UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL ACTION NO. 17-34-DLB-HAI
CIVIL ACTION NO. 20-66-DLB-HAI

UNITED STATES OF AMERICA **PLAINTIFF**

v. **JUDGMENT**

RICHARD R. CRAWFORD **DEFENDANT**

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Consistent with the Order Adopting Report and Recommendation entered today, and pursuant to Federal Rule of Civil Procedure 58, it is hereby **ORDERED** and **ADJUDGED** as follows:

(1) The Magistrate Judge's Report and Recommendation (Doc. # 124) is **ADOPTED** as the findings of fact and conclusions of law of the Court;

(2) Defendant's Motion to Vacate his Conviction and Sentence under 28 U.S.C. § 2255 (Doc. # 99) is hereby **DENIED**;

(3) The Court determines there would be no arguable merit for appeal in this matter and, therefore, **NO CERTIFICATE OF APPEALABILITY SHALL ISSUE**; and

(4) This matter is hereby **DISMISSED WITH PREJUDICE** and **STRICKEN** from the Court's active docket.

This 20th day of October, 2021.

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL ACTION NO. 17-34-DLB-HAI
CIVIL ACTION NO. 20-66-DLB-HAI

UNITED STATES OF AMERICA **PLAINTIFF**

v. **ORDER ADOPTING REPORT AND RECOMMENDATION**

RICHARD R. CRAWFORD **DEFENDANT**

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I. INTRODUCTION

This matter is before the Court on Magistrate Judge Hanly Ingram's Report and Recommendation (R&R) (Doc. # 124), wherein he recommends that Defendant Richard Crawford's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. # 99) be denied. Initially, Defendant failed to object. Almost two months later, the Court entered an Order adopting Judge Ingram's Report and Recommendations. (Doc. # 125). Following the entry of that Order, Defendant explained to the Court that he never received Judge Ingram's R&R. (Doc. # 129). The Court construed this Motion as one for relief of judgment, vacated the Order adopting Judge Ingram's R&R, and gave Crawford an opportunity to file objections. (Doc. # 130). Defendant, proceeding *pro se*, filed Objections to the Report and Recommendation (Doc. # 134). *See* 28 U.S.C. § 636(b)(1)(C); LR 72.2. For the reasons set forth below, the Defendant's objections are

overruled and the Report and Recommendation is **adopted** as the findings of fact and conclusions of law of the Court.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 14, 2017, Defendant Crawford was charged with several crimes related to drug distribution. (Doc. # 1). Defendant proceeded to trial beginning on August 6, 2018 (Doc. # 54). At the conclusion of the trial, Defendant was convicted on all three counts: (i) distribution of cocaine, (ii) possession of cocaine, and (iii) possession of cocaine base. (Doc. # 61). On November 27, 2018, Defendant was sentenced to a total term of imprisonment of two hundred sixteen (216) months, followed by six (6) years of supervised release. (Doc. # 70).

Defendant appealed his sentence to the Sixth Circuit Court of Appeals (Doc. # 71), which affirmed the conviction and sentence on November 18, 2019. *United States v. Crawford*, 943 F.3d 297 (6th Cir. 2019); (Doc. # 92).

On May 4, 2020, Defendant filed a Motion to Vacate his sentence under 28 U.S.C. § 2255. (Doc. # 99). In his Motion to Vacate, Defendant argued that his conviction should be vacated due to ineffective assistance of counsel, specifically arguing that his trial counsel failed to: (1) impeach informant's testimony, (2) properly seek suppression of the search warrant of an apartment on 661 Mission Lane, (3) seek suppression of evidence or incriminating statements made by Crawford during his unlawful arrest, (4) seek suppression of fruits of the search from 661 Mission Lane, (5) present testimony from an eyewitness to petitioner's warrantless arrest, (6) file a motion in limine excluding an informant named Jerry Heard, (7) object to a constructive possession jury instruction, (8)

[1] On September 20, 2021, the Court received a letter from the Sixth Circuit advising it that Crawford had filed a Writ of Mandamus. (Doc. # 136).

challenge Defendant's prior convictions which led to an enhanced sentence, and (9) his actions resulted in "cumulative error." (Doc. # 99-6 at 1, 11, 22, 25, 27, 34, 46, 48, 57). Defendant further argues that his appellate counsel provided ineffective representation when he failed to argue that the case should be remanded for resentencing without an enhancement under the sentencing guidelines and that due to an intervening change of law, Crawford's prior offenses no longer qualify as predicate offenses. (*Id.* at 52, 56). Following the filing of Crawford's Motion, the United States moved to strike Crawford's memorandum for exceeding the page limit prescribed in the local rules. (Doc. # 102). Judge Ingram denied the United States' Motion to Strike, but only required the United States to respond to three of Crawford's claims as Judge Ingram dismissed the other claims on initial review. (Doc. # 103). Thereafter, Crawford filed a Motion to Stay, which included what Judge Ingram construed as objections (Docs. # 110 and 124 at 5), and an additional "memorandum of law in support" of his § 2255 Motion. (Doc. # 114). The United States Responded opposing Crawford's Motion (Doc. # 119), and Crawford replied (Doc. # 123).

