No. 20-3441

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 31, 2021
DEBORAH S. HUNT, Clerk

OMAR ISRAEL-GRIFFIN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: KETHLEDGE, DONALD, and LARSEN, Circuit Judges.

Omar Israel-Griffin, a pro se federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-3441

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OMAR ISRAEL-GRIFFIN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	)	ORDER

Before: KETHLEDGE, DONALD, and LARSEN, Circuit Judges.

Omar Israel-Griffin petitions for rehearing en banc of this court's order entered on February 11, 2021, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

"APPENDIX C"

No. 20-3441

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 11, 2021
DEBORAH S. HUNT, Clerk

OMAR ISRAEL-GRIFFIN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GRIFFIN, Circuit Judge.

Omar Israel-Griffin, a federal prisoner represented by counsel, appeals a district court order denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Israel-Griffin has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

A federal grand jury indicted Israel-Griffin for distribution of substances containing heroin and fentanyl resulting in the death of Ethan Blair. He faced a sentence of 20 years to life imprisonment. Following plea negotiations, the government filed a superseding information that removed the specification as to the resulting death, capping Israel-Griffin's potential sentence at 20 years of imprisonment. In a written plea agreement, the parties agreed that Israel-Griffin's distribution of controlled substances caused Blair's death. They also agreed that the government would move for a substantial-assistance reduction under U.S.S.G. § 5K1.1 and request an 84-month sentence if Israel-Griffin provided "full and complete cooperation," which could "include that he testify . . . concerning all matters pertaining to . . . all other criminal activity in which he may have been involved or as to which he may have knowledge." The district court accepted Israel-Griffin's guilty plea and ordered the preparation of a presentence report. The presentence report determined that Israel-Griffin had a total offense level of 35 and a criminal history category of IV, resulting in a guidelines range of 235-293 months.

Prior to sentencing, the government determined that it would not file a § 5K1.1 motion because Israel-Griffin had not completely cooperated under the terms of the plea agreement, and it recommended a sentence of 235 months of imprisonment. Israel-Griffin maintained that he was entitled to an 84-month sentence because he had substantially complied with the plea agreement, and he argued that the government's decision not to file a § 5K1.1 motion constituted a breach of the plea agreement. At the sentencing hearing, the district court conducted a sidebar on the matter and advised the parties that it was inclined to accept the government's position. During the remainder of the hearing, counsel advised the court of Israel-Griffin's remorse, but he did not argue any other mitigation or seek a variance or downward departure. The district court imposed a 235-month sentence and asked whether the parties had any objections. Counsel deferred to Israel-Griffin, who inquired about withdrawing his guilty plea, but the court declined to allow withdrawal of the plea. On appeal, this court concluded that the record was insufficient to allow review of Israel-Griffin's claim that trial counsel was ineffective for failing to move for a variance or departure at sentencing. *United States v. Israel-Griffin*, 756 F. App'x 584, 586-87 (6th Cir. 2018).

In his § 2255 motion, Israel-Griffin claimed that: (1) his guilty plea was involuntary because counsel coerced him to plead guilty to obtain a 7-year sentence, but he was subsequently sentenced to 20 years of imprisonment; (2) counsel was ineffective for advising Israel-Griffin to plead guilty without discussing possible defenses or potential trial strategy with him and for failing to move to withdraw Israel-Griffin's plea after he said at sentencing that he wished to do so; (3) counsel was ineffective at sentencing for failing to present mitigation in favor of a lower sentence and for failing to move for a variance or departure; and (4) appellate counsel was ineffective for filing an inadequate brief.

The district court issued an order partially denying the § 2255 motion, concluding that: (1) Israel-Griffin had procedurally defaulted his challenge to the voluntariness of his guilty plea by not raising the issue on direct appeal and, even if he had established cause for the procedural default, he could not show actual prejudice because he had acknowledged that no one coerced him to plead guilty and the record established that he understood the terms of his plea agreement; and

(2) Israel-Griffin had failed to show that counsel was ineffective with respect to his guilty plea because he had acknowledged that counsel discussed possible defenses and trial strategy and because it was objectively reasonable for counsel to recommend a guilty plea. However, the district court scheduled an evidentiary hearing on Israel-Griffin's claim that counsel was ineffective for failing to present any mitigation at sentencing and for failing to move for a variance or departure, and it appointed counsel to represent him at the hearing.

