No. 20-3012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 18, 2020
DEBORAH S. HUNT, Clerk

RAMONE L. WRIGHT,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MURPHY, Circuit Judge.

Ramone L. Wright, a federal prisoner proceeding pro se, appeals a district court judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The court construes the notice of appeal as a request for a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(2). Wright has filed a motion to proceed in forma pauperis.

The district court sentenced Wright to 180 months of imprisonment after pleading guilty pursuant to a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement to two counts of interstate robbery, in violation of 18 U.S.C. § 1951; and two counts of brandishing a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Wright appealed, and this court dismissed the appeal as untimely. *United States v. Wright*, No. 17-3642 (6th Cir. Sept. 1, 2017) (order). Wright then filed a § 2255 motion, arguing that he received ineffective assistance of counsel when counsel allowed him to enter a guilty plea while under the influence of the prescription drug Remeron, when counsel failed to review his presentence report with him, and when counsel failed to raise any objections at sentencing. Subsequently, Wright filed a motion to amend, which the district court denied as untimely and because the proposed amendment was frivolous. The district court then denied the § 2255 motion and declined to issue a certificate of appealability. *Wright v. United States*, No. 2:16-cr-00059 (S.D. Ohio Dec. 6, 2019).

APPENDIX A

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial is on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. And the Supreme Court has held that this right to the assistance of counsel includes "the right to the effective assistance of counsel" during "critical stages" of a prosecution, including the entry of a guilty plea. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Turner v. United States*, 885 F.3d 949, 952–53 (6th Cir. 2018) (en banc) (citing *Missouri v. Frye*, 566 U.S. 134, 140 (2012)). To prove constitutionally ineffective assistance of counsel, a petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland*, 466 U.S. at 687. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Generally, prejudice means "a reasonable probability" that "but for such conduct the outcome of the proceedings would have been different." *Williams v. Anderson*, 460 F.3d 789, 800 (6th Cir. 2006). In the plea-entry context, prejudice means "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would [instead] have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "Surmounting *Strickland*'s high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2011)).

Wright argues that he received ineffective assistance of counsel when counsel allowed him to enter a guilty plea while under the influence of the antidepressant drug Remeron. Specifically, Wright asserts that because Remeron can cause disorientation and hallucinations, his guilty plea was not knowing, intelligent, and voluntary. However, Wright has failed to make a substantial showing that counsel acted unreasonably by letting him enter a guilty plea because he identifies no evidence in support of his assertion that Remeron affected his ability to understand the nature of the plea proceedings. Indeed, at the change of plea hearing, Wright told the district court that Remeron did not affect his ability to understand the nature of the plea proceedings. Based on its observations during the hearing, the district court found that Wright's guilty plea was knowing, intelligent, and voluntary. And Wright has presented no evidence that the drug had ever caused him to feel disoriented or to hallucinate. Wright thus has not shown either that his counsel was constitutionally deficient in allowing him to enter a guilty plea while on his antidepressant medication or that there is a reasonable probability that, but for any error, he would have rejected the favorable plea deal and insisted on going to trial. Accordingly, reasonable jurists would not debate the district court's rejection of this claim.

Wright also argues that he received ineffective assistance of counsel when counsel failed to review his presentence report with him and raise objections at sentencing. Wright does not identify any objection his counsel should have raised at sentencing. And Wright's counsel averred that he spent nearly two hours reviewing the report with Wright beforehand and that Wright had no objections to the report. But even assuming Wright made a substantial showing that his counsel provided deficient assistance, Wright has not made a substantial showing of prejudice because the binding plea agreement provided for a 180-month sentence and no objection by counsel to the presentence report or at sentencing could have affected the agreed-upon sentence. Accordingly, reasonable jurists would not debate the district court's rejection of this claim.

Finally, reasonable jurists would not debate the district court's decision to deny the motion to amend to add Wright's claim that he received ineffective assistance of counsel when counsel failed to object to a defect in the indictment. Wright argues that his indictment was defective

because it failed to specify whether he was being charged with violating 18 U.S.C. § 1951(a) or (b). But § 1951's single criminal prohibition appears only in subsection (a); subsection (b) merely contains the statutory definitions of a few terms in subsection (a). The indictment's citation of § 1951 thus satisfied Federal Rule of Criminal Procedure 7(c)(1)'s requirements, so Wright's indictment was not defective and Wright's claim to the contrary was meritless. Accordingly, reasonable jurists would not debate the district court's denial of Wright's motion to amend.

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

**AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Ramone L. Wright,

vs.

Case No. 2:18-cv-120
2:16-cr-59

United States of America,

Judge Michael H. Watson

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the December 6, 2019 Opinion and Order, the Report and Recommendation is ADOPTED and AFFIRMED. The Motion to Vacate is DENIED.

Date: **December 6, 2019** **Richard Nagel, Clerk**

s/ Jennifer Kacsor

By Jennifer Kacsor/Courtroom Deputy

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ramone L. Wright,

Movant,

v.

United States of America,

Respondent.

Crim. Case No. 2:16-cr-59
Civ. Case No. 18-cv-120
Judge Michael H. Watson
Magistrate Judge Michael R. Merz

OPINION AND ORDER

On May 9, 2019, the Magistrate Judge issued a Report and Recommendation ("R&R") recommending that Movant's motion to vacate under 28 U.S.C. § 2255 be denied. ECF No. 84. Movant has objected to the R&R. ECF No. 86. Pursuant to 28 U.S.C. § 636(b), this court has conducted a *de novo* review. For the reasons that follow, Movant's objections are **OVERRULED**. The R&R is **ADOPTED** and **AFFIRMED**. The motion to vacate is **DENIED**. ECF No. 60. The Court **DISMISSES** this action; **DECLINES** to issue a certificate of appealability; and **CERTIFIES** that any appeal would be objectively frivolous.

Pursuant to a negotiated plea agreement, Movant was convicted of two counts of violating the Hobbs Act, 18 U.S.C § 1951, and two counts of brandishing a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). ECF No. 49-1. Movant challenges that conviction in his motion to vacate, alleging that he received ineffective assistance of counsel

during plea negotiations because counsel allowed him to plead guilty while he was taking the prescription drug Remeron. The Magistrate Judge concluded that Movant had failed to demonstrate that counsel's performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1984) because Movant failed to produce any evidence indicating that the prescription pills impacted his judgment.

Movant objects to this conclusion because "Remeron was prescribed to [Movant] for anti-psychotic symptoms by a licensed psychiatrist. Remeron document that was submitted to the court was provided by BOP official record (medical file)." ECF No. 86, at PAGE ID #341. Movant further objects because the Magistrate Judge is not a licensed psychiatrist. *Id.* These objections are without merit. The issue is not why Movant was taking the pills, or if he was taking them because a doctor had prescribed them. The issue is whether the pills impacted Movant's ability to understand the plea proceedings. Movant has produced no evidence indicating that they did. As the Magistrate Judge correctly noted, at the plea hearing Movant testified that he was taking Remeron but that it did not affect his ability to understand the proceedings. *Transcript*, ECF No. 52, at PAGE ID # 160. That statement is entitled to a great presumption of truthfulness. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). In addition, the side effects listed in the drug information pamphlet that Movant has submitted do not indicate that the drug might cause issues that could impact understanding. ECF No. 80, at PAGE ID # 287. Therefore, Movant's late breaking and conclusory

assertion that he was unable to understand the nature of the proceedings because he was taking Remeron— which flatly contradicts the statement that he made in open court— is simply not enough to overcome the presumption of truthfulness afforded to his in-court statement.

