No. 20-5220

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 25, 2020
DEBORAH S. HUNT, Clerk

NICHOLAS COREY GARNER, aka Frank Marten, aka Clark David Thomson, aka Wallace Steeves, aka Neal Marion, aka Ronald Peterson, aka Patrick Steele, aka Nicholis Corey Garner,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: CLAY, Circuit Judge.

Nicholas Corey Garner, a pro se federal prisoner, applies for a certificate of appealability ("COA") in his appeal from the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence as well as several motions concerning discovery and miscellaneous matters. *See* 28 U.S.C. § 2253(c)(1)(B). Garner also moves to file an oversized brief.

Garner engaged in an international conspiracy to defraud people buying cars over the internet. *See United States v. Carmichael*, 676 F. App'x 402, 404 (6th Cir. 2017). He pleaded guilty without a plea agreement to conspiracy to commit wire fraud. The district court sentenced him to 240 months of imprisonment. This court affirmed Garner's conviction and sentence on appeal. *Id.* at 405-11.

Garner has since made numerous filings in the district court. In 2018, he filed a § 2255 motion, which alleged seventeen claims in all, including that his attorneys were ineffective, that the prosecutor committed misconduct, and that his guilty plea was not knowing and voluntary. A magistrate judge recommended denying the motion on the merits. *United States v. Garner*, No. CR512065JMHMAS3, 2019 WL 7899167 (E.D. Ky. Apr. 30, 2019) (report &

recommendation). The district court adopted the magistrate judge's recommendations over Garner's objections, denied his § 2255 motion, and declined to issue a COA. *United States v. Garner*, No. CR 12-65-DLB-MAS, 2020 WL 430809 (E.D. Ky. Jan. 28, 2020). In that same order, the district court also denied as moot several other motions that Garner had filed in his § 2255 proceedings. Garner appealed not only the denial of his § 2255 motion but also "all pleadings related thereto."

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

In Garner's COA application, he raises arguments about claims 1, 4, 6, 7, 8, 12, 13, 14, and 15. Garner did the same in his objections to the magistrate judge's report and recommendation. By failing to present arguments about his other claims, Garner has abandoned them. *See Souter v. Jones*, 395 F.3d 577, 585 (6th Cir. 2005); *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

Claims 1, 4, 7, 8, 12, and 13 alleged ineffective assistance by the attorney who represented Garner from his detention hearing until his sentencing. Claims 6, 14, and 15 alleged ineffective assistance by his appellate attorney. To prove ineffective assistance of counsel, a § 2255 movant must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *United States v. Coleman*, 835 F.3d 606, 612 (6th Cir. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

In Garner's first claim, he maintained that his attorney did not ensure that he had a full understanding of an offered plea agreement before he rejected it in favor of pleading guilty without an agreement. The district court noted that a letter from counsel that Garner relied on in support of this claim in fact undermined it. *Garner*, 2020 WL 430809, at *5. In the letter, counsel

explained why he believed that the government's offer—which likely carried the statutory maximum sentence of 240 months—was less advantageous than a "naked guilty plea," in which counsel believed a lower sentence was possible. Thus, Garner has not made a substantial showing that his attorney was deficient in explaining the plea strategy. And although Garner ultimately received the statutory maximum 240-month sentence after his naked guilty plea, he has not made a substantial showing that the government had offered him a lower sentence and thus that he was prejudiced by his counsel's performance.

In Garner's fourth claim, he asserted that his attorney failed to investigate the allegedly illegal search and seizure of his car. The district court denied this claim because Garner failed to show prejudice. The court noted that police performed a valid inventory search of Garner's car after they had pulled him over for speeding and discovered that he had an outstanding warrant for his arrest in this case. *Id.* at *6-7. Thus, because Garner has not made a substantial showing that counsel overlooked viable arguments about the search, no reasonable jurist could debate the denial of this claim.

In his seventh claim, Garner alleged that counsel failed to investigate the allegedly illegal search of his email. The district court similarly rejected this claim for lack of prejudice, because the government's search was performed pursuant to a search warrant. *Id.* at *7. No reasonable jurist could debate that decision.

In his eighth claim, Garner alleged that his attorney coerced him into pleading guilty. The district court denied this claim after quoting Garner's plea colloquy, in which the district court explained the indictment, Garner's rights, his potential sentence, and the like, ensuring that Garner understood the ramifications of his guilty plea. *Id.* at *4. The district court also referenced the letter cited above, in which counsel explained the naked guilty plea and its implications. *Id.* As a result, Garner has not made a substantial showing that his attorney coerced him or otherwise did not explain the plea to him.

Garner's twelfth and thirteenth claims alleged that his attorney failed to investigate and raise objections about the number of victims, the amount of loss suffered, and the restitution in his case. The district court denied these claims because these matters "were repeatedly contested by

Garner's counsel," noting "that these proceedings involved Garner's counsel raising objections, eliciting testimony, and cross-examining the Government's witnesses." *Id.* at *6. In recommending rejecting this claim, the magistrate judge cited counsel's "exhaustive understanding of all aspects of this case." *Garner*, 2019 WL 7899167, at *6. Garner has not made a substantial showing that his attorney's performance with regard to these issues involved "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

In claims 6, 14, and 15, Garner alleged that his appellate attorney was constitutionally ineffective. In his sixth claim, Garner asserted that his attorney failed to raise an argument on appeal challenging the restitution portion of his sentence. The district court determined that Garner could not show prejudice. The court once more cited the "thoroughness of the district court's proceedings related to" this issue. *Garner*, 2020 WL 430809, at *7. The court also noted that counsel did raise an argument about the related issue of the district court's calculation of loss, which this court affirmed. *Id.* Moreover, Garner's co-defendants raised a restitution argument on appeal, and this court affirmed the district court's calculation. *Carmichael*, 676 F. App'x at 412-13. Thus, Garner has not made a substantial showing of prejudice.

In his fourteenth and fifteenth claims, Garner asserted that his attorney failed to argue on appeal that the district court erred in applying two sentencing enhancements, one for being an organizer of a criminal activity and another for having more than 250 victims. The district court denied these claims because, even if those enhancements had not been applied, it would not have reduced his advisory sentencing range under the United States Sentencing Guidelines below the statutory maximum sentence that Garner received. *See Garner*, 2019 WL 7899167, at *6 n.3. Thus, the court held that counsel was not deficient for failing to raise these arguments on appeal and that Garner was not prejudiced. *Id.* at *7. No reasonable jurist could debate that decision.

Among the other motions that Garner filed in his § 2255 case, he sought an evidentiary hearing, discovery, and a pre-hearing conference. In denying Garner's § 2255 motion, the district court held that a hearing was unnecessary. A district court "shall . . . grant a prompt hearing" to a § 2255 movant "[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). Because, as explained above, Garner's § 2255 motion showed that he was not entitled to relief, no reasonable jurist could debate the district court's decision not to hold an evidentiary hearing, much less a pre-hearing conference. And the same is true for the district court's denial of Garner's discovery motion, because he failed to show "good cause." *Thomas v. United States*, 849 F.3d 669, 680 (6th Cir. 2017); *see also* Rule 6(a) of the Rules Governing § 2255 Proceedings.