After the evidentiary hearing, at which trial counsel was the only witness, the district court rejected Israel-Griffin's remaining claim. The district court concluded, on the basis of counsel's testimony and the record before it, that counsel's performance did not prejudice Israel-Griffin because the court would not have granted a variance or a departure. Therefore, it denied the § 2255 motion and declined to issue a COA.

Israel-Griffin seeks a COA with respect to his claims that: (1) counsel was ineffective for misleading him about the cooperation requirements of the plea agreement and failing to move to withdraw his guilty plea; and (2) counsel was ineffective for failing to present mitigation at sentencing or move for a variance or departure.

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

Reasonable jurists would not debate the district court's rejection of Israel-Griffin's claims that trial counsel rendered ineffective assistance. To prove an ineffective-assistance claim, a movant must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the plea context, a

movant can establish prejudice by showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); "that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time," *Missouri v. Frye*, 566 U.S. 134, 147 (2012); or "that counsel's deficient performance infected his decisionmaking process, and thus undermines confidence in the outcome of the plea process," *Rodriguez-Penton v. United States*, 905 F.3d 481, 488 (6th Cir. 2018) (citing *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017)).

1. Guilty Plea

Israel-Griffin claimed that trial counsel was ineffective for providing "gross misadvice" as to the plea offer and failing to explain the cooperation requirements set forth in the plea agreement. But in light of the record, reasonable jurists would not debate the district court's conclusion that counsel was not ineffective in this regard. During the plea hearing, the district court verified that Israel-Griffin understood his trial rights, the crimes charged, the consequences of the guilty plea, and the factual basis for the plea. Israel-Griffin acknowledged that no one had threatened him or coerced him to plead guilty and that no promises, other than those contained in the plea agreement, were made to induce him to plead guilty. The district court reviewed the cooperation requirements set forth in the plea agreement and explained that the determination of whether he had complied with the terms of the cooperation requirements would be left to the government's discretion. And the plea agreement explained that cooperation might require that Israel-Griffin testify; it also contained an acknowledgement that Israel-Griffin had reviewed the agreement with counsel and that he understood its terms. On this record, reasonable jurists would agree that counsel did not induce Israel-Griffin to plead guilty by misleading him about the cooperation requirements.

Nor would reasonable jurists debate whether Israel-Griffin would have rejected the plea offer and insisted on going to trial absent counsel's allegedly deficient performance. The superseding information reduced his sentencing exposure to a maximum of 20 years of imprisonment, when absent a plea he would have faced a statutory range of 20 years to life. The

plea agreement also gave Israel-Griffin the opportunity to obtain a government recommendation of an 84-month sentence based on his full cooperation—an opportunity that he declined by deciding not to testify, despite the fact that the plea offer indicated that his cooperation might include testifying.

Finally, reasonable jurists would not debate whether counsel was ineffective for failing to move to withdraw Israel-Griffin's guilty plea. Israel-Griffin contends that counsel should have followed through on his request that the district court permit him to withdraw his plea by filing a formal motion to withdraw the plea. But no grounds for withdrawal of the plea are apparent, based on the record as discussed above, and at the sentencing hearing the district court stated that it would not grant such a motion.

2. Sentencing

Reasonable jurists would not debate the district court's rejection of Israel-Griffin's claim that trial counsel was ineffective for failing to present arguments in support of mitigation and for failing to move for a variance or departure. During the evidentiary hearing on the § 2255 motion, counsel explained that he did not present evidence of mitigation beyond stating Israel-Griffin's remorse because the facts concerning Israel-Griffin's childhood were already before the court via the presentence report, and his strongest argument was that the court should grant Israel-Griffin the benefit of the plea agreement. Regardless of the reasonableness of this strategy, reasonable jurists would not debate that prejudice is absent. The district court expressly concluded that it would not have granted a motion for a variance or departure in light of the circumstances of the case and the record before the court. This conclusion is supported by the court's determination at the sentencing hearing that the nature of the case, which included Israel-Griffin's admission that his distribution had caused the death of Blair, warranted a guideline sentence. As counsel and the district court noted, the record at sentencing included the plea agreement and Israel-Griffin's acknowledgment that his distribution resulted in Blair's death, the presentence report, and the parties' sentencing memoranda. Israel-Griffin argues that the court's conclusion contradicts its initial determination, made in the order partially denying the § 2255 motion, that the record was

insufficient to decide whether it would have granted a request for a variance or departure. But that determination was made in anticipation of the evidentiary hearing and any evidence presented during the hearing. Israel-Griffin failed to present any new evidence that might have supported a motion for a variance or departure, and the district court was free to revisit the issue based on the current record and to determine that it would not have granted a variance or departure. Reasonable jurists would agree that Israel-Griffin failed to establish prejudicially deficient performance in these circumstances.

