Appendix

Roberto Antoine Darden,
Petitioner

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari

R. Darden 72636-083
USP-Tucson
PO BOX 24550
Tucson, AZ 85734

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6800

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO ANTOINE DARDEN, a/k/a Dizz-e, a/k/a Javon,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge. (4:11-cr-00052-AWA-LRL-1; 4:14-cv-00136-AWA)

Submitted: December 20, 2019 Decided: January 30, 2020

Before DIAZ, THACKER, and RUSHING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Roberto Antoine Darden, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Roberto Antoine Darden seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Darden has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny Darden's motion for counsel, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: July 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6800
(4:11-cr-00052-AWA-LRL-1)
(4:14-cv-00136-AWA)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERTO ANTOINE DARDEN, a/k/a Dizz-e, a/k/a Javon

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Diaz, Judge Thacker, and Judge Rushing.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

ROBERTO ANTOINE DARDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 4:11cr52

ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit regarding Petitioner Roberto Antoine Darden's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. ECF No. 124. On remand, Mr. Darden's Motion is **DENIED.**

I. BACKGROUND

On November 23, 2011, Mr. Darden pleaded guilty to Counts Three and Nine of the Superseding Indictment pursuant to a written plea agreement. ECF No. 54. Count Three charged him with Conspiracy to Produce Child Pornography, in violation of 18 U.S.C. §§ 2251(a) and (e). ECF No. 32. Count Nine charged him with Tampering with a Witness, Victim, or Informant, in violation of 18 U.S.C. § 1512(b)(3). *Id.* Mr. Darden was represented by counsel through a Criminal Justice Act appointment. ECF No. 53. In his plea agreement, Mr. Darden represented that he was "satisfied that [his] attorney ha[d] rendered effective assistance." ECF No. 54 at 2. At his guilty plea hearing, he represented to the Court that he had had ample time to discuss the case

with his attorney and that he understood the charges against him. ECF No. 64 at 5–6, 9. He also stated that he did not believe that any of his constitutional rights had been violated. *Id.* at 18–19.

Mr. Darden subsequently filed several motions seeking to have his attorney withdrawn from the case and to withdraw his guilty plea. ECF Nos. 62, 65, 66, 70. The Court held a hearing at which Mr. Darden was asked if he had a complaint that his counsel was ineffective. ECF No. 88 at 5. Mr. Darden responded, "As of now, no. We discussed it downstairs. He clarified everything finally for me." *Id.* He also answered that he no longer wished to withdraw his guilty plea. *Id.* at 6.

Mr. Darden was sentenced on October 12, 2012. ECF No. 103. He raised forty-two objections to the Presentence Investigation Report, all of which the Court overruled. *See* ECF No. 113. He was assessed a Total Offense Level of 46 and a Criminal History Category of III. The Court sentenced him to 600 months' imprisonment. ECF No. 104 at 2.

The United States Court of Appeals for the Fourth Circuit denied Mr. Darden's direct appeal. ECF No. 121. Subsequently, Mr. Darden filed a Motion under 28 U.S.C. § 2255. ECF No. 124. The Court denied that Motion on February 8, 2018. ECF No. 158.

Mr. Darden appealed, and the Fourth Circuit concluded that not all of Mr. Darden's claims were resolved fully. ECF No. 165. Specifically, Mr. Darden's claims that counsel provided ineffective assistance by failing to (1) move to suppress the seizure of certain evidence from a plastic tub Mr. Darden left at a former residence and (2) file a motion *in limine* excluding statements from the victim regarding a photo lineup were not addressed. *Id.* The Fourth Circuit accordingly remanded the case to this Court to address these ineffective assistance claims. *Id.*

II. STANDARD OF REVIEW

A petitioner collaterally attacking his or her sentence or conviction bears the burden of proving that his or her sentence or conviction was imposed in violation of the United States Constitution or federal law, that the court was without jurisdiction to impose such a sentence, that the sentence exceeded the maximum authorized by law, or that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. The petitioner bears the burden of proving his or her grounds for collateral relief by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

A collateral attack under 28 U.S.C. § 2255 is far more limited than an appeal. The doctrine of procedural default bars the consideration of a claim that was not raised at the appropriate time during the original proceedings or on appeal. A collateral challenge is not intended to serve the same functions as an appeal. *United States v. Frady*, 456 U.S. 152, 165 (1981). There are two instances, however, when a procedurally defaulted claim may be considered on collateral review. The first instance is when a petitioner shows both cause for the procedural default and actual prejudice resulting from the alleged error. *Id.* at 167; *see also Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *United States v. Mikalajunas*, 186 F.3d 490, 492–95 (4th Cir. 1999). The petitioner "must demonstrate that the error worked to his [or her] 'actual and substantial disadvantage,' not merely that the error created a 'possibility of prejudice.'" *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir. 1997) (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)). Alternatively, if a petitioner can demonstrate that he or she is actually innocent, then the court should also issue a writ of habeas corpus in order to avoid a miscarriage of justice, regardless of whether the claim was procedurally defaulted. *See Mikalajunas*, 186 F.3d at 493 (citing *Murray*, 477 U.S. at 496).

Claims of ineffective assistance of counsel may properly be brought for the first time on a petition pursuant to 28 U.S.C. § 2255, *see United States v. DeFusco*, 949 F.2d 114, 120–21 (4th Cir. 1991), and may be asserted as a means to establish "cause" to overcome a petitioner's previous failure to raise an independent claim unrelated to counsel's performance. *Murray*, 477 U.S. at 488.

The Sixth Amendment to the United States Constitution provides, in relevant part, 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. The Sixth Amendment right to counsel includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court's standard for assessing claims of ineffective assistance of counsel is "highly deferential," and courts considering such claims "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also Kimmelman v. Morrison*, 477 U.S. 365, 381–82 (1986) (discussing the "highly demanding" *Strickland* test).

Moreover, as 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" and that the court "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To establish a valid claim for ineffective assistance of counsel, petitioner must prove both (1) that his or her attorney's conduct fell below an objective standard of reasonableness and (2) that the attorney's deficient performance caused petitioner prejudice. *Strickland*, 466 U.S. at 687–91.

The first prong of the *Strickland* test requires a petitioner to establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the

Sixth Amendment." *Id.* at 687. "[E]ffective representation is not synonymous with errorless representation," and establishing deficient performance requires more than a showing that counsel's performance was below average. *Springer v. Collins*, 586 F.2d 329, 332 (4th Cir. 1978); *see also Strickland*, 466 U.S. at 687–88.

The second prong of the *Strickland* test requires a petitioner to establish actual prejudice, which is demonstrated by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A petitioner's conclusory statements will not suffice to prove such a reasonable probability.

A petitioner who alleges ineffective assistance of counsel in a case in which he or she pleaded guilty must demonstrate "that there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *accord Fields v. Att'y Gen. of Md.*, 956 F.2d 1290, 1297–98 (4th Cir. 1992) & *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988) ("When a defendant challenges a conviction entered after a guilty plea, [the] 'prejudice' prong of the test is slightly modified."). An inquiry into whether a petitioner has presented sufficient evidence to demonstrate such a reasonable probability will often necessitate an inquiry into the likely results at trial. *Hill*, 474 U.S. at 59–60. That a plea bargain is "favorable" to a petitioner and that "accepting it was a reasonable and prudent decision" is evidence of the "voluntary and intelligent" nature of the plea bargain. *Fields*, 956 F.2d at 1299.

In evaluating a claim of ineffective assistance of counsel made after a guilty plea, statements made under oath, such as those made in a proceeding pursuant to Rule 11 of the Federal Rules of Criminal Procedure, are binding on the petitioner "[a]bsent clear and convincing evidence

to the contrary." *Id.* "[A]llegations in a § 2255 motion that directly contradict the petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always palpably incredible and patently frivolous or false." *United States v. Lemaster*, 403 F.3d 216, 221 (4th Cir. 2005) (internal quotation marks omitted). Accordingly, "a district court should, without holding an evidentiary hearing, dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements." *Id.* at 222.

III. ANALYSIS

Mr. Darden's second ground for relief includes seven categories. The Court addressed most of these categories in the previous Order and addresses the remaining two in this Order pursuant to the remand from the Fourth Circuit.