In denying Garner's § 2255 motion, the district court also denied several related motions as moot. Garner moved for summary judgment and default judgment, and, given the analysis above denying a COA in his § 2255 case, no reasonable jurist could debate the denial of these motions. Garner filed a motion for a temporary stay, but he later filed a motion to lift the stay, even as the district court never took up his original motion. He moved for status about the district court's order rescinding the referral of Garner's § 2255 case to the magistrate judge, which is within the district court's discretion. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72. Finally, Garner filed a "Motion in Response to the Court's Order," a motion for status regarding that motion, and a motion to compel, all of which concerned documents that the district court had ordered his trial attorney to provide to him. In his motion to compel, Garner notes that counsel provided him with at least some of the documents, while Garner also argued that counsel did not send him copies of numerous filings available on the docket. Given the district court's denial of his underlying § 2255 claims, and because Garner did not show good cause for additional discovery, no reasonable jurist could debate the denial of these motions.

Accordingly, Garner's motion to file an oversized brief is **GRANTED**, and his COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX E

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

CRIMINAL ACTION NO. 12-65-DLB-MAS
CIVIL ACTION NO. 18-228-DLB-MAS

UNITED STATES OF AMERICA **PLAINTIFF**

v. **ORDER ADOPTING REPORT AND RECOMMENDATION**

NICHOLAS COREY GARNER **DEFENDANT**

* * * * * * * * * * * * * * * * * *

This matter is before the Court upon pro se Defendant Nicholas Corey Garner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Doc. # 882). Consistent with local practice, this matter was referred to United States Magistrate Judge Matthew A. Stinnett[1] for the purpose of reviewing the Motion and preparing a Report and Recommendation ("R&R"). On April 30, 2019, Judge Stinnett issued his R&R (Doc. # 963) wherein he recommends that Garner's Motion be denied. Garner having filed timely Objections to the R&R (Doc. # 971), this matter is now ripe for the Court's review. For the reasons set forth herein, Garner's Objections are **overruled** and the R&R is **adopted** as the findings of fact and conclusions of law of the Court. As a result of the denial of Garner's § 2255 Motion, many of his other pending Motions must be denied as moot. *See infra*.

[1] This matter was originally referred to Judge Wier. Judge Wier received his judicial commission as a district judge of the Eastern District of Kentucky on June 12, 2018, terminating his service as a magistrate judge; the referral was rescinded accordingly, (Doc. # 901). The case was then randomly referred to Magistrate Judge Stinnett on January 25, 2019. (Docs. # 935 and 936).

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

On March 12, 2013, Garner and numerous co-defendants were indicted on charges of conspiracy to commit wire fraud.[3] (Doc. # 152). The conspiracy involved a dozen individuals in an international scheme to defraud people purchasing vehicles on the internet over the course of several years. *Id.* On December 4, 2013, Garner pled guilty to conspiracy without a plea agreement. (Doc. # 333). In June 2014, prior to sentencing, Garner moved pro se to withdraw his guilty plea over his counsel's objections. (Doc. # 413). The Court denied this request and Garner was sentenced on February 2, 2015, to 240 months of imprisonment and ordered to pay $1,807,517.06 in restitution. (Docs. # 443, 591, 594 and 772). On January 13, 2017, the Sixth Circuit affirmed the District Court's Judgment. (Doc. # 822).

On April 13, 2018, Garner filed a Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255. (Doc. # 882). In his Motion, Garner sets out seventeen (17) grounds, which he argues support his belief that his sentence violated his right to counsel, equal protection and speedy trial rights, as well as alleging ineffective assistance of counsel. *Id.* On May 29, 2018, the United States responded in opposition to Garner's Motion, (Doc. # 898), and Garner subsequently replied in support of his Motion, (Doc. # 903).

As Judge Stinnett noted, Garner's Motion relates in great part to his open guilty plea. (Doc. # 963 at 3). Many of Garner's arguments in support of the Motion relate to

---

2 As an initial matter, Garner makes no specific objection, *see infra*, to the factual and procedural background outlined in Magistrate Judge Stinnett's R&R. (Doc. # 971 at 1–2). As a result, the relevant factual background as set forth in the R&R is adopted by the Court. *Id.*

3 Two previous Indictments had been returned charging Garner with the same crime and alleging his participation in the conspiracy. (Docs. # 12 and 43).

Garner's claims of ineffective assistance of counsel by three separate defense attorneys. *See* (Doc. # 882). Among other things, he argues that his counsel and the district court failed to assure that his plea was intelligent and knowing and that he understood the charges against him. *See id.* He also claims his counsel failed to make appropriate pre-trial objections. *See id.* Moreover, he claims that his appellate counsel failed to raise the issue that his guilty plea was not intelligently given on appeal. *See id.* Finally, Garner argues that his case involved prosecutorial misconduct and that he should be able to withdraw his guilty plea. *See id.*

On April 30, 2019, Magistrate Judge Stinnett filed his R&R, recommending that Garner's Motion be denied. (Doc. # 963). In doing so, Judge Stinnett separated Garner's seventeen (17) grounds into two main categories: (1) ineffective assistance of counsel claims and (2) claims related to prosecutorial misconduct and withdrawal of Garner's guilty plea. *Id.* at 2–14.

Judge Stinnett first addressed the ineffective assistance of counsel claims, which were the basis of grounds 1, 2, 3, 5, 8, 10, and 17, and which he concluded were refuted by the record. *Id.* at 2–9. Next, he concluded that the remainder of Garner's arguments, which related to his claim of ineffective assistance of counsel, 3, 4, 6, 7, 14, and 15, fail to meet the *Strickland* standard. *Id.* at 9–13. Finally, he found that Garner's remaining arguments, relating to grounds 9 and 11 and which raise issues of prosecutorial misconduct and withdrawal of his guilty plea, were without merit because they are underdeveloped and conclusory. *Id.* at 13–14.

On May 5, 2019, Garner timely filed Objections to the Magistrate Judge's Report and Recommendation. (Doc. # 971). Having considered the objected-to portions of the

R&R de novo as required, *see infra*, the Court adopts Judge Stinnett's recommendation, (Doc. # 963), as its own.

II. ANALYSIS

A. Standard of Review

Under Federal Rule of Civil Procedure 72(b)(2), a habeas petitioner may object to a magistrate judge's R&R. Fed. R. Civ. P. 72(b)(2). If the petitioner objects, "The 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).

The Sixth Circuit has held "[o]nly 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). A specific objection "explain[s] and cite[s] specific portions of the report which [counsel] deem[s] problematic." *Robert v. Tesson*, 507 F.3d. 981, 994 (6th Cir. 2007) (quoting *Smith v. Chater*, 121 F.3d 709, 1997 WL 415309, at *2 (6th Cir. 1997) (unpublished opinion)). A general objection that does not identify specific issues from the magistrate's report is not permitted because it renders the recommendations of the magistrate useless, duplicates the efforts of the magistrate, and wastes judicial economy. *Howard v. Secretary of Health and Human Services*, 932 F.2d 505, 509 (6th Cir. 1991). While filings by a pro se Defendant must be construed more liberally than those prepared by an attorney, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Castro v. United* States, 540 U.S. 375, 381-83 (2003), a pro se petitioner is not exempt from following the rules of the Court, *Ashenhust v. Ameriquest Mortg. Co.*, No. 07-13352, 2007 WL 2901416, at *1 (E.D. Mich. Oct. 3, 2007) (citing *McNeill v. United States*, 508 U.S. 106, 113 (1993))

(While "[t]hese [objection] rules are tempered by the principle that *pro se* pleadings are to be liberally construed . . . a *pro se* litigant must still comply with the procedural rules of the court.").