Accordingly, Israel-Griffin's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

"APPENDIX B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

OMAR ISRAEL-GRIFFIN,

Defendant/Petitioner.

CRIMIAL CASE NO. 1:16-cr-044
CIVIL CASE NO. 1:19-cv-700

Judge Michael R. Barrett

FILED UNDER SEAL

ORDER

This matter is before the Court on Petitioner's § 2255 motion to vacate, set aside, or correct sentence. (Doc. 82). In a prior Order, the Court denied Petitioner's § 2255 motion to the extent that he challenged the voluntary nature of his plea and his counsel's representation at his plea hearing. (Doc. 85, sealed). The Court set the matter for an evidentiary hearing regarding Petitioner's remaining ineffective assistance of counsel argument surrounding his sentencing. *Id.* The Court appointed counsel for Petitioner (Docs. 86, 87) and held an evidentiary hearing on March 4, 2020 (Doc. 90). For the reasons that follow, the Court will deny the remainder of Petitioner's § 2255 motion.

I. BACKGROUND

This case began with a two-count indictment for the unlawful distribution of substances containing heroin and fentanyl entered on May 4, 2016. (Doc. 3). Count one of the indictment referenced the fact that Ethan Blair died as a result of the unlawful distribution. In light of the specification related to Mr. Blair's death, Petitioner faced a statutory 20-year minimum to life sentence. (*Id.*; 21 U.S.C. § 841(b)(1)(C)). The Court initially appointed a Federal Public Defender to represent Petitioner in July 2016. (Doc. 5).

Petitioner retained private counsel and the Court relieved the appointed Federal Public Defender in December 2016. (Docs. 23, 24).

In April 2017, Respondent filed a one-count superseding information for distribution and attempt to distribute the same substances. (Doc. 38). The information removed the specification as to the resulting death, and thus the statutory 20-year minimum to life sentence, and resulted in a sentencing range of no mandatory minimum with a cap at 20 years. *See* (Doc. 84, sealed). The information came in conjunction with a plea agreement and statement of facts that contained the parties' agreement that Petitioner's unlawful distribution had caused Mr. Blair's death. (Doc. 41). The plea agreement included Petitioner's "understand[ing] that in determining a sentence, the Court has an obligation to calculate the applicable sentencing guideline range and to consider that range, possible departures under the United States Sentencing Guidelines ("U.S.S.G."), and other sentencing factors under 18 U.S.C. § 3553(a)." (*Id.* at PAGEID #: 60).

The plea agreement set forth the obligations of Petitioner and of Respondent at paragraphs seven and eight. Among other things, those paragraphs provided that: "Defendant [ ] agrees that he has the opportunity to cooperate;" Defendant "understands that, should he choose to cooperate, that such cooperation may include that he testify . . . concerning all matters pertaining to the Superseding Information filed herein and to any and all other criminal activity in which he may have had been involved in or as to which he may have knowledge;" the Government "agrees that if Defendant [ ] provides substantial assistance in the investigation or prosecution of others who have committed criminal offenses, the United States Attorney may move the Court pursuant to §5K1.1 of

the Federal Sentencing Guidelines and/or 18 U.S.C. § 3553(e) for an appropriate departure;" "Defendant [ ] understands that whether such motion should be made lies within the sole discretion of the USAO;" and, in exchange for "full and complete cooperation as determined by the United States," Respondent would request an 84-month sentence. (*Id.* at PAGEID #: 61).

The presentence investigation report ("PSR") calculated a total offense level of 35, a Criminal History Category of IV, and a guidelines range of 235–293 months—further subject to a 20-year cap based on the statutory maximum resulting in a sentencing range of 235-240 months. (PSR, ¶¶ 126–127).

By the time of sentencing, Respondent had determined that Petitioner had not completely and substantially cooperated per the terms of the plea agreement and thus joined Probation's recommendation of a 235-month sentence. (Doc. 45, sealed). In its sentencing memorandum, Respondent noted that Petitioner had identified but "refused to supply testimony against [large-scale suspected drug suppliers, already known to Respondent, in the Cincinnati area]" and had been unable to give any pursuable information regarding his own drug supplier. (*Id.* at PAGEID #: 70). Respondent informed the Court that Petitioner "did nothing to assist the agents/investigations in any useable fashion." *Id.*

Petitioner's counsel filed a sentencing memorandum in which he maintained that Petitioner had "substantially performed his contractual duties with only minor deficiencies" and focused on the perceived breach of the plea agreement by Respondent. (Doc. 46, sealed, PAGEID #: 75). On that basis, Petitioner sought to limit his sentencing exposure to 84 months. (*Id.*).

