

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

April 8, 2022

Lyle W. Cayce
Clerk

No. 20-20656
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROLLIE ANDRE LOTT,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-734-1

Before CLEMENT, HAYNES, and HIGGINSON, *Circuit Judges.*

PER CURIAM:*

Rollie Andre Lott, federal prisoner # 77670-479, appeals the denial of his motion for appointment of counsel, which he filed after the district court granted a writ of garnishment in favor of the Government. He argues that the district court violated his due process rights by failing to hold a hearing

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 20-20656

pursuant to 28 U.S.C. § 3202(d). He also moves this court for appointment of counsel on appeal.

In his brief before this court, Lott asserts that the property at issue was exempt from garnishment and that it belonged to another person. Because Lott did not move for a hearing for the district court to resolve these issues, this court will not consider them on appeal. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 399, 341-42 (5th Cir. 1999)..

AFFIRMED; MOTION DENIED.

ENTERED

August 31, 2022

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROLLIE ANDRE LOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Civil Action No. H-21-1090

Criminal Action No. H-18-734-1

ORDER

Pending before the Court are Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Civil Document No. 1, Criminal Document No. 129) and the United States' Response to Lott's Motion for Relief Under 28 U.S.C. § 2255 Motion (Criminal Document No. 136). On March 23, 2022, the Court held an in-person hearing to address the motion (the "Hearing"). Having considered the motions, submissions, evidence, and arguments presented at the Hearing, as well as the applicable law, the Court DENIES Petitioner's motion and GRANTS Respondent's motion.

I. BACKGROUND

A federal grand jury indicted Petitioner Rollie Andre Lott ("Lott") on four counts: three counts of bank fraud in violation of 18 U.S.C. § 1344 and one count of

aggravated identity theft in violation of 18 U.S.C. § 1028A.¹ The Court held a pretrial conference, during which Lott expressed a desire to plead guilty. At a pretrial hearing, Lott pled guilty to one charge of bank fraud a written plea agreement.² By not having to plead guilty to aggravated identity theft, Lott avoided a mandatory two-year sentence that would have run consecutive to the bank fraud conviction.

On the single bank fraud count, the Court sentenced Lott to sixty months in prison.³ Lott unsuccessfully appealed on several grounds, including ineffective assistance of counsel. In affirming Lott's conviction and sentence, the Fifth Circuit declined to address the ineffective assistance of counsel claim because "[t]he record is not sufficiently developed to address" the claim. *United States v. Lott*, 833 F. App'x 585, 586 (5th Cir. 2021) (per curiam).

Last year, Lott moved under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence.⁴ Lott asserts the following six grounds in his motion: (1) the

¹ On December 20, 2018, Lott was initially indicted on the same four counts. *Indictment*, Document No. 1. The charges described above are based on the superseding indictment in this case.

² *Transcript of Proceedings Before the Honorable David Hittner: Pretrial Conference and Rearraignment of Rollie Andre Lott*, Document No. 102 at 33:23–33:25.

³ *Sentencing Hearing Minute Entry*, Document No. 56.

⁴ *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody*, Civil Document No. 1 and Criminal Docket No. 129 [hereinafter *Motion Under § 2255*].

Government lacked jurisdiction for bank fraud because the entity Lott allegedly defrauded does not have Federal Deposit Insurance Corporation ("FDIC") insurance; (2) ineffective assistance of counsel; (3) prosecutorial misconduct withholding exculpatory evidence that would allegedly show Lott's innocence; (4) violation of due process by failing to let Lott review presentence report (the "PSR"); (5) an alleged breach of the plea bargain; and (6) the amount assessed in restitution is allegedly overstated. The Government moved for judgment on the record. On March 23, 2022, the Court held the Hearing.⁵

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW⁶

The findings of fact and conclusions of law are listed below. The facts have been established by a preponderance of the evidence.

a. General Facts

1. On December 20, 2018, a federal grand jury issued a four-count indictment against Lott.⁷
2. Also on December 20, 2018, the Court issued a bench warrant as to Lott.