Moreover, the Undersigned recalls Movant's demeanor and appearance in open court during the plea hearing. Movant appeared lucid and capable of understanding the nature of the proceeding. He was given time to consider his position, how he wished to proceed, and to consult with his attorney. He answered the Court's questions under oath in a cogent and coherent manner including the Court's question about whether the Remeron impacted his ability to understand the proceedings. The Court's impression is buttressed by the fact that defense counsel indicated at the hearing that he had no problem speaking with Movant during a recess, *Transcript*, ECF No. 52, at PAGE ID # 162, and by counsel's subsequent declaration, which avers that Movant's abilities did not appear to be impacted by his medications, *Affidavit*, ¶ 7, ECF No. 79, at PAGE ID # 281. For these reasons, Movant's objection is **OVERRULED**, and the Magistrate Judge's conclusion is **ADOPTED** and **AFFIRMED.**

The Magistrate Judge also reached a number of other conclusions. With regard to counsel's performance during plea negotiations, the Magistrate Judge concluded that Movant failed to establish that counsel's performance was prejudicial under *Strickland* given that the plea agreement resulted in a sentence

that was significantly lower than the one Movant risked receiving at trial given the substantial evidence of his guilt. The Magistrate Judge also concluded that Movant failed to establish deficient performance or prejudice with regard to his claim that counsel was ineffective for failing to review with him the Presentence Investigation Report or raise objections at the sentencing hearing. Further, the Magistrate Judge concluded that Movant had waived a number of claims related to the voluntariness of his plea— claims raised for the first time in his Reply— because he had waived the right to directly appeal his conviction subject to certain exceptions. Movant failed to object to any of these conclusions. Therefore, they are **ADOPTED** and **AFFIRMED**. The Court agrees with the Magistrate Judge and finds that Movant is not entitled to relief on any of the grounds that Movant raised in the motion to vacate or that he raised for the first time in his Reply.

In his objections, Movant also raises new grounds that he did not assert in his motion to vacate. Specifically, Movant alleges that his plea was not knowing, intelligent, and voluntary because the government failed to disclose materials in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and because of judicial involvement in plea negotiations. Because neither of these ground for relief were alleged in the motion to vacate, they were not before the Magistrate Judge when the R&R was issued.

In any event, the Court finds that Movant's attempts to amend his motion and bring these new grounds are barred by the statute of limitations. The amended judgment of sentence was entered February 15, 2017. ECF No. 49. As a result, Petitioner had fourteen days, or until March 1, 2017, to file a timely direct appeal. *See* Fed. App. R. 4(b)(1)(A). He did not do so. Consequently, the one-year statute of limitations to file a motion to vacate began running on March 2, 2017, and it expired one year later on March 2, 2018. *See* 28 U.S.C. § 2255(f)(1). These new grounds were raised, however, in Movant's objections, which are dated May 23, 2019. These grounds do not relate back to the claims in the original motion to vacate, and thus, amendment is futile. *See Dado v. United States,* No. 17-2013, 2018 WL 1100279, at * 3 (6th Cir. Feb. 15, 2018) (citing *Mayle v. Felix*, 545 U.S. 644, 650 (2005) (finding that district court did not err in denying attempt to amend a motion to vacate; an amended petition does not escape the one-year statute of limitations if it asserts new grounds for relief that rely on alleged facts that differ in both time and type from those alleged in the original pleading)); *United States v. Clark,* 637 F. App'x 206, 209 (6th Cir. 2016) (explaining that "[a] party cannot amend a § 2255 petition to add a completely new claim after the statute of limitations has expired") (internal citations omitted); *Howard v. United States*, 533 F.3d 472, 475–76 (6th Cir. 2008). Moreover, Movant does not allege, and the record does not reflect, any basis for tolling the statute of limitations.

For these reasons, the R&R, ECF No. 84, is **ADOPTED** and **AFFIRMED**. The Clerk is **DIRECTED** to terminate ECF Nos. 60 and 84 and enter final judgment.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAMONE L. WRIGHT,

Petitioner,

v.