At the sentencing hearing, and at sidebar concerning Plaintiff's cooperation, the Court noted that "the Plea Agreement made it very clear that it was in the sole discretion of [Respondent] whether or not a 5K would be filed[.]" (Doc. 68, sealed portion of sentencing hearing, PAGEID #: 197–98). Petitioner's counsel then offered that Petitioner was now willing to testify, to which Respondent noted that it would be open to a Rule 35 motion. (*Id.* at PAGEID #: 198).[1] During the balance of the sentencing hearing, Petitioner's counsel stood on the discussions at sidebar along with his sentencing memorandum and discussed his client's remorse in mitigation. (Doc. 67, PAGEID #: 180-81). Petitioner's counsel did not seek any variance or downward departure.

The Court sentenced Petitioner to the low end of the sentencing range: 235 months. (*Id.* at PAGEID #: 189). Immediately before doing so, the Court stated that "[t]here is nothing before me at this time which would warrant either a departure or a variance from the calculation." *Id.* The Court gave Petitioner a final opportunity to raise any last objection, and Petitioner's counsel deferred to his client—who asked whether he could withdraw his plea. (*Id.* at PAGEID #: 193). The Court did not entertain the request and instead confirmed that Petitioner would confirm with his counsel regarding an appeal. (*Id.* at PAGEID #: 193–94).

Petitioner directly appealed to the U.S. Court of Appeals for the Sixth Circuit. (*See* Doc. 51). His appellate counsel argued that he was denied the effective assistance of counsel when counsel failed to request a variance or departure at sentencing. (Sixth Cir. No. 17-4100, Doc. 41, PAGE: 8). As to the former, appellate counsel noted facts found at the detention hearing and in the PSR that he argued should have been presented by

[1] According to Respondent, Petitioner has never followed through on his willingness to testify. (Doc. 84, PAGEID #: 289).

counsel in support of a downward variance under 18 U.S.C. § 3553. (*Id.* at PAGE 19-21). As to the latter, appellate counsel flagged a downward departure under U.S.S.G. § 4A1.3(b)(1), where "reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." (*Id.* at PAGE 21-23).

In its decision, the Sixth Circuit summarized Petitioner's background:

> He was raised by a single mother who struggled financially. His father regularly used marijuana cigarettes laced with crack cocaine, including during the time he was conceived. Eventually, his father abused solely crack cocaine and died of an overdose when Israel-Griffin was 13 years old. His mother indicates that after his father's death, Israel-Griffin buried his emotions, which led to him abusing drugs. Israel-Griffin first tried marijuana at age 10 with older boys in the neighborhood. By age 13, he was smoking marijuana daily, eventually experimenting with prescription opiates, molly, and ecstasy. Israel-Griffin first tried heroin at age 24, and admits to currently being addicted to it. Lacking a positive male role model, he was influenced by local drug dealers, and began selling drugs to support his addictions. He also reports being exposed to a significant amount of violence in his neighborhood, including witnessing people being shot and killed. The PSR indicates that Israel-Griffin has three children and believes he is a "great father." [PSR, ¶ 102, 103, 105]. He believes that he is not a bad person, has a strong support system, and hopes that he and his family can relocate to Florida after his release to get a "clean slate." *Id.* at ¶ 104-06.

(Doc. 76, PAGEID #: 239–40). The Sixth Circuit also noted that seven of Petitioner's 13 adult criminal convictions were for misdemeanor marijuana possession and one for felony heroin possession. (*Id.* at PAGEID #: 240).

On review of these facts and the standard of law applicable to ineffective assistance of counsel claims, the Sixth Circuit concluded that "there [wa]s no record of why defense counsel chose not to request a variance or departure." (*Id.* at PAGEID #: 242). In other words, it had nothing before it on counsel's strategy (or lack thereof) to be considered against the alleged deficient performance. The Sixth Circuit accordingly held

that resolution of the ineffective assistance claim "require[d] information not currently contained in the record, and to develop this record, his claims should first be raised in the district court." (*Id.* at PAGEID #: 242 (citation omitted)). The Sixth Circuit dismissed the appeal without prejudice. (*Id.* at PAGEID #: 243).

Petitioner filed his § 2255 motion asserting ineffective assistance of counsel. His memorandum in support alleges, in addition to arguments already denied, that counsel did not "fil[e] any motions to challenge the Government's case." (*Id.* at PAGEID #: 278–79). The Court reads this contention as a reference to his arguments made on appeal regarding the failure, at sentencing, to request a variance or departure.

Respondent filed a Response to Petitioner's § 2255 motion, per the Court's order. (Doc. 84, sealed). In short, Respondent asserted that Petitioner's "trial counsel did an admirable job in working out an agreement that did not result in a lifetime imprisonment for the Petitioner" and that "[a]ny issues with Petitioners' lengthy sentence are as a result of his own actions and his own refusal to cooperate," as Petitioner "knew the consequences of his plea." *Id.*

In the prior Order, the Court denied Petitioner's § 2255 motion regarding his challenges to the voluntary nature of his plea and his counsel's representation at his plea hearing. (Doc. 85, sealed). The Court set the matter for an evidentiary hearing regarding his ineffective assistance of counsel argument regarding sentencing. (Doc. 85, sealed). The Court appointed counsel for Petitioner (Docs. 86, 87) and held an evidentiary hearing on March 4, 2020. (Doc. 90).

II. STANDARD OF REVIEW

Relief under 28 U.S.C. § 2255 is warranted upon a showing of either "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003) (citing *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001)). A petitioner using § 2255 must demonstrate relief by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006).

III. ANALYSIS

To demonstrate an error of constitutional magnitude in this context, a petitioner "must show that his attorney's performance was so inadequate as to violate his Sixth Amendment rights." *Myers v. United States*, Case No. 1:10-cr-69-1, 2019 WL 330847, at *2 (S.D. Ohio Jan. 25, 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). *Strickland* set forth a two-part test for ineffective assistance of counsel claims. First, the petitioner must show that counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Under this prong, the court must "indulge a strong presumption that counsel's conduct falls within a wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged conduct might be considered sound trial strategy." *Id.* at 689 (internal quotation omitted). This is so, because "reasonable lawyers may disagree on the appropriate strategy for defending a client." *Bigelow v. Williams*, 367 F.3d 562, 570 (6th Cir. 2004) (citation omitted). Second, the petitioner must demonstrate prejudice—"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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Sentencing is a critical stage of the criminal process where the right of counsel attaches. *McPhearson v. United States*, 675 F.3d 553, 559 (6th Cir. 2012) (citing *Benitez v. United States*, 521 F.3d 625, 630 (6th Cir. 2008). "Counsel's failure to object to an error at sentencing or failure to raise a viable argument that would reduce his client's sentence may constitute deficient performance." *Id.* (citing *United States v. Thomas*, 38 F. App'x. 198, 203 (6th Cir. 2002)) (remaining citations omitted). As with ineffective assistance claims generally, however, any such failure must be objectively unreasonable in order to meet the first *Strickland* prong. *See id.*

Here, at the time of the sentencing hearing, Respondent had communicated, via sentencing memorandum, that it determined Petitioner to have violated the plea agreement by providing well short of complete and substantial cooperation. (Doc. 45). Petitioner's counsel filed a sentencing memorandum that focused exclusively on enforcement of the plea agreement and contained no other mitigation argument. (Doc. 46). The Court conducted a sidebar at the start of the sentencing hearing as it pertained to the plea agreement and expressed its inclination toward Respondent's position. (Doc. 68, sealed portion of sentencing hearing, PAGEID #: 197–98). At this point, and as noted in the prior order, the Court expects that an objectively reasonable attorney would have realized that it could no longer count on the benefit of the plea agreement at sentencing.

Petitioner's counsel raised no objections to the PSR at the sentencing hearing. (Doc. 67, PAGEID #: 180). The Court acknowledged Petitioner's counsel's arguments

pertaining to the plea agreement in his sentencing memorandum and at the sealed sidebar, and asked for anything further "in anticipation of or mitigation of a potential sentence." (*Id.*). At that point, Petitioner's counsel conveyed Petitioner's "tremendous amount of remorse" before introducing Petitioner's mother. (*Id.* at PAGEID #: 181). Then Petitioner addressed the Court, reiterating his remorse, after which the Court asked Petitioner's counsel if he had anything else. Petitioner's counsel replied: "No, sir. Thank you." (*Id.* at PAGEID #: 185). Just before the close of the hearing, the Court asked whether there were "any objections either to the facts or the calculation of the presentence investigation, is there any objection of any kind you wish to make at this time to preserve?" After a consultation with Petitioner, counsel made no objection and deferred to his client, who asked to withdraw his plea. (*Id.* at PAGEID #: 193).

Petitioner's § 2255 counsel called Petitioner's trial counsel as the sole witness at the evidentiary hearing. (Doc. 90). Petitioner's trial counsel reviewed his recollection of the important facets of the plea agreement and explained that: (1) the plea negotiations took Petitioner from a potential life sentence to a maximum of 20 years; (2) the plea agreement stated that, if Defendant substantially cooperated, as determined solely by the United States, the United States would request a sentence of 84 months; (3) there were extensive discussions regarding the meaning of "cooperation" as found in the plea agreement; and, despite those discussions, (4) Defendant refused to testify beyond giving some names during the proffer. In response to questioning why trial counsel did not expressly articulate factors found in 18 U.S.C. § 3553(a) and argue for a variance or departure at the sentencing hearing, trial counsel stated that the Court already had those facts in front of it as contained in the PSR and Petitioner's mother discussed his childhood.

As noted above, an ineffective assistance claim may be derailed upon the demonstration that either prong is lacking. *Strickland*, 466 U.S.at 697. In considering the prejudice prong, the Court is permitted to "rely on his recollections of the trial in ruling on the collateral attack." *Smith v. United States*, 348 F.3d 545, 551 (6th Cir. 2003) (internal quotation omitted). Considering an ineffective assistance of counsel claim based on the failure to move for a downward departure, one district court within the Sixth Circuit relied on its recollections of the plea and sentencing hearings to conclude that a petitioner could not show prejudice. *Castillo-Partida v. United States*, No. 02-20011-BC, 2005 WL 2290307, *4 (E.D. Mich. Sept. 1, 2005) (where no new facts were presented in connection with the § 2255 motion, the court concluded that it "would not have granted a motion for downward departure based on that record[.]"). At the sentencing hearing, this Court acknowledged the difficulty and tragedy of this particular case, predominantly due to Mr. Blair's death. (Doc. 67, PAGEID #: 188-89). The Court acknowledged the Sentencing Guidelines and ruled that:

> Taking into consideration everything that's in front of me at this time, I feel that the appropriate sentence in this case is a guideline calculation case. There is nothing before me at this time which would warrant either a departure or a variance from the calculation. But I believe that, based upon everything in front of me, the low end of the guidelines is appropriate. So the sentence in this case at this time is 235 months.

(*Id.*, PAGEID # 189).

The Court had in front of it, inter alia, the superseding information (Doc. 38); the plea agreement in which Petitioner agreed that his unlawful distribution caused Mr. Blair's death (Doc. 41); the PSR; the parties' sentencing memoranda (Docs. 45, 46); and the arguments presented at the sentencing hearing. The Court concludes that, based on the record, it would not have granted a downward variance or departure had Petitioner's

counsel requested a departure or variance. *See Castillo-Partida*, 2005 WL 2290307, at *4. The Court notes that had it considered a lesser criminal history, as possibly suggested by the Sixth Circuit, a history of III or II would still have resulted in the imposed sentence being within the guideline range, albeit the mid-range for III and upper range for II. Accordingly, Petitioner cannot establish *Strickland*'s prejudice prong on his remaining ineffective assistance of counsel argument and the Court will deny his § 2255 motion.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Petitioner's § 2255 motion (Doc. 82) is **DENIED**. The Court will not issue a certificate of appealability. *See* Rules Governing Sec. 2255 Proceedings for the U.S. Dist. Courts, Rule 11(a). Petitioner's § 2255 motion is not "debatable among reasonable jurists," subject to being "resolved differently on appeal[,]" or "adequate to deserve encouragement to proceed further." *Poandl v. United States*, No. 1:12-cr-00119-1 (1:16-cv-00286), 2017 WL 1247791, at *17 (S.D. Ohio April 5, 2017) (citing *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 7 N.4 (1983))). Petitioner has also failed to make a substantial showing of the denial of a constitutional right. *Id.* (citing 28 U.S.C. § 2253(c) and FED. R. APP. 22(b)).

IT IS SO ORDERED.

s/ Michael R. Barrett
Michael R. Barrett, Judge
United States District Court