IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

UNITED STATES OF AMERICA,
Government,
vs. Case No. 3:15-cr-177
MICHAEL ANTHONY BENANTI,
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE C. CLIFFORD SHIRLEY, JR.

Wednesday, May 3, 2017

APPEARANCES:

Co-counsel pro-se

ON BEHALF OF THE GOVERNMENT:

DAVID P. LEWEN, JR., ESQ., and
KELLY ANN NORRIS, ESQ.
U.S. DEPARTMENT OF JUSTICE
OFFICE OF U.S. ATTORNEY
800 Market Street, Suite 211
Knoxville, TN 37902

ON BEHALF OF THE DEFENDANT:

ROBERT R. KURTZ, ESQ.
STANLEY & KURTZ, PLLC
422 South Gay Street, Suite 301
Knoxville, TN 37902

RICHARD L. GAINES, ESQ.
DANIEL & ENGLISH
550 West Main Avenue, Suite 950
Knoxville, TN 37902

REPORTED BY:

Teresa S. Grandchamp, RPR, CRR
P.O. Box 1362
Knoxville, Tennessee 37901
(630) 842-0030

THE COURTROOM DEPUTY: All rise. This court is again in session with the Honorable C. Clifford Shirley, Jr., United States Magistrate Judge, presiding. Please come to order and be seated.

We are here for a scheduled motion hearing in Case 3:15-cr-177, United States of America versus Michael Benanti.

Here on behalf of the government are Kelly Norris and David Lewen.

02:17PM Is the government ready to proceed?

MR. LEWEN: Present and ready, Your Honor.

THE COURTROOM DEPUTY: And here on behalf of the defendant are Robert Kurtz and Richard Gaines.

Is the defendant ready to proceed?

MR. KURTZ: Ready to proceed, Your Honor.

THE COURT: All right. Although there are a number of motions pending in this case, we are

02:18PM taking up only at this point Document 153, which is Mr. Benanti's pro se motion to grant him co-counsel status or motion to proceed pro se, and Document 158, which is a pro se motion to deny the strike request regarding the motions to strike filed by the government.

EXHIBIT A
Doc 243

So, given that they're the defendant's motions, Mr. Kurtz, I'll hear from you first.

MR. KURTZ: Your Honor, in regards to Document No. 153, I think you correctly identified that is the primary motion. I believe that that relates back to other motions, however, that Mr. Benanti has filed, Documents No. 151 and 154, the Motion for New Trial and the Amended Motion for New Trial.

02:19PM I believe that the -- I did not file these motions, but I have met with Mr. Benanti, and I believe that the motion to be granted co-counsel status or motion to proceed pro se has to do with my position on the other motions that I referenced.

Mr. Benanti feels very strongly that the grounds that he has raised, specifically in the Amended Motion for New Trial, Document No. 154, are well-taken and should be considered by the Court.

I have been involved in this case since the
02:20PM inception and litigated the Motion for -- the Motion to Suppress that was filed, that was heard back, I believe, on June 2nd of last year, if I remember correctly, and if I believed that it was appropriate to file this -- these motions at this time, I would have done so.

THE COURT: What's the difference in 151 and 154? And does 154 just amend 151 or --

MR. KURTZ: It amends it, and, I think, can be relied upon completely for -- I think it really replaces 151 --

THE COURT: Okay.

MR. KURTZ: -- is my understanding.

THE COURT: That was my question.

MR. KURTZ: And so, other than that, Your
02:20PM Honor, I don't know what more I can address directly.

I have not moved to adopt Document 154. I do not intend to adopt Document 154, and so I think that leaves the Court maybe needing to address Mr. Benanti.

THE COURT: What do you understand legally are the relief options that Mr. Benanti has?

MR. KURTZ: In terms of this motion?

THE COURT: This motion 153 that's pending
02:21PM in front of me.

MR. KURTZ: I believe the Court has several options. I believe the Court could allow, after inquiry, for Mr. Benanti to represent himself going forward.

I believe that the Court, if the Court

wasn't satisfied with that inquiry, could deny that motion.

And I guess there is some mix in-between where the Court could allow him to proceed pro se with elbow counsel, or, in the alternative, I guess the Court could appoint new counsel to review it to determine if different counsel had a different opinion.