CRIM CASE NO. 2:16-CR-00059
CIV CASE NO. 18-CV-00120
Judge Michael H. Watson
Magistrate Judge Kimberly A. Jolson

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION
AND ORDER

This matter is before the Court on Respondent's Motion to Hold Answer in Abeyance, (Doc. 63), Petitioner's Motion to Amend (Doc. 65), and Petitioner's Motion to Waive Attorney Client Privilege (Doc. 66). For the reasons that follow, Respondent's Motion to Hold Answer in Abeyance (Doc. 63) and Petitioner's Motion to Waive Attorney Client Privilege (Doc. 66) are **GRANTED**, subject to the limitations described herein. Respondent shall have **fourteen (14) days** from the date of this Order to file an answer, motion, or other response to Petitioner's motion to vacate in accordance with the provisions of Rule 5 of the Rules Governing § 2255 Proceedings in the United States District Courts. Petitioner may have **twenty-one (21) days** thereafter to submit a reply to Respondent's answer or other pleading. Further, it is **RECOMMENDED** that Petitioner's Motion to Amend (Doc. 65) be **DENIED**.

I. BACKGROUND

Pursuant to a negotiated plea agreement, Petitioner, a federal prisoner, was convicted of two counts of violating the Hobbs Act, 18 U.S.C § 1951, and two counts of brandishing a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (Doc.

49-1). Petitioner was sentenced on February 15, 2017. (*Id.*). Petitioner filed an appeal of that judgment on June 14, 2017. (Doc. 53). On September 1, 2017, the Sixth Circuit Court of Appeals dismissed that appeal *sua sponte* as untimely without prejudice to any remedies Petitioner may have under 28 U.S.C. § 2255. (Doc. 56).

On February 14, 2018, Petitioner moved this Court to vacate, set aside, or correct his sentence pursuant to § 2255, asserting that he was denied the effective assistance of trial counsel at the plea agreement and sentencing stages. (Doc. 60). On March 5, 2018, Respondent was ordered to answer Petitioner's motion to vacate by March 26, 2018. (Doc. 62). Respondent subsequently moved this Court to hold that answer date in abeyance pending Petitioner's waiver of his attorney-client privilege asserting that Respondent could not answer Petitioner's allegations without such a waiver. (Doc. 63). Because Petitioner's memorandum in opposition to Respondent's motion to hold in abeyance was due April 3, 2018, the Court stayed the answer date until after the April 3, 2018, deadline expired. (Doc. 64). Petitioner did not, however, oppose the motion to hold in abeyance. Instead, on March 23, 2018, Petitioner filed a Motion to Waive Attorney-Client Privilege. (Doc. 66). Petitioner's motion to waive privilege incorrectly indicates that this action is pending in the United States District Court for the Northern District of Ohio. (*Id.*). Respondent did not oppose Petitioner's motion to waive privilege or otherwise indicate that Petitioner's motion would not suffice as a formal waiver.

In the interim, on March 16, 2018, Petitioner filed a Motion to Amend his § 2255 motion to vacate pursuant to Rule 15 of the Federal Rules of Civil Procedure ("FRCP 15"). (Doc. 65). In that motion to amend, Petitioner seeks to add a claim alleging that trial counsel was ineffective for failing to object to a defect in the indictment. (*Id.*). Specifically, Petitioner alleges that indictment was defective because "when . . . charging Title 18 U.S.C. § 1951 [the

indictment] did not provide what subsection of the code [P]etitioner was being charged under, i.e. (a) or (B) . . . . (*Id.* at PAGEID #: 216.).