B. Garner's Objections

Garner did not to raise objections to the R&R as it pertains to grounds 2, 3, 5, 9, 10, 11, 16, and 17; thus, these objections are waived. (Doc. # 971); *see supra*. Instead, Garner makes seven numbered objections, relating to the following grounds raised in his motion: 1, 4, 6, 7, 8, 12, 13, 14, and 15. *Id.* In the instant action, Garner was represented by seven separate attorneys from pre-indictment through his direct appeal. (Doc. # 963 at 2). In his § 2255 motion, Garner made ineffective assistance of counsel claims against three of his attorneys: (1) Andrew Stephens, who represented from his detention hearing on July 30, 2013 until his sentencing on February 2, 2015; (2) Thomas Lyons, who represented him at the restitution hearing; and (3) Mark Wettle who represented Garner during his direct appeal.

Although the grounds in his initial Motion dealt with other matters as well, Garner's objections here relate exclusively to his claims of ineffective assistance of counsel prior to his plea, at the time of his guilty plea, and at the appellate stage of this action. (Doc # 971). Garner's waived objections and his specific objections will be addressed in turn.

1. Waived Objections

The United States Supreme Court has held that when the petitioner fails to file any objections, "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard." *Thomas v. Arn,* 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). "In order to

preserve an issue for appeal, a defendant is required to file objections with the district court to the findings of the magistrate judge." *United States v. Hunter,* 2001 WL 128297 at *4 (6th Cir.2001) (citing *United States v. Walters,* 638 F.2d 947, 949 (6th Cir.1981)). By failing to raise any objection to the R&R as to grounds 2, 3, 5, 9, 10, 11, 16, and 17, Garner waives any objection to the Judge Stinnett's conclusions with respect to these grounds.

2. *Ineffective Assistance of Counsel Claims*

As noted above, Garner makes specific objections as to grounds 1, 4, 6, 7, 8, 12, 13, 14, and 15, as listed in his initial motion. (Doc. # 971). Garner's objections relating to his ineffective-assistance-of-counsel claims, however, largely re-argue the grounds raised in his Motion. *Id.* In his R&R, Judge Stinnett identifies two types of ineffective-assistance claims Garner made in his Motion: those that can be refuted by the record and those that fail to meet the *Strickland* standard. (Doc. # 963 at 2–13); *see also, Strickland v. Washington*, 466 U.S. 668, 685-87 (1984). The Court will similarly categorize Garner's virtually identical ineffective-assistance-of-counsel arguments.

i. Objections refuted by the record

Garner's third and fourth objections relate to grounds 1 and 8 of his § 2255 Motion. (Doc. # 971 at 7–10). In particular, Garner complains that his attorney, Mr. Stephens coerced his plea (ground 8/objection 3), *id.* at 7–8, and that Mr. Stephens also "...failed to assure that [Garner] had a full understanding and knowledge of the offered plea[,]" (ground 1/objection 4), *id.* at 9–10. In his R&R, Judge Stinnett found that both of these claims are refuted by the record. (Doc. # 963 at 3–9). The Court agrees.

Garner first argued (ground 8) in his § 2255 Motion that Stephens told him he would "not get a 20-year sentence." (Doc. # 424 at 1320–21). Judge Stinnett concluded that, even if Garner's allegation was accurate, it was corrected during Garner's plea colloquy by the Court informing Garner he could get a 20-year sentence and would not be able to withdraw his plea. (Doc. # 963 at 8). The Court agrees with his conclusion.

Garner now objects (objection 3) to the R&R claiming that he was coerced into pleading guilty, by Mr. Stephens alleged statement that if Garner went to trial "...he most definitely [would] get 20 years...[.]" (Doc. # 971 at 8). The Court disagrees with Garner's assessment for the same reasons it agrees with Judge Stinnett's conclusion that even if Garner's allegation was true, it was corrected during Garner's plea colloquy when the Court informed him that he could receive a 20-year sentence even if he pled guilty.

It is undisputed that the Court informed Garner that he could receive a 20-year sentence. After being duly sworn and affirming that he understood his oath of truthfulness, (Doc. # 424 at 4), the District Court conducted a plea colloquy that included, among other things[4], the following relevant exchange:

> . . .
>
> **THE COURT:** Are you fully satisfied with the advice, counsel and representation he's given you in this matter?
>
> **THE DEFENDANT:** Yes, sir, I am.
>
> **THE COURT:** I understand there is no plea agreement; is that correct?
>
> **MR. STEPHENS:** That is correct, Your Honor please.
>
> **THE COURT:** Okay, you understand if I accept your plea pursuant to this - - accept your plea to this sole count of this indictment, that will deprive you

his letter contradicts this statement

[4] The R&R includes a lengthy recitation of the plea colloquy. (Doc. # 963 at 3–7). In the interest of clarity and judicial economy, the Court quotes the relevant portions of the plea colloquy and reincorporates by reference the remainder of the plea colloquy. (Doc. # 424 at 2–12).

of valuable civil rights such as the right to vote, the right to hold public office, the right to serve on a jury and the right to possess any kind of firearm. Do you understand that?

THE DEFENDANT: Yes, sir, I do.

THE COURT: The penalties prescribed by law for this offense are not more than twenty years in prison, a $250,000 fine and three years' supervised release, plus a mandatory special assessment of $100 and restitution, if applicable. You understand that?

THE DEFENDANT: Yes, I do.

THE COURT: While those are the statutory penalties, your sentence will be determined using the -- the sentencing guidelines as a framework for my decision. . . . You will have the right to appeal that sentence to the United States Court of Appeals for the Sixth Circuit. If you are sentenced to prison, you will not be released on parole because parole has been abolished in the federal system. Finally, if a sentence is more severe than you expected, you will still be bound by your plea and will have no right to withdraw it. Do you understand all that?

THE DEFENDANT: Yes, I do.

THE COURT: Have any questions about it?

THE DEFENDANT: No, sir.

. . .

THE COURT: Mr. Garner, to the charge we just discussed, how do you plead, guilty or not guilty?

THE DEFENDANT: I plead guilty.

(Doc. # 424 at 4–6, 10).

Contrary to Garner's objection, this argument is further refuted by Stephens's November 13, 2013 letter to Garner, which states, in part:

> My experience with Judge Hood is that people who come in and admit their guilt are *generally* treated with a far less severe hand than if they go to trial and are convicted or enter a plea according to a plea agreement which is otherwise a plea to the statutory maximum.

> Thus, at sentencing, you would be able to argue in mitigation of a statutory maximum sentence asking for a variance under the 3553 sentencing factors. *In my opinion*, this *could* very well apply to you for something along the lines of a far more reasonable sentence than 240 months. Again, my experience dictates to me that upon a plea, *while it would be possible that you could get a Guideline sentence similar to those in Ms. Roth's plea agreement, it is my belief that you could ask for and may very well be granted a variance to a reasonable sentence.*

(Doc. # 971-1 at 10–11) (emphasis added).

These excerpts of the plea colloquy and letter indicate that both Garner's attorney and the district court plainly informed Garner, before he entered his plea, that it would still be possible for him to receive a Guideline sentence near the statutory maximum. Thus, Garner's claim that Stephens coerced him into entering a plea with the promise of a lower sentence than if he went to trial is plainly refuted by the record.