III. REPORT AND RECOMMENDATION

Judge Ingram's Report and Recommendation recommends denying Defendant's Motion to Vacate, Set Aside, or Correct his Sentence under § 2255 as meritless. (Doc. # 124 at 5).

Judge Ingram initially determined that four of Crawford's original complaints were foreclosed by the Sixth Circuit decision in his case—his ineffective assistance of counsel claims related to (1) failing to pursue a *Franks* hearing, (2) failing to move to suppress evidence or incriminating statements made after Crawford's allegedly unlawful arrest, (3)

failing to argue that the search warrant was invalid as an "anticipatory warrant," and (4) failing to present testimony from an eye-witness at Crawford's suppression hearing. (*Id.* at 4, 7). Judge Ingram correctly explained that a petitioner "may not use a § 2255 motion to rel[itigate] an issue that was raised on appeal." (*Id.* at 7). Judge Ingram applied the familiar two-prong *Strickland* test to Defendant's ineffective assistance of counsel claims, which requires a defendant to show (1) that his counsel was deficient and (2) counsel's deficiency actually prejudiced the defendant. (*Id.* at 6-7) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Judge Ingram broadly acknowledged that because the Sixth Circuit determined that the underlying search warrants were valid, and that Crawford's *Miranda* rights were not violated, he cannot show he was prejudiced by the actions of his attorney. (*Id.* at 7).

Crawford first argued that his counsel was ineffective by failing to pursue a *Franks* hearing. (*Id.* at 7). Judge Ingram explained that whether an affidavit contains probable cause is determined by looking only to the four corners of the affidavit. (*Id.*) (citing *United States v. Abernathy*, 843 F.3d 243, 249 (6th Cir. 2016)). If a defendant wants to bring in evidence beyond the affidavit, he must meet the "heavy burden" of demonstrating that a *Franks* hearing is necessary because the affidavit warrants a presumption of validity. (*Id.* at 8) (quoting *United States v. Bateman*, 945 F.3d 997, 1008 (6th Cir. 2019)). A *Franks* hearing is only appropriate when a defendant illustrates that an officer's statement was made with "reckless disregard for the truth." (*Id.*). As noted by Judge Ingram, the Sixth Circuit specifically found that Crawford was not entitled to a *Franks* hearing, and found that even without the inclusion of the specific statement challenged by Crawford, probable cause still would have supported the granting of the warrant. (*Id.*). Likewise, the Sixth

Mirandized. (*Id.*). Because this decision by counsel was a reasonable strategic one, it does not follow that he was ineffective. (*Id.*).

Next, Judge Ingram addressed Crawford's arguments related to Heard, a confidential informant. (*Id.*). Crawford makes two arguments related to Heard: that counsel acted ineffectively by (1) failing to impeach Heard and (2) failing to prevent Heard from testifying. (*Id.*). Counsel explained that he did not use the recording at trial because he did not believe any of Heard's statements were inconsistent with his trial testimony, the quality of the recording was poor, Crawford made inconsistent statements to counsel about what was actually on the recording, and the recording, even if it was admissible, contained statements from Crawford that may have been construed as evidence of guilt. (*Id.* at 13). Therefore, Judge Ingram believed that counsel's decision not to play the recording to impeach Heard was a reasonable strategic decision. (*Id.*). Regardless, Judge Ingram explained that even if the recording were to shed doubt on Heard's credibility, Crawford was still not prejudiced by his counsel's failure to introduce this recording because there was enough other evidence at trial to convict Crawford. (*Id.* at 14). Judge Ingram further found that Crawford's argument that counsel should have filed a motion *in limine* to prevent Heard from testifying at trial was meritless. (*Id.* at 15). Judge Ingram explained that even assuming Heard was unreliable, which was rebutted by the Sixth Circuit, counsel stated there was no legal basis to exclude Heard's testimony. (*Id.*). Judge Ingram examined Crawford's citations to FRE 609, FRE 613, and the "best evidence rule," and determined none of these applied to Heard's testimony. (*Id.*). Therefore, counsel was not ineffective for failing to file a frivolous motion. (*Id.*).

Judge Ingram then turned to Crawford's argument that the trial court erred in giving a "constructive possession" jury instruction, and that counsel was ineffective because he did not object to this instruction. (*Id.* at 16). Judge Ingram found that any error was harmless because there was no evidence presented that would allow jurors to find constructive possession, which is further bolstered by Crawford's trial testimony that he was in physical possession of the cocaine. (*Id.*). Because the error was harmless, Judge Ingram determined that Crawford could not prove prejudice. (*Id.*).

Next, Judge Ingram rejected Crawford's argument that he suffered "cumulative error" from his counsel's alleged ineffective assistance. (*Id.*). Judge Ingram explained that "Crawford has not established any instances of ineffective assistance, so there are no errors to cumulate." (*Id.*). Judge Ingram then addressed Crawford's repeated citation of *United States v. Chronic*, 466 U.S. 648, 659 (1984). In *Chronic*, the Supreme Court held that if counsel fails to subject the prosecutor's case to "meaningful adversarial testing, then there has been a denial of Sixth Amendment rights," and no specific showing of prejudice is required. (*Id.* at 16-17). However, Judge Ingram found that Crawford's attorney vigorously litigated Crawford's case on his behalf, and although Crawford may disagree with his attorney's strategies, his disagreement does not mean he was denied assistance of counsel. (*Id.* at 17).

Finally, Judge Ingram discussed Crawford's prior drug felonies and how they relate to Crawford's objection to the career-offender sentencing enhancement. (*Id.*). Judge Ingram explained that Crawford's objections "hinge on whether Crawford's prior Ohio state convictions for cocaine trafficking qualify as predicate crimes to support the career offender enhancement under USSG §§ 4B1.1 and 4B1.2." (*Id.*). Crawford argued that

certificate of appealability to Crawford as no reasonable jurist would find the court's assessment of the merits of Crawford's constitutional claims debatable. (*Id.* at 25).

IV. ANALYSIS

A. Standard of Review

The Court reviews *de novo* the portions of the Report and Recommendations to which specific objections have been filed. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). Where there are no objections, or the objections are vague or conclusory, the Court is not required to review the Defendant's claims. *Thomas v. Arn*, 474 U.S. 140, 150 (1985); *United States v. Jenkins*, No. 6:12-cr-13-GFVT, 2017 WL 3431834, at *1 (E.D. Ky. Aug. 8, 2017). Allegations in *pro se* habeas complaints are held to a less stringent standard and are construed liberally, however "inartfully pleaded." *Franklin v. Rose*, 765 F.2d 82, 84-85 (6th Cir. 1985) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

An objection that does "nothing more than state a disagreement with a Magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *United States v. Shephard*, No. 5:09-cr-81-DLB, 2016 WL 9115464, at *1 (E.D. Ky. Sept. 18, 2016) (quoting *VanDiver v. Martin*, 304 F. Supp. 2d 934, 938 (E.D. Mich. 2004)). Thus, "objections that merely restate arguments raised in the memoranda considered by the Magistrate Judge are not proper, and the Court may consider such repetitive arguments waived." *Holl v. Potter*, No. C-1-09-618, 2011 WL 4337038, at *1 (S.D. Ohio Sept. 15, 2011). Where an objection is simply a repetition of what the Magistrate Judge has already considered, it fails "to put the Court on notice of any potential errors in the Magistrate's R&R." *Shephard*, 2016 WL 9115464,

at *1 (citing *VanDiver*, 304 F. Supp. 2d at 938). The Court adopts the findings of fact and conclusions of law in the Recommended Disposition to which Defendant has not objected. *Arn*, 474 U.S. at 150.

B. Crawford's General Objections

In evaluating Crawford's Objections, the Court notes that many of Crawford's Objections restate the same arguments made in his Motion to Vacate and accompanying filings that were already addressed by Judge Ingram. For example, Crawford re-alleges his various ineffective assistance of counsel claims that Judge Ingram found were foreclosed by the decision of the Sixth Circuit. (Doc. # 134 at 2) (again arguing that there was not probable cause to support the search warrant); (*Id.*) (again arguing that counsel rendered incompetent performance by failing to request a *Franks* hearing); (*Id.* at 4-7) (again arguing his arrest was warrantless and therefore counsel was ineffective in failing to suppress the fruits of the search following the arrest); (*Id.* at 8-9) (again arguing that counsel was ineffective by failing to use the audio recording and not challenging the warrant as an invalid "anticipatory warrant"); (*Id.* at 14-17) (again arguing that counsel should have introduced an audio recording in order to impeach Heard's testimony).

Each of Crawford's arguments related to issues already taken up on direct appeal simply restate previous arguments and simply disagree with Judge Ingram's recommendation. Besides vaguely alleging that "[e]xceptional [c]ircumstances warrant further review," Crawford does not describe such exceptional circumstances as used in that context. (*Id.* at 2). As stated above, an objection that "state[s] a disagreement with a Magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Shephard*, 2016 WL

Judge Ingram, Crawford's attorney "vigorously litigated the case pretrial, through trial, and at sentencing." (Doc. # 124 at 17). The Court agrees. Therefore, Crawford's general objections discussed above are **overruled**.

C. Crawford's Specific Objections

Crawford has made few Objections to Judge Ingram's Report and Recommendation that meet the specificity requirements explained above. He objects on the following grounds: (1) Judge Ingram "failed to understand the importance of Canfield's presence" at the suppression hearing as his testimony was "critical due to the conflicting inconsistent testimony offered" by the other officers, (Doc. # 134 at 10-14); (2) counsel's failure to submit an audio recording to "recollect the witness's memory . . . hampered [Crawford's] ability to subject the Government's case to a meaningly (sic) 'adversarial testing process'" (*id.* at 17-19); and (3) two of Crawford's drug convictions are part of one related case and therefore are to be treated as one offense for the purpose of determining the applicability of the career offender enhancement (*id.* at 22-23).

1. Counsel's Failure to Subpoena Deputy Canfield

Crawford objects to Judge Ingram's finding that counsel did not render ineffective assistance by failing to subpoena Deputy Canfield, and alleges that "[c]ounsel purposely failed to subpoena Deputy Canfield." (*Id.* at 10). Crawford alleges that Canfield's testimony was "critical" in that it would have rebutted testimony by the other Officers that Crawford was *Mirandized*. (*Id.* at 12).

Unfortunately for Crawford, the "decision whether to call a witness to testify [] is a matter of strategy that falls squarely within defense counsel's domain." *Smith v. United States*, No. 2:06-CR-3, 2009 WL 124180, at *6 (W.D. Mich. Jan. 16, 2009). As noted by

Judge Ingram, Canfield's testimony was unnecessary because "it is not clear how calling Canfield to testify would have yielded a different result" as the other two officers "testified unequivocally that they did Mirandize him." (Doc. # 124 at 12).

But even assuming that counsel was ineffective in failing to subpoena Canfield, Crawford still fails to meet the second prong of *Strickland*. As discussed above, *supra* Section III, to prove counsel was ineffective under *Strickland* a defendant must show: (1) that his counsel was deficient and (2) counsel's deficiency actually prejudiced the defendant. 466 U.S. at 687. "*Strickland* asks whether it is 'reasonably likely' the result would have been different" had counsel presented testimony from Canfield. *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Here, it is clear that counsel's failure to subpoena Canfield did not result in prejudice to Crawford. As discussed by the Sixth Circuit, in the recording Canfield "mentions that he did not know whether Crawford had been Mirandized," but "the unequivocal testimony from two other officers" established "that Crawford had been Mirandized." *Crawford*, 943 F.3d at 310. The district court was presented with conflicting testimony, but ultimately chose to believe the testimony of the other officers. *Id.* It would be entirely unlikely for Canfield's testimony to alter this finding as Canfield's statement on the recording was presented to the Court in a different fashion. (*See* Doc. # 28 at 3). Unfortunately for Crawford, "*Strickland*'s prejudice prong cannot be met where the omitted testimony would be cumulative to other evidence already on the record." *Hanna v. Ishee*, 694 F.3d 596, 619 (6th Cir. 2012). Therefore, because any testimony given by Canfield would likely be cumulative when considered with the audio recording, Crawford's first specific Objection is **overruled**.

2. Counsel's Failure to Submit Audio Recording Evidence

In Crawford's Objection filing, under "Ground Six," which corresponds with his earlier argument that counsel never attempted to suppress Heard's testimony (Doc. # 99-6 at 34), he makes a new claim—that counsel should have made the audio recording available to "recollect the witness's memory," and when he failed to submit this evidence, it "hampered [Crawford's] ability to subject the Government's case to a meaningly (sic) 'adversarial testing process.'" (Doc. # 134 at 17). So far as Crawford's Objection simply expresses disagreement with Judge Ingram's recommendation that counsel was ineffective for failing to exclude the testimony of Heard or present the audio recording to impeach his testimony, that objection is considered to be waived, and is therefore **overruled**. *See Holl,* 2011 WL 4337038, at *1 (S.D. Ohio Sept. 15, 2011) ("objections that merely restate arguments raised in the memoranda considered by the Magistrate Judge are not proper, and the Court may consider such repetitive arguments waived.").