⁵ Fifth Circuit Judge Gregg Costa presided over the Hearing, sitting by designation. United States District Court Judge David Hittner presided over the pretrial hearings and the sentencing.

⁶ All of the following findings and conclusions are adopted by the Court and should be construed as findings of fact or conclusions of law as circumstances dictate.

⁷ *Indictment*, Document No. 1.

3. On January 4, 2019, Lott entered an initial appearance before United States Magistrate Judge Nancy Johnson, where he requested appointed counsel.

4. On January 7, 2019, the Court issued an order appointing counsel as to Lott and Lott was arraigned before Magistrate Judge Johnson. Lott was appointed Federal Public Defender Marjorie Meyers ("Meyers").

5. On February 22, 2019, the Court granted Lott's unopposed motion to substitute retained counsel Chanae Connell ("Connell") as attorney of record. Meyers was subsequently terminated from the case.

6. On March 27, 2019, a grand jury in Houston, Texas issued a superseding indictment (the "Superseding Indictment"), indicting Lott on three counts of bank fraud in violation of 18 U.S.C. § 1344 and one count of aggravated identity theft in violation of 18 U.S.C. §1028A.⁸

7. The first count of the Superseding Indictment charged Lott with knowingly executing and attempting to execute a scheme to defraud Capital One Bank on June 8, 2018 by opening Capital One credit card accounts in the name of an alleged victim of identity theft ("D.B."), and using those accounts to make purchases in the amount of \$1,297.92 from the Dump Furniture store ("Count One").

8. On April 3, 2019, Lott was arraigned again, this time by United States Magistrate Judge Peter Bray.

⁸ *Superseding Indictment*, Document No. 27.

9. On July 12, 2019, the Court held a pretrial conference/rearraignment (the “PTC/R”). The trial was set to begin on July 15, 2019. At the PTC/R, Lott consulted with Connell and subsequently pleaded guilty to Count One.

10. On October 8, 2019, the Court sentenced Lott to sixty months in the custody of the Bureau of Prisons, five years of supervised release, and ordered Lott to pay \$112,394.69 in restitution and a \$100 special assessment.⁹

11. On October 16, 2019, Lott appealed on several grounds, including ineffective assistance of counsel.

12. On January 15, 2021, the United States Court of Appeals for the Fifth Circuit (the “Fifth Circuit”) affirmed Lott’s conviction and sentence, but declined to address the ineffective assistance of counsel claim because “[t]he record is not sufficiently developed to address” the claim. *United States v. Lott*, 833 F. App’x 585, 586 (5th Cir. 2021) (per curiam).

13. On April 1, 2021, Lott moved under 28 U.S.C. § 2255, *pro se*, to vacate, set aside, or correct his sentence.¹⁰

14. On June 3, 2021, the Government responded by moving for judgment on the record.

⁹ *Sentencing Hearing Minute Entry*, Document No. 56.

¹⁰ *Motion Under § 2255*, *supra* note 5.

15. At the Hearing, the Court heard testimony from Connell and Lott regarding Connell's representation.

16. Connell and Lott agree Lott filed an ethics complaint against Connell which was subsequently dismissed.

17. Lott asserts the following six grounds in his motion: (1) the Government lacked jurisdiction for bank fraud because the entity Lott allegedly defrauded does not have Federal Deposit Insurance Corporation ("FDIC") insurance; (2) ineffective assistance of counsel; (3) prosecutorial misconduct withholding exculpatory evidence that would allegedly show Lott's innocence; (4) violation of due process; (5) an alleged breach of the plea bargain; and (6) the amount assessed in restitution is allegedly overstated. The Government contests each ground. The Court addresses the standard of review, and then each ground asserted by Lott in turn.

b. Standard of Review

i. Relief Under § 2255

18. Following a conviction and exhaustion or waiver of the right to direct appeal, courts presume a defendant stands fairly and finally convicted. *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998).