Next, Garner argued (ground 1) that his counsel failed to assure that his guilty plea was knowingly and intelligently given. (Doc. # 882). However, in the R&R, Judge Stinnett concluded that "Garner's claim that he did not understand the 'plea agreement' is rebutted by his admission [during the plea colloquy] that he understood there was no plea agreement." (Doc. # 963 at 8). The Court agrees.

Garner also objects (objection 4) to Judge Stinnett's R&R, claiming that it is in error because "...there was a plea agreement offered in this case." (Doc. # 971 at 9–10). This objection, too, is refuted by the record. The district court's plea colloquy makes clear that there was, indeed, no plea agreement between the parties. In fact, Garner declined to enter the offered plea agreement, which was at the statutory maximum of twenty years. *See* (Doc. # 971-1 at 10) (letter from Stephens discussing the offered plea agreement); (Doc. # 424) (Garner's guilty plea without an agreement). Instead, Garner swore under oath that he knowingly opted to enter an open guilty plea. *See* (Doc. # 424). As the United

States Supreme Court has held "[t]he representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-73 (1977). Accordingly, the Court finds that Garner's objections are unavailing. Those objections that are clearly refuted by the record are **overruled.**

ii. Objections failing to meet the *Strickland* test.

The remainder of Garner's objections (1, 2, 5, 6, and 7) relate to grounds 4, 6, 7, 12, 13, 14, and 15 of his § 2255 Motion, and require analysis under the *Strickland* standard. Garner's objections mirror the claims made in his § 2255 Motion, asserting that Stephens, Lyons, and Wettle were ineffective as counsel at differing stages of this action, because, among other things, his counsel allegedly failed to investigate or object to a warrantless search of his vehicle (ground 4), and the search of his email (ground 7), the determination of the number of victims and amount of loss (grounds 12 and 13), the determination of the amount of restitution (grounds 6 and 15), or the application of a leadership enhancement (ground 14). (Doc. # 882).

Reviewing these ineffective-assistance-of-counsel claims, Judge Stinnett ultimately concluded that each failed to meet the two-part test set forth in *Strickland*. (Doc. # 963 at 9–13). Under *Strickland* an ineffective-assistance-of-counsel claim requires that a prisoner show (1) that his "counsel's performance was deficient measured by reference to 'an objective standard of reasonableness'" and (2) "resulting prejudice, which exists where 'there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceedings would have been different.'" *United States v. Coleman*, 835 F.3d 606, 612 (6th Cir. 2016) (quoting *Strickland*, 466 U.S. at 688, 694).

"To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688)). 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.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). 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).

Prejudice results from a deficient performance when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693).

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.* Here, Judge Stinnett found that "Garner fails to make a sufficient showing under *Strickland* to prove either prong on any of his remaining grounds of relief." (Doc. # 963 at 10).

As discussed above, Garner alleges in his § 2255 Motion that Stephens was ineffective because he did not object to the number of victims, the amount of loss, and the amount of restitution (grounds 12 and 13). (Doc. # 882 at 11). Garner further argued that Stephens was incompetent because he failed to investigate or object to a warrantless search of his vehicle (ground 4), and the search of his email (ground 7). *Id.*

Judge Stinnett ultimately concluded that these claims were baseless. (Doc. # 963 at 11). He notes that Garner's claims, with respect to the number of victims, the amount of loss, and restitution, were repeatedly contested by Garner's counsel in the district court. *Id.* at 12. In particular, he notes that these proceedings involved Garner's counsel raising objections, eliciting testimony, and cross-examining the Government's witnesses. *Id.* As to Garner's claims that Stephens was ineffective for failing to raise objections to the search of his car, phone, and email, the Judge Stinnett found that there were not legally valid objections or motions Stephens could have made related to the evidence obtained in the inventory search of Garner's car made pursuant to his arrest nor the phone and email search conducted pursuant to a search warrant. *Id.* at 13.

Garner objects to the R&R (objection 5) arguing that Stephens's performance was deficient because he did not object "...to the PSR on the grounds that there was not a

complete investigation concerning the amount of victims... [,]" and that Stephens failed to make the appropriate objections to the amount of restitution. (Doc. # 971 at 11–12). Garner further objects (objections 1 and 2) to the Judge Stinnett's conclusion that "there were no legally valid objects or motions for Mr. Stephens to make" related to the inventory search of Garner's car or the warrant search of his phone and email. *Id.* at 1–6.

First, the Court disagrees with Garner's claim that Stephens was deficient for failing to object to the number of victims. The district court held a hearing on loss, a separate hearing on restitution, and heard testimony on both loss amount and the number of victims at the sentencing hearing. (Docs. # 537, 541, 545, 612, 742, 743, 744, and 805). As noted by Judge Stinnett, the fact that Stephens did not succeed on every motion or objection with regards to the amount of loss and restitution does not make his performance deficient. Thus, his objection on this ground is misguided.

The Court also disagrees with Garner's claim that had Stephens made an objection to the search of his car, phone, and email, all evidence resulting from those searches would have been suppressed. (Doc. # 971 at 1–6). In order to establish a viable claim of ineffective assistance of counsel based upon counsel's failure to file pretrial motions, Garner must be able to demonstrate that the basis for the motion is meritorious, and that there is a reasonable probability that the outcome would have been different. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986). A petitioner must demonstrate this by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). Here, Garner fails to do so. As Judge Stinnett noted, the vehicle was searched as part of an inventory search pursuant to a valid arrest and the phone and email were searched pursuant to a search warrant. (Doc. # 963 at 13). Garner has not demonstrated

that had Stephens objected to these searches that there was a reasonable probability that the outcome would have been different. Accordingly, this objection also fails.

Further, in his § 2255 Motion, Garner argued that his appellate counsel's legal strategies were unreasonable. Specifically, he claims that he asked Wettle to argue on direct appeal that the district court incorrectly calculated the number of victims and the loss amount and used a procedurally deficient method for determining restitution amount; he argues that Wettle was ineffective for failing to raise those arguments (grounds 6 and 15). (Doc. # 882 at 19). Garner also argued that Wettle was ineffective for choosing not to argue that Garner should have received a 3-level as a supervisor rather than a 4-level enhancement as a leader in the scheme (ground 14). *Id.*

Judge Stinnett dispensed with each of these arguments, noting that Wettle did, in fact, raise the loss issue on direct appeal to the Sixth Circuit, which upheld the district court's ruling, concluding "that the district court made a reasonable estimate of loss." (Doc. # 963 at 11); (Doc. # 822 at 6). Next, he reasoned that Garner cannot show Wettle was ineffective for making the strategic decision not to raise the issue of restitution on appeal (Doc. # 963 at 11). In particular, he explained that Wettle's decision not to raise this issue was understandable given that the District Court entered a fourteen-page Memorandum Opinion and Order, *id.* (citing (Doc. # 772)), setting forth its methodology and reasons for ordering restitution and the Sixth Circuit upheld, *id.* (citing (Doc. # 822 at 16–18)), restitution amounts against Garner's co-defendants. Finally, he found that Garner's argument that Wettle should have argued that Garner should receive a 3-level rather than 4-level enhancement was unavailing because it would not have reduced the sentence Garner ultimately received. (Doc. # 963 at 11). As a result, Judge Stinnett

concluded that Garner's claims fail to meet the *Strickland* test for showing that Wettle's performance was deficient. *Id.*