As to Crawford's new argument, when read in concert with Crawford's Motion to Vacate, it is clear Crawford is referencing an audio recording between himself and the confidential informant Heard. (Doc. # 99-6 at 34).[2] Crawford states that when Agent Nelson was being cross-examined by his attorney, Nelson asked counsel to play the recording to recollect his memory, to which counsel responded "it's not mine." (Doc. # 134 at 19). The relevant portion of the trial transcript states:

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[2] The Court notes that arguments made for the first time in a reply brief are ordinarily deemed waived. *See Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). However, in an attempt to hold Crawford's pleading to the less stringent standard required of those proceeding *pro se*, this Court determined it was appropriate to address the newly raised argument. *See Franklin v. Rose*, 765 F.2d at 84-85.

> Q. You talked about the controlled buy itself, and you agree with me, I think, your words were that the audio, while inside that gymnasium or the workout place, whatever you want to call it, L.A. Fitness, was unintelligible?
>
> A. Yes, sir. I agree with you.
>
> Q. Outside, so before Mr. Heard goes in and after he comes out, you can hear just fine, right?
>
> A. It's been a while since I've listened to it. From what I recall, it was unintelligible.
>
> Q. Before and after also?
>
> A. You'd – you would have to play it so I could recollect my memory.
>
> Q. It's not mine, but okay. So unintelligible. Do you have any idea why?
>
> A. Electronic devices sometimes fail. I can't say why. It wasn't – it wasn't my device. It was Northern Kentucky Drug Strike Force's. So I don't know if they –

(Doc. # 85 at 75). This testimony clearly established that the recording was unintelligible, which presumably could support Crawford's argument that Heard covered the recording device. (Doc. # 134 at 18). However, it is unclear how using this recording to "recollect the witness's memory" would have assisted in Crawford's case. As explained by Judge Ingram, if Heard covered the microphone, it would impair his credibility, "[b]ut it would by no means affect the outcome of the trial, where drugs were found at Crawford's residence and Crawford admitting selling (or at least 'fronting') cocaine to Heard." (Doc. # 124 at 14). Likewise, this Court finds that even if the recording was played to "recollect the witness's memory," it would not have affirmatively established that Heard covered the microphone and could have potentially incriminated Crawford further.

As explained by Crawford's counsel, not only was the recording unintelligible, it "had possible statements in it that were negative to Crawford's case and might have been construed as evidence of guilt." (Doc. # 119-1 at 8). Counsel was attempting to shield his client from unfavorable evidence by not presenting the recording to Agent Nelson.

This kind of strategy decision may not form the basis for an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 689 (noting that counsel has "wide latitude" in "making tactical decisions").

Similarly, any argument by Crawford that counsel's failure to submit the recording resulted in a lack of adversarial testing of the Government's case is meritless. This is evidenced by counsel's cross examination of both Agent Boyd in reference to this recording, (Doc. # 85 at 75), and by his vigorous cross examination of Heard. (Doc. # 86 at 69-77). In his cross examination of Heard, counsel discusses his past criminal history, his proclivity for lying, and the nature of the unintelligible recording. (*Id.* at 70-73). This type of cross examination, considered in conjunction with counsel's other contributions to Crawford's defense, clearly meets the bar of subjecting the prosecution's case to meaningful adversarial testing. *United States v. Reynolds*, Nos. 18-13104 and 12-20843, 2020 WL 209749, at *7 n.2 (E.D. Mich. Jan. 14, 2020) (finding that where counsel "presented a vigorous defense," "extensively cross-examined witnesses, and offered an alternative theory of the case" he did not fail to subject the Government's case to meaningful adversarial testing). Therefore, Crawford's second specific Objection is **overruled.**

3. Applicability of the Career Offender Enhancement

Finally, Crawford argues that two of his prior drug convictions are part of one related case and therefore are to be treated as one offense for the purpose of determining the applicability of the career offender enhancement, and restates his argument that *United States v. Havis* is also applicable. (Doc. # 134 at 22-23). Unfortunately for

Crawford, the Court is unable to address these types of non-constitutional claims on collateral review.

As explained by the Sixth Circuit, "a non-constitutional challenge to [an] advisory guidelines range suffers from a greater defect: it is not cognizable under § 2255." *Snider v. United States*, 908 F.3d 183, 189 (6th Cir. 2018). In *Bullard v. United States*, Bullard challenged his designation as a career offender following the holding in *United States v. Havis*, as he was previously convicted for attempting to sell drugs. 937 F.3d 654, 656 (6th Cir. 2019). The Sixth Circuit first acknowledged that if he "received his sentence today, he would not be a career offender under the Guidelines." *Id.* at 657. Bullard, like Crawford, filed a § 2255 motion to vacate, arguing that his misclassification as a career offender resulted in a higher advisory guideline range. *Id.* The Sixth Circuit ultimately determined that Bullard could not challenge his classification on collateral review, finding that a § 2255 claim is "generally cognizable only if [it] involved a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* at 658 (citing *Snider*, 908 F.3d at 189) (internal quotations omitted). The court reasoned that these types of complaints challenge "the district court's choice between alternative sentences 'under an advisory Guidelines scheme.'" *Id.* at 659 (quoting *United States v. Foote*, 784 F.3d 931, 941 (4th Cir. 2015). As the district court is free to vary from the guidelines, this "confirms the absence of any 'miscarriage of justice' in Guidelines calculations: a district court can lawfully impose the same sentence with or without the career offender designation." *Id.* Therefore, like Bullard, Crawford cannot collaterally attack his career offender enhancement under the sentencing guidelines.

However, even if the Court did consider Crawford's argument that his previous drug convictions should be treated as one offense, it would not change Crawford's status as a career offender. As evidenced by Crawford's PSR, there are three convictions that support Crawford's career offender enhancement: (1) Boone County Circuit Court, Docket No.: 11-CR-117, (2) Hamilton County Common Pleas Court, Docket No.: B 0906422, and (3) Hamilton County Common Pleas Court, Docket No.: B 0404141. (*See* PSR, Doc. # 73 at 8). Crawford argues that his enhancement was incorrectly calculated because two of his prior drug convictions are part of one related case. (Doc. # 134 at 22-23). However, upon closer inspection, even assuming that this is true, his argument still fails because he has another qualifying predicate drug trafficking conviction.

Crawford argues that his "2009 and 2011 convictions stemmed from one related event." (Doc. # 134 at 22). Crawford was convicted in Hamilton County for two counts of trafficking in cocaine and one count of possession of cocaine on September 16, 2009. (Doc. # 73 at 13). Thereafter, he was convicted in Boone County for trafficking in cocaine, testosterone cypionate, boldenone undecylenate, and possession of marijuana on September 16, 2009. (*Id.* at 14). "Cases are related if they: (1) occurred on a single occasion, (2) were part of a single common plan of scheme, or (3) were consolidated for sentencing." *United States v. Coleman*, 964 F.3d 564, 566 (6th Cir. 1992) (citing U.S.S.G. § 4A1.2 commentary). Even assuming that Crawford's two convictions occurred on a single occasion, which it appears that they did, his argument still fails because he was also convicted of a qualifying drug trafficking crime in 2004. (See PSR at Doc. # 73 at 13).

(3) Defendant's Motion to Vacate his Conviction and Sentence under 28 U.S.C. § 2255 (Doc. # 99) is hereby **DENIED**;

(4) The Court determines there would be no arguable merit for appeal in this matter and, therefore, **NO CERTIFICATE OF APPEALABILITY SHALL ISSUE**;

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

(6) A Judgment shall be entered contemporaneously herewith.

This 20th day of October, 2021.

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

No. 21-6041

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 29, 2022
DEBORAH S. HUNT, Clerk

RICHARD R. CRAWFORD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: CLAY, ROGERS, and STRANCH, Circuit Judges.

Richard R. Crawford petitions for rehearing en banc of this court's order entered on June 1, 2022, denying him 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. Crawford's motion to stay the proceedings is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-6041

RICHARD R. CRAWFORD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: GILMAN, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Richard R. Crawford for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 21-6041

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD R. CRAWFORD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GILMAN, Circuit Judge.

Richard R. Crawford, a federal prisoner proceeding pro se, appeals the district court's denial of his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. Crawford has filed an application for a certificate of appealability. Also pending are Crawford's motions to correct his application for a certificate of appealability and to "correct the government's assertion that [he] was convicted of 'possession with intent to distribute.'"

Crawford is currently serving a 216-month term of imprisonment for his jury-trial convictions on one count of distribution of cocaine, one count of possession of cocaine, and one count of possession of cocaine base. The issues relevant to this appeal arise out of the investigation that led to Crawford's arrest and his pre-trial motions to suppress.

Crawford's drug-trafficking activity first came to the attention of Officer Erik Nelson of the Blue Ash (Ohio) Police Department through a confidential informant, Jerry Heard. *United States v. Crawford*, 943 F.3d 297, 302 (6th Cir. 2019). After verifying Heard's reliability, Nelson obtained a warrant to electronically track Crawford's cell phone and later, with the assistance of Agent Chris Boyd of the Norfolk (Kentucky) Police Department, obtained a warrant that allowed the placement of a tracking device on Crawford's vehicle. *Id.* at 302-03. Law enforcement eventually arranged a controlled buy between Heard and Crawford. *Id.* at 303. During a monitored

phone call, Heard and Crawford agreed to meet at a nearby gym. *Id.* Officers gave Heard $1,400 in tagged cash and placed a listening device on him. *Id.* Once inside the gym, however, the listening device malfunctioned and did not clearly record the transaction. *Id.* But Heard reported to the investigating officers that he had followed Crawford's instructions to enter the locker room where Crawford was storing cocaine in a bag, to put the money into the bag, to take out the cocaine, and then to return the bag to Crawford. *Id.* The tracking device on Crawford's car showed that he drove back to his apartment after the transaction. *Id.*

On June 29, 2017, Boyd applied for a search warrant for Crawford's apartment. *Id.* When officers executed the search warrant later that day, they discovered cocaine and $3,705 in cash, which included $1,390 in tagged bills that were used in the controlled buy. *Id.* at 304. Officers detained Crawford at the scene, issued *Miranda*[1] warnings, and interviewed him. *Id.* During the interview, Crawford admitted to having sold an ounce of cocaine to "Jerry" and to having placed cocaine under his sink. *Id.*

Crawford filed a motion to suppress all evidence obtained as a result of the warrant authorizing the monitoring of his cell phone, the warrant for location tracking of his vehicle, and the warrant to search his apartment, as well as the statements he made to law enforcement on June 29, 2017. He argued that none of the warrants were supported by probable cause and, "for the GPS tracking and search of the residence, the government relied on information obtained from the previous, illegal searches or seizures, making them fruit of the poisonous tree and causing a domino effect of illegal searches." After a magistrate judge recommended that the motion be denied, Crawford filed a second motion to suppress, this time targeting the incriminating statements that he made during the June 29, 2017, search of his home on the ground that such statements were obtained without him having been read *Miranda* warnings. After an evidentiary hearing, the district court denied both motions.

After his conviction and sentence, Crawford filed an appeal, raising three arguments concerning the denial of his motions to suppress: (1) none of the three warrants were supported

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

by probable cause; (2) the warrant to search his home was premised upon a false statement in the supporting affidavit, and he was entitled to a hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to determine whether evidence obtained pursuant to that warrant should have been suppressed; and (3) the incriminating statements made on June 29, 2017, should have been suppressed because officers did not read him his *Miranda* rights before interrogating him and he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights. *Crawford*, 943 F.3d at 305-11. We rejected all of Crawford's arguments and affirmed the district court's judgment. *Id.* at 313.

Crawford then filed a pro se § 2255 motion in the district court, raising 11 grounds for relief: (1) counsel was ineffective during trial when he failed to impeach Heard's testimony with inconsistent statements made during the controlled buy and failed to retain an expert witness to determine whether Heard had manipulated the recording device that law enforcement placed on him during the controlled buy so that it could not record; (2) counsel was ineffective in seeking suppression of the evidence obtained during the June 29, 2017, search of Crawford's home and vehicle and in failing to request a *Franks* hearing to challenge the allegedly false statements in the affidavit supporting the search warrant; (3) counsel was ineffective for failing to seek suppression of the "evidence seized and/or incriminating statements made by [Crawford] following his unlawful and warrantless arrest on June 29, 2017"; (4) counsel was ineffective for failing to seek suppression of the evidence seized on June 29, 2017, on the ground that the search warrant was an anticipatory warrant; (5) counsel was ineffective for "allowing the suppression hearing to be conducted without testimony from a crucial eyewitness to [his] warrantless arrest and subsequent interrogation without [*Miranda*] warnings being issued to him"; (6) counsel was ineffective for failing to move to exclude Heard's testimony at trial; (7) counsel was ineffective for failing to object to the court's jury instruction on constructive possession; (8) counsel was ineffective for failing to challenge the use of Crawford's prior convictions to enhance his sentence; (9) appellate counsel was ineffective for failing to challenge the career-offender enhancement to Crawford's

sentence; (10) due to intervening changes in the law, his prior convictions no longer qualify Crawford as a career offender; and (11) trial counsel's ineffectiveness resulted in cumulative error.