II. DISCUSSION

A. Petitioner's Waiver of Attorney-Client Privilege is Sufficient

For good cause, the Court **GRANTS** Respondent's unopposed motion to hold the answer in abeyance. (Doc. 63). Respondent sought to stay the answer date until Petitioner waived the attorney-client privilege. Petitioner already impliedly waived that privilege as it relates to the ineffective assistance of counsel claims in his § 2255 motion. *See In re Lott*, 424 F.3d 446, 452–54 (6th Cir. 2012) (explaining that implied waiver of privilege typically occurs in habeas proceedings when a petitioner asserts that his counsel was ineffective); *Shafer v. United States*, Nos. 17-cv-0423; 15-cr-0096, 2018 WL 565278, at * 3 (S.D. Ohio Jan. 25, 2018) (explaining that courts routinely find a limited, implied waiver of attorney-client privilege in § 2255 proceedings alleging ineffective assistance of counsel). Nevertheless, it has been this Court's practice to require a petitioner to submit a written waiver of his attorney-client privilege when he alleges ineffective assistance of counsel in a § 2255 motion. *See, e.g.*, *Szewczyk v. United States*, Nos. 2:11-cv-786, 2:10-cr-91, 2013 WL 950872, at *2 (S.D. Ohio Mar. 12, 2013), *adopted by*, 2013 WL 1664827 (S.D. Ohio April 17, 2013).

Although Petitioner's unopposed motion to waive attorney-client privilege is incorrectly captioned, the Court accepts that it serves as a formal waiver in this action. Accordingly, Petitioner's motion to waive privilege (Doc. 66) is also **GRANTED**. The Court instructs that the waiver of privilege is limited solely to any communications between Petitioner and his former counsel which may be pertinent to his claims for relief. *In re Lott*, 424 F. 3d at 453 (explaining

that "[c]ourts must 'impose a waiver no broader than needed to ensure the fairness of the proceedings before it.'") (quoting *Bittaker v. Woodford*, 331 F. 3d 715, 718–20 (9th Cir. 2003)).

B. Petitioner's Amendment is Futile

Petitioner's Motion to Amend his § 2255 motion (Doc. 65), is governed by FRCP 15. *See* 28 U.S.C. § 2242; *see also* Rule 12 of the Federal Rules Governing Section 2255 Proceedings in the United States District Courts. FRCP 15(a)(2) provides that a court should "freely give leave" to amend "when justice so requires." Leave to amend should, however, "be denied when the amendment would be futile." *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 633 (6th Cir. 2009) (quoting *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995)). "Amendment of a complaint is futile when the proposed amendment would not permit the complaint to survive a motion to dismiss." *Miller v. Calhoun Cty.*, 408 F.3d 803, 817 (6th Cir. 2005) (citing *Neighborhood Dev. Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 23 (6th Cir. 1980)).

The Sixth Circuit Court of Appeals has held that an attempt to amend a § 2255 motion is futile if the amendment is barred by the one-year statute of limitations of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2255(f)(1). *See Oleson v. United States*, 27 F. App'x 566, 570 (6th Cir. 2001) (holding that a motion to amend was futile because it was barred by the AEDPA's one-year statute of limitation). An amendment is barred by the AEDPA's one-year statute of limitations when it is untimely and it does not "relate back" to a timely original § 2255 motion. *See Dado v. United States*, No. 17-2013, 2018 WL 1100279, at * 3 (6th Cir. Feb. 15, 2018) (citing *Mayle v. Felix*, 545 U.S. 644, 650 (2005)); *United States v. Clark*, 637 F. App'x 206, 209 (6th Cir. 2016); *Howard v. United States*, 533 F.3d 472, 475–76 (6th Cir. 2008)). An amendment relates back to an original § 2255 motion if it "arose out of the

same conduct, transaction, or occurrence" set forth in the original pleading. *Clark*, 637 F. App'x at 209 (citing FRCP 15(c)(1)(B)). On the other hand, an amendment does not relate back if it "asserts new grounds for relief supported by facts that differ in both time and type from those the original pleading set forth." *Dado*, 2018 WL 1100279, at * 3 (citing *Mayle*, 545 U.S. at 650). Accordingly, when presented with an untimely amendment, a court must determine if it addresses the same "common core of operative facts" as the initial § 2255 motion. *Clark*, 637 F. App'x at 209 (citing *Mayle*, 545 U.S. at 664).

In this case, Petitioner was sentenced on February 13, 2017. (Doc. 47). He had fourteen days to directly appeal that judgment. *See* Fed. App. R. 4(b)(1)(A). Petitioner did not file a timely appeal. Instead, he filed an untimely appeal which the Court of Appeals dismissed *sua sponte*. (Doc. 56). Because he did not file a timely appeal, Petitioner's conviction became final when the fourteen-day period to file an appeal expired on February 27, 2017. *See Gillis v. United States*, 729 F. 3d 641, 644 (6th Cir. 2013) (explaining that "[a] conviction becomes final when the time for a direct appeal expires and no appeal has been filed, not when an untimely appeal has been dismissed"). Pursuant to § 2255(f)(1), the one-year statute of limitations to file a motion to vacate under § 2255 begins to run the next day, and it expired on February 28, 2018. Thus, Petitioner's proposed amendment, filed March 16, 2018, is untimely.

The undersigned further concludes that Petitioner's untimely amendment does not relate back to the original § 2255 motion. (Doc. 60). The original § 2255 motion sets forth the following grounds alleging that trial counsel was ineffective at the plea agreement and sentencing stages:

> **Ground One:** [Petitioner] was denied his Sixth Amendment right to effective assistance of counsel . . . when court appointed counsel . . . knowingly allowed [Petitioner] to take a plea agreement while on the prescription drug (Remeron) that affected [Petitioner's] right to understand anything during the plea agreement.

* * *

> **Ground Two:** [Petitioner] was denied his Sixth Amendment right to effective assistance of counsel . . .when counsel . . . failed to review [Petitioner's] Presentence Investigation report with him and counsel failed to make any objections at sentencing that prejudiced [Petitioner's] sentence.

(Doc. 60, at PAGEID #: 195–96). In contrast, the proposed amendment asserts that trial counsel was ineffective at the pre-trial stage for failing to object to an alleged defect in the indictment. (Doc. 65). To be sure, the grounds asserted in the amendment and the original motion all involve ineffective assistance of counsel claims. Nevertheless, Petitioner cannot satisfy the relate back standard by raising ineffective assistance claims in his original motion and then amending to assert an ineffective assistance claim that is based upon allegations of an entirely distinct type of attorney malfeasance. *See Watkins v. Deangelo-Kipp*, 854 F.3d 846, 850 (6th Cir. 2017) (citing *United States v. Ciampi*, 419 F.3d 20, 24 (1st Cir. 2005)).

Because the untimely amendment seeks to raise a new ground for relief based on facts that are different in both time and type than those alleged in the original § 2255 motion, the undersigned finds that the untimely amendment does not relate back. *See Clark*, 637 F. App'x at 209 (finding that an amendment alleging that appellate counsel performed ineffectively by failing to challenge drug amounts used to calculate a petitioner's base offense level did not relate back to an original § 2255 motion alleging that appellate counsel performed ineffectively by failing to challenge career offender enhancement); *Evans v. United States*, 284 F. App'x 304, 305, 313 (6th Cir. 2008) (denying discovery to determine whether trial counsel gave petitioner incorrect advice regarding sentence he would receive through a plea agreement; an ineffective assistance claim based on such facts would not relate back to an original § 2255 motion alleging that trial counsel performed ineffectively by failing to pursue particular avenues to impeach a

witness). Accordingly, because Petitioner's amendment appears to be time barred, it is **RECOMMENDED** that the Motion to Amend (Doc. 65) be **DISMISSED**.

III. CONCLUSION

For the reasons stated, Respondent's Motion to Hold Answer in Abeyance (Doc. 63) and Petitioner's Motion to Waive Attorney Client Privilege (Doc. 66), are **GRANTED**. Further, it is **RECOMMENDED** that Petitioner's Motion to Amend (Doc. 65) be **DENIED**.

IT IS SO ORDERED.

Date: April 20, 2018

/s/ Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE