No. 20-5536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK ANDREW MORRIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: McKEAGUE, Circuit Judge.

Mark Andrew Morris, a federal prisoner proceeding through counsel, appeals the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate sentence. Morris has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

Following a two-day trial, a jury found Morris guilty of two counts of production of child pornography, in violation of 18 U.S.C. § 2251(a) (Counts 1 and 2); two counts of distribution of visual depictions of minors engaging in sexual contact by means of interstate commerce, in violation of 18 U.S.C. § 2252(a)(2) (Counts 3 and 4); receipt of visual depictions of minors engaging in sexual conduct by means of interstate commerce, in violation of 18 U.S.C. § 2252(a)(2) (Count 5); and possession of matter containing visual depictions of minors engaging in sexual conduct and transported interstate, in violation of 18 U.S.C. § 2252(a)(4)(B) (Count 6). The district court imposed terms of imprisonment of 360 months on each of Counts 1 and 2; 240 months on each of Counts 3, 4, and 5; and 120 months on Count 6. All sentences were to run concurrently for a total term of imprisonment of 360 months. This court affirmed. *United States v. Morris*, No. 16-6396 (6th Cir. Sept. 5, 2017).

Morris timely filed his § 2255 motion to vacate in January 2018, alleging that trial counsel had been ineffective for failing to: (1) review the indictment and the charges with him; (2) review

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discovery with him; (3) adequately inform and advise him about plea negotiations; (4) adequately prepare for trial; (5) investigate Morris's mental issues; and (6) request a continuance longer than eight days after the government sought a superseding indictment and changed its theory of the case the week before trial. In support of his motion to vacate, Morris filed an affidavit, a copy of a rejected plea agreement, emails between trial counsel and the United States Attorney regarding the plea agreement, and a prior competency evaluation. He also requested an evidentiary hearing. The government filed a response, as well as an affidavit from trial counsel. Morris filed a reply.

A magistrate judge reviewed the pleadings and issued a report and recommendation that Morris's motion to vacate be denied. The magistrate judge determined that Morris had not demonstrated that counsel was constitutionally deficient or, assuming that counsel rendered deficient performance, that Morris was prejudiced by counsel's actions. The magistrate judge also determined that an evidentiary hearing was not necessary because Morris's assertions were contradicted by the record and recommended that his request for a hearing be denied. Likewise, the magistrate judge recommended denying a COA.

Over Morris's objections, the district court determined that Morris failed to demonstrate that he had been denied his constitutional right to the effective assistance of counsel. The district court therefore denied Morris's motion to vacate, denied his request for an evidentiary hearing, and declined to issue a COA.

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

To prevail on an ineffective assistance of counsel claim, a defendant must show: (1) that counsel's performance was so deficient that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that the poor performance "prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is "measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (quoting *Strickland*, 466 U.S. at 688; citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). To demonstrate prejudice, "[t]he defendant must show that there is 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.

In his first claim, Morris argued that, although counsel provided him with a copy of the indictment and superseding indictment in his case, counsel did not review the elements of the offenses, or possible defenses or sentences. Reasonable jurists would not debate the district court's denial of this claim. This court has recognized that:

> [a] criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available.

Smith v. United States, 348 F.3d 545, 553 (6th Cir. 2003). In addition to the statements made by counsel and by Morris in open court regarding review of the indictments, counsel's affidavit stated that he "thoroughly reviewed the indictments with [Morris]" and explained to him that the district court would use the Sentencing Guidelines to determine his final sentencing range. Morris disputes counsel's assertion, pointing to an email from counsel to the United States Attorney wherein counsel expressed uncertainty as to which version of the Sentencing Guidelines would apply and noted that he "had not tried a c[hild] p[ornography] case in years and was rusty." This assertion by Morris does not demonstrate that counsel failed to discuss the indictments with him, however, or that—even if counsel was uncertain about which version of the Guidelines would apply—he did not discuss all possible sentences with Morris. Moreover, Morris acknowledged that he had not claimed in his affidavit that counsel's failure to review the indictment with him

caused him to reject a plea agreement and proceed to trial. Instead, he argued that it was "implicit" that, had he understood that he faced a potential life sentence, he would have done things differently. Morris's conclusory allegation does not establish he was prejudiced as a result of counsel's actions. This claim does not deserve encouragement to proceed further.

Secondly, Morris alleged that, although counsel provided him with a copy of discovery, he failed to review any evidence with him. In contrast, counsel's affidavit stated that Morris's case began in state court and, once Morris's federal prosecution began, counsel discussed with Morris whether he had seen the discovery provided by the State and Morris told him he had. Counsel also averred that he discussed the materials with Morris and that Morris never indicated that he did not understand; in fact, counsel noted that Morris expressed his disagreement with "significant portions" of the discovery. In his objections, Morris disputed any such conversations took place but, even if they did, they were not meaningful and he did not understand them.

Reasonable jurists would not debate the district court's denial of this claim. Assuming deficient performance, as the district court did, Morris's petition did not explain how the outcome of his case would have been different if he had reviewed all of the discovery. In his COA application, Morris does not appear to challenge the district court's finding that he did not establish prejudice, arguing instead that prejudice should be "implied" because review of evidence with a client is a crucial part of representation. Although prejudice may be presumed in certain instances of the ineffective assistance of counsel, *see United States v. Cronic*, 466 U.S. 648, 659-60 (1984) (listing three types of cases), the failure to review discovery is not one of those instances. Because Morris did not establish that he was prejudiced by any alleged failure by counsel, this claim does not deserve encouragement to proceed further.

Third, Morris alleged that, during plea negotiations, counsel only gave him copies of two proposed plea agreements—one binding and one non-binding—but did not ask if he had read the agreements or had questions about them. Reasonable jurists would not debate the district court's denial of this claim. In the context of plea negotiations, counsel must inform clients of formal plea offers, *Missouri v. Frye*, 566 U.S. 134, 145 (2012), and provide effective assistance to help clients

decide whether to accept. *Lafler v. Cooper*, 566 U.S. 156, 168 (2012). However, "[t]he decision to plead guilty—first, last, and always—rests with the defendant, not his lawyer. Although the attorney may provide an opinion . . . the ultimate decision of whether to go to trial must be made by the person who will bear the ultimate consequence of a conviction." *Smith*, 348 F.3d at 552.

As the district court explained, the record refutes Morris's allegations with respect to the offer of a binding plea agreement. In fact, the emails that Morris himself attached to his motion to vacate between Morris's counsel and the United States Attorney demonstrate that Morris was actively involved in the negotiations of a binding plea agreement. The transcript of a May 9, 2016, motion hearing also reflects that Morris was involved in the discussion of a binding agreement. Because the record is clear that Morris participated in the discussion of a binding plea agreement, he cannot demonstrate that counsel's performance was deficient in this regard.

The record further refutes Morris's claim that counsel did not discuss a non-binding agreement. In Morris's affidavit, he acknowledges that he received a copy of a plea agreement and that counsel asked him whether he had read it. In the plea agreement, the government proposed that Morris would plead guilty to Count 1—using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct—and that the government would dismiss the remaining counts. The plea agreement recommended that Morris's base offense level would be 32 and listed certain enhancements that the government would recommend for the purpose of calculating Morris's sentence. The proposed plea contained no agreement as to Morris's criminal history category. Despite receiving the agreement and being told to read it, Morris claims that he was not aware that the government would dismiss Counts 2 through 6 or that he would receive a downward adjustment for his acceptance of responsibility. Morris does not aver, however, that counsel refused to answer any questions he had about the agreement. Rather, Morris states that when he questioned counsel about how much time he would have to serve, counsel stated that he believed it would be about twenty-seven years, and Morris told counsel to ask for five years. Morris stated that counsel never discussed a guilty plea with him again and, in total, spent less than fifteen minutes discussing the plea agreement. Morris also argued that the

plea agreement proposed a total offense level of 44, which was a miscalculation that counsel should have detected, pointing to the fact that his presentence report calculated a level of 36 before any reduction for an acceptance of responsibility. He asserted that a level of 36 and a criminal history category of I would have resulted in a sentencing range of 188 to 235 months and that, had he been aware of that range, he would have accepted the deal.

"The failure of defense counsel to 'provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance.'" *Smith*, 348 F.3d at 553 (quoting *Moss v. United States*, 323 F.3d 445, 474 (6th Cir. 2003)). "[I]n such cases, the prejudice prong is satisfied if there is a 'reasonable probability' that the defendant would have accepted the Government's plea offer, but-for counsel's ineffective assistance or inadequate advice." *Sawaf v. United States*, 570 F. App'x 544, 547 (6th Cir. 2014) (citing *Lafler*, 566 U.S. at 164). "[I]f the difference between the length of the sentence proposed in the Government's plea offer and the sentence imposed after a trial conviction was substantial[,]" then prejudice is presumed. *Id.* (citing *United States v. Morris*, 470 F.3d 596, 602 (6th Cir. 2006); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003)).

Even assuming that counsel did not adequately explain the non-binding agreement, Morris cannot establish prejudice. As the district court pointed out, Morris's argument about the proper calculation of his sentence was flawed because the agreement did not contain a recommended total offense level; the agreement only listed certain guidelines that the parties would recommend, it contained no agreement as to Morris's criminal history category, and it allowed the parties to argue in favor of or to object to other calculations. Moreover, Morris conflated the calculation of his total offense level after proceeding to trial with the potential calculation of the total offense level in the event he entered a guilty plea. Even so, assuming a criminal history category of I and the application of all of the enhancements contemplated by the plea agreement and a three-level reduction for his acceptance of responsibility, Morris's sentence under the plea agreement—which effectively proposed a total offense level of 43—would have corresponded to a guideline range of life imprisonment. Given that Morris's affidavit made clear that he was not willing to agree to a

deal that required him to serve 27 years, he cannot say that he was prejudiced by not accepting a deal with a potential life sentence. Further, prejudice may not be presumed because Morris received a total term of imprisonment of 360 months following his trial, less than the maximum potential sentence contemplated by the plea agreement. This claim does not deserve encouragement to proceed further.

Next, Morris claims that counsel was ineffective because he met with him for only short periods of time while he was in the courtroom holding area, spending less than one hour with him preparing for trial; did not have meaningful conversations with him about defenses, witnesses, or rebuttal evidence; did not contact his wife or son to interview them prior to their trial testimony; and did not request funds for computer expert.

As the district court recognized, Morris did not claim that counsel failed to communicate with him. Instead, Morris took issue with the amount of time that counsel spent with him and the quality of that time. Assuming deficient performance, Morris did not establish how additional time spent with counsel would have altered the outcome of his trial. Morris did not set forth any defense, rebuttal evidence, or witness that would have been introduced but for counsel's failure to spend more time with him. Likewise, Morris has not set forth any evidence either that his wife and son would have provided had counsel interviewed them prior to trial or that a computer expert could have provided. Absent such a showing, Morris did not establish that there was a reasonable probability that the result of the trial would have been different but for counsel's actions. *See Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005). This claim does not deserve encouragement to proceed further.

In his fifth claim, Morris alleged that counsel was ineffective because, even though he knew that Morris had undergone a competency evaluation in state court, he did not seek to have him re-evaluated in light of additional medical records showing that he suffered from anxiety, depression, and paranoid schizophrenia. Morris also alleged that counsel did not discuss the issue of competency with him and did not present a mental-capacity defense at trial or argue any mitigation factors at sentencing.

A competency hearing is required "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a). "[E]ven if [the defendant is] mentally ill, '[i]t does not follow that because a person is mentally ill he is not competent to stand trial.'" *United States v. Dubrule*, 822 F.3d 866, 875-76 (6th Cir. 2016) (second and third alteration in original) (quoting *United States v. Davis*, 93 F.3d 1286, 1290 (6th Cir. 1996)).

Reasonable jurists would not debate that Morris failed to make a substantial showing that he was denied the effective assistance of counsel. The competency evaluation performed in state court noted that the court had requested, but not yet received, the medical records that Morris refers to by the time the report was prepared. Nevertheless, the report noted Morris's prior diagnoses but nevertheless deemed him competent to stand trial. Morris has not demonstrated that he was prejudiced by counsel's failure to have him re-evaluated for competency in light of records that would have been cumulative information to the original evaluator.

Moreover, the record establishes that counsel addressed Morris's mental health at sentencing, arguing that Morris had "severe emotional and mental problems" and that he suffered from "anxiety, severe depression, and paranoid schizophrenia." Because Morris cannot demonstrate a reasonable probability that he would have avoided even "a minimal amount of additional time in prison" were it not for counsel's performance at sentencing, *Glover v. United States*, 531 U.S. 198, 203 (2001), he has not established prejudice in connection with this claim. As a result, the claim does not deserve encouragement to proceed further.

In his last claim, Morris argued that counsel was ineffective for agreeing to an eight-day continuance when the United States sought a second superseding indictment approximately a week before trial. The government sought to change Counts 1 and 2 to remove language that the images were "produced and then distributed in interstate commerce" and to add language that the images were produced using "materials [that] had been shipped or transported in interstate commerce." Morris claimed that counsel had another significant hearing scheduled in another case during the

eight-day continuance and, as a result, could not have prepared adequately for a change in defense theory. Morris stated that counsel should have requested a longer continuance, while counsel claimed that he did not need more than eight days.

Even if counsel should have sought a longer continuance, this claim fails for the same reason as many of Morris's other arguments—he cannot establish that he was prejudiced by counsel's actions. Morris has not demonstrated that a longer continuance would have added anything to the defense. The magistrate judge noted that Morris did not "identify what would have been changed, added, or improved to his trial preparation" if counsel had had more time. This claim does not deserve encouragement to proceed further.

For the foregoing reasons, Morris's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

UNITED STATES OF AMERICA,	)	Criminal Case No.
	)	5:15-cr-4-JMH-CJS-1
Plaintiff,	)	
	)	Civil Action No.
v.	)	5:18-cv-27-JMH-CJS
	)	
MARK ANDREW MORRIS,	)	**Judgment**
	)	
Defendant.	)	

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Consistent with the Court's Memorandum Opinion and Order entered this date, it is hereby **ORDERED** and **ADJUDED** as follows:

(1) Defendant Mark Andrew Morris's Motion to Vacate or Set Aside Judgment and Sentence Under 28 U.S.C. § 2255 [DE 91], including his request for an evidentiary hearing, is **DENIED**;

(2) Judgment is **ENTERED** in favor of the United States;

(3) This action is **DISMISSED** and **STRICKEN** from the Court's docket;

(4) No certificate of appealability shall issue; and

(5) This is a **FINAL** and **APPEALABLE** Judgment, and there is no just cause for delay.

This 7th day of May, 2020.

Signed By:
Joseph M. Hood
Senior U.S. District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

UNITED STATES OF AMERICA,	)	Criminal Case No.
	)	5:15-cr-4-JMH-CJS-1
Plaintiff,	)	
	)	Civil Action No.
v.	)	5:18-cv-27-JMH-CJS
	)	
MARK ANDREW MORRIS,	)	**MEMORANDUM OPINION**
	)	**AND ORDER**
Defendant.	)	

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This matter comes before the Court on Magistrate Judge Candace J. Smith's Report and Recommendation [DE 102] recommending Defendant Mark Andrew Morris's Motion to Vacate or Set Aside Judgment and Sentence Under 28 U.S.C. § 2255 [DE 91] be denied. Morris filed a timely Objection to the Report and Recommendation [DE 103], so his Motion [DE 91] is ripe for review by this Court.

Magistrate Judge Smith recommends Morris's Motion [DE 91] be denied because he has failed to show his counsel was ineffective for allegedly failing to (1) review any of his Indictments [DE 1; DE 20; DE 31] with him, (2) adequately review discovery with him, (3) adequately inform and advise him of a written non-binding plea agreement, or failing to inform him of a binding plea agreement, (4) adequately prepare for trial, (5) conduct an investigation beyond a prior mental evaluation of Morris, and (6) request a longer continuance when the United States sought the Second Superseding Indictment [DE 31]. [DE 102, at 6-25]. It is further

recommended that Morris's request for an evidentiary hearing be denied, as well as a certificate of appealability to the United States Court of Appeals for the Sixth Circuit. *Id.* at 25-26.

In this case, the record refutes Morris's claims of ineffective assistance of counsel presented in his Motion [DE 91]. Thus, Morris's petition for relief under § 2255 is **DENIED**, and the Court declines to grant his request for an evidentiary hearing or issue a certificate of appealability.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 8, 2015, Defendant Morris was charged by federal indictment with two counts of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2), one count of receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography, in violation of § 2252(a)(4)(B). [DE. 1]. On March 10, 2016, a Superseding Indictment [DE 20] added two counts of production of child pornography, in violation of 18 U.S.C. § 2251(a). On May 12, 2016, a Second Superseding Indictment [DE 31] charged Morris with two counts of production of child pornography in violation of 18 U.S.C. § 2251(a), two counts of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2), one count of receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of § 2252(a)(4)(B). The Second Superseding Indictment [DE 31] removed from Counts I

and II the language that the images were produced and "transmitted using a means or facility of interstate commerce" to instead charge that the images were produced "using materials that have been mailed, shipped or transported in and affecting interstate or foreign commerce by any means, including by computer . . . ." [DE 20; DE 31].

During the criminal case, the United States and Morris, by and through court-appointed counsel Richard R. Melville, engaged in plea discussions. *See* [DE 25; DE 28; DE 72, at 2; DE 93]. As a result of those discussions, the United States offered Morris a non-binding plea agreement. [DE 91-3]. Under the agreement, the United States offered to dismiss Counts II through VI in exchange for a guilty plea to Count I. *Id.* at 1. Additionally, Morris and the United States would agree to recommend certain sentencing guidelines to be used to calculate Morris's sentence. *Id.* at 2-3. However, the agreement was rejected, and Morris proceeded to trial. Following a two-day jury trial in May 2016, the jury found Morris guilty on all counts of the Second Superseding Indictment [DE 31]. [DE 78, at 330].

Following Morris's trial and prior to his sentencing, the United States Probation Office ("USPO") prepared the Presentence Investigation Report ("PSR"). [DE 67]. The PSR [DE 67] contained a summary of the facts of the case and provided the recommended calculations under the Sentencing Guidelines for the Court's

consideration. As to Count I, the calculations placed Morris at a base offense level of 32. *Id.* at 6. Pursuant to USSG § 2G2.1(b)(1)(B), Morris's offense level was increased by two (2) levels because the offense involved a minor who had attained the age of twelve (12) years old, but not sixteen (16) years old. *Id.* at 6-7. Pursuant to USSG § 2G2.1(b)(5), Morris's offense level was further increased by two (2) levels because the minor involved was in the custody, care, or supervisory control of Morris. *Id.* Thus, Morris's adjusted offense level for Count I was calculated to be a level 36. *Id.* at 7. Regarding Count II, the PSR placed Morris's base offense level as a 32. *Id.* Similar to Count I, and pursuant to USSG § 2G2.1(b)(1)(B), his offense level was increased by two (2) levels, and pursuant to USSG § 2G1.1(b)(5), it was increased by an additional 2 levels. *Id.* Morris's adjusted offense level for Count II was calculated to be a level 36. *Id.* Due to the relationship between the offense conduct, and pursuant to USSG § 3D1.2(d), Counts III through VI were grouped together. *Id.* The adjusted base offense level for Counts III through VI was calculated to be a 37. *Id.* at 7-8.

Pursuant to USSG § 3D1.4, the combined adjusted offense level of all counts applicable to Morris "is determined by taking the offense level . . . with the highest offense level," which was 37, and "increasing that level by the amount indicated" in the Sentencing Guidelines, which in this case was 3. *See id.* at 8.

Thus, Morris's combined adjusted offense level was 40. *Id.* Pursuant to USSG § 4B1.5(b)(1), this level was increased, which resulted in a total offense level of 43. *Id.* at 8-9. Morris's criminal history was calculated to be a category I. *Id.* at 9. The PSR calculated his guidelines sentencing range to be life imprisonment. However, the maximum statutory sentence was 130 years. *Id.* at 15. Accordingly, Morris's guidelines sentencing range became 1,560 months. *Id.* On September 6, 2016, Morris was sentenced to a total term of 360 months imprisonment followed by a life term of supervised release. [DE 64].

Morris appealed his conviction to the Sixth Circuit, challenging the sufficiency of the evidence used to convict him of Counts I through V, which the Sixth Circuit affirmed on September 5, 2017. [DE 89, at 2-5]. There is no evidence Morris petitioned for a writ of certiorari. On January 22, 2018, Morris, through counsel, timely filed the present § 2255 Motion. [DE 91]. The United States responded to the motion, [DE 97], and Morris replied, [DE 99], making it ripe for review. On September 3, 2019, pursuant to 28 U.S.C. § 636(b)(1)(B), Magistrate Judge Smith submitted a Report and Recommendation [DE 102] for the disposition of this matter. On September 16, 2019, Morris filed a timely Objection to the Report and Recommendation. [DE 103].

II. STANDARD OF REVIEW

Generally, a prisoner has a statutory right to collaterally attack his conviction or sentence. *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) ("[B]oth the right to appeal and the right to seek post-conviction relief are statutory rights that may be waived if the waiver is knowingly, intelligently, and voluntarily made."). For a petitioner to prevail on a 28 U.S.C. § 2255 claim, he must show that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law nor open to collateral attack, or otherwise must show that there was "a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255.

Put another way, "[t]o prevail on a motion under § 2255, a [petitioner] must prove '(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.'" *Goward v. United States*, 569 F. App'x 408, 412 (6th Cir. 2014) (quoting *McPhearson v. United States*, 675 F.3d 553, 559 (6th Cir. 2012)). The petitioner must sustain these allegations by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (unpublished) ("Defendants seeking to set aside their sentences pursuant to 28 U.S.C. § 2255 have the burden of sustaining their contentions by

a preponderance of the evidence."); *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). If the petitioner alleges a constitutional error, he must establish by a preponderance of the evidence that the error "had a substantial and injurious effect or influence on the proceedings." *Watson*, 165 F.3d at 488 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *Pough*, 442 F.3d at 964. Alternately, if he alleges a non-constitutional error, he must establish "a fundamental defect which inherently results in a complete miscarriage of justice . . . an error so egregious that it amounts to a violation of due process." *Watson*, 165 F.3d at 488 (citing *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990).

A petitioner may object to a magistrate judge's report and recommendation. Fed. R. Civ. P. 72(b)(2). If the petitioner objects, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1). "Only those specific objections to the magistrate's report made to the district court will be preserved for appellate review." *Carson v. Hudson*, 421 F. App'x 560, 563 (6th Cir. 2011) (quoting *Souter v. Jones*, 395 F.3d 577, 585-86 (6th Cir. 2005).

III. DISCUSSION

Morris's objections to the Report and Recommendation [DE 102] expand on the arguments he used to support his § 2255 petition.

See [DE 103]. The Court, having reviewed the record, Morris's Motion [DE 91], Magistrate Judge Smith's Report and Recommendation [DE 102], and Morris's Objection [DE 103], finds Morris's grievances do not rise to the level of proof required to demonstrate a constitutional violation of the magnitude required by 28 U.S.C. § 2255. Further, this Court finds Morris is not entitled to an evidentiary hearing and declines to issue a certificate of appealability in this case.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

As previously stated herein, Morris alleges his counsel, Melville, deficiently performed by failing to (1) review any of his Indictments [DE 1; DE 20; DE 31] with him, (2) adequately review discovery with him, (3) adequately inform and advise him of a written non-binding plea agreement, or failing to inform him of a binding plea agreement, (4) adequately prepare for trial, (5) conduct an investigation beyond a prior mental evaluation of Morris, and (6) request a longer continuance when the United States sought the Second Superseding Indictment [DE 31]. [DE 91]. The Court shall discuss each of Morris's allegations in turn, including Magistrate Judge Smith's recommendations and Morris's objections regarding each allegation.

To prevail on an ineffective assistance of counsel claim under § 2255, the petitioner must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To

prove deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. In applying this test, reviewing courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance . . ." *Id.* Second, the petitioner must establish prejudice, by showing there is a reasonable probability that but for counsel's unprofessional errors, the result of his proceedings would have been different. *Id.* at 694-95. Notably, "[w]hen deciding ineffective-assistance claims, courts need not address both components of the [deficient performance and prejudice] inquiry 'if the defendant makes an insufficient showing on one.'" *Campbell v. United States*, 364 F.3d 727, 730 (6th Cir. 2004); *Strickland*, 466 U.S. at 697.

Courts have "declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688) (alterations in *Wiggins*). Still, a court's review of this prong includes a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Petitioner carries the burden of establishing 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).

Meeting "*Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). The standard "must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington*, 562 U.S. at 105. "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one" because "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Id.*

1. COUNSEL'S ALLEGED FAILURE TO REVIEW INDICTMENTS WITH MORRIS

Morris alleges his counsel "merely provided him with a copy of the Indictments" and "did not review the elements of the offense, possible sentences, and defenses." [DE 91-1, at 2]. In *Smith v. United States*, the Court of Appeals for the Sixth Circuit found the following:

> A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available.

348 F.3d 545, 553 (6th Cir. 2003).

Here, as Magistrate Judge Smith stated, "[T]he record contradicts Defendant's assertion that his counsel failed to review any of the Indictments with him." [DE 102, at 6]. On March 16, 2016, Morris was before the Court for his first arraignment after the initial Indictment [DE 1]. [DE 8; DE 74]. The transcript of that proceeding shows Morris was represented by attorney Pam Ledgewood, who was standing in for Melville during the first arraignment. [DE 74, at 2]. The undersigned asked Ledgewood if she was "aware of whether Mr. Melville and Mr. Morris have had a chance to review this indictment," and Ledgewood responded that after speaking with Morris, she could confirm "[t]hey have reviewed the indictment" and "waive any formal reading of the indictment[.]" *Id.* at 2-3. At that time, Morris failed to raise any objection to Ledgewood's statement, and the undersigned specifically asked Morris, "And does all that sound good to you, Mr. Morris?" *Id.* at 3. Morris replied, "Yes, sir." *Id.* Furthermore, at each subsequent arraignment, the undersigned asked Melville whether he and Morris had seen the subsequent Superseding Indictments [DE 20; DE 31], and Melville, with Morris present in the courtroom, replied that they had. [DE 75, at 2; DE 80, at 2].

In addition to finding that the record refutes Morris's claim that his counsel failed to review the Indictments [DE 1; DE 20; DE 31] with him, Magistrate Judge Smith also found that even if Melville's performance was deficient, "[Morris] fails to offer how

the alleged deficiency of not reviewing or explaining the indictments to him impacted his decision to persist in his not guilty plea and proceed to trial." [DE 102, at 7 (citing [DE 91-1, at 2-3; DE 91-2, at 1; DE 99, at 9])]. Morris contends that while Melville claims "he thoroughly reviewed the indictments with [Morris]" and "explained that the Court would consider the Federal Sentencing Guidelines in determining a final sentence[,]" an electronic communication Melville sent to opposing counsel shows "Melville did not understand which sentencing guidelines applied (2006 or 2015)." [DE 103, at 1-2 (citing [DE 97-1, at 2; DE 91-4, at 1])]. Morris further argues Melville and the United States greatly differed on the proper calculation for his possible sentence, with Melville suggesting 8[3] years and the United States suggesting 130 years, and due to this disparity, the United States allegedly told Melville "that he may wish to consult with the federal probation office on these issues." *Id.* at 2. Morris proposes Melville's alleged "uncertainty is contained in his earlier email wherein he indicated that he had not tried a CP case in years and was rusty." *Id.* (citing [DE 91-4, at 1]). Morris admits he "does not expressly state in his affidavit" that Melville's performance led Morris to reject a plea agreement and proceed to trial, but Morris argues "that it is implicit that he would have decided otherwise had he understood the potential life imprisonment versus a lesser sentence." *Id.*

Neither the e-mail between Melville and the United States regarding Morris's sentence nor Morris's argument that it is "implicit" that he would have decided to go to trial had he been better informed of his possible sentence persuade the Court to find that Melville's performance was deficient or that Morris was prejudiced by Melville's performance. The e-mail exchange between Melville and the United States shows a typical back-and-forth conversation between counsel regarding Morris's potential sentence and the language that Melville believed should be omitted from the plea agreement. *See* [DE 91-4]. Based on the Court's review of the e-mails in question, the uncertainty regarding Melville's possible sentence is present on both sides, and the United States suggested Melville discuss the matter with the USPO. *Id.* Morris insists, "There is no indication in [Melville's] affidavit that he consulted with the probation office on these important issues." [DE 103, at 2].

While it is true Melville's Affidavit [DE 97-1] does not state that Melville consulted with USPO, Melville does assert that he "went over the charges, the elements of the crimes, possible defenses and the possible statutory penalties" with Morris and explained that the Court would consider, but would not be bound by, the Sentencing Guidelines. Melville further asserts that Morris expressed that "he understood the charges and the possible penalties." [DE 97-1, at 2]. Moreover, the fact that Melville did

not include any information about a consultation with USPO in his Affidavit [DE 97-1] does not mean such a consultation did not take place, and Morris does not cite to any requirement that counsel must consult with USPO prior to sentencing. Melville may have discussed Morris's possible sentence with USPO, or he may have researched the matter further on his own. Regardless, the mere fact that such a consultation is absent from the record does not demonstrate that Melville's performance was deficient, and Morris pointing out what is not in the record does not overcome the strong presumption that Melville's conduct falls within the range of reasonable professional assistance.

Moreover, Morris merely stating that it is "implicit" that he would have pleaded guilty had he been better informed of his possible sentence does not establish prejudice. To establish prejudice in such a scenario, Morris must show there is a reasonable probability that but for Melville's alleged misunderstanding of Morris's potential sentence, Morris would have chosen not to proceed to trial. *See Strickland*, 466 U.S. at 694-95. Morris's pronouncement that had he known the potential sentence he faced, it is "implicit" that he would have decided not to go to trial fails to show there is a reasonable probability that he would have made a different decision. At most, it shows a possibility of what Morris would have done, which is insufficient to establish prejudice. Therefore, Morris's claims related to Melville's

alleged failure to review the Indictments [DE 1; DE 20; DE 31] with Morris fail under both the performance and prejudice prongs.

2. COUNSEL'S ALLEGED FAILURE TO ADEQUATELY REVIEW DISCOVERY WITH MORRIS

Morris claims Melville "provided [Morris] with a copy of the discovery but did not review the evidence with his client." [DE 91-1, at 3]. He alleges Melville "did not explain any of the discovery contents or ask [Morris] whether he had questions or information about the evidence, such as rebuttal or potential witnesses." *Id.* Magistrate Judge Smith found that even assuming Melville provided deficient performance, "Morris has failed to sufficiently allege that he was prejudiced by counsel's asserted failure to review discovery with him." [DE 102, at 8]. Specifically, Magistrate Judge Smith found, "Morris does not specify what discovery counsel failed to review with him, nor does he allege how 'the outcome of his case would have been different if he had reviewed the entirety of discovery.'" *Id.* (quoting *United States v. Watson*, No. 2:13-cr-8-ART-REW, 2015 WL 8606353, at *3 (E.D. Ky. Oct. 29, 2015)). In Morris's Objection [DE 103], he does not attempt to argue he was prejudiced by Melville's alleged deficient performance. Instead, he "disputes that Mr. Melville discussed with him how the discovery related to the crimes he was charged with[,]" and even assuming Melville had such a discussion with Morris, Morris alleges the discussion was neither meaningful

nor comprehended by him. [DE 103, at 3]. However, whether Melville had such a discussion or not is irrelevant because Morris has failed to show, or even argue, how he was prejudiced by Melville's alleged deficient performance. Accordingly, the Court agrees with Magistrate Judge Smith's recommendation that Morris has failed to establish Melville provided ineffective assistance of counsel on this issue. *See* [DE 102, at 8-9].

3. COUNSEL'S ALLEGED FAILURE TO INFORM OR ADVISE MORRIS OF PLEA AGREEMENTS

Morris alleges his counsel was ineffective by failing to properly inform him of a proposed binding plea agreement and by failing to adequately advise him regarding a proposed non-binding plea agreement. [DE 91-1, at 3-7].

The decision to plead guilty rests with the defendant. *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003). Counsel does, however, have an absolute obligation to "fully inform her client of the available options." *Id.* at 552. Failing to do so can violate a defendant's right to effective assistance of counsel. *Id.* A defendant must do more than state that he or she would have gone to trial if counsel gave different advice. *Shimel v. Warren*, 838 F.3d 685, 698 (6th Cir. 2016); *see also Moore v. United States*, 676 F. App'x 383, 385-86 (6th Cir. 2017). "If a plea bargain is offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v. Cooper*,

566 U.S. 156, 162-68 (2012). For a defendant to establish that the ineffective assistance of counsel led him to reject a plea agreement and proceed to trial, he must show that:

> but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 164; *see also Magana v. Hofbauer,* 263 F.3d 542, 547-48 (6th Cir. 2001). The prejudice prong is presumptively satisfied "if counsel failed to provide the defendant with an estimated range of the penalties that could result from a trial conviction" and "the difference between the length of the sentence proposed in the Government's plea offer and the sentence imposed after a trial conviction was substantial." *Sawaf v. United States,* 570 F. App'x 544, 547 (6th Cir. 2014) (citing *United States v. Morris,* 470 F.3d 596, 602 (6th Cir. 2006), *Griffin v. United States,* 330 F.3d 733, 737 (6th Cir. 2003)). Finally, when a defendant alleges ineffective assistance of counsel in plea negotiations, the representations of the Parties and findings made by the judge constitute a barrier to relief in later proceedings attacking it. *Blackledge v. Allison,* 431 U.S. 63, 73-74 (1977). There is a "strong presumption of

verity" of statements made under oath during the acceptance of a plea bargain. *Id.* at 74.

a. COUNSEL'S ALLEGED FAILURE TO INFORM HIM OF A BINDING PLEA AGREEMENT

Morris claims his counsel failed to properly inform of a proposed binding plea agreement. [DE 91-1, at 4]. In Melville's Affidavit [DE 97-1], he contests Morris's claim by asserting that he and the United States "discussed a possible binding plea agreement, and the AUSA sent [Melville] a sample agreement from a different case to review its format." [DE 97-1, at 3]. Meville further asserts, "At the time the AUSA did not have an exact sentence in mind but later said it would be around 27 years." *Id.* On May 9, 2016, Melville discussed the proposed agreement with Morris, and Melville asserts that Morris "rejected it . . . [and] asked to counter-offer with a binding plea agreement that would have him serve five years with credit for time served . . . ." *Id.* at 3-4. According to Melville, the United States rejected Morris's counteroffer, and instead of accepting either the original proposed plea agreement or a binding plea agreement that included 27 years imprisonment, Morris insisted on going to trial. *Id.* at 4.

Magistrate Judge Smith correctly suggests, "A review of the record directly refutes Defendant's assertion that his counsel failed to inform him of a proposed binding plea agreement." [DE

102]. On May 9, 2016, at the hour of 10:00 a.m., the undersigned held a hearing on Morris's Motion to Continue Trial [DE 25]. [DE 27; DE 72]. During the hearing, at which Morris was present with counsel, the United States, Melville, and the Court discussed "the possibility of a binding plea agreement." [DE 72, at 3]. While a formal binding plea agreement had not been offered, counsel for the United States had spoken to Melville and was willing to offer one "if [Morris] was inclined to take [the offer], but it would have to be approved by [his] boss." *Id.* at 4. Melville told the Court he would speak with his client after the hearing to discuss the offer. *Id.*

After the May 9, 2016, hearing, the United States filed a Motion to Continue Trial [DE 28], which stated that the offer of a binding plea agreement "was approved and made by the [United States] to counsel for the Defendant at approximately 11:50 a.m. on May 9, 2016" and that "Defendant's counsel advised the [United States] by telephone at approximately 1:40 p.m. on May 9, 2016, that the Defendant did not intend to enter a guilty plea." [DE 28, at 1]. Later that day, Melville sent counsel for the United States an e-mail stating that Melville "discussed a proposed binding plea agreement" with Morris, who rejected the offer and counteroffered. [DE 91-4, at 4]. Accordingly, as Magistrate Judge Smith found, "[B]ecause the record reflects that a binding plea agreement was discussed in the Defendant's presence, Defendant has failed to

raise a legitimate factual dispute as to counsel's communication of a proposed binding plea agreement and thus cannot show counsel rendered deficient performance." [DE 102, at 11].

Regardless of whether Melville adequately discussed the proposed binding plea agreement with Morris, Morris fails to show there is a reasonable probability that the Court would have accepted its terms and, thus, does not establish that he was prejudiced by Melville's actions. *See Lafler*, 566 U.S. at 164. The mere fact that the Court "inquired about the possibility of a plea" and "granted a continuance per the AUSA's request which extended the deadlines, including the plea deadline," does not show that the Court would have accepted the terms of the proposed binding plea agreement, as Morris suggests in his Objection [DE 103, at 6-7 (citing [DE 25, at 75-76])]. Therefore, the Court agrees with Magistrate Judge Smith that Morris fails to establish ineffective assistance of counsel on this issue.

b. COUNSEL'S ALLEGED FAILURE TO ADEQUATELY ADVISE MORRIS OF A NON-BINDING PLEA AGREEMENT

Morris claims that had his counsel adequately advised him, he would have accepted a proposed non-binding plea agreement. [DE 91-1, at 4; DE 91-2, at 2]. Under the proposed agreement, if Morris would have pleaded guilty to Count I, the United States would have moved to dismiss Counts II through IV and agreed to recommend

certain sentencing guidelines be used to calculate Morris's sentence. *See* [DE 91-3].

Generally, Morris alleges, "Counsel did not review the agreement with his client—only asking whether he had read it and had any questions." [DE 91-1, at 3]. Morris's further assertions are made with more specificity. Morris claims that when he asked Melville how many years Morris would have to serve under the plea agreement, his counsel responded, "'I think 27,'" and Morris asked Melville to counter with five (5) years, which the United States rejected. *Id.* Next, Morris specifies that his counsel allegedly failed to review several aspects of the proposed agreement with Morris, such as the elements of Count I, the facts the United States alleged it could prove to establish the elements of Count I, Morris's possible statutory punishment, the recommended sentencing guidelines, the right to object to the calculations or argue for more favorable calculations, the impact that the dismissal of Counts II through IV would have on Morris's offense level, the reduction Morris could receive if he accepted responsibility, and Morris's criminal history category under the guidelines. *Id.* at 4. According to Morris, Melville "spent approximately 15 minutes with him on the Plea Agreement and or possible resolution via a guilty plea." *Id.*

In Melville's Affidavit [DE 97-1], he asserts that he "received a proposed plea agreement on April 29, 2016. [DE 97-1,

at 3]. Melville further asserts that on May 2, 2016, he met with Morris "for over an hour," and that following the meeting, Morris confirmed that "he understood the plea agreement but did not wish to make a decision on whether to sign it without speaking with his parents about it for advice." *Id.* Melville insists, "Defendant was adamant that he would not accept the original proposed plea . . . and that he wanted to take the case to trial." *Id.* at 4. Melville's statements regarding meeting with Morris are corroborated by an April 30, 2016, e-mail he sent to the United States, in which he asserted that he was "meeting with [Morris] at 10:30 on Monday morning, and I hope you have a chance to address these questions [about the plea agreement] prior to that." [DE 93-1, at 1]. The Monday following April 30, 2016, was May 2, 2016.

Unlike Morris's conclusory statement that Melville met with him for no longer than fifteen (15) minutes, Melville's assertions are supported by the record. Morris's May 4, 2016, Motion to Continue Trial [DE 25] contains the following: "[D]efendant states he and the U.S. are still negotiating a plea agreement tendered to counsel on or about April 29, 2016." [DE 25, at 1]. The transcript for the May 9, 2016, hearing shows the Parties were "still working on a plea agreement." [DE 72, at 2-3]. During the hearing, Melville asserted that he "had the plea agreement for a little over a week" and Morris was "still undecided." *Id.* at 2, 4. Despite being

present for the hearing, Morris did not object to any of Melville's statements.

Even if Melville performed deficiently when he advised Morris about the proposed non-binding plea agreement, Morris fails to show that he was prejudiced by his counsel's actions. Morris argues that "[h]ad counsel adequately advised [Morris], he would have elected to plead guilty and argued for calculations in line with a level 36 that was listed for Count I in the PSR." [DE 91-1, at 4]. In Morris's Reply [DE 99], he specifically asserts that "the United States offered to dismiss counts in exchange for a guilty plea to Count I," and "[t]he U.S. calculated a 44" as the recommended total offense level for Count I, whereas "[t]he PSR prepared for sentencing in this matter, calculated a level 36 for Count I, prior to any reduction for acceptance of responsibility." [DE 99, at 5; DE 99, at 5 n.5]. Morris argues the United States' recommendation of a total offense level of 44 "was a miscalculation which should have been detected by counsel had he contacted the Probation Office; and ultimately corrected by Probation, as done in the PSR." [DE 99, at 5 n.5]. Morris asserts that "[t]he range of sentence for 36, Offense Level I, is 188-235 months." [DE 99, at 5].

Magistrate Judge Smith found, "The Defendant's assertion that the non-binding plea agreement suggested a total offense level of 44 is flawed," and the undersigned agrees. [DE 102, at 16]. Instead

of recommending a total offense level of 44 for Count I, the proposed non-binding plea agreement recommends certain sentencing guidelines and reserves the Parties' rights to "object to or argue in favor of other calculations." [DE 91-3, at 2-3]. Furthermore, the non-binding plea agreement states, "No agreement exists about the Defendant's criminal history category pursuant to U.S.S.G. Chapter 4." *Id.* at 3.

Morris's assertion that had he been adequately advised by his counsel, he would have accepted the non-binding plea agreement and argued for "calculations in line with a level 36 that was listed for Count I in the PSR" is equally flawed. [DE 91-1, at 4]. As Magistrate Judge Smith notes, "[T]he Defendant confuses the calculations contained in the post-trial PSIR for the calculations that would have been applicable if he had pleaded guilty." [DE 102, at 17]. Indeed, "[t]he recommended adjusted offense level for Count I 'calculated in the post-trial PSIR is irrelevant, because the plea agreement at issue necessarily contemplates pleading guilty to a particular offense and foregoing trial." *Id.* (quoting *United States v. Totten*, NO. 1:12-CR-194-8, 2017 WL 2664711, at *3 (M.D. Penn. June 21, 2017)). Therefore, the Court agrees with Magistrate Judge Smith's following finding:

> [T]he offense level calculations in the PSIR referred to by Defendant contemplate Defendant's convictions after trial, and not a decision to plead guilty to Count I. Moreover, calculating a recommended range under the proposed plea agreement would be "impossible absent an

> agreement as to Defendant's criminal history category," and further considering the fact that the agreement reserved the right for the parties to argue in favor of or object to other calculations.

[DE 102, at 17 (quoting *United States v. Gooden*, No. 15-cr-5-DCR-CJS-4, 2017 WL 9325622, at *12 (E.D. Ky. Nov. 30, 2017) *adopted in* 2018 WL 276132 (E.D. Ky. Jan. 3, 2018))].

Lastly, Magistrate Judge Smith assessed that "[e]ven if Defendant's argument had merit, he must also demonstrate that but for counsel's performance, he would have pleaded guilty and then actually received a lower sentence from the Court based upon his advocacy for a lower offense level." [DE 102, at 17]. Then, Magistrate Judge Smith correctly found, "Morris has failed to offer any evidence, nor does the record support a finding, that had he pleaded guilty, 'the difference between the length of the sentence proposed in the Government's plea offer and the sentence imposed after a trial conviction was substantial.'" *Id.* (quoting *Sawaf*, 570 F. App'x at 547). In Morris's Objection [DE 103], he contends, "The difference between the potential sentence in the plea offer for Count (level 33-36) and the sentence received, 360 months (level 43), is substantial." [DE 103, at 7]. However, the proposed non-binding plea agreement did not propose a length of sentence, and Morris is again basing the United States' alleged plea offer on the recommended calculations found in the post-trial PSR, which would have been inapplicable had Morris pleaded guilty. *See* [DE

103, at 7 n.9]. Furthermore, as stated previously herein, even if the fact that Morris was pleading guilty to Count I is taken into account, since no criminal history category was agreed to in the proposed non-binding plea agreement, there is no way to calculate what the recommended range would have been. Therefore, the Court adopts Magistrate Judge Smith's recommendation on this issue and will find that Morris fails to show his counsel provided ineffective assistance regarding the proposed non-binding plea agreement.

4. COUNSEL'S ALLEGED FAILURE TO ADEQUATELY PREPARE FOR TRIAL

Morris claims his counsel's preparation for trial amounted to ineffective assistance for the following reasons: (1) counsel failed to adequately prepare Morris for trial; (2) counsel failed to interview witnesses Devin and Lisa Morris prior to trial; and (3) counsel failed to prepare for "anticipated computer/internet evidence or request funds for a computer expert to assist him with evidence evaluation or to testify for the defense." [DE 91-1, at 7].

a. ADEQUACY OF TRIAL PREPARATION

Regarding Melville's alleged failure to adequately prepare Morris for trial, Morris alleges that Melville's preparation "consisted of short meetings with his client (only minutes) each time he was in the holding area at the courthouse" and that "[d]uring these minimal encounters, [Melville] failed to have any

meaningful conversation with his client about defenses, potential witnesses, and rebuttal evidence." *Id.* While Morris estimates counsel "spent less than [one] hour of time with him to prepare for a two day, six count jury trial," Melville contends that he "spent 20.5 hours in trial preparation" and "over seven hours of time with Defendant prior to trial." [DE 97-1, at 5].

Whether Melville's performance was deficient is inconsequential because as Magistrate Judge Smith stated, "Morris has failed to allege how counsel's preparation or lack of meaningful communication resulted in prejudice to him." [DE 102, at 18]. Morris's assertion that Melville's "lack of performance resulted in prejudice" does not demonstrate that but for Melville's allegedly deficient performance, Morris's outcome would have been different. [DE 91-1, at 10]. Prejudice is not established by merely alleging that counsel failed to properly perform. If that were the case, there would be no need to determine prejudice under the *Strickland* standard because a finding of deficient performance would satisfy both components. *See Campbell*, 364 F.3d at 730; *Strickland*, 466 U.S. at 697.

Moreover, Morris's reliance on the Court of Appeals for the Seventh Circuit's decision in *White v. Godinzez*, 301 F.3d 796 (7th Cir. 2002) is misplaced. [DE 91-1, at 8-10]. Morris cites *White* as support for his argument that Melville's failure to "spend time with [Morris] to discuss trial strategy, ask about possible

defenses and witnesses, and take phone calls" amounts to ineffective assistance of counsel. *Id.* at 10 (citing *White*, 301 F.3d at 799-800). While the Seventh Circuit affirmed the district court's judgment that petitioner's counsel was ineffective because he spent less than one (1) hour with the petitioner and failed to discuss trial strategy and possible witnesses with the petitioner before trial, "the petitioner was able to establish prejudice under *Strickland* by providing a specific witness and affidavit from that witness which established that there was a reasonable probability that, but for counsel's lack of preparation and communication, the outcome of trial would have been different." [DE 102, at 19 (citing *White*, 301 F.3d at 798-99, 800-04)].

Unlike the petitioner in *White*, "Morris 'has not identified any material information that was not communicated to or from his trial attorney, or demonstrated how any such communication failure prejudiced his defense at trial.'" *Id.* (quoting *Sanders v. Ford*, No. 3:16-cv-02763, 2017 WL 3888492, at *14 (M.D. Tenn. Sept. 6, 2017)). As Magistrate Judge Smith correctly found, "[Morris's] allegation that his counsel failed to have meaningful communication with him does 'not identify counsel's asserted failing with any specificity or show how any different conduct might have changed the result.'" *Id.*; *see also Bowling v. Parker*, 344 F.3d 487, 506 (6th Cir. 2003) (holding that, even if defendant's assertion that his counsel spent only one hour

preparing him throughout the litigation were correct, defendant failed to prove prejudice when he did not show "how additional time spent with counsel could have altered the outcome of his trial."). For the foregoing reasons, the Court will agree with Magistrate Judge Smith's recommendations and find Morris has failed to show prejudice and, therefore, ineffective assistance of counsel on this issue.

b. CONTACTING AND INTERVIEWING WITNESSES

Morris's argument that Melville provided ineffective assistance by not contacting and interviewing Devin and Lisa Morris fails under both the deficient performance and prejudice components of the *Strickland* standard. In Melville's Affidavit [DE 97-1], he readily admits that he chose not to contact Devin and Lisa Morris because "there was no defense they could offer and an interview with them would not have changed their trial testimony about who obtained and who used the various computers in the home." [DE 97-1, at 4]. If counsel determines further investigation of certain evidence is reasonably expected to provide nothing more than cumulative information, and counsel decides to focus on investigating matters that may be of more importance and use at trial, counsel's decision to do so does not equate to deficient performance. *See Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) ("[T]here comes a point at which evidence from [a further investigation] can reasonably be expected to be only cumulative, and the search for

it distractive from more important duties."); *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). In the present case, Melville decided that interviewing Devin and Lisa Morris would not have provided him with any new information or helped Morris's defense, and his decision not to do so was reasonable and, thus, does not suggest his performance was deficient. Furthermore, Morris fails to show how Melville's decision not to interview Devin and Lisa Morris would have changed the outcome of his trial, so Morris is also unable to establish he was prejudiced by Melville's decision.

c. PREPARATION FOR ANTICIPATED COMPUTER EVIDENCE

Like Morris's other arguments regarding Melville's trial preparation, Morris's claim that counsel failed to prepare for anticipated computer evidence and request funds for a computer expert does not satisfy the *Strickland* standard. *See* [DE 91-1, at 7-10]. Accordingly, Magistrate Judge Smith found the following:

> While the record shows that counsel did cross-examine the Government's witnesses regarding computer evidence (R. 77, at 90-97, 169-175, 183-185; R. 78, at 250), "a petitioner cannot show deficient performance or prejudice resulting from a failure to investigate if the petitioner does not make some showing of what evidence counsel should have pursued and how such evidence would have been material." *Hutchison v. Bell*, 303 F.3d 720, 748 (6th Cir. 2002) (citing *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997)). In his assertion that counsel did not prepare or hire an expert to combat the Government's computer evidence, Defendant does not specify what counsel should have pursued or done in preparing for the Government's anticipated computer evidence, other than hiring an expert. But Defendant fails to provide any insight of how an expert would have provided helpful testimony, or that such testimony would

> have had an impact on the outcome of trial. *See Mitchell v. Meko*, No. 5:8-cv-511-KSF, 2011 WL 7070995, at *8 (E.D. Ky. Aug. 30, 2011) (finding that because a petitioner could not prove that an "expert would have provided helpful testimony," petitioner's speculative statement that an expert could have provided helpful testimony did not equate to a "reasonable probability that testimony from [an] expert would have . . . led to an acquittal" or different result), *adopted in* 2012 WL 176583 (E.D. Ky. Jan. 20, 2012). Thus, Morris's argument that his counsel failed to prepare lacks merit and he cannot establish a claim for ineffective assistance of counsel on this issue.

[DE 102, at 20-21]. Even Morris's Objection [DE 103, at 7-8] fails to describe what evidence his counsel should have pursued or how having an expert would have changed the outcome of his case. Instead, Morris merely names two witnesses that Melville had to cross-examine and states "that [Morris] tried to help Mr. Melville during this phase of the trial by passing notes with questions to his lawyer" and that "[Morris] was very concerned the jury may have difficulty following and understanding the technical computer evidence/testimony." *Id.* at 7 (citing [DE 91-2, at 2, 4]). When liberally construed, Morris's statements amount to little more than general assertions that an expert's testimony would have been helpful. Therefore, for the reasons stated in Magistrate Judge Smith's Report and Recommendation [DE 102, at 7-10], the Court will find Morris has failed to establish an ineffective assistance of counsel claim on this issue.

5. COUNSEL'S ALLEGED FAILURE TO INVESTIGATE MORRIS'S MENTAL HEALTH

Morris claims Melville provided ineffective assistance because he failed to investigate Morris's mental health issues. [DE 91-1, at 10-12]. Morris states that he "suffer[s] from anxiety, severe depression, and paranoid schizophrenia." [DE 91-2, at 3]. Morris's first argument related to his mental health proposes that Melville knew Morris had received a mental evaluation in his state court proceedings and failed to both investigate "this issue beyond reading the mental evaluation," [DE 91-1, at 10], and request a reevaluation of Morris's mental health, "even though the prior [state court] assessment reached its conclusion without the benefit of psychiatrist and psychologist records from Bluegrass Comprehensive Care and Caritas," [DE 91-5]; *see also* [DE 99, at 7-9; DE 67, at 13]. Morris asserts that the records "were referenced in the PSR" and indicated that Morris had a diagnosis of Schizoaffective Disorder and was prescribed Prozac. [DE 91-1, at 10]; *see also* [DE 95-1; DE 67, at 13].

Magistrate Judge Smith recommends the Court find Morris has failed to establish his counsel performed deficiently because Morris's mental health evaluation shows that his "prior diagnosis of schizoaffective disorder was revealed to the evaluator during their assessment of [Morris], as well as him being prescribed Prozac." [DE 102, at 22 (citing [DE 91-5, at 4-5])]. Also, it is

Magistrate Judge Smith's position that since Morris fails "to allege any other information contained in the Bluegrass Comprehensive Care medical records not already disclosed in the evaluation," he has not "articulate[d] how the medical records would have changed the evaluation result, his decision to persist in his not guilty plea, or the outcome of the trial." *Id.* The Court agrees with Magistrate Judge Smith's recommendations. By failing to argue that the medical records would have revealed something other than what was already known to the evaluator, Morris has not established either that his counsel's performance was deficient or that Morris was prejudiced.

Next, Morris argues Melville failed to present a mental capacity defense either during trial or at sentencing. [DE 91-1, at 10; DE 99, at 8]. In Melville's Affidavit [DE 97-1, at 5], he asserts that "Defendant's actions, questions, conversations, technical knowledge and demeanor led [counsel] not to have legal concerns about his mental state." Regarding the alleged deficient performance on this issue, Magistrate Judge Smith correctly found the following:

> [W]hile counsel may have been aware of Defendant's prior evaluation and mental health, "Defendant's presentation suggested to counsel that Defendant was not suffering from a mental defect that would potentially exculpate him from the crimes charged." [*United States v.*] *Parker*, [NO. 07-82-DLB-JGW, NO. 11-7186-DLB-JGW,] 2012 WL 13080896, at *4 [E.D. Ky. Sept. 24, 2012]. Therefore, "[g]iven the deferential standard articulated in *Strickland* . . . counsel's decision not to investigate

> a potential mental defect defense was reasonable" and does not surmount to deficient performance during trial or sentencing. *See id.*

[DE 102, at 23]. Magistrate Judge Smith further found, and the Court agrees, that Morris "has not alleged whether or how a mental capacity defense would have changed the outcome of trial." *Id.*

Regarding Melville's alleged failure to present a mental capacity defense at sentencing, the record proves otherwise. Specifically, in Melville's Sentencing Memorandum [DE 57, at 2], he asserted that Morris "has severe emotional and mental problems he must deal with" and "suffers from anxiety, severe depression and paranoid schizophrenia." Additionally, Melville attached a letter from Morris's mother to his Sentencing Memorandum [DE 57], which discussed Morris's mental health. [DE 57-2]. In Morris's Objection [DE 103, at 9], he admits Melville brought Morris's mental capacity to the Court's attention during sentencing, but Morris argues, "Waiting until sentencing was too late." The Court disagrees because as stated previously herein, Melville opined that Morris did not suffer from a mental defect that would exculpate him from the crimes charged. Therefore, Melville did not perform deficiently by waiting until sentencing to present Morris's mental capacity, and Morris's claim of ineffective assistance of counsel fails.

6. COUNSEL'S ALLEGED FAILURE TO REQUEST A LONGER CONTINUANCE

Morris claims his counsel was ineffective for failing to request a longer continuance after the United States sought the Second Superseding Indictment [DE 31]. [DE 91-1, at 12-13]. On May 9, 2016, the United States filed a Motion to Continue Trial [DE 28], which was scheduled for May 17, 2016. On May 12, 2016, the Court held a hearing on the United States' Motion [DE 28], and the United States explained that it was seeking a Second Superseding Indictment [DE 31] that would alter the language of Counts I and II. [DE 29]; *see* also [DE 76, at 3]. As discussed previously herein, the language found in the first two counts was changed from alleging that the images were produced and "transmitted using a means or facility of interstate commerce" to instead allege that the images were produced "using materials that have been mailed, shipped or transported in and affecting interstate or foreign commerce by any means, including by computer . . . ." [DE 20; DE 31]. The Court granted the United States' request for a continuance, and Melville agreed that continuing the trial to May 25, 2016, would provide him enough time to prepare for the changes to Counts I and II. *See* [DE 76, at 8]. Additionally, in Melville's Affidavit [DE 97-1, at 5], he insists that he "did not need longer than an 8 day continuance to develop a defense to the amended charges." Morris argues, "[Melville] should have requested a longer continuance to investigate and prepare a defense for this

theory change, especially in light of significant hearings in other cases." [DE 91-1, at 13 (citing *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2002); *Strickland*, 466 U.S. 668 (1984))].

"The Sixth Circuit has held that ''[n]o absolute rule can be articulated as to the minimum amount of time required for an adequate preparation for trial of a criminal case.''" [DE 102, at 24 (citing *United States v. Faulkner*, 538 F.2d 724, 729 (6th Cir. 1976))]. "Accordingly, a defendant demonstrates prejudice by showing that a 'continuance would have made relevant witnesses available, or would have added something to the defense.'" *United States v. Shrout*, 6-cr-175-JMH-EBA, 2011 WL 6812977, at *6 (E.D. Ky. Dec. 6, 2011) (quoting *Faulkner*, 538 F.2d at 730) *adopted in* 2011 WL 6812969 (E.D. Ky. Dec. 28, 2011). "In *Shrout*, this Court held that defendant failed to establish prejudice because he did 'not explain how additional time would have added anything to his defense . . . .'" *Id.*

Here, Morris argues a longer continuance should have been requested because more time was needed to investigate and defend the amended charges. [DE 91-1, at 12-13]. Morris asserts, "Counsel had virtually no time to investigate or corroborate that the production under counts 1 and 2 occurred by using materials that had been shipped or transported in interstate commerce." [DE 91-1, at 13]; *see also* [DE 103, at 10]. However, as Magistrate Judge Smith found, "[Morris] does not identify what would have been

changed, added or improved to his trial preparation had he and his trial counsel been given more time." [DE 102, at 24]. For this reason, Morris has failed to establish that he was prejudiced by Melville's performance and has not established a claim for ineffective assistance of counsel.

B. EVIDENTIARY HEARING

Section 2255 requires that a district court hold an evidentiary hearing to determine the issues and make findings of fact and conclusions of law "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999); *Amr v. United States*, 280 F. App'x 480, 485 (6th Cir. 2008) ("[T]he court is not required to hold an evidentiary hearing if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact."); *Schriro v. Landigran,* 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."). Magistrate Judge Smith recommends Morris's request for an evidentiary hearing be denied because "the record in this case demonstrates that Morris has failed to establish a claim of ineffective assistance of

counsel, and for the reasons started herein, the Court agrees. Thus, Morris's request for an evidentiary hearing is denied.

C. CERTIFICATE OF APPEALABILITY

"[A] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing for constitutional claims rejected on the merits, a defendant 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); *see also Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). The "question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U.S. at 342. For claims denied on procedural grounds, a certificate appealability "should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

In the present case, the Court finds that reasonable jurists would not debate the denial of Morris's Motion [DE 91]. Thus, the Court will not issue a certificate of appealability in this matter.

IV. CONCLUSION

In the instant case, Morris's Motion [DE 91] fails to demonstrate that "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). Because "it plainly appears . . . that the moving party is not entitled to relief, the [Court] must dismiss the motion." Rules Governing Section 2255 Proceedings, Rule 4.

Accordingly, **IT IS ORDERED** as follows:

(1) Defendant Mark Andrew Morris's Motion to Vacate or Set Aside Judgment and Sentence Under 28 U.S.C. § 2255 [DE 91] is **DENIED;**

(2) Morris's request for an evidentiary hearing is **DENIED;**

(3) Morris's request for a certificate of appealability is **DENIED;**

(4) This action is **DISMISSED** and **STRICKEN** from the Court's active docket; and

(5) Judgment **SHALL** be entered contemporaneously with the Memorandum Opinion and Order.

This 7th day of May, 2020.

Signed By:
Joseph M. Hood
Senior U.S. District Judge