19. As a result, review of convictions under § 2255 ordinarily is limited to questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on collateral review without a showing of either: (1) cause for his

procedural default and actual prejudice resulting from the error; or (2) a constitutional violation has probably resulted in the conviction of one who is actually innocent. *United States v. Liedtke*, 107 F. App'x 416, 418 (5th Cir. 2004) (per curiam); *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991).

20. A petitioner must show “cause” to explain the reason why the objection was not made at trial or on direct appeal and show “actual prejudice” was suffered from the alleged errors. *United States v. Frady*, 456 U.S. 152, 167 (1982).

21. To prove “cause,” a petitioner must show an external obstacle prevented him from raising his claims either at trial or on direct appeal. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

22. To prove actual prejudice, the petitioner must show he has suffered an actual and substantial disadvantage, meaning a “defendant must show that there is a reasonable probability that, but for [the alleged] errors, the result of the proceeding would have been different.” *Frady*, 456 U.S. at 170; *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011).

23. “A reasonable probability is a probability sufficient to undermine confidence in the outcome,” which requires “a ‘substantial,’ and not just ‘conceivable,’ likelihood of a different result.” *Cullen*, 563 U.S. at 189 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

24. “This cause and actual prejudice standard presents ‘a significantly higher hurdle’ than the ‘plain error’ standard [applied] on direct appeal.” *Shaid*, 937 F.2d at 232 (quoting *Fradley*, 456 U.S. at 166).

25. Constitutionally ineffective assistance of counsel is cause for a procedural default. *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

ii. *Ineffective Assistance of Counsel*

26. Courts analyze an allegation of ineffective assistance of counsel in a § 2255 motion under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001).

27. The movant must show his counsel’s performance was both deficient and prejudicial to prevail on an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700; *Willis*, 273 F.3d at 598.

28. To show deficiency, the movant must show his counsel’s assistance was outside a broad range of what is considered reasonable. *Strickland*, 466 U.S. at 669.

29. To establish prejudice, the petitioner “must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 694).

30. Thus, when a petitioner challenges his conviction, the issue is whether “a reasonable probability exists that the jury would have had a reasonable doubt as to guilt.” *Hernandez v. Johnson*, 213 F.3d 243, 249 (5th Cir. 2000).

31. “This is a heavy burden which requires a ‘substantial,’ and not just a ‘conceivable,’ likelihood of a different result.” *United States v. Wines*, 691 F.3d 599, 604 (5th Cir. 2012) (quoting *Harrington*, 562 U.S. at 112).

32. “Counsel’s errors must be ‘so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.’ ” *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687).

33. The movant must prove both prongs of the analysis: counsel tendered deficient performance and the movant suffered prejudice. *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997).

c. *Federal Jurisdiction for Bank Fraud*

34. The federal bank fraud statute punishes execution or attempted execution of “a scheme . . . to defraud a financial institution” to obtain, by means of fraudulent pretenses or representations, “moneys . . . or other property owned by, or under the custody or control of, a financial institution” 18 U.S.C. § 1344.

35. A “financial institution” is defined as, among other things, an “insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance

Act [(the “FDIA”)]” or a “depository institution holding company (as defined in section 3(w)(1) of the [FDIA]).” 18 U.S.C. § 20.¹¹

36. To sustain a conviction for bank fraud under 18 U.S.C. § 1344, proof of the victim financial institution’s FDIC-insured status “is not only an essential element . . . but it is also essential for the establishment of federal jurisdiction.” *United States v. Perez-Ceballos*, 907 F.3d 863, 867 (5th Cir. 2018).

37. “Where the government fails to sufficiently prove the FDIC-insured status of the victim bank, [the Fifth Circuit] has overturned bank fraud convictions for lack of jurisdiction.” *Id.*; see *United States v. Davis*, 735 F.3d 194, 199 (5th Cir. 2013) (collecting cases).

38. But when the indictment alleges, and the jury finds, that an FDIC-insured entity was the victim, jurisdiction exists. *Perez-Ceballos*, 907 F.3d at 867. Once that is established, a defendant’s argument that a different entity (one that is not FDIC-insured) was the actual victim does not go to jurisdiction but instead is a factual challenge to the jury’s finding that the FDIC-insured entity was the victim. *Id.*

39. This latter situation describes Lott’s argument. The indictment lists Capitol One Bank as the victim. Lott does not dispute its FDIC-insured status. He instead

¹¹ A depository institution holding company is a company that itself “has control over any bank.” 12 U.S.C. § 1841(a)(1).

argues that a separate entity, Capitol One Credit Card, is the victim. To support that argument, he filed what he purported to be a letter from the FDIC's Division of Depositor and Consumer Protection, which stated the following in response to an inquiry by Lott: "Capital One Bank and Capital One Credit Card Service LLC may be two different subsidiaries of Capital One Financial Corporation Assuming that the companies in question are two different subsidiaries, the financial well-being should be maintained separately or independently of each organization, and one company would not control the other company. However, we are unable to find any specific information regarding Capital One Credit Card Service LLC, but we do know that this entity is not connected to Capital One Bank for FDIC insurance coverage purposes. . . . Since Capital One Credit Card Service LLC is not an FDIC-insured bank, there would not be any FDIC insurance coverage extended to the cardholders of this company."¹²

40. But arguing that another entity is the actual victim is not a jurisdictional argument. *See Perez-Ceballos*, 907 F.3d at 867. Jurisdiction exists in this prosecution because the indictment alleged and the jury found that Lott defrauded

¹² *Motion Under § 2255, supra* note 5, Exhibits 1, 2 (*Purported Letter From FDIC to Rollie A. Lott*). The Court notes that, for some reason, this exhibit was not attached to the version of the § 2255 motion entered into the criminal docket, although it was attached to the civil version. Further, Exhibits 1 and 2 appear to be two pages from the same FDIC letter, and are entered out-of-order in the docket. The Court assumes for the purposes of this motion Exhibits 1 and 2 are two pages of the same letter, although the Court declines to reach a conclusion as to the letter's authenticity.

an FDIC-insured entity Capital One Bank. *Id.* Lott is just disagreeing that Capital One Bank was the victim, arguing the victim was instead an affiliate focused on credit cards. That is a run-of-the-mill factual sufficiency challenge to the verdict. Even assuming Lott has shown cause for not raising this issue on direct appeal, he has not shown that jury's finding that Capital One Bank was the victim is so irrational as to raise a due process claim.

41. Accordingly, Lott's motion is denied and the Government's motion is granted as to the FDIC insurance issue.

d. Ineffective Assistance of Counsel

Lott contends Connell provided him with constitutionally ineffective assistance of counsel on fifteen separate grounds. These grounds are: (1) "no adversarial testing;" (2) refusal to subpoena documents proving Lott's innocence; (3) failure to show Lott the PSR or object to the PSR; (5) failure to object to losses; (6) failure to suppress evidence; (7) failure to communicate a plea bargain to Lott; (8) failure to make plea negotiations; (9) "Defendant was told to lie;" (10) Connell allegedly misled Lott to think he was facing thirty years; (11) refusal to file a notice of appeal; (12) refusal to interview witnesses; (13) "defense strategies fundamentally diverged;" (14) "third-party fee arrangement arguably created a conflict of interest;" (15) "counsel threatened not to investigate case or file pretrial motions if Defendant

did not accept a plea;" and (16) failure to advise Lott of the charges against him.¹³

The Government contends Lott cannot show cause or prejudice as to any of these grounds. Most of Lott's specific claims consist of a single sentence fragment, sometimes with a citation to an exhibit and no further elaboration or argumentation.

No cases or statutes are cited.

42. The movant must prove both prongs of the analysis: counsel tendered deficient performance and the movant suffered prejudice. *Carter*, 131 F.3d at 463.

43. At an evidentiary hearing addressing a § 2255 motion, the Court, as the fact finder, is tasked with evaluating the credibility of the witnesses. *See United States v. Giacomel*, 153 F.3d 257, 258 (5th Cir. 1998).

i. No Adversarial Testing

44. *Pro se* filings are construed liberally by courts. *See United States v. Flores*, 380 F. App'x 371, 372 (5th Cir. 2010) (per curiam).

45. However, even construed liberally, it is unclear what Lott means by this claim. There is no elaboration in the motion as to what sort of testing he would have desired, how he feels it would have exonerated him, or an explanation as to why Connell's failure to conduct this testing falls outside the broad range of reasonable conduct. Given the lack of specific allegations, Lott's motion is denied as to this ground.

ii. Refusal to Subpoena Documents to Prove Lott's Innocence

¹³ *Motion Under § 2255, supra* note 5, at 9.

46. Lott contends Connell should have subpoenaed certain records to prove his innocence.

47. Although he does not elaborate about who these parties are, he attaches as an exhibit a letter Lott wrote to the Clerk of Court of the Southern District of Texas requesting “a subpoena (receipt) of-or documents my attorney requested from” the Texas Department of Corrections or the Harris County Central Jail Records.¹⁴

48. Lott does not elaborate about why he thinks records from the Texas Department of Corrections or the Harris County Central Jail Records would prove his innocence or explain why Connell’s failure to subpoena these records falls outside the broad range of reasonable conduct. Lott’s motion is denied as to this ground.

iii. Failure to Show Lott the PSR

49. A defendant has the right to review and object to the presentence report prepared before sentencing. *United States v. Jackson*, 453 F.3d 302, 305–06 (5th Cir. 2006).

50. At the Hearing, Lott testified Connell had failed to communicate the contents of the PSR. Lott presented no other evidence he sought to review the PSR or his review of the PSR would have potentially impacted the outcome of his sentencing.

¹⁴ *Motion Under § 2255, supra* note 5, Exhibit 10.

51. Also at the hearing, Connell testified she had communicated the contents of the PSR to Lott before sentencing.

52. Having considered the credible testimony presented at the Hearing, the Court finds Lott has not shown Connell failed to communicate to Lott the PSR before sentencing and, even if she had not, Lott has not shown he was prejudiced by this alleged failure. Accordingly, the motion is denied as to this ground.

iv. Failure to Object to Loss Amount

53. Although courts consider *pro se* motions liberally, the petitioner still must reasonably brief the issues of fact and law. *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995).

54. Here, Lott's argument that Connell failed to object to the losses is a single six-word statement without citation to the record or any authority.

55. The Court finds Lott has failed to make a showing sufficient to show Connell's failure to object to the losses at sentencing falls outside the broad range of reasonable conduct. Accordingly, the motion is denied as to this ground.

v. Failure to Move to Suppress Evidence

56. Lott does not say what evidence he believes should be suppressed or why Connell's failure to move to do so rises to the level of constitutionally ineffective assistance of counsel. Accordingly, the motion is denied.

vi. Failure to Communicate Plea Bargain

57. There is no evidence that a written plea bargain exists other than the government's dismissal of the other three counts alleged against Lott.

58. After consulting with Connell at the PTC/R, Lott agreed to plead guilty to Count One and the Government subsequently moved to dismiss all charges besides Count One.

59. Lott does not explain what plea bargain Connell allegedly failed to communicate or why he would have been prejudiced by her alleged failure to do so.

The motion is dismissed on this ground.

vii. Failure to Make Plea Negotiations

60. Lott presents no evidence Connell failed to make plea negotiations. Nor does he show that the government would have agreed to a plea on more favorable terms than the dismissal of the other three counts. That benefit Lott received was already significant because it avoided the consecutive two-year sentence for aggravated identify theft.

61. The Court thus finds Lott has not shown prejudice and the motion is dismissed as to this ground.

viii. Counsel Told Lott to Lie

62. Lott contends Connell told Lott to lie. Lott's motion does not explain what he was allegedly told to lie about.

63. Connell testified at the Hearing she never told Lott to lie. Nor is it apparent how this supposed lie impacted the case. This claim is dismissed.

ix. Misleading Lott as to his Potential Sentence

64. Lott contends Connell told him he could face up to thirty years, which Lott alleges is wrong. But Connell was correct—the maximum sentence for bank fraud is thirty years. 18 U.S.C. § 1344. Accordingly, the motion is denied as to this ground.

x. Refusal to File Lott's Notice of Appeal

65. Lott contends Connell refused to file a notice of appeal on his behalf.

66. Even assuming this was true, Lott appealed eight days after he was sentenced.

67. The Court thus finds Lott has not shown prejudice as to this ground and the motion is denied.

xi. Refusal to Interview Witnesses

68. Lott does not identify what witnesses he believes would have provided exculpatory evidence or point to law that would require Connell to interview any witness.

69. Accordingly, the Court finds Lott has not shown prejudice as to this ground and the motion is denied.

xii. Defense Strategies Fundamentally Diverged

70. Lott contends his strategy and Connell's fundamentally diverged. Lott, however, does not explain what their respective strategies were or how they were

incompatible. Lott presents no evidence Connell failed to pursue a strategy he consented to.

71. Accordingly, the Court finds Lott has shown neither ineffective assistance nor prejudice. The motion is denied.

xiii. Conflict of Interest

72. Lott contends a conflict of interest was created by his fee arrangement.

73. Both Lott and Connell represented at the Hearing that Connell was paid a retainer by Lott's family.

74. Lott points to no point of law supporting the proposition a conflict of interest is created by a defendant's family paying for their legal defense.

75. Accordingly, the Court finds Lott has not shown cause and the motion is denied as to this ground.

xiv. Coercion into Taking a Plea

76. Lott contends Connell threatened to not investigate his case if he refused to take a plea. Lott testified to this effect at the Hearing.

77. Connell testified she made no such representation to Lott.

78. Having considered the credible evidence presented at the Hearing, the Court finds Lott has failed to show ineffective assistance and the motion is denied as to this ground.

xv. Failure to Inform Lott of the Charges Against Him

79. Lott contends Connell erred by failing to tell him of the charges he was facing.

80. However, Lott represented at the PTC/R he had received and read the Superseding Indictment, and thus would have known the charges against him.¹⁵

81. The Court thus finds Lott has failed to show he was prejudiced by any failure by Connell to inform him of the charges he was facing.

82. Accordingly, Lott's motion is denied and the Government's motion is granted as to the ineffective assistance of counsel claim.

d. Prosecutorial Misconduct

83. Lott contends the Government engaged in prosecutorial misconduct by withholding evidence Capital One Bank did not issue Capital One credit cards and thus there was no federal jurisdiction for bank fraud. The Government contends Lott waived this argument by not raising it in appeal.

84. Due process is violated when the prosecution knowingly offers false testimony to obtain a conviction and fails to correct such testimony. *Tucker v. Johnson*, 242 F.3d 617, 625–26 (5th Cir. 2001).

85. A § 2255 petitioner who has already exhausted appeal and failed to raise in the appeal a particular ground for reversal raised in the § 2255 motion has procedurally defaulted on that ground, and to raise it for the first time must show both: (1) cause excusing the procedural default; and (2) actual prejudice resulting

¹⁵ PTC/R, *supra* note 2, at 25:23–26:1.

from the error. *Frady*, 456 U.S. at 168; *see United States v. Alanis*, 88 F. App'x 15, 22 (5th Cir. 2004) (per curiam) (denying § 2255 motion claim of prosecutorial misconduct on the grounds a petitioner had failed to raise the issue in direct appeal).

86. Here, Lott did not assert a claim for prosecutorial misconduct on his direct appeal. *See Lott*, 833 F. App'x at 585.

87. The only evidence offered by Lott as to prosecutorial misconduct is the FDIC letter, which the Court has already held decided is insufficient to show Capital One Bank was not the issuer of Capital One credit cards.¹⁶

88. The Court finds Lott has failed to show cause as to his procedural default on any claim of prosecutorial misconduct. Accordingly, Lott's motion is denied and the Government's motion is granted as to the prosecutorial misconduct ground.

e. Failure to Review the Presentence Report

89. Lott contends his due process rights were violated because he did not review the PSR. The Government contends Lott may not raise this issue because the Fifth Circuit already ruled on it in Lott's direct appeal.

90. A defendant has the right to review and object to the presentence report prepared before sentencing. *Jackson*, 453 F.3d at 305–06.

¹⁶ *See* Subpart II.c, *supra* page 14.

91. Courts cannot consider issues raised and addressed in direct appeal in a subsequent § 2255 motion without a showing of cause for procedural default and actual prejudice. *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986).

92. Lott presents no new arguments in the § 2255 as to the PSR that he did not also raise in direct appeal.

93. The Court thus finds Lott's motion should be denied and the Government's motion should be granted as to Lott's right to review the PSR.

f. Breach of Plea Bargain

94. Lott contends there was a breach of the plea bargain because he was ordered to pay restitution as to all victims, even though he only pleaded guilty to one charge against one victim. The Government contends Lott failed to raise this issue on direct appeal and does not show cause or prejudice.

95. Lott makes no argument as to why he did not raise this issue on direct appeal.

96. Lott is also wrong on the merits. Because bank fraud involves a "scheme," restitution extends to all victims of the scheme. *United States v. Inman*, 411 F.3d 591, 595 (5th Cir. 2005).

97. Accordingly, Lott's motion should be denied and the Government's motion granted as to the breach of plea bargain claim.

g. Amount of Assessed Restitution is Overstated

98. Lott contends the restitution he was ordered to pay includes finance charges, interest, and late fees, which he contends not permitted under sentencing guidelines. The Government contends Lott waived this issue by failing to raise it on appeal and does not show cause or prejudice.

99. Lott was ordered to pay restitution in the amount of \$112,394.69 in this case.

100. Lott did not object to the amount of restitution at the time of sentencing or in his direct appeal.

101. Lott provides no reason for his procedural default on this issue.

102. Accordingly, the Court finds Lott's motion should be denied and the Government's motion granted as to the restitution ground.

III. CONCLUSION

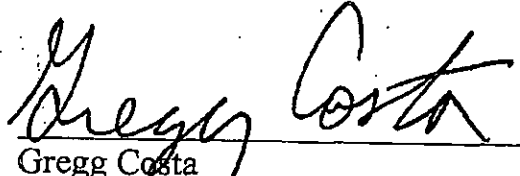
Based on the foregoing, the Court hereby

ORDERS that Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Civil Document No. 1, Criminal Document No. 129) is **DENIED**. The Court further

ORDERS that the United States' Response to Lott's Motion for Relief Under 28 U.S.C. § 2255 Motion (Criminal Document No. 136) is **GRANTED**.

THIS IS A FINAL JUDGMENT.¹⁷

SIGNED at Houston, Texas, on this 31st day of August, 2022.


Gregg Costa
United States Circuit Judge

¹⁷ A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). After careful review of the pleadings and the applicable law, the Court concludes that reasonable jurists would not find its assessment of the claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 483–84 (“To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes showing that reasonable jurists could debate whether . . . the petitioner should have been resolved in a different manner . . .”). Because Lott does not allege facts showing that his claim could be resolved in a different manner, a certificate of appealability will not issue.