First, Mr. Darden argues that he was denied effective assistance of counsel when counsel failed to seek suppression of incriminating evidence seized in violation of the Fourth Amendment to the United States Constitution. ECF No. 134 at 5–11. Specifically, Mr. Darden states that law enforcement received consent from a third party who was a confidential source to search a locked plastic container that belonged to Mr. Darden. *Id.* at 5–6. Mr. Darden states that the confidential source had no authority to grant consent to search Mr. Darden's property and that law enforcement knew that she lacked authority. *Id.* The locked container contained contracts, fliers, business cards, and other items related to Mr. Darden's sex-trafficking operation. *Id.* at 7.

The Court notes that Mr. Darden was asked at his guilty plea hearing whether he believed his constitutional rights were violated. He answered in the negative. ECF No. 64 at 18–19. Mr. Darden also stated in his plea agreement, at his plea hearing, and at the subsequent motions hearing that he was satisfied with his attorney's performance. Mr. Darden cannot alter those statements without compelling cause to do so. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn

declarations in open court carry a strong presumption of verity."); *United States v. Lemaster*, 403 F.3d 216, 221 (4th Cir. 2005) (stating that because "courts must be able to rely on the defendant's statements made under oath during a properly conducted Rule 11 plea colloquy," § 2255 claims that contradict a petitioner's plea colloquy are deemed false absent extraordinary circumstances).

Mr. Darden cannot show deficient performance nor prejudice. Mr. Darden's counsel submitted an affidavit that explained his reasoning for not seeking suppression. ECF No. 145-1 at 3. Counsel stated that the property in question was left by Mr. Darden in an apartment in which he no longer lived. *Id.* Counsel stated that the registered tenant of the apartment discovered pornography and prostitution-related material belonging to Mr. Darden in the closet and contacted the complex's management, who in turn contacted law enforcement. *Id.* He stated that the tenant allowed law enforcement into her apartment and handed law enforcement the documents and other property Mr. Darden had left. *Id.* at 3-4. He stated that it was his opinion that there was no Fourth Amendment violation as a result of the search. *Id.*

Counsel's performance was not deficient. The *Strickland* test requires that counsel's performance be so lacking that a defendant essentially has no counsel at all. The *Strickland* test is not met where counsel makes a reasoned conclusion as to whether a constitutional violation had occurred that just happens to differ with the defendant's conclusion.

Nor can Mr. Darden show prejudice, because he has not shown a reasonable probability that a suppression motion would have been successful and that a successful motion would have resulted in Mr. Darden electing to go to trial. Even absent the contents of the plastic container, the Government had ample evidence to offer against Mr. Darden had the case gone to trial. Mr. Darden's argument does not warrant the relief he seeks.

Mr. Darden's second previously unaddressed argument is that counsel was ineffective for failing to file a motion *in limine* excluding statements from the victim regarding a photo lineup that included Mr. Darden. ECF No. 134 at 18–23. On January 6, 2011, the Hampton Police Department showed victim Jane Doe a photo array. ECF No. 134 at 19. Mr. Darden argues that the photo array was suggestive because Mr. Darden was the only one pictured wearing bland clothing. *Id.* Mr. Darden argues that Jane Doe's identification of him from that lineup is manifestly suspect, using the five-factor test from *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).[1]

Mr. Darden cannot show deficiency or prejudice. Mr. Darden's counsel stated that he would have cross-examined Jane Doe and attacked her credibility had the case gone to trial, but that it was his reasoned opinion that her statements were admissible. ECF No. 145-1 at 7. Even if Jane Doe's lineup statement were excluded, Jane Doe would have testified, and Mr. Darden does not contest that Jane Doe could have reliably identified co-conspirator Ujima Crudup, who is connected to Mr. Darden by other evidence. In short, Mr. Darden cannot show that the exclusion of this one statement would have resulted in him proceeding to trial, particularly because Mr. Darden's counsel asserts that Jane Doe's other testimony would have been harmful to Mr. Darden's case. *Id. See also Hill*, 474 U.S. at 371 (instructing courts to consider the likelihood of success at trial when considering whether a defendant would have opted to proceed to trial).

Neither of these arguments by Mr. Darden supports granting the relief he seeks.

IV. CONCLUSION

On remand, Mr. Darden's Motion to Vacate Under 28 U.S.C. § 2255, ECF No. 124, is **DENIED.** Petitioner has failed to demonstrate a substantial showing of the denial of a

[1] These five factors are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199–200.

constitutional right. Therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. *See Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). The Clerk shall forward a copy of this Order to Petitioner and to counsel of record for Respondent.

IT IS SO ORDERED.

Arenda L. Wright Allen
United States District Judge

April 24th, 2019
Norfolk, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

ROBERTO ANTOINE DARDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Criminal No. 4:11cr52-1

ORDER

This matter is before the Court on a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 motion") filed by Petitioner Roberto Antoine Darden ("Mr. Darden"). ECF No. 124. Mr. Darden seeks collateral relief for the following reasons: (1) the Government breached the plea agreement; (2) ineffective assistance of counsel; (3) a "Brady Violation;" and (4) insufficient evidence. For the reasons that follow, Mr. Darden's § 2255 Motion is **DENIED**.

Also pending before the Court are the following: Motion to Proceed in Forma Pauperis (ECF No. 150); Motion for Return of Property (ECF No. 151); Motion to Supplement the Record (ECF No. 152); Motion to Expand or Supplement the Record (ECF No. 153); Motion to Expand the Record (ECF No. 154); Motion Objecting to the District Court's Sealing of a Motion (ECF No. 155); Motion Objecting to this Court's Seal (ECF No. 156); and a Motion for Leave to Amend (ECF No. 157). For the following reasons, Mr. Darden's Motion for Return of Property is **DENIED**, and Mr. Darden's remaining motions are **DISMISSED AS MOOT**.

I. BACKGROUND

On June 20, 2011, a Sealed Criminal Complaint alleging violations of 18 U.S.C. § 1591 and 18 U.S.C. § 2251(a) was filed against Mr. Darden. ECF No. 1. The same day, the Court issued an arrest warrant for Mr. Darden. ECF No. 5. Mr. Darden was arrested on June 24, 2011. On July 21, 2011, Mr. Darden was indicted on Sex Trafficking of Children, in violation of 18 U.S.C. §§ 1594(c), 1591(a) and (b)(1) (Counts 1–2), Conspiracy to Produce Child Pornography, in violation of 18 U.S.C. § 2251(a) and (e) (Count 3); Production of Child Pornography, in violation of 18 U.S.C. § 2251(a) (Count 4) and Obstruction, in violation of 18 U.S.C. § 1591(d) (Count 5). ECF No. 20.

On August 18, 2011, the counts of the Indictment were dismissed against Mr. Darden in favor of a nine-count Superseding Indictment. Count One charged Mr. Darden with Sex Trafficking of Children-Conspiracy, in violation of 18 U.S.C. § 1594(c). Count Two charged Mr. Darden with Sex Trafficking of Children, in violation of 18 U.S.C. §§ 1591(a) and (b)(1). Count Three charged Mr. Darden with Conspiracy to Produce Child Pornography, in violation of 18 U.S.C. §§ 2251(a) and (e). Count Four charged Mr. Darden with Production of Child Pornography, in violation of 18 U.S.C. § 2251(a). Count Five charged Mr. Darden with Obstruction, in violation of 18 U.S.C. § 1591(d). Counts Six and Seven charged Mr. Darden with Distribution of Narcotics to Persons Under Twenty-One Years of Age, in violation of 21 U.S.C. §§ 841(a) and 859. Count Eight charged Mr. Darden with Extortion by Interstate Communications, in violation of 18 U.S.C. § 875(d). Count Nine charged Mr. Darden with Tampering with a Witness, Victim or Informant, in violation of 18 U.S.C. § 1512(b)(3). Mr. Darden was also charged with Forfeiture pursuant to 18 U.S.C. §§ 1594(d), (e) and 2253. The property subject to forfeiture included, but was not limited to, the following items, some of

which were seized from Mr. Darden in June 2011: a Western Digital external USB hard drive bearing serial number WCAV56817661; a HTC cellular phone bearing serial number HT067HL04499; all documents and items used in the creation or maintenance of the company known as Liquid Studios or Liquid Playhouse; all documents and items used in the creation or maintenance of the company known as Hot H3ad Ent3rtainm3nt or Hotheadent; and an automobile bearing Tennessee license plate 636QTL.

A. November 23, 2011 Guilty Plea Hearing

On November 23, 2011, Mr. Darden pled guilty to Counts Three and Nine of the Superseding Indictment pursuant to a written plea agreement (the "Plea Agreement"). ECF No. 54. Mr. Darden was represented by counsel through a Criminal Justice Act Appointment. ECF No. 53. The Plea Agreement was signed by the Assistant United States Attorney, Mr. Darden's counsel, and Mr. Darden. *See* ECF No. 54.

As part of Mr. Darden's Plea Agreement, he represented that "[t]he defendant is satisfied that the defendant's attorney has rendered effective assistance." ECF No. 54 at 2. Mr. Darden, Mr. Darden's counsel, and the Assistant United States Attorney each initialed the bottom right-hand corner of the page. ECF No. 54 at 2.

At the hearing held on November 23, 2011, when the Court accepted Mr. Darden's guilty plea, the Court confirmed that Mr. Darden's plea was knowing and voluntary. The Court asked Mr. Darden, "Have you had ample opportunity to discuss [the] charges and your case in general with your attorney . . . ?" ECF No. 64 at 5–6. Mr. Darden responded, "Yes." ECF No. 64 at 6. When asked whether Mr. Darden had read the Indictment, he responded that he had not, and he was given time to do so. ECF No. 64 at 8. He was subsequently asked if he understood the essential elements of the charges, to which he replied "Yes." ECF No. 64 at 9. The Court

further asked, "Do I need to review the elements again?" ECF No. 64 at 9. Mr. Darden responded, "No." ECF No. 64 at 9.

B. February 29, 2012 Motions Hearing

On February 29, 2012, this Court held a hearing on several pending motions:

1. Mr. Darden's Motion to Withdraw Counsel (ECF No. 62);
2. Counsel's Motion to Withdraw as Attorney (ECF No. 65);
3. Mr. Darden's Motion to Withdraw Plea of Guilty (ECF No. 66);
4. The Government's Motion to Determine Defendant's Breach of Plea Agreement (ECF No. 69); and
5. Counsel's Motion to Withdraw as Attorney and Schedule Hearing (ECF No. 70).

At the hearing, the Court asked Mr. Darden about his *pro se* Motion and his counsel's alleged conflict of interest. ECF No. 88 at 4. Mr. Darden explained that his Motion "stem[med] from a miscommunication." ECF No. 88 at 5. The Court asked Mr. Darden, "do you have a complaint right now about [your counsel] and him being ineffective?" Mr. Darden responded, "As of now, no. We discussed it downstairs. He clarified everything finally for me." ECF No. 88 at 5. The Court asked again, "So based on everything you're saying this afternoon I'm assuming you're good with him representing you at your sentencing hearing?" Mr. Darden responded, "Yeah." ECF No. 88 at 6.

The Court also inquired about Mr. Darden's motion to withdraw his plea of guilty. Mr. Darden responded that he no longer wished to withdraw his guilty plea because he had clarified matters with counsel. ECF No. 88 at 6. The Court asked "Mr. Darden, is there any other matter you want to bring to the court?" Mr. Darden replied, "No." ECF No. 88 at 8.

The Government and the Court confirmed that "Mr. Darden is now saying today that he no longer wants [his attorney] to withdraw as counsel," and that "he has no complaints about [counsel's] representation vis-à-vis the plea hearing or in the sentencing hearing and he doesn't want to breach his plea agreement at all." ECF No. 88 at 8–9. Mr. Darden replied, "Yes. Yes." ECF No. 88 at 9.

C. October 12, 2012 Sentencing Hearing

Mr. Darden's sentencing hearing was held on October 12, 2012. ECF No. 103. In preparation for sentencing, the United States Probation Office prepared a Presentence Investigation Report ("PSR"). The PSR indicated that Mr. Darden had forty-four unresolved objections. ECF No. 79 at 60–79.

At sentencing, Mr. Darden was represented by his counsel. Forty factual objections that were asserted did not affect the Guidelines, and Mr. Darden presented no evidence regarding those forty factual objections. ECF No. 113 at 13. Pursuant to Federal Rule of Civil Procedure 32, the Court overruled those forty objections. ECF No. 113 at 15. Mr. Darden withdrew two objections, and proffer was given on the remaining two objections. ECF No. 113 at 15. After the proffer, the Court overruled these remaining two objections. ECF No. 113 at 26, 30.

Mr. Darden was assessed a Total Offense Level of 46, and a Criminal History Category of III. The Court sentenced Mr. Darden to 600 months, consisting of 360 months' imprisonment on Count Three and 240 months' imprisonment on Count Nine, all to be served consecutively. ECF No. 104 at 2.

D. § 2255 Motion

The United States Court of Appeals for the Fourth Circuit denied Mr. Darden's direct appeal. ECF No. 121. Subsequently, Mr. Darden filed the instant motion under 28 U.S.C. §

2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. ECF No. 124. In his Motion, Mr. Darden claims four bases for relief:

1. The Government breached Paragraph 21 and Paragraph 3 of the Plea Agreement;
2. Ineffective assistance of counsel;
3. The Government suppressed material evidence favorable to Mr. Darden; and
4. Mr. Darden was denied due process because there was insufficient evidence to convict him of Count 9.

ECF No. 134.

II. LEGAL STANDARD

A. Collateral Review under 28 U.S.C. § 2255

A federal prisoner moving to vacate, set aside, or correct a sentence bears the burden of proving that (1) the sentence or conviction was imposed in violation of the United States Constitution or federal law, or (2) the Court was without jurisdiction to impose such a sentence, or (3) the sentence exceeded the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a).

Collateral review under 28 U.S.C. § 2255 is distinguished from direct review, and from an appeal, because it is far more limited than an appeal and is not intended to serve the same functions as an appeal. *United States v. Frady*, 456 U.S. 152, 165 (1982). To obtain collateral relief, Petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. Although the procedural default doctrine generally bars claims not raised previously at trial, *see United States v. Pettiford*, 612 F.3d 270, 280 (4th Cir. 2010), a freestanding claim of ineffective assistance may be asserted for the first time in a § 2255 habeas motion for collateral relief. *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991).

B. Ineffective Assistance of Counsel

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. CONST. amend. VI. Ineffective assistance of counsel claims are properly raised in a motion under 28 U.S.C. § 2255. *United States v. Richardson*, 195 F.3d 192, 198 (4th Cir. 1999). The decision in *Strickland v. Washington* sets forth the two-part test under which ineffective assistance of counsel claims are examined. 466 U.S. 668 (1984). To prevail on an ineffective assistance of counsel claim, a petitioner must show (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) that the "deficient performance prejudiced the defense." *Id.* at 687.

A petitioner must 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. A petitioner must overcome the presumption that the challenged conduct might be the "result of sound trial strategy." *Spencer v. Murray*, 18 F.3d 229, 233 (4th Cir. 1994).

C. Government Response Not Necessary

Rule 4(b) of the Rules Governing § 2255 Proceedings for the United States District Courts requires a federal judge to perform a preliminary review of a § 2255 motion. Specifically, Rule 4(b) states:

> If [the § 2255] 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 and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

R. Governing § 2255 Proceedings in U.S. Dist. Cts. 4(b).

If a court determines that a petitioner's claims are without merit, the court may dismiss or deny the motion without requiring a government response. *See United States v. Rogers*, No.

WMN-09-467, 2014 WL 11955410, at *1-2 (D. Md. Aug. 6, 2014). After reviewing Petitioner's motion and case file, the Court finds that dismissal of this action without a response from the Government is warranted.

III. ANALYSIS

A. Ground One

Mr. Darden asserts that he is entitled to relief because the Government breached Clause Three and Twenty One of the Plea Agreement. ECF No. 124 at 4. Mr. Darden argues that pursuant to Clause Twenty One of the Plea Agreement, the Government agreed that there were no representations or agreements reached other than those in the plea. ECF No. 124-1 at 1. The Government allegedly breached this clause at sentencing when it considered filing a motion for acceptance of responsibility. EFF No. 124-1 at 32. Mr. Darden takes no issue with the Government's failure to file this motion, but rather argues that the Plea Agreement prevented the Government from even considering doing so. ECF No. 124-1 at 32.

When the Government breaches a plea agreement, a defendant is entitled to "specific performance of the agreement on the plea, in which case [the defendant] should be resentenced by a different judge," or "the opportunity to withdraw his plea." *Santobello v. New York*, 404 U.S. 257, 263 (1971). To qualify for such remedies, the breach must be material. *See United States v. Scruggs*, 356 F.3d 539, 543 (4th Cir. 2004). For a breach to be material, "the injured party will be deprived of the benefit which he reasonably expected." *Id.* (quoting Restatement (Second) of Contracts § 241 (Am. Law Inst. 1981)). The Plea Agreement established that Mr. Darden was not entitled to this extra point for acceptance of responsibility. *See* ECF No. 54. Assuming without deciding that the Government's actions could be construed as a breach of the Plea Agreement, such conduct was in no sense material.

Mr. Darden also argues that the Government breached the Plea Agreement by deleting Paragraph Three from the Statement of Facts. ECF No. 124-1 at 34. Mr. Darden asserts that by deleting this paragraph, the Government failed to "satisfy the essential elements" necessary to prove his guilt beyond a reasonable doubt. ECF No. 124-1 at 39. According to Mr. Darden, the Government breached the Plea Agreement by failing to provide a factual basis for his guilt. ECF No. 124-1 at 39.

A plausible interpretation of this issue suggests that *Mr. Darden* breached the Plea Agreement. Paragraph Three of the Statement of Facts reads in pertinent part: "The defendant admits the facts set forth in the statement of facts filed with this plea agreement and agrees that those facts establish guilt of the offense charged beyond a reasonable doubt." ECF No. 54 at 2. The Government and Mr. Darden both initialed Paragraph Three's deletion from the Statement of Facts. When he accepted the Plea Agreement, Mr. Darden conceded that, even with Paragraph Three's omission, the facts established his guilt of the offense charged beyond a reasonable doubt.

B. Ground Two

Mr. Darden also asserts that he is entitled to relief because his attorney provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Mr. Darden asserts seven grounds of ineffective assistance:

1. Counsel was ineffective for failing to subpoena evidence favorable to Mr. Darden's defense;
2. Counsel was ineffective for failing to investigate and seek suppression of certain letters seized illegally;

3. Counsel was ineffective for failing to file a motion in limine to exclude hearsay declarations of co-conspirators;
4. Counsel was ineffective by providing erroneous information regarding Count Three's elements;
5. Counsel was ineffective when he failed to move the Court to sever Count Nine;
6. Counsel was ineffective for failing to file a motion in limine to exclude Jane Doe's testimony; and
7. Counsel was ineffective because of conflicts of interest.

ECF No. 134 at 5–32.

Regarding the first, second, and third alleged errors, the record establishes that Mr. Darden pled guilty to Counts Three and Nine because he desired to do so and was guilty. *See* ECF Nos. 54, 64, 88 (see below). Assuming without deciding that counsel was deficient as alleged, Mr. Darden has made no showing of prejudice resulting from counsel's alleged actions. Absent proof of prejudice, "a court need not determine whether counsel's performance was deficient." *Strickland*, 46 U.S. at 697.

In regards to the fourth and fifth alleged errors, Mr. Darden's acceptance of the Plea Agreement, along with his testimony at the February 29, 2012 hearing, shows that he understood the elements of both offenses and was satisfied that he had been rendered effective assistance by counsel. In the Plea Agreement, Mr. Darden agreed that he was "satisfied that the defendant's attorney has rendered effective assistance." ECF No. 54 at 2. In addition, during Mr. Darden's plea colloquy, the Court confirmed that Mr. Darden read the agreement fully and that his plea was knowing and voluntary. ECF No. 64 at 5–9. Mr. Darden also confirmed that he understood

the elements of both counts at the February 29, 2012 hearing, and that he had no complaints about his counsel's performance. ECF No. 88 at 5–9.

In the sixth alleged error, Mr. Darden is likely referencing Jane Doe's victim impact statement, which was provided during sentencing. ECF No. 134 at 22. Pursuant to Federal Rule of Criminal Procedure 32, victims who are present are given an opportunity to be heard. Fed. R. Civ. P. 32(i)(4)(B). There was no error in counsel's failure to object to the introduction of Jane Doe's statement.

In the seventh alleged error, Mr. Darden asserts that his counsel had a conflict of interest because he had once supervised the presiding judge and one of the Government's attorneys, and because another Government attorney had been his neighbor. ECF No. 134 at 28–29. Mr. Darden argues that these relationships caused his counsel to pressure him into accepting the Plea Agreement. ECF No. 134 at 29.

"To establish that a conflict of interest resulted in ineffective assistance . . . [t]he petitioner must show (1) that his lawyer was under an actual conflict of interest and (2) that this conflict adversely affected his lawyer's performance." *United States v. Nicholson*, 475 F.3d 241, 249 (4th Cir. 2007) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). Mr. Darden has failed to make this showing.

Accordingly, the arguments presented in Ground Two afford Mr. Darden no relief.

C. Ground Three

Mr. Darden also asserts that he was denied due process when the Government allegedly suppressed material evidence favorable to his defense. ECF No. 134 at 34. Specifically, Mr. Darden asserts that his "Freshmeat Freshman" DVD would have established that "Adrianna Bailey and Jane Doe did not sign a contract etc.," and would have "disprove[d] the government's

many theories had it been disclosed to the defense and not fraudulently concealed (3) weeks before trial." ECF No. 134 at 34.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors must disclose to the defense materially exculpatory evidence in their possession. To prove a constitutional violation under *Brady*, the defendant bears the burden of proving the nondisclosure, as well as a reasonable probability that but for this nondisclosure, his or her conviction or sentence would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433 (1955).

Mr. Darden has alleged merely that the Government possesses this DVD, and that his counsel requested it repeatedly without success. ECF No. 134 at 34. He has presented no other evidence of an alleged nondisclosure. Mr. Darden has also failed to show a reasonable probability that his conviction or sentence would have been different had this DVD been disclosed. Accordingly, Ground Three affords Mr. Darden no relief.

D. Ground Four

Mr. Darden asserts that there was insufficient evidence to convict him of 18 U.S.C. § 1512(b)(3). ECF No. 134. As previously established, Mr. Darden's decision to enter a plea of guilty pursuant to the Plea Agreement was knowing and voluntary. In Paragraph Three of the Plea Agreement, Mr. Darden agreed that "the facts set forth in the statement of facts filed with [the] plea agreement . . . establish guilt of the offense charged beyond a reasonable doubt." ECF No. 54 at 2. Accordingly, Ground Four affords Mr. Darden no relief.

IV. MISCELLANEOUS MOTIONS

A. Motion for Return of Property

In his Motion, Mr. Darden seeks return of his "Freshmeat Freshman DVD." ECF No. 151. He also asks the Court to sanction the Government's attorneys if the DVD has been altered.

ECF No. 151 at 3. Pursuant to the Plea Agreement, Mr. Darden agreed to forfeit "[a]ll documents and items used in the creation or maintenance of the company known as Liquid Studios or Liquid Playhouse . . . [and] Hot H3ad Ent3rtainm3nt or Hotheadent." ECF No. 54 at 9. Mr. Darden's Consent Order of Forfeiture became final on November 23, 2011. ECF No. 57. Assuming the Government has possession of this DVD, it was forfeited properly pursuant to the Consent Order of Forfeiture. Accordingly, this Motion is **DENIED**.

B. Remaining Motions

Also pending before the Court is Mr. Darden's Motion to Proceed in Forma Pauperis (ECF No. 150); Motion to Supplement the Record (ECF No. 152); Motion to Expand or Supplement the Record (ECF No. 153); Motion to Expand the Record (ECF No. 154); Motion Objecting to the District Court's Sealing of a Motion (ECF No. 155); Motion Objecting to this Court's Seal (ECF No. 156); and a Motion for Leave to Amend (ECF No. 157). The Court has reviewed these motions and the accompanying documentation, and concludes that each is without merit. Mr. Darden's Petition is denied, and these remaining motions are **DISMISSED AS MOOT**.

V. CONCLUSION

For the foregoing reasons, Mr. Darden's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 124) is **DENIED**. Mr. Darden's Motion for Return of Property (ECF No. 151) is **DENIED**. Mr. Darden's Motion to Proceed in Forma Pauperis (ECF No. 150); Motion to Supplement the Record (ECF No. 152); Motion to Expand or Supplement the Record (ECF No. 153); Motion to Expand the Record (ECF No. 154); Motion Objecting to the District Court's Sealing of a Motion (ECF No. 155); Motion Objecting to this Court's Seal (ECF No. 156); and a Motion for Leave to Amend (ECF No. 157) are **DISMISSED AS MOOT**.

The Court also **DENIES** a certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, because Mr. Darden has failed to demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003).

Mr. Darden is **ADVISED** that if he intends to appeal this Final Order and seek a certificate of appealability from the United States Court of Appeals for the Fourth Circuit, he must forward a written Notice of Appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia, 23510 within sixty days from the date of this Order.

The Clerk is **REQUESTED** to send a copy of this Order to Mr. Darden and to the United States Attorney's Office in Norfolk, Virginia.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

February 8th, 2018
Norfolk, Virginia

Additional material from this filing is available in the Clerk's Office.