THE COURT: What I understand the request to be is a request to be co-counsel with you and Mr. Gaines.

02:22PM

MR. KURTZ: I think that is one of the areas of relief that he requested. I'm not aware of any precedent in this district for that having happened, Your Honor.

THE COURT: What is your position on the question of -- first, if I were to grant that co-counsel status?

MR. KURTZ: I think that it would be an inherent conflict of interest. I don't know how going forward a subsequent 2255 would ever be handled in a situation like that.

02:22PM

I have, as an officer of this court, the duty to do certain things, and I think that's clear to everyone. And so if you were to grant that

motion, I can foresee situations where you ask me, Well, what is your argument on this? And I would be in a position potentially of either agreeing with my co-counsel, sitting silently, or disagreeing, which would be giving the Court two opposing views on the same issue, and it would certainly not be furthering Mr. Benanti's objectives.

THE COURT: What if he was permitted co-counsel status only as to the Motion to Dismiss or Motion For a New Trial? Excuse me.

02:23PM

MR. KURTZ: I'm just trying to think through that. I still see some of the same troubles. It may mitigate it some, but I still see some potential for problems.

THE COURT: Well, if he was, he would have to be advised with regard to a 2255, which we have motioned after the fact, where he claims things went wrong. One of the allegations often is ineffective assistance of counsel.

02:24PM

That would probably fall on deaf ears if you were your own counsel. It wouldn't much be heard to hear you were ineffective after begging to be so. So that's always the case. I don't see how that's a conflict for you.

MR. KURTZ: Well, if I'm representing

Mr. Benanti and I am supposed to advise him of what I think is in his best interest legally and factually --

THE COURT: Right.

MR. KURTZ: -- and he is of equal status to me in representing things to the Court, I mean, do I get put in a position of the Court asking me about my position on issues that are raised in this motion? I mean --

02:25PM THE COURT: I don't think so. That's what I was saying. We're not in the position that some of these cases -- and this is a pretty rare situation.

MR. KURTZ: I agree.

THE COURT: But one of the situations often is pretrial; so we have all the trial ramifications.

This one, the only thing left is sentencing and appeal; right? So you don't have any pre-sentencing motions pending that you or

02:25PM Mr. Gaines have filed, do you?

MR. KURTZ: No.

THE COURT: All right. So as far as motions, the only motion that would be pending, if allowed, would be Mr. Benanti's, if granted, pro se status only as to that motion. He would be the one

responsible for that, not you and Mr. Gaines.

MR. KURTZ: You've caught me a little off guard, Your Honor. That's not an avenue that I was expecting, and I still see it as problematic.

THE COURT: Well, as rare as these are, the 99 percent are: I either want my lawyers or I want to represent myself. It's rarely: I want my lawyers and I want to represent myself. And the reason that's so rare is the default position on

02:26PM that legally is generally no.

But as I read the cases, there is always an inherent right of discretion of the Court to exercise the right to what essentially the cases call hybrid counsel.

And so that's where I'm asking if you can -- if you could fashion a hybrid situation that doesn't put you in a conflict situation, allows you still to represent him fully and completely in sentencing on sentencing matters, and/or on appeal,

02:27PM and allows him to argue simply this Motion For a New Trial based on, I guess, essentially alleged prosecutorial misconduct. Where does that create a problem for you?

MR. KURTZ: If the Court is considering fashioning such a hybrid system where we -- where I

and Mr. Gaines are not at all -- are you considering -- is the Court considering we're not involved in that argument whatsoever?

THE COURT: Right. It's the same as being pro se, and lawyers are not involved in that.

MR. KURTZ: Can I have a minute?

THE COURT: Yeah. Because, I mean, if you're pro se -- so what I'm talking about is -- generally what we look at is: Are you pro se for the entire case? And sometimes there is elbow counsel. You may have served as elbow counsel. And if you do, it's a little bit of an awkward situation. You could provide some legal information, but you can't stand up and argue; you can't represent them because you are not their lawyer in that case.

02:28PM

02:29PM

MR. KURTZ: And so in this instance, if something were to happen and Mr. Benanti wanted assistance, what -- I mean, I worry about that. Would I then be expected to step into that role, or would --

THE COURT: No, I think -- you know, in the cases I can think of where we've allowed pro se defendants and elbow counsel, elbow counsel obviously often provides them information they don't

want to hear and about issues that aren't allowed to be raised and they try to raise them anyway.