Garner objects (objections 6 and 7) to these conclusions. (Doc. # 971 at 13–17). However, Garner makes the same arguments as he raised in his § 2255 Motion. *Id.* Garner claims that Wettle should have raised the issue of the district court's calculation of the number of victims and the method for determining restitution on direct appeal. *Id.* at 13–14. Moreover, he argues that Wettle should have argued on direct appeal that Garner should receive a 3-level rather than 4-level enhancement because doing so ". . . would have reduced [Garner]'s sentence." *Id.*

The Court disagrees. As discussed above, these were contested restitution issues at the district court level, which ultimately held a hearing on loss, a separate hearing on restitution, and heard testimony on both loss amount and the number of victims. (Docs. # 537, 541, 545, 612, 742, 743, 744, and 805). Further, while Garner did, indeed, expressly request Wettle raise these issues on direct appeal, (Doc. # 882 at 28–30), the United States Supreme Court has held that "[t]his process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). As a result, we find Wettle's decision not to raise these issues on direct appeal does not render his assistance ineffective under *Strickland*, particularly where the record reflects the thoroughness of the district court's proceedings related to the number of victims and the methodology and reasoning for ordering the amount of restitution. Simply put, appellate counsel is not required to raise meritless arguments on direct appeal. *See*

Martin v. Mitchell, 280 F.3d 594, 607(6th Cir. 2002) (appellate counsel not ineffective for failing to raise an issue that would have failed). Moreover, Judge Stinnett's conclusion that Wettle's decision not to raise the enhancement argument was reasonable given that, even if it were successful, it would not have lowered Garner's guideline range below the 240-month sentence imposed. As a result, the Court finds that Garner's these objections also are meritless, and that there is no relief available to him on the theory that he was provided ineffective assistance of counsel. *Strickland*, 466 U.S. at 694.

C. 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). Here, because the record refutes Garner's factual allegations and conclusively shows that Garner is not entitled to habeas relief, the Court will not hold an evidentiary hearing. *See Arredondo*, 178 F.3d at 782.

D. Certificate of Appealability

Finally, "[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.

In this case, the Court had considered the issuance of a certificate of appealability as to each of Garner's claims. Ultimately, no reasonable jurist would find the assessments on the merits debatable or wrong. As a result, no certificate of appealability shall issue.

III. OTHER PENDING MOTIONS

The adoption of the R&R and the denial of Garner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 moots out many of his other pending motions. The motions that become moot as a result of the Court's denial of Garner's Motion to Vacate include motions requesting documents and transcripts in furtherance of the § 2255 Motion, (Docs. # 868, 878, 879 and 921), a motion regarding the magistrate referral, (Doc. # 908), requests to stay proceedings and resume proceedings, (Docs. # 910 and 915), requests for conferences and hearings in support of his § 2255 Motion, (Doc. # 920 and 921), and motions for summary judgment and default judgment on the claims raised in the § 2255 Motion, (Docs. # 934 and 947). While Judge Stinnett noted some of these motions in his R&R, *see* (Doc. 963 at 15), the Court finds the list of motions that shall be denied as moot to be more extensive. Having reviewed all of the pending motions, as well as Garner's § 2255 Motion and Judge Stinnett's R&R, the Court finds that the following motions must be denied as moot: Motion in Response to the Court's Order (Doc. # 868), Motion to Compel Attorney Andrew Stephens to Turn Over Requested Documents (Doc. # 878), Motion for Status on Motion Filed Sept. 11, 2017 (Doc. # 879), Motion for Status Concerning DE # 901 Order (Doc. # 908), Motion to

Temporarily Stay Proceedings (Doc. # 910), Motion to Lift Temporary Stay (Doc. # 915), Motion for Evidentiary Hearing (Doc. # 920), Motion for Discovery (Doc. # 921), Motion for Pre-Hearing Conference (Doc. # 922), Motion for Summary Judgment (Doc. # 934), and Motion for Default Judgment (Doc. # 947).

IV. CONCLUSION

Garner cannot demonstrate that counsel was ineffective, nor has he offered any evidence of prosecutorial misconduct or that the Court should revisit his request to withdraw his guilty plea. Here, ". . . 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). 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) The Report and Recommendation of the United States Magistrate Judge (Doc. # 963) is hereby **ADOPTED** as the findings of fact and conclusions of law of the Court;

(2) Defendant's Objections (Doc. # 971) are hereby **OVERRULED**;

(3) Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. # 882) is hereby **DENIED**;

(4) Docket entries 868, 878, 879, 908, 910, 915, 920, 921, 922, 934, and 947 are hereby **DENIED AS MOOT**;

(5) This matter is hereby **DISMISSED** and **STRICKEN** from the Court's active docket;

(6) For the reasons set forth herein and in the Magistrate Judge's Report and Recommendation (Doc. # 963), the Court determines that there would be no arguable merit for an appeal in this matter and, therefore, **NO CERTIFICATE OF APPEALABILITY SHALL ISSUE**; and

(7) A separate Judgment will be filed concurrently herewith.

This 28th day of January, 2020.

Signed By:
David L. Bunning DB
United States District Judge

J:\DATA\ORDERS\Lexington\2012\12-65 Order Adopting R&R re 2255.docx

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	**Criminal Action No. 5:12-065-JMH-MAS-3**
	)	
v.	)	**and**
	)	**Civil Action No. 5:18-229-JMH-MAS-3**
NICHOLAS COREY GARNER,	)	
	)	
Defendant/Petitioner.	)	
	)	

REPORT & RECOMMENDATION

This matter is before the undersigned on Petitioner Nicholas Corey Garner's ("Garner") Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255. [DE 882]. Garner alleges violations of his right to counsel, equal protection rights and speedy trial rights as well as multiple claims of ineffective assistance of counsel. [DE 354]. The United States responded in opposition [DE 379], and Garner filed a reply [DE 392]. After reviewing the record in its entirety, the Court recommends Garner's motion be denied for the reasons stated below.

I. RELEVANT FACTUAL BACKGROUND

On March 18, 2013, Garner and numerous co-defendants were indicted on charges of conspiracy to commit wire fraud. [DE 171]. The conspiracy involved a dozen individuals in an international scheme to defraud people purchasing vehicles on the Internet over the course of several years. [DE 171]. On December 4, 2013, Garner pleaded guilty to conspiracy without a plea agreement. [DE 333]. In June 2014, prior to sentencing, Garner moved, pro se, to withdraw his guilty plea over his counsel's objections. [DE 413 and 419]. The Court denied this request and Garner was sentenced on February 2, 2015, to 240-months of imprisonment and ordered to

pay $1,807,517.06 in restitution. [DE 443, 564, 591, 594, 598]. The Sixth Circuit affirmed the District Court's judgment on January 13, 2017. [DE 822].

Garner then timely filed the present Motion to Vacate, Set Aside, or Correct a Sentence on April 13, 2018. [DE 882]. In total, Garner has alleged seventeen grounds in support of his motion. While the bulk of Garner's arguments focus on alleged violations of his Sixth Amendment rights under the theory of ineffective assistance of three different defense counsel, he also claims prosecutorial misconduct and renews his motion to withdraw his guilty plea.

II. ANALYSIS

A. Ineffective Assistance of Counsel

Garner utilized seven different attorneys in this matter from pre-indictment through his direct appeal.[1] He makes claims against three of them: Andrew Stephens ("Stephens"), who represented Garner from the detention hearing on July 30, 2013, until the sentencing on February 2, 2015; Thomas Lyons ("Lyons"), who represented him at the restitution hearing; and Mark Wettle ("Wettle"), who represented Garner during his direct appeal to the Sixth Circuit Court of Appeals.

To succeed on a § 2255 motion, petitioner "must establish an error of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619,

[1] Garner submitted at least thirteen letters or pro se motions to the Court complaining about his trial counsel. [DE 105, 115, 121, 136, 148, 196, 338, 367, 379, 445, 471, 568, 584]. The Court held at least three hearings addressing conflicts between Garner and his numerous lawyers. [DE 109, 116, and 591]. One of his court-appointed attorneys moved to withdraw from the case due to "personal safety concerns" after Garner told her "she is not going to be alive much longer." [DE 237 at 746].

637-38 (1993)). In his motion, Garner has raised numerous grounds to support his claim for ineffective assistance of counsel. The Court will address each of these arguments below.

1. Grounds Refuted by the Record

Garner's motion focuses primarily on his open guilty plea. Garner argues that his counsel and the District Court failed to assure that his guilty plea was intelligent and knowing and that he understood the charges against him. In a related argument, he claims his appellate counsel failed to raise the issue that his guilty plea was not intelligently given on appeal. Garner's grounds for relief 1, 2, 3, 5, 8, 10, and 17 are all variations of this argument. All of them are refuted by the record.

Stephens began his representation of Garner with a *Boykin* letter setting forth the charges against him and the possible penalties. [DE 419-1 at Page ID # 1290-94]. The letter also set forth Garner's constitutional, statutory, and appellate rights. [*Id.*].

The heart of Garner's numerous arguments, moreover, rest upon an allegedly faulty plea colloquy. Again, Garner alleges that the plea was not done intelligently and knowingly nor that the District Court addressed him directly. Thus, the Court provides the plea colloquy at length below to demonstrate how plainly the record refutes Garner's argument. After being duly sworn and affirming that he understood his oath of truthfulness [DE 424 at Page ID # 1318], the District Court then conducted the following plea colloquy.

> THE COURT: Are you currently under the influence of any drug, medication or alcoholic beverage?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you seen a copy of the indictment, the -- I guess it's the third superseding indictment; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you seen a copy of that?

THE DEFENDANT: Yes, sir, I have one.

THE COURT: Have you discussed that indictment and your case in general with Mr. Stephens as your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with the advice, counsel and representation he's given you in this matter?

THE DEFENDANT: Yes, sir, I am.

THE COURT: I understand there is no plea agreement; is that correct?

MR. STEPHENS: That is correct, Your Honor please.

THE COURT: Okay, you understand if I accept your plea pursuant to this -- accept your plea to this sole count of this indictment, that will deprive you of valuable civil rights such as the right to vote, the right to hold public office, the right to serve on a jury and the right to possess any kind of firearm. Do you understand that?

THE DEFENDANT: Yes, sir, I do.

THE COURT: The penalties prescribed by law for this offense are not more than twenty years in prison, a $250,000 fine and three years' supervised release, plus a mandatory special assessment of $100 and restitution, if applicable. You understand that?

THE DEFENDANT: Yes, I do.

THE COURT: While those are the statutory penalties, your sentence will be determined using the -- the sentencing guidelines as a framework for my decision. . . . You will have the right to appeal that sentence to the United States Court of Appeals for the Sixth Circuit. If you are sentenced to prison, you will not be released on parole because parole has been abolished in the federal system. Finally, if a sentence is more severe than you expected, you will still be bound by your plea and will have no right to withdraw it. Do you understand all that?

THE DEFENDANT: Yes, I do.

THE COURT: Have any questions about it?

THE DEFENDANT: No, sir.

THE COURT: We had a trial scheduled in your case for January 14th of next year. You understand that if you wanted to continue to plead not guilty to this charge, you would have a right to that trial.

THE DEFENDANT: Yes, I do.

THE COURT: And that would be a trial by jury, you are aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: You would have the right to assistance of counsel for your defense. You are aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: You would have a right at that trial to see, hear and have cross examined all witnesses against you. You understand that?

THE DEFENDANT: Yes, I do.

THE COURT: You would have a right to compulsory process. In other words, the court would subpoena witnesses to testify in your defense. You understand that?

THE DEFENDANT: Yes, I do.

THE COURT: You would have a right, too, to remain silent. In other words, you could not be forced to testify. You could obviously testify, but it would be voluntarily and in your own defense. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And finally you would have the right to make the government prove this charge to the jury beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Now, if I accept your plea, there will never be a trial in this matter and you will have waived or given up your right to a trial as well as those rights associated with the trial that I have just described. You understand that?

THE DEFENDANT: Yes, I do, I understand.

THE COURT: This indictment is I think 15 pages long, and you have read it, right?

THE DEFENDANT: Yes, sir.

THE COURT: You have discussed it with Mr. Stephens.

THE DEFENDANT: Yes, sir.

THE COURT: So it -- I don't see any real need to read the whole thing to you, do you?

THE DEFENDANT: No, sir, no, sir.

THE COURT: Well, let me ask you this. What did you do that would warrant you to entering into a guilty plea -- entering a guilty plea to this conspiracy?

THE DEFENDANT: I used false identification.

THE COURT: Yeah.

THE DEFENDANT: And my real identification to send wires by Western Union.

THE COURT: Yeah.

THE DEFENDANT: And sending and receiving money –

THE COURT: Well, who did you send money to?

THE DEFENDANT: Some --

THE COURT: Somebody overseas?

THE DEFENDANT: Yes, sir.

THE COURT: Well, where did you get this money?

THE DEFENDANT: It was sent to me.

THE COURT: And then you in turn -- did you keep any of it, or what did you do?

THE DEFENDANT: Yes, sir, yes, sir, yes, sir, I kept a percentage of it.

THE COURT: Who sent it to you, do you know?

THE DEFENDANT: No, sir.

THE COURT: And then -- but you knew that there was something wrong with this money; is that correct?

THE DEFENDANT: Yes, sir, yes, sir.

THE COURT: How did you know that?

THE DEFENDANT: Because I obtained it with a fraudulent ID.

THE COURT: Okay, you used this fraudulent ID to get this money.

THE DEFENDANT: Yes, sir.

THE COURT: And then you sent it overseas by wire, kept part of it; is that correct?

THE DEFENDANT: Yes, sir, yes, sir.

THE COURT: And somebody else over -- well, had to be over there to get that wire transfer.

THE DEFENDANT: Yes, sir.

THE COURT: So somebody else was involved with you, too?

THE DEFENDANT: Yes, sir.

THE COURT: Satisfactory factual basis, Miss Roth?

MS. ROTH: Yes, Your Honor.

THE COURT: Concur, Mr. Stephens?

STEPHENS: Concur, yes, sir, I do.

THE COURT: Mr. Garner, to the charge we just discussed, how do you plead, guilty or not guilty?

THE DEFENDANT: I plead guilty.

[DE 424 at Page ID # 1319-25].

"[T]he representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal" because of the "strong presumption of verity" of the statements made under oath during the plea colloquy. *Id.* at 74.

Garner swore under oath at the plea colloquy that he was satisfied with his counsel, that he understood the ramifications of pleading guilty, and that he understood the charges against him. The Court required Garner to set forth, in his own words, what actions he undertook that constituted each element of conspiracy to commit wire fraud.[2] Garner was able to do so, stating:

[2] The elements of wire fraud are that a defendant (1) knowingly participated in a scheme to defraud in order to obtain money or property; (2) that the scheme included a material misrepresentation or concealment of a material fact; (3) that the defendant had the intent to

"I used false identification . . . And my real identification to send wires by Western Union . . . And sending and receiving money." [DE 424 at Page ID # 1324]. As set out above, Garner told the Court he knew there was something "wrong" with the money because he used false identification to obtain it, he sent it overseas, and he kept a percentage of the money. [*Id.*]. He also confirmed there were other people involved in the scheme. [*Id.*]. Garner's arguments that he did not know the elements of the crime he pleaded guilty to, or did not understand them, are in direct conflict with his representations to Judge Hood under oath. *See Curry v. United States*, 39 Fed. App'x 993, 994 (6th Cir. 2002) (finding that a defendant's "plea serves as an admission that he committed all of the elements of the crime."). Garner's claim that he did not understand the "plea agreement" is rebutted by his admission that he understood there was no plea agreement. [DE 424 at Page ID # 1319]. Garner's argument that Stephens told him he would "not get a 20-year sentence," if true, was corrected during the plea colloquy by the Court informing Garner he could get a 20-year sentence, and would not be able to withdraw his guilty plea. [*Id.* at 1320-21]. Garner's claim that the District Court did not address him "personally and in open court" and failed to determine whether the plea was voluntary is directly refuted by the transcript of the rearraignment, quoted above. [DE 882 at Page ID #7782; DE 424 at Page ID # 1318-27]. Accordingly, the Court recommends the District Court deny Garner's motion for § 2255 relief on the grounds that Stephens provided ineffective assistance of counsel.

Garner's ineffective assistance claim against Lyons, who represented Garner leading up to and at the hearing on restitution, is also refuted by the record. Garner alleges Lyons failed to

---

defraud; and that the defendant used or caused another person to use wire communications in interstate or foreign commerce in furtherance of the scheme. *See* 18 U.S.C. § 1343; Sixth Circuit Pattern Jury Instructions Sec. 10.02; *see also* 18 U.S.C. § 1346 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

object to the amount of restitution and number of victims and failed to raise the issue with the Court that Garner was unable to pay restitution in a $1.8 million lump sum payment. Garner also implies that Lyons is at fault for the United States' Probation Office's ("USPO") supposed misinformation in the Presentence Investigation Report ("PIR"), and the Court's alleged failure to adhere to Fed. R. Crim. P. 32. An ineffective assistance claim cannot lie against Lyons for the actions of the Court or the USPO. Lyons did not represent Garner during the presentencing phase, at which time objections to the PIR would have been appropriate. Lyons did, however, raise the issue of the Court's failure to require the USPO to abide by the requirements of 18 U.S.C. § 3664 in accepting a summary chart supporting the restitution amount. [DE 805 at 7350-51]. The District Court, however, did not agree with Lyons' argument; that does not make him ineffective under the law. *See Hodge v. Haeberlin*, 579 F.3d 627, 644 (6th Cir. 2009) ("Counsel does not fall below this [*Strickland*] standard by failing to prevail when arguing a debatable point to the court.").

2. Grounds Failing to Meet *Strickland* Standard

Garner's remaining ineffective assistance of counsel claims require the application of the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 685-87 (1984). To prevail on an ineffective assistance of counsel claim in a § 2255 motion, a petitioner must prove (1) that their counsel's performance was deficient, and (2) that petitioner suffered prejudice due to that deficiency. *Id.* at 687. Deficient performance is shown only through proving "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. A showing of prejudice requires a "reasonable probability that, but for counsel's errors, the judicial outcome would have been different." *Id.* at 694-95. A petitioner must satisfy both prongs of the test, but 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. Garner fails to make a sufficient showing under *Strickland* to prove either prong on any of his remaining grounds for relief.

A finding of deficiency requires the petitioner "prove that counsel's representation was not merely below average, but rather that it 'fell below an objective standard of reasonableness.'" *United States v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). Courts "employ a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689); *see also O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994).

Garner claims his appellate counsel's legal strategies were unreasonable because he failed to raise certain issues despite Garner's express request that he do so. [DE 882 at Page ID # 7718, 7729, 7738-40 (grounds 3, 6, 14, and 15)]. "[I]neffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel." *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). His appellate counsel, Wettle, explained in his statement attached to the United States' response that while Garner did raise these issues with Wettle, Wettle explained to Garner that the issues "did not raise to the level of palpable error" and he did not believe the issues to be valid ones for appeal. [DE 898-3, Statement of Mark Wettle, Page ID # 7876.]. The Court notes that the admission of this statement as evidence in Garner's § 2255 matter is likely inappropriate because the statement is not a sworn-to affidavit. However, upon independent review of the record and the relevant law, the Court agrees with Wettle's purported statement that the issues Garner wished to appeal were not viable issues on appeal or were weak arguments which would confuse or dilute any better arguments he might have had. Regardless of the Court's agreement with Wettle, "[t]his process of 'winnowing out weaker arguments on appeal and focusing on' those

more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52) (1983).

Garner also asked Wettle to argue that the Court incorrectly calculated the issue of the number of victims, the loss amount, and used a procedurally deficient method for determining the restitution amount. [DE 882 at Page ID # 7729]. Contrary to Garner's claim, Wettle did raise the loss issue at the Sixth Circuit Court of Appeals, and that Court upheld the District Court's ruling, concluding "that the district court made a reasonable estimate of the loss." [DE 822 at Page ID # 7449]. Further, the District Court wrote a fourteen-page Memorandum Opinion and Order setting forth its methodology and reasons for ordering restitution in the amount that it did. [DE 772]. Garner cannot show that Wettle was ineffective in making a strategic decision not to raise this issue on appeal, particularly in light of the appeals court upholding the restitution amounts against his co-defendants. [DE 822 at Page ID # 7459-61]. Similarly, he cannot show Wettle was ineffective in choosing not to argue that Garner should have received a 3-level enhancement for his role as a "supervisor" rather than a 4-level enhancement for his role as a "leader" in the scheme. Wettle reasonably "winnowed out" this argument because it would not have reduced the sentence Garner received.[3] Garner has not made the requisite showing under *Strickland* that Wettle's performance was deficient.

Garner makes similarly baseless claims against Stephens that fail to meet the *Strickland* standard. He maintains Stephens failed to investigate and object to the warrantless search of his

[3] If Garner's analysis were to be accepted, it would have lowered the lowest end of Garner's Sentencing Guidelines range from 292 months to 262 months, which is still above the 240-month sentence the District Court imposed. *Strickland* involves an "exacting standard" of showing that, but for counsel's failure, there is a reasonable probability that the outcome would have been different. *Hinkle v. Randle*, 271 F.3d 239, 245 (6th Cir. 2001).

vehicle, search of his email, and the number of victims, and the amount of loss and restitution. [DE 882 at 7721 (grounds 4 and 7)]. As noted repeatedly herein, the number of victims and the amounts of loss and restitution were contested issues in this case. The Court held a hearing on loss, a separate hearing on restitution, and heard testimony on both loss amount and the number of victims at the sentencing hearing.[4] [DE 537, 541, 545, 612, 742, 743, 744, 783, 805]. At the loss hearing, Stephens raised objections and cross-examined the government's witness.[5] Stephens, in his sworn affidavit attached to the United States' response to the § 2255 motion, states that while the losses in this matter were incredibly difficult to quantify, he reviewed the all of voluminous information available to him. [DE 898-1 at Page ID # 7867]. Stephens' exhaustive understanding of all aspects of this case is demonstrable throughout the record in this case. [*See, e.g.*, DE 381, 424, 472, 742, 743, and 744]. As noted above, "[c]ounsel does not fall below this [*Strickland*] standard by failing to prevail when arguing a debatable point to the court."). *See Hodge v. Haeberlin*, 579 F.3d 627, 644 (6th Cir. 2009). The fact that Stephens did not succeed on every motion or objection does not make his performance deficient.