A magistrate judge recommended that Crawford's motion be denied. First, the magistrate judge explained that claims two, three, four, and five were foreclosed by this court's rulings on Crawford's direct appeal that the three warrants were valid and that Crawford's *Miranda* rights were not violated. The magistrate judge then addressed Crawford's remaining claims and concluded that they were meritless or not cognizable in a post-conviction motion. Crawford filed objections to the magistrate judge's report and recommendation, which the district court overruled. The court adopted the magistrate judge's report and recommendation, denied Crawford's motion, and declined to issue a certificate of appealability.

Crawford now seeks a certificate of appealability from this court. He has also filed a motion to correct his application for a certificate of appealability. Crawford's corrected application raises arguments concerning only claims one through five and 11. He makes no arguments as to the remaining claims and thus has forfeited review of those claims in this court. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000); *see also Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a 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).

To establish ineffective assistance of counsel, a defendant must show both that (1) counsel's performance was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances,

the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The test for prejudice is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694.

In his first ground for relief, Crawford claimed that counsel was ineffective at trial for failing to use the audio recording from the listening device placed on Heard during the controlled buy to impeach Heard's credibility. As noted above, during the controlled buy, the listening device malfunctioned and did not capture a clear recording of the transaction. Neither party introduced the recording into evidence at trial. In his application for a certificate of appealability, Crawford states: "When listening to the recording, [Heard] is never heard . . . asking [Crawford] anything related to a drug transaction. [Crawford] never instructs [Heard] to take his gym bag into the locker room and remove drugs or to put any currency into [Crawford]'s gym bag." Crawford asserted in his § 2255 motion that his attorney theorized that Heard had purposefully covered up the device during the controlled buy but failed to bring this out at trial to impeach Heard. He contended that counsel should have retained an expert witness to confirm that the recording device had been "manipulated" by Heard. Crawford also claimed that the recording captured Heard being assaulted by agents after the controlled buy, suggesting that no transaction had taken place.

In a sworn affidavit submitted by the government in response to Crawford's § 2255 motion, counsel explained that he did not use the audio recording for several reasons, including that Heard did not make any statements at trial that were inconsistent with any statements that could be attributed to him on the unintelligible recording, the recording was of such poor quality that the statements and who had made them could not be discerned, and certain statements—to the extent that they could be understood—could have been construed as evidence of guilt. Counsel further stated, "Crawford's statements about the informant being beaten, coerced or bullied are his interpretation of what he believes he heard on the recording." With respect to Crawford's belief that Heard intentionally covered the microphone during the encounter, counsel stated that this was

but one possibility for the poor quality of the recording that Crawford "latched on to," but that there were no means to substantiate this explanation.

Given the problems with the recording identified by counsel, reasonable jurists could not disagree with the district court's determination that counsel's decision not to introduce the recording into evidence did not rise to the level of deficient performance. Crawford's speculative claims that Heard intentionally manipulated the listening device and that the investigating officers assaulted Heard after the controlled buy cannot overcome the presumption that counsel made a sound strategic decision in not introducing the recording. *See Strickland*, 466 U.S. at 689. Nor could reasonable jurists debate the district court's determination that Crawford could not establish prejudice. Even if counsel could have demonstrated that Heard purposefully covered the microphone or that Heard had an altercation with the officers on the scene after the controlled buy, Crawford cannot show that the outcome of the trial would have been different given his own admission to having sold cocaine to Heard and the recovery of cocaine and marked cash from his home during the subsequent search.

In claims two through five, Crawford argued that counsel was ineffective for failing to raise various arguments in challenging the search warrants. Reasonable jurists could not debate the district court's rejection of these claims because they were foreclosed by our ruling on Crawford's direct appeal. In affirming the trial court's judgment, we determined that the three search warrants were valid, that Crawford's *Miranda* rights were not violated, that Crawford was not entitled to a *Franks* hearing, and that the evidence was seized pursuant to a valid search warrant. *Crawford*, 943 F.3d at 305-11. Given these rulings, Crawford cannot make a substantial showing that trial counsel's failure to raise these arguments amounted to deficient performance or that the trial court would have granted the motion to suppress had counsel raised such arguments. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial.") (citation omitted). No certificate of appealability is warranted for these claims.

Finally, Crawford seeks a certificate of appealability on his claim that counsel's ineffectiveness resulted in cumulative error that entitles him to relief. Even assuming that Crawford's cumulative-error theory is viable, *see Dimora v. United States*, 973 F.3d 496, 507 (6th Cir. 2020) (per curiam), "there are simply no errors to cumulate," *Getsy v. Mitchell*, 495 F.3d 295, 317 (6th Cir. 2007). Reasonable jurists would therefore not debate the district court's rejection of this claim.

Accordingly, Crawford's motions to correct the application for a certificate of appealability and to correct the government's assertion are **GRANTED**, and the corrected application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk