*, Cv. No. 2:14-cv-02486-STA-cgc, 2016 WL 3448744, at *4 (W.D. Tenn. June, 20, 2016) (*quoting Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976)).

"[A] § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Id.* (*quoting Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999)).

"After a § 2255 motion is filed, it is reviewed by the Court and, '[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion.'" *Id.* at *5 (*quoting* Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts ("§ 2255 Rules")).

III. ANALYSIS

As noted above, Fox asserts four grounds for § 2255 relief: (1) that his trial attorneys, as well as, his court appointed appellate counsel, Paul L. Nelson, Andre Mathis, and Brian R. Huffman, all provided ineffective assistance of counsel; (2) the undersigned District Court and United States Attorney's Office deprived him of his constitutional rights because the indictment did not name the underlying offense precipitating a violation and conviction of 18 U.S.C. § 2422(b); (3) that the sentence imposed by the district court was improperly enhanced without supporting evidence; and last (4) that the Government and Court officials engaged in various alleged instances of outrageous conduct, including witness and evidence tampering. (ECF No. 1, 5- 12.)

Ground I: Ineffective Assistance of Counsel Claims

Fox asserts that each of his attorneys provided ineffective assistance of counsel, separately and collectively. Fox lists numerous allegations of ineffective assistance of counsel claims against his respective attorneys. The Government's response disputes all of Fox's allegations that his trial and appellate counsel were ineffective. (ECF No. 15, 4-18.) The Court finds that all of these allegations are conclusory in nature, lack support in the record and all are widely contradicted by the attached affidavits of counsel.

An ineffective assistance of counsel claim under the Sixth Amendment is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668 (1984). The benchmark for

judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686. In these circumstances, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his case. *Id.* at 687-88.

To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "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. 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.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (*quoting Strickland*, 466 U.S. at 687, 689)).

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. "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. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Harrington*, 562 U.S. at 104 (quotations omitted) (citing *Strickland*, 466 U.S. at 687); *see also 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"). Additionally, "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.* After reviewing the record, the Court finds that Movant's request for relief pursuant to 28 U.S.C. § 2255 should be DENIED.

Many of the claims against court-appointed and retained counsel for Fox are the same. However, the Court shall address the claims against all three attorneys in turn below.

1. Ineffective Assistance of Counsel Claims Against Paul Nelson:

Regarding court-appointed Appellate Counsel Paul L. Nelson, Fox asserts that he: (1) failed to raise arguments challenging the district court's "subject matter jurisdiction" and/or "essential elements" claim; (2) failed to raise ineffective assistance claims against the other trial and appellate attorneys; (3) failed to assert that the undersigned trial court did not allow him to allocate before sentencing; (4) failed to challenge the trial court's refusal to properly instruct the jury on the essential elements of the offense; and (5) failed to raise 5th and 6th Amendment claims on appeal. (ECF No. 1, 4, Ground 1(a) ¶¶ 1-5 & 5, ¶¶ 19 & 21.) The Government responds that the ineffective assistance of counsel claims against Nelson are conclusory and lack any factual basis. It also asserts that the outcome in this case would not have differed but for Nelson's alleged errors. (ECF No. 15, 7-8). *See Short v. United States*, 504 F.2d 63, 65 (6th Cir. 1974).

On April 15, 2015, Nelson filed a Petition for Rehearing and/or Rehearing *En Banc* before the Sixth Circuit regarding the Government's failure to disclose impeachment evidence — in

essence, a *Brady* violation. *See United States v. Arnold E. Fox*, Case No. 14-5391. (ECF No. 43, 7-14.) Following denial of the request, counsel filed a motion to withdraw because "[a]fter extensive review of this matter, counsel has concluded that this matter presents no non-frivolous issues which warrant Supreme Court review and has advised Mr. Fox of that opinion." (ECF No. 45, 2 ¶5.) Thus, it appears that counsel searched the record for any viable claims on Fox's behalf. Finding none, counsel advised Fox on how to file a *pro se writ of certiorari* and moved to withdraw. Counsel did not have any grounds to raise subject matter jurisdiction, ineffective assistance of counsel claims against the other attorneys or the 5th and 6th Amendment claims on appeal. Subsequently, Fox has failed to present any non-frivolous issues that should have been presented to the Supreme Court.

The fourth claim of ineffective assistance of counsel against Nelson concerns his failure to challenge the modification of the jury instruction regarding "grooming." This issue was rejected on direct appeal by the Sixth Circuit. In affirming Fox's conviction and sentence, the Sixth Circuit concluded that, "the court's § 2422(b) instruction adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in reaching its decision." *United States v. Edington*, 526 F. App'x 584, 589-90 (6th Cir. 2013). Therefore, this issue has already been addressed by the appeals court and requires no further review.

It appears that Fox has raised claims of ineffective assistance of counsel only because the case ended unfavorably for him. With regard to Nelson, Fox has established neither deficient performance nor prejudice. *Strickland*, 466 U.S. at 697.

2. Ineffective Assistance of Counsel Claims Against Bryan R. Huffman:

In reference to his personally retained trial and appellate counsel, Brian R. Huffman, Fox alleges ineffective assistance of counsel because counsel allegedly: (1) failed to memorialize

witness statements and testimony; (2) failed to subpoena *Brady/Giglio* evidence; (3) coerced Fox into not testifying at trial and against offering a statement during the sentencing proceedings; (4) failed to argue that the undersigned district court violated his right to allocate; (5) failed to challenge subject matter jurisdiction and essential element arguments; (6) failed to argue 5th and 6th Amendment violations; (7) failed to raise that Huffman, himself, provided ineffective assistance of counsel on behalf of Fox by not fully investigating the matter and offering every possible defense; (8) failed to object to the 4th Amendment issues and (9) and failed to investigate the alleged victim's criminal history and present that evidence at trial. (ECF No. 1, 4-5, Ground 1(a), ¶¶ 6-14.)

Specifically, Fox initially asserts that Huffman was ineffective because he failed to memorialize witness statements. Huffman avers that he, along with his contracted investigator, interviewed multiple witnesses - most of whom were privy to a family feud. He found this information had "nothing to do with the allegations against Movant" and, if presented, would likely risk the Government's introduction of additional detrimental evidence against his client. (ECF No. 15-1, 3, ¶7a & 7, ¶7k.) Beyond Fox's bare allegations, there is nothing in the record that shows Huffman failed to interview witnesses and present testimony from any potential witnesses, as Fox claims. The Court finds that this claim of ineffective assistance lacks a factual basis. Fox has failed to show that Huffman's performance was deficient or that he has suffered prejudice. *Strickland,* 466 U.S. at 669; and *Short*, 504 F.2d at 65.

Secondly, Fox asserts Huffman failed to subpoena *Brady/Giglio* evidence with regard to the victim's character. Fox contends that Huffman failed to investigate the alleged victim's criminal history and present that evidence at trial. (ECF No. 1, 4-5; Ground 1 ¶¶ 7 & 14). Generally speaking, a *Brady* violation occurs when the Government fails to turn over evidence

that is: 1) favorable to the Defendant; 2) material or relevant; and 3) available to the prosecution at the time of the non-disclosure. Evidence is material for *Brady* purposes if there is a reasonable possibility that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Stricker v. Green*, 527 U.S. 263, 280 (1999); *Brady v. Maryland*, 373 U.S. 83,87 (1963) (Suppression of evidence by the prosecution that is favorable to an accused violates due process when it is material either to guilt or punishment irrespective of the good or bad faith of the prosecution). Also, "[i]n a criminal proceeding involving alleged sexual misconduct, Rule 412(a) prohibits evidence offered to prove that a victim engaged in other sexual behavior, as well as evidence offered to prove a victim's sexual predisposition." Fed. R. Evid. 412 (a); *See United States v. Thompson,* 178 F.Supp.3d 86, 90 (W.D.N.Y. April 6, 2016) (internal quotations omitted).

The Sixth Circuit addressed Fox's *Brady* claim, concluding that the *Brady* claim lacked merit. The Appellate Court determined that pursuant to Fed. R. Evid. 412, any evidence regarding S.S.'s sexual conduct or predisposition would have been excluded at trial in order to protect the privacy of a minor. The Court also found such evidence was marginally relevant to Fox's defense and there was no prejudice. *See Fox*, 600 F. App'x at 420-21. Any information regarding the victim's sexual predisposition was not admissible at trial. In addition, the victim's credibility had already been severely damaged during trial when she admitted lying to Fox and others on numerous occasions, thus rendering any additional impeachment material cumulative. Counsel's attempts to raise this issue at sentencing and as grounds for a new trial and on appeal were denied. Therefore, these arguments do not support an ineffective assistance of counsel claim. This claim of ineffective assistance of counsel has no merit.

Fox raises a third claim against Huffman for coercing him not to testify at trial and against offering a statement during the sentencing proceedings. Huffman and his paralegal advised Fox of his rights to testify at trial and the benefits and dangers of doing so. (ECF No. 15-1, 3 ¶ c.) Counsel asserted that he advised Fox not to testify in his defense but also that he had an absolute right to do so. (*Id.*) A review of the trial transcript does not support Fox's claim that Huffman tried to prevent Fox from testifying during the trial. Huffman and the undersigned Court questioned Fox on this very issue, wherein Fox affirmed that he had been fully advised of his right to remain silent or testify, and his final decision to remain silent.

> **THE COURT:** All right. I would like to go ahead and take up the issue of whether or not Mr. – Mr. Fox, Mr. Arnold Fox is going to testify or not.
>
> **MR. ARNOLD FOX:** No, I'm not, your Honor.
>
> **THE COURT:** Okay. I need for you to come around and place you under oath, there are certain questions that I need to make clear on the record.
>
> Okay. If you would, please, just raise your right hand.
> Do you solemnly swear or affirm, under the penalties of perjury, the testimony that you are about to provide the court in the case now on trial to be the truth, the whole truth and nothing but the truth, so help you God?
>
> **MR. ARNOLD FOX:** Yes, I do.
>
> **THE COURT:** Okay. Do you care to inquire?
>
> **BY MR. HUFFMAN:**
>
> Q. Mr. Fox, you have been present throughout the trial and you have been observing the proceedings and you have had lengthy discussions with myself, my staff and my law partner. You have been advised as to our opinion as to how the trial is proceeding. You've also been advised as to our opinion of whether or not you wish to testify or take the stand in your defense.

You have been advised by us that you have an absolute constitutional right to testify in your defense. We have given you advice as to our strong opinion that you do not testify in your own defense.
Now at this point in time, please let the judge know what your decision is regarding testimony.

A. Officially I'm not going to testify.

THE COURT: All right. Just a couple of questions to follow-up on that.

THE WITNESS: Yes, sir.

BY THE COURT:
Q. Your mind is clear today, you understand everything that you're doing?

A. Yes, sir.

Q. You're making this decision without any reservations, threats, or coercion anything along those lines.

A. I'm making the decision without that, yes.

Q. Okay. Now you realize that you have, as your lawyer has indicated, an absolute right to remain silent and not testify and conversely, the other side of the ledger, an absolute right to testify in your own behalf.

You understand that if you were to testify, you know, your credibility would be tested similarly to the way the other witnesses are handled. And I would instruct the jury along those lines.

You understand that, don't you?

A. Yes.

Q. On the other hand, if you decided that you wanted to remain silent, I think you've heard me tell the jury on many occasions and I would tell them again that's your absolute right to remain silent, no one can force you to testify and they can't hold that against you.

Do you understand?

A. Yes, sir.

Q. Have you had ample opportunity to discuss this with your lawyer?

A. I have.

Q. I'm assuming he has answered all of your questions.

A. Yes.
Q. But ultimately it is your decision whether or not you want to testify.

A. Yes, Your Honor.

Q. And your decision is?

A. I'm not going to testify.

THE COURT: Okay. Thank you, Mr. Fox.

THE WITNESS: Yes, sir.

THE COURT: You may be seated.

(Witness excused.)

(ECF No. 160, 5, 22-25, 6, 1-12, 7, 6-25, 8, 1-25, & 9, 1-13.) The record clearly shows that Huffman did not force Fox to remain silent during the trial.

Fox also claims Huffman failed to argue that the undersigned District Court violated his right of allocution. The Government rebuts this as lacking merit citing to the record and Huffman's affidavit, while noting that the Court allowed Fox to read a statement during the proceeding. (ECF No. 15, 10-11.) After reviewing the transcript of the sentencing hearing, Fox exercised his right to testify *and* exercised his right of allocution for nearly two hours during the sentencing hearing. (ECF Nos. 161, 108-177 & 162, 64-291.) This claim is frivolous.

The argument that Huffman failed to challenge subject matter jurisdiction and essential element arguments simply fail as contrary to the law in this district. Both of these arguments

have been resolved under case law of this Circuit. It is not necessary to include the elements of the state offenses in an indictment charging a crime under § 2422(b). *See United States v. Roman*, 795 F.3d 511, 515 n.2 (6th Cir. 2015). "The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *United States v. Lopez,* 514 U.S. 549, 558-59 (1995) (*quoting Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)). As such, it would have been futile for counsel to have raised these issues on behalf of Fox and as such, he was justified in not doing so.

The Court also finds that Fox's sixth claim that Huffman failed to argue 5th and 6th Amendment violations are conclusory, lack factual basis, and are without merit. Fox merely asserts that Huffman failed to raise these arguments before the Court. (ECF No. 1, 4.) As noted by the Government, Huffman averred that he extensively reviewed the record and raised all possible defenses in order to properly represent his client. (ECF No. 15-1, 5 ¶ f.) After reviewing the transcripts and affidavits of counsel, as well as, the position taken by counsel on appeal, the Court finds this claim has no basis and is also not well taken.

Fox asserts that Huffman was ineffective because he failed to assert that he, himself, had personally provided ineffective assistance of counsel by not fully investigating the matter and offering every possible defense. This argument simply has no factual basis or evidentiary support. Equally without merit is Fox's claim that both Huffman and Mathis were ineffective because they failed to raise 4th Amendment issues. These arguments are not supported by the record as both counsel clearly indicated that those issues were frivolous and should not be raised. In response, Huffman provides,

> h. Movant alleges undersigned counsel failed to object to the 4th Amendment issues that are clearly evident in the [Movant's] case.

> Such allegations are without merit. Undersigned counsel found no such issues existed. Movant takes issues with the searches conducted pursuant to warrants issued by a neutral and detached magistrate. Such searches led to evidence introduced at trial against Movant. Undersigned counsel and appointed trial counsel found no such meritorious issues to raise in pretrial motions.

(ECF No. 15-1, 6 ¶ h.) Similarly, trial counsel Andre Mathis explains:

> 7. Fox alleges that I failed to object to "4th Amendment issues that are clearly evident in the Petitioner's case." Based on my review of the facts and law related to the search and seizure of Fox's cellular telephone, I did not believe that the Government conducted an illegal search and seizure, which is why I did not file a motion to suppress in Case No. 11-cr-20302. Fox was indicted in Case No. 12-cr-20117 for possession of child pornography. I did file a motion to suppress in that case because I believed that the facts and law established an illegal search of seizure of Fox's property.

(ECF No. 15-2, 2, ¶ 7.)

3. Ineffective Assistance of Counsel Claims Against Andre Mathis

Fox also raises several claims of ineffective assistance of counsel claims against his court-appointed trial counsel, Andre Mathis. (ECF No. 1, 18, 6-8.) Specifically, Fox asserts that his court-appointed trial counsel was ineffective at trial because he: (1) failed to memorialize witness statements and testimony; (2) refused to subpoena *Giglio* and *Brady* evidence; (3) did not object to the 4th Amendment issues; and (4) failed to investigate the alleged victim's criminal past. (ECF No. 1, 5 ¶¶ 15-18.) Fox contends that despite providing counsel a list of nineteen persons for Mathis to interview, counsel only interviewed one party, thereby failing to memorialize witness statements that could have added to his defense. (*Id.* at 7-8.) In his affidavit, Fox asserts that to no avail, he asked Mr. Mathis about the substance of the indictment as well as requested that he and his retained counsel request copies of the grand jury minutes. (ECF No. 1-3, 1-2.) The Government responds that Fox's self-serving statements within his affidavits should be considered incredible as a matter of law. (ECF No. 15, 14.)

Attorney Mathis addresses Fox's claims in his affidavit in which he asserts that he acquired an investigator to assist with witness interviews; provided Fox with their statements; represented Fox during a detention and suppression hearing for which transcripts were provided; that he investigated all possible defenses and researched the elements of the charge offense against Fox, including false allegations, finding no non-frivolous claims in which to argue before the Court. He further asserts that records regarding the victim's past were unavailable based on her status as a minor. (ECF No. 15-2, 2, ¶¶ 5, 8-12.) The Court has previously addressed the *Giglio/Brady* claims, the victim's criminal history, and the Fourth Amendment claims, extensively. For the same reasons discussed above, the Court finds that Fox has failed to demonstrate evidence of ineffective assistance of counsel by Mathis.

Fox insists that all of the attorneys were ineffective by: (1) failing to require that the Government prove subject matter jurisdiction concerning rape, statutory rape and other conduct that lacked an essential element of the offense – an economic nexus; (2) failing to investigate for possible defenses such as retaliation by agents regarding a family feud; and last (3) failing to investigate essential elements of the charged offense as to the facts and law. (ECF No. 1, 5 ¶¶ 19-21.) The affidavits of counsel rebut sufficiently these allegations. All of the attorneys indicated that they researched the elements of the charge, investigated the evidence for any possible defenses, and rendered appropriate representation and consultation in every manner based on the complicated factual history surrounding this case.

In response to Fox's arguments that counsel failed to challenge the Court's subject matter jurisdiction over this case, the Government responds that "petitioner provides no factual basis for this allegation." Huffman's affidavit clearly provides that all counsel involved in the

case had examined the issue of subject matter jurisdiction, finding that any contrary assertion lacked merit based on prior decisions by the court and the appellate court. (ECF Nos. 15, 11.)

After reviewing the entire record, even without benefit of the attorney affidavits, the Court finds no evidence that any of the associated attorneys' representation of Fox fell below the objective professional standards to provide effective counsel. Fox tries to flood the record with countless unfounded accusations against his counsel. However, nothing in the record demonstrates deficient performance by any of his lawyers. Quite the contrary, each lawyer provided Fox with exemplary representation, knowing full well he would eventually attack them with baseless ineffective assistance claims. All lawyers carried out their professional responsibilities even in light of the overwhelming facts and evidence against him. *Strickland*, 466 U.S. 688, 689.

Ground II: Prosecution for & Jury Instruction on an Unnamed Offense

Fox argues that he was unlawfully prosecuted and is currently imprisoned in violation of his constitutional and due process rights for an offense, aggravated statutory rape, that was not explicitly charged in the indictment or named in the underlying offense in the indictment, 18 U.S.C. § 2422(b). (ECF No. 1, 7-8, ¶¶ 2- 7.) Within his § 2255 motion, Fox asserts that

> 4) the Government and the Court contend that that underling sexual activity that invokes the Federal Statute is found in the print of the indictment, and the Court instruction to the Jury is "Aggravated Statutory Rape" which is **NOT** enumerated anywhere in the language of the statute.
>
> . . . .
>
> 7) That the defendant [Petitioner] was accused by indictment drafted by the Government; Informed by the District Court; and advised by defense counsel, that the underlying sexual activity that is purported to invoke the Federal Criminal Statute, 18 U.S.C. § 2422(b), is/was "STATUTORY RAPE" of which the **"defendant"** can be charged with a criminal offense.

(ECF No. 1, 8 ¶¶ 4 & 7.) Basically, Fox complains that the state offense of aggravated statutory rape is not a federal crime and it was not alleged or included in his indictment. Fox also contends that the applicability of the residual clause of § 2422(b) to conduct other than that found in the enumerated offenses of 18 U.S.C. § 2422 is unconstitutional. (ECF No. 18, 18-19.) The Government responds that because this claim was not raised on direct appeal, it cannot be asserted as a ground for relief under § 2255. (ECF No. 15, 18-19.) *See Ray v. United States*, 721 F.3d 758, 761 (6th Cir. 2013). Fox maintains that he did actually "call into question the Federal Criminal Statute 18 U.S.C. § 2422(b) as [unconstitutionally vague] in light of the United States Supreme Court decision in *Johnson v. United States*, 576 U.S. __ , [136 S.Ct. 2551] (2015)." (ECF No. 23.)

A review of Fox's Notice of Appeal as well as the Sixth Circuit decision in this regard clearly shows that Fox did not raise this issue on his direct appeal. It is well established that an argument not raised on direct appeal is waived. *See Jones v. United States*, 178 F.3d 790, 795 (6th Cir. 1999) (*quoting Grant v. United States*, 72 F.3d 503, 505-06 (6th Cir. 1996). An argument can only be raised for the first time on collateral review when the alleged error constitutes a "fundamental defect which inherently results in a complete miscarriage of justice" ... or in the alternative, raised again on a collateral review, if it were raised and considered on direct appeal amid a highly exceptional circumvent such as an intervening changed in the law. *Jones,* 178 F.3d at 796. In this case, the offense charged in 18 U.S.C. § 2252(b) was enacted on or about June 25, 1948, and last amended on July 27, 2006. There have been no recent intervening changes in the law since Fox's indictment, jury trial, conviction, sentencing and subsequent appeal that would provide Fox an exception to his waiver of this issue by failing to raise the claim on appeal. Moreover, the Sixth Circuit has determined that the underlying

criminal offenses are not elements of the federal offense charged in 18 U.S.C. § 2422(b). *See United States v. Roman*, 795 F.3d 511, 515 n.2 (6th Cir. 2015)(the elements of the state offenses are not incorporated into the elements of the federal crime under § 2422(b)); *United States v. Hackwork*, 438 F. Appx 972, 976-77 (6th Cir. 2012) and *United States v. Hart*, 635 F.3d 850, 856 (6th Cir. 2011). Accordingly, the Government is correct that this claim is barred for Fox's failure to raise this issue on direct appeal before the Sixth Circuit. Even if this claim had not been waived, Fox's argument is still meritless because the indictment provides him with notice of what he was charged with. The indictment alleged that Fox attempted to persuade a minor to engage in unlawful sexual activity. The definition of unlawful sexual activity contains the elements of the state offense of aggravated statutory rape. The jury was so instructed. For these reasons, Fox's claim has no merit and is DISMISSED.

Ground III: The Constitutionality of 18 U.S.C. § 2422(b) and 18 U.S.C. § 3006A

Fox contests the constitutionality of 18 U.S.C. § 2422(b) as exceeding the Congressional intent for regulations of interstate commerce under the Commerce Clause. (ECF No. 1, 8 ¶¶ 5-6 & ECF No. 18, 16.) Fox also filed a Motion for the Court to Certify that the United States Attorney General has questioned the Constitutionality of 18 U.S.C. § 2422(b) under *Johnson*. (ECF No. 23). In *Johnson*, the United States Supreme Court held that the ACCA's residual clause is void for vagueness, while leaving "the use of force" and enumerated offense clauses undisturbed. *Johnson v. United States,* 135 S. Ct. 2551, 2557 (2015). The residual clause of the Armed Career Criminal Act ("ACCA") is not at issue in this case.

On appeal, the Sixth Circuit did not address the merits of this issue regarding whether 18 U.S.C. § 2422(b) exceeds Congressional power to regulate interstate commerce, as it was presented within a *pro se* filing while Fox was represented by counsel. *Fox*, 600 F. App'x at

422. However, this issue has been resolved in other litigation. The Supreme Court identified three general categories of activity that Congress may regulate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e. those activities that substantially affect interstate commerce.

United States v. Cotton, 760 F.Supp.2d 116, 139 (2011) (*quoting United States v. Lopez*, 514 U.S. 549, 558-59 (1995)(citations omitted)). Cotton argued that a sex offender registry was akin to regulation of domestic violence and as such, lacked a substantial relationship to interstate commerce. However, in accordance with *Lopez*, the Supreme Court dismissed this argument. ". . . . Section 2250 falls squarely within the first two prongs of *Lopez*, . . . Congress may forbid or punish the use of channels of interstate commerce to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin." (*Cotton*, 760 F.Supp.2d at 139) (citations omitted). "The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.... Even if [the court] were to assume that the harms and targeted illegal conduct were purely local in nature, the use of the *channels* and *instrumentalities* of interstate commerce is necessarily part of the commission of the targeted offense under 18 U.S.C. § 2550." *Id.* at 139. Therefore, Fox's argument that offenses under 18 U.S.C. § 2422(b) exceed Congressional authority is without merit. In enacting this provision, Congress has forbidden sex offenders from using the channels of interstate commerce for immoral purposes. "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect

interstate commerce." *Gonzales v. Raich, et al.*, 125 S.Ct. 2195, 2216 (2005). Accordingly, this argument does not justify § 2255 relief in this case.

Ground IV: Imposition of an Improper Sentence

Fox asserts that the District Court improperly imposed an enhanced sentence based on a computer that never surfaced, for obstruction of justice lacking support, by adding points for statements made by Whitney Fox, imposing conditions of supervised release that forbid computer use when he was not convicted with use of computer least in violation of the Constitution. (ECF No. 1, 10, ¶¶ 1-2.) The Government asserts, *inter alia*, that Huffman raised objections to the proposed enhancements resulting in the District Court granting a downward departure.[1] Moreover, the Government asserts that alleged errors in sentencing are not cognizable on collateral review. *Id.* at 20. The Court agrees.

Fox did not challenge the factors that were taken into consideration or the actual terms of the sentence that were ultimately imposed by the undersigned district court on direct appeal. *See Fox*, 600 F. App'x at 415. As noted above, a motion to vacate pursuant to 28 U.S.C. § 2255 is not a substitute for direct appeal. Accordingly, sentencing challenges that were not made on direct appeal are generally waived and cannot be made for the first time in a § 2255 motion. *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001). "If the claim could have been raised on direct appeal, the Court considers it for the first time in a § 2255 motion only if the petitioner shows: 1) cause and actual prejudice to excuse his failure to raise the claim previously; or 2) that he is "actually innocent" of the crime. *Stephens v. United States*, No. 2018 WL 1522080 at *4 (S.D. Ohio W.D. March 28, 2018)(*quoting Ray v. United States,* 721

[1] The Court misspoke during the sentencing hearing. Although the hearing transcript indicates the Court departed from the guideline sentencing range, actually, the Court varied from the range in arriving at the final sentence of 188 months confinement.

F.3d 758, 761 (6th Cir. 2013)). In this case, Fox has not presented either cause for or actual prejudice to excuse his failure to challenge his sentence on direct appeal.

Alternatively, if this claim were reviewable on the merits, the Court finds it unpersuasive. Fox has not suffered any prejudice based on the Court's imposition of a 188-month sentence, instead of one within the initially proposed guideline range of 262 to 327 months, the sentencing guideline range for a person convicted of an offense under 18 U.S.C. § 2422(b) with a Criminal History Category of I and an Adjusted Offense Level of 34. (Criminal Case No. 11-20302, ECF Nos. 148, 149 & 162, 50-51.) The record shows that Huffman submitted and argued many objections on behalf of Fox to the presentence report. As a result, the Court sustained some of those objections which ultimately led to an Adjusted Offense Level and a lower sentence. (ECF No. 162, 23, 30, 34, 42, 44, 48-49, 50-51.) Moreover, the Sixth Circuit has held that 18 U.S.C. § 2422(b)'s ten year mandatory minimum sentence for attempting to entice a minor into sexual relations raises no inference that it is grossly disproportionate or an 8th Amendment violation as cruel and unusual punishment. *United States v. Hart*, 635 F.3d 850, 859 (6th Cir. 2011).

As such, Fox's argument that the Court imposed an improper sentence lacks merit.

Miscellaneous Arguments:

Outrageous Conduct by Government/Court Staff

Fox also asserts an entitlement to § 2255 relief because the Government and Court officials engaged in outrageous conduct. Fox merely claims that Government officials and Prosecutors tampered with witnesses, attempted to influence his son to testify against him, edited text messages and transcripts in order to present evidence against him; conversed with his daughter in front of jurors; and agents joked and played during Court as well as took photographs in

costumes in front of his home. (ECF No. 1, 12.) Fox even suggests that AUSA Debra Ireland committed fraud by offering perjured testimony before the Court. (ECF No. 18, 10.) Fox asserts that his attorneys refused to present these arguments to the Sixth Circuit on appeal. In response, the Government contends that, not only do these conclusory assertions lack merit, but again were not presented on direct appeal and as such are waived. (ECF No. 15, 21-22.) Within his Reply, Fox simply reiterates unfounded conclusions that "innocent prisoners would never be convicted if not for outrageous government conduct," that the Government falsified evidence and proffered perjured testimony and there was insufficient evidence to convict him. (ECF No. 18, 3-13.) On direct appeal, the Sixth Circuit determined that "[u]nder these circumstances, the government presented evidence sufficient to prove beyond a reasonable doubt that Fox attempted to coerce or entice S.S." (*United States v. Fox*, Case No. 14-5391 and ECF No. 175, 7.) No relief may be found on this claim.

Motion To Amend Complaint

On February 16, 2018, Fox filed a *Pro Se* Motion to Amend his Complaint under *Nelson* asserting his innocence because he cannot be punished or penalized for uncharged conduct. *See Nelson v. Colorado*, 137 S.Ct. 1249 (2017). (ECF No. 32.) The Court finds that leave to amend the § 2255 Motion should be Denied.

A party may amend its pleading only with the opposing party's written consent or the court's leave and the court should freely give leave when justice so requires. Fed. R. Civ. P. 15(a)(2). However, denial is appropriate where the Court finds that any amendment would be futile. *See Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) (*quoting Forman v. Davis*, 371 U.S. 178, 182 (1962)). Based on the Court's finding that Fox's § 2255 motion should be denied and the case dismissed, the motion to amend is Denied as Moot.

V. APPELLATE ISSUES

A Certificate of Appealability ("COA") may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and 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 petitioner 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) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (*per curiam)* (holding a prisoner must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further). A COA does not require a showing that the appeal will succeed. *Welch v. United States*, 136 S.Ct. 1257, 1263 (2016); *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, there can be no question that the claims in this Motion are noncognizable, and are without merit. Because any appeal by Petitioner on the issues raised in this Motion does not deserve attention, the Court **DENIES** a certificate of appealability.

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**.[2]

CONCLUSION

For the foregoing reasons, the Court finds that Petitioner's Motion to Vacate or Set Aside his Sentence under 28 U.S.C. § 2255 are **DENIED**. Accordingly, all remaining pending motions, ECF Nos. 11, 12, 16, 21, 23, 24 & 32, are Denied as Moot and the case is ordered Dismissed. The Court has fully disposed of the instant § 2255 motion, denying all substantive claims and as such rendering any and all remaining motions Moot. As a result, the Court admonishes Fox that should he choose to file a second or successive petition for § 2255 relief, he must first obtain authorization to proceed from the United States Sixth Circuit Court of Appeals. *In re Sims*, 111 F.3d 45 (1997). Therefore, Mr. Fox is directed not to file any additional motions in this case as he may not proceed with a second or successive § 2255 motion for relief without authorization from the United States Sixth Circuit Court of Appeals. As the Court has denied Mr. Fox a certificate of appealability in good faith or *in forma pauperis,* any appeal from this action must be accompanied by the full payment for costs of appeal.

IT IS SO ORDERED on this 13th day of June, 2018.

s/ John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE

[2] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).