Garner's remaining ineffective assistance claims relate to supposed Fourth Amendment violations not raised by Stephens. "Though free-standing Fourth Amendment claims cannot be raised in collateral proceedings under either § 2254 or § 2255, the merits of a Fourth Amendment claim still must be assessed when a claim of ineffective assistance of counsel is founded on

[4] It is important to note that Garner insisted, over the Court and Stephens' extreme unease, that he represent himself at the sentencing hearing. [DE 612 at Page ID # 3739-59]. At the sentencing, counsel for the United States expressed concern as to whether the defense had had an adequate opportunity to cross-examine the agent who testified to the number of victims; as a result the Court allowed the agent to take the stand once again at the sentencing and be subject to cross-examination by Garner (who had dismissed Stephens by that point in the hearing). [DE 612 at Page ID # 3760].

[5] By way of example only, and not an exhaustive list, *see* DE 742 at 5743, 5751, 5752, 5799 and 5825-26 (objections); DE 743 at 6108-26 (cross-examination).

incompetent representation with respect to a Fourth Amendment issue." *Ray v. United States*, 721 F.3d 758, 762 (6th Cir. 2013). Garner's arguments that Stephens' performance was deficient because he did not investigate or object to the search of his vehicle and the search of his email are easily disposed of. The vehicle was searched as part of an inventory search pursuant to Garner and his mother's valid arrest.[6] [DE 742 at 5790-91]. Garner's phone and email was searched pursuant to a search warrant. [DE 612 at 3800; *See also* Case No. 5:12-MJ-5061-REW]. There were no legally valid objections or motions for Stephens to make related to the pieces of evidence obtained pursuant to these searches. Accordingly, Garner's ineffective assistance of counsel claims related to these searches fail both prongs of *Strickland* and should be denied.

B. Garner's Remaining Arguments

Although the bulk of Garner's arguments center upon ineffective assistance of counsel, he also raises two other issues: prosecutorial misconduct and withdrawal of his guilty plea.

Initially, Garner offers no facts to support his argument that there was prosecutorial misconduct. [DE 882 at Page ID # 7733 (ground nine)]. Garner baldly alleges that the United States Attorney did not "satisfy its [sic] burden of Proof" as required at the "preplea, plea, pre-sentencing or sentencing" stage of the case. Conclusory statements are insufficient to warrant § 2255 relief. *See Lovejoy v. United States*, No. 95-3968, 1996 WL 331050, at *3 (6th Cir. June 13, 1996) (acknowledging that conclusory statements are insufficient to warrant § 2255 relief). [DE 882 at Page ID # 7733]. Thus, Garner's underdeveloped claim of prosecutorial misconduct should

[6] Garner and his mother/co-defendant were pulled over for speeding and arrested when the officer on the scene discovered they had outstanding arrest warrants as a result of the Indictment in this case. [DE 12, 15, 77, 742 at 5790, and 898 at 7853]. The vehicle was impounded and searched, whereupon the much-discussed "ledger" detailing the fraud scheme was discovered.

be dismissed. *See Johnson v. United States*, 457 Fed. App'x 462, 466-67 (6th Cir. 2012); *United States v. Domenech*, No. 1:06-CR-245-2, 2013 WL 3834366, at *2 (W.D. Mich. July 24, 2013).

In his eleventh ground for relief Garner essentially renews his motion to withdraw his guilty plea. [DE 882 at 7735; *see* DE 413 for original motion]. Garner does not raise any new facts or arguments that would justify the Court revisiting this exhaustively-litigated issue in his § 2255 motion. [See DE 413, 415, 416, 419, 433, 443]. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. [. . .] As the third circuit has noted, [c]ourts naturally look with a jaundiced eye upon any defendant who seeks to withdraw a guilty plea after sentencing on the ground that he expected a lighter sentence." *Baker v. United States*, 781 F.2d 85, 92 (6th Cir. 1986) (quotation marks and citations omitted). Further, Garner did not raise this issue on direct appeal. Thus, the plea cannot be collaterally attacked without a showing of "cause" and "actual prejudice," a showing that Garner does make in his motion. [DE 822]; *Bousley v. United States*, 523 U.S. 614, 622 (1998). Accordingly, the Court recommends the district deny the § 2255 motion on this ground.

III. CONCLUSION

For the reasons stated herein, the Court recommends the District Court deny Garner's Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255. The Court notes that despite Garner's insistence that three different attorneys provided ineffective assistance of counsel, and his allegations that the District Court violated his rights, the record in this case serves as evidence to the contrary. The instant motion is a continuation of Garner's attempt to thwart justice, mislead the Court, and manipulate every individual involved in this case.[7]

[7] The record is replete with evidence of Garner's attempts to delay, obfuscate the truth, mislead, and manipulate: making death threats against his counsel [DE 237]; his own counsel's

Finally, there are numerous pending pro se motions in this matter. If the District Court adopts this Report and Recommendation and denies § 2255 relief, the following motions will be moot: DE 908, 910, 913, 915, 920, 921; and 922.

CERTIFICATE OF APPEALABILITY

A certificate of appealability may issue only if a defendant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473,484 (2000) (addressing issuance of a certificate of appealability in the context of a habeas petition filed under 28 U.S.C. § 2254, which legal reasoning applies with equal force to motions to vacate brought pursuant to 28 U.S.C. § 2255). In cases where a district court has rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

In this case, reasonable jurists would not debate the denial of Defendant's § 2255 motion or conclude that the issues presented are adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court **RECOMMENDS** that the District Court **DENY** a certification of applicability.

---

statements that Garner's continual complaints of conflict were "generated by the Defendant, his own conduct, and his very poorly disguised attempts to delay and obfuscate" [DE 472 at 1583]; that Garner has a "complete and utter lack of understanding of his own criminal behavior" [DE 570 3489]; that "Defendant's repeated attempts to get yet a fifth attorney to 'see the case his way' is simply a tactic of delay and obfuscation and should not be sustained by the Court" [*Id.*]; the Court's observation that "Garner believes his counsel is against him when, in fact, the law and the facts are against him" [DE 585 at 3632]; Garner's admission that the doctor who conducted his psychological examination called him, in Garner's paraphrasing, a "lying MF'er" [DE 612 at 3749].

RECOMMENDATION

For all of the reasons stated in this decision, the Court **RECOMMENDS** that:

1) the District Court **DENY**, with prejudice, Defendant's § 2255 motion [*See* DE 882]; and
2) the District Court **DENY** a Certificate of Appealability as to all issues, should movant request a COA.

The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights concerning this recommendation, issued under subsection (B) of said statute. As defined by § 636(b) (1), Fed. R. Civ. P. 72(b), Fed. R. Crim. P. 59(b), and local rule, within fourteen days after being served with a copy of this recommended decision, any party may serve and file written objections to any or all portions for consideration, de novo, by the District Court.

Entered this 30th day of April, 2019.

Signed By:
Matthew A. Stinnett MAS
United States Magistrate Judge