MR. KURTZ: I mean, I'm thinking more specifically of a case I remember some years ago, and I don't remember who was involved in it, but I believe it was a trial in front of Judge Varlan. I think Phil Lomonaco was appointed elbow counsel, and as the trial started, the client leaned over and said, "I don't want to do voir dire; you do it," and he was expected to get up and do it at that point.

02:29PM

And I think that is the role of elbow counsel or standby counsel in some instances, and if that is the expectation here, then it would be --

THE COURT: I know nothing of that, and that would not be my expectation. My expectation is just the opposite. You're either pro se or you're represented. This case, the question is: Is this that one exception of the case where you carve out one motion?

02:30PM

MR. KURTZ: If I could have a second to speak with Mr. Gaines.

THE COURT: Sure.

(A brief recess was taken.)

MR. KURTZ: Your Honor --

THE COURT: Yes, sir.

MR. KURTZ: -- so in talking about this, I can see how the Court could potentially fashion a hybrid system that might work.

Here is my concern, and that is: Mr. Benanti is in lock- -- is locked up most of the time. He has access to what they call the kiosk for approximately 45 minutes a day because he's in an area where six other individuals use that same kiosk during the same time that he's allowed out. So for a four-hour period where he's out, six people have to use that kiosk, which is the only access to legal information that he has.

02:33PM

So if he were to go forward pro se, purely pro se, then there is no way for him to properly prepare, to research, to pull caselaw that he needs to pull, to buttress his claims that have been made in Document 154.

And so where that puts me is that I would be having to assist him in doing that, which I'm happy to do. I've tried to assist him at every step of this proceeding. My concern is: If I missed something in my research, if I don't provide the correct case, then what exposure -- I mean, where does that leave us?

02:33PM

And so I'm happy to assist him as much as I

can. I'm still very uncertain about how particular your order would be, the Court's order would be in fashioning what this looks like.

And so I don't know that I could fully answer your question. Is there a way to do it? Possibly, but -- and I'm just kind of sitting here thinking of concerns as they come up, and there are probably more than what I just identified, but that's one that's pretty important to me.

02:34PM

And it may be that Mr. Benanti needs access to a law library or an online law library. And in previous discussions with him, he is -- I believe that Mr. Benanti would also need access to some of the discovery which is in electronic format, predominantly, to be able to prepare for this.

And so we had previously requested the Court to allow him access to a computer, and I don't know if that's a laptop or a desktop, whatever the jail can accommodate, to review that, but I think those are two issues that I think would need to be addressed.

02:35PM

THE COURT: All right. Anything else, Mr. Kurtz?

MR. KURTZ: Pardon me?

THE COURT: Anything else?

MR. KURTZ: No.

THE COURT: Anything else Mr. Benanti wants to offer?

THE DEFENDANT: I think that is a good solution.

THE COURT: All right. Mr. Gaines, anything you want to offer?

MR. GAINES: No, Your Honor.

THE COURT: Mr. Lewen?

02:35PM MR. LEWEN: Your Honor, I want to make sure that the document we're talking about, I -- the document ID number is kind of blocked out with the handwriting. It's the one with the crayonic colors. I think it's, like, 20, 30 pages long. Is that the one we're talking about? I cannot see the document ID number on this.

THE COURT: I don't know what you're looking at. This is called Motion to Be Granted Co-Counsel Status or Motion to Proceed Pro Se. It's

02:36PM handwritten. It's one page. And it's Document 153.

MR. LEWEN: I understand that one. I was under the impression that the carve-out that the Court was talking about for the particular motion was this particular motion; this one. I think it's 154.

THE COURT: 154 is the -- basically what I would call an Amended Motion For a New Trial.

MR. LEWEN: All right. Your Honor, I mean, I do not want to speak for Mr. Kurtz or Mr. Gaines, but in just sitting here listening and sort of putting myself in their shoes, and Mr. Kurtz alluded to exposure, if he is left on in any type of representative capacity, it is clear -- I mean, the record is very clear that this defendant is ready

02:37PM and willing to make baseless personal attacks on people if he thinks it will help him.

If Mr. Kurtz and Mr. Gaines are on this case in that capacity of either co-counsel, elbow counsel, they should just be prepared for BPR complaints by Mr. Benanti because he's going to think that it's going to be helpful to his cause.

I was anticipating that this hearing was going to be one that we normally -- normally have where -- and I understand the procedural posture is

02:37PM very different because we have a duly-convicted defendant here. Typically it's pretrial.

But if the Court wants to talk to the defendant about this potential decision to go pro se, which is a significant decision, I know the Court recognizes that, and in my years of being

here, that's not a decision that is made lightly.

I thought it was important -- and given the law in the case, I don't know that there is anything that can really stop him from going pro se if that's what he really wants and if he has a full understanding of what that means, and if he understands that it doesn't mean you get to do whatever you want.

I thought it would be helpful in assisting the Court in this process, I have a 55-second excerpt of a jail call that directly relates to this issue. I think it would be helpful to have the Court hear that when determining what's the best way to resolve things.

02:38PM

And so with the Court's permission, I'm happy to play it. I've given it to Mr. Kurtz. We played plenty of jail calls at trial. I don't think there is an issue.

If the Court wants a witness, I have Agent Nocera that can testify about getting the call. But I believe we all agree that this call was made on April 25th, last week.

02:39PM

THE COURT: That's fine. I think I probably know what it is.

(Audio played in open court; not reported.)

MR. LEWEN: So, Your Honor, that's -- that call was different than the one that I had put in my earlier Motion to Strike.

THE COURT: Oh, okay. Yeah.

MR. LEWEN: But that's the concern that the United States has, is if this defendant were allowed to go pro se, I know the Court has a thorough kind of discussion with anybody contemplating that decision, but my concern is what he thinks going pro se is going to enable him to do in this court and in the district court; that is, to use his words, to do whatever the hell he wants. And that's simply not going to happen.

02:41PM

And I thought it important that the Court hear that and understand that that's the mindset of this particular defendant regarding what he thinks he wants to do.

All that being said, as I read all of his motions, it appears that the relief that he's seeking is -- it appears to be just another objection to the R & R from the June 2nd suppression hearing, which, of course, all of those issues are preserved for appeal.

02:41PM

And what I would not want to see happen in this case is: We have many, many victims in this

matter that want to testify, that want to exercise their rights under the Victim Witness Rights Act. We have a sentencing set for July. I don't want to keep these people in limbo anymore than they have to.

And so I don't know if Mr. Benanti is wanting this to be a delay of that day for him, but to the extent it is, the United States objects to that. We should keep this July hearing and deal with this unique issue however best the Court sees fit.

02:42PM

But with that, I just -- I'll leave it to the Court's discretion. I just wanted the Court to hear that.

I have that disk. I can make it an exhibit to this hearing if the Court wishes.

THE COURT: I heard it. I understand it.

So, what do you think are the options that the Court has with regard to this motion?

02:42PM

MR. LEWEN: I agree with opposing counsel. I think one option is he goes pro se.

THE COURT: All across the board.

MR. LEWEN: All across the board.

THE COURT: Okay.

MR. LEWEN: Pro se at sentencing, and then,

you know, the Sixth Circuit will deal with CJA counsel however it deals with that. But I don't think that needs to take up this Court's time.

I think all that's left is sentencing and potentially dealing with this motion that he filed pro se under Rule 33. He can go pro se under that and represent himself at sentencing.

He could get elbow counsel, in addition to being pro se. That's up to the Court. I would

02:43PM

never want to presume that -- what the Court would do in that instance, but I've seen elbow counsel a number of times.

The co-counsel, I just -- Mr. Benanti is -- he is not a lawyer, but Supreme Court is pretty clear that everyone has a right to represent him or herself if they so choose. It doesn't make them a lawyer. It doesn't make them co-counsel.

I guess that's just -- I'm having a hard time conceptualizing someone like Mr. Benanti being

02:44PM

co-counsel with Mr. Kurtz and Mr. Gaines.

But I don't know that -- about the carve-out. Carving out Mr. Gaines and Mr. Kurtz to represent him in some capacity on this pro se Motion For a New Trial and then resume full counsel responsibilities for sentencing. That part is

easier, the full-counsel responsibilities for sentencing. I don't -- I don't know how that works on this carve-out for this -- that was my computer, Your Honor. I'm sorry.

THE COURT: Oh.

MR. LEWEN: And --

THE COURT: Okay. Let me clear up what I'm thinking because you and Mr. Kurtz have said the same thing.

02:44PM I don't envision any representative capacity in regard to the Motion For a New Trial.

MR. LEWEN: Okay.

THE COURT: Because if you're pro se, you have no lawyer. You are pro se. You represent yourself.

Elbow counsel is just there to provide you some advice so you can represent yourself and so you don't mess up in court. You don't get the judge mad at you. You know what -- how to introduce evidence.

02:45PM But there is no representative capacity in that case. In fact, you're prohibited from representing them by virtue of the pro se nature of the defendant's responsibility.

So, generally we have this across-the-board pro se, and they come in here and represent

themselves in all manner and fashion. Sometimes we give them elbow counsel so they at least know how to conduct a hearing to some minimalistic degree to at least function.

But the lawyer doesn't make the decisions. The lawyer can say -- in some of the tax protester-type cases, you know, that's a stupid argument, or that's not a correct argument, or this Court has already ruled against that argument

02:46PM 15 years in a row. But they could still make the argument because they don't -- the lawyer doesn't represent them. The lawyer can just tell them that.

So I don't envision any representative capacity. I just envision -- and I'm not saying I'm doing this. I'm just asking.

The other is: The lawyer represents them all the way through. They're the total representative, and the defendant has no right to represent themselves at all in those cases, which is

02:46PM why they don't file things when they're represented by counsel.

But in looking at this, it turns out there are some cases where there is some hybrid representation, pro se representation allowed. Granted, there aren't many --

how you deal with them, the procedural niceties, so to speak, are always an issue when there is a pro se litigant.

So the only reason -- just to let you both in, the only reason why I'm even considering this in this case is -- and maybe I should have asked this on the front end -- might be your answer to this question: If I said no -- if I said no, you're not going to get to go pro se --

02:50PM MR. LEWEN: Well --

THE COURT: -- okay? And you got lawyers and you appear to be doing a good job and whatever; just -- you're represented. That's the way it is. Local rules says you can't file things when you're represented.

With regard to the argument that he wants to make, the allegations of prosecutorial misconduct, whether it's, as you say, just a subterfuge for another objection to the old R & R or

02:51PM something else.

MR. LEWEN: And baseless.

THE COURT: And baseless. What is his ability to litigate that going forward if his lawyers won't? And what I'm thinking about is: Have I guaranteed a 2255 in the sense that that

would be his only recourse? And I would actually have to advise him of that because he couldn't appeal it because it was never an issue.

I guess he could appeal my denial of the pro se status, but he couldn't appeal a ruling on the Motion For a New Trial because there would have never been a motion. My ruling would effectively erase that.

If he can't file it, it can't be heard and

02:52PM it can't be ruled on, and then he can't appeal that motion itself, the merits of it, to the Sixth Circuit. We're not letting him argue the merits here in this Court. As I understand 2255, then the sole relief is to bring it back then.

And so the question is: Is there much judicial economy involved in that? And the second is: Is that almost inherently unfair in a -- what would I call it -- you know, a broad brush sort of view? Not as to the person, Mr. Benanti, and/or how

02:53PM you might feel about him and/or his case and/or his conviction, but just in the purest legal sense of a defendant and his or her opportunity to make an argument something that has to be, I guess, at some level beyond facially realist. You understand what I'm saying?

MR. LEWEN: Yes, Your Honor.

THE COURT: -- because it's so rare. But the -- so the only question for me is whether that would apply in this case.

As I read the cases, I have discretion as to whether to allow it, and if I allow it, how to fashion it. So that's why I was asking you all those questions.

I haven't decided whether I would do that or not, but if I did, I wanted your input on whether I could, whether I should, and if I did, what it would look like.

02:47PM

MR. LEWEN: I think the answer to the first question, can you, I think, yes, you can do that; the Court can do that.

Second question I feel more strongly about, and that is whether the Court should do that. I don't think the Court should do that. I think there is a notion of stability, even when you look at our local rules. If you're represented as the attorney, that way I know who I'm dealing with on the other side.

02:48PM

And this sort of -- you know, I guess a buffet-style sort of like, well, I'm going to file pro se here, but this next time, I'm going to have a

lawyer. And then, well, my response to your reply brief on that one, I'm going to be pro se again -- I mean, there, I think the Court's order could be very clear that it's -- the contours are sharply drawn and everyone knows the lay of the land.

But, still, I -- I like the policy of certainty of knowing who it is I'm dealing with. I've dealt with Mr. Kurtz and Mr. Gaines. They both have been retained from day one in this case. And that's who we've been dealing with with the U.S. Attorneys' Office, and this would change things and it would make things more difficult, and I don't know how the lines of communication would go between me and him.

02:49PM

So should the Court? If the Court is seeking my view, I say, no, I don't think the Court should do it. I think the Court should decide, Mr. Benanti, you get your wish; you get to go pro se from hence forth, or after the Court talks with him, maybe he decides to keep Mr. Kurtz on. I don't know. But --

02:49PM

THE COURT: Well, those are all good arguments and factors that I do consider when I'm considering whether to let any defendant go pro se at all. Lines of communication, who you deal with,

MR. LEWEN: I do understand. And from a fairness perspective --

THE COURT: That's where I'm caught in this case.

MR. LEWEN: Well, and you articulating it the way you did made me realize the issues that could be created for me down the road in stuff that I would have to respond to.

May I have a moment, Your Honor.

02:53PM THE COURT: Oh, please. Go ahead.

(A brief recess was taken.)

MR. LEWEN: Your Honor, I don't know that there is a -- I think there is a less worse answer. I don't know that there is any good answers here.

You know, in terms of a 2255, we have that now, or it's going to be kicked down the road later. So, I guess my concern is the precedent that this could potentially set, and that is: Anybody who exercises their right to go to trial and gets

02:56PM convicted, loses, and is represented by attorneys, and the attorneys, using what they know as lawyers, review all available positions to take post-trial, like a Motion For a New Trial --

THE COURT: Right.

MR. LEWEN: -- and the attorney decides,

I'm not going to file it because there is nothing there, what potentially gets created now is: Defendants can say, Well, I want to do this. I want to handle this pro se, file it myself. My attorney thinks it's bogus, but I think it's great and I want to be able to have my day in court on it. That's my concern is that --

THE COURT: Well, they could do that anyway. Any defendant could fire their lawyers the

02:57PM day after trial and file all kinds of pro se motions.

MR. LEWEN: Oh, yeah, but he's not moving to fire -- that's not the issue right now.

THE COURT: No, I understand. But I'm saying: The effect is the same. The only thing we're talking about is you having to respond to a motion.

MR. LEWEN: Right.

THE COURT: You know, I don't know -- I

02:57PM hold lots of hearings. The district judges don't hold near as many. And the odds are, I would guess, pretty great there wouldn't be a hearing on this motion.

I think Judge Varlan usually rules on the papers. I generally have a hearing. He generally

rules on the papers. So all we're talking about is you responding to a motion and then him ruling on that motion.

Now, if he fired these two lawyers, you'd be in the same boat; right?

MR. LEWEN: Yes.

THE COURT: So there is functionally no difference. The only real difference is after the motion, if it's denied and you go to sentencing, then the lawyers are back. But he's out as a pro se litigant, because he's only going to be pro se as to this motion that he's already filed.

The question is whether Judge Varlan should consider the motion and your response to it or not, essentially.

MR. LEWEN: I have no problem responding to the motion.

THE COURT: Right.

MR. LEWEN: Just, this is -- it just seems like there is some picking and choosing. You know, Mr. Benanti wants this; he doesn't want that, and --

THE COURT: There does. I mean, it has that appearance. I'm concerned about the -- you know, any time I do anything, you know, its precedential value, because, you know, invariably, I

get whatever I do cited back to me by those to whom they think it benefits.

Be that as it may, I'm just trying to decide this on the limited facts in front of me in this case.

And I suspect it sounds like I've caught both of you a little short on what you were expecting, but I wanted to tell you that upfront so you didn't waste your time arguing to me what you thought you were going to be arguing and me come down with some order that you had no idea where that came from. I wanted to give you an opportunity to do this.

MR. LEWEN: I think if the Court wants to fashion an order, the United States would simply request the Court be explicitly clear as to what the rules of engagement are because we're dealing with someone who doesn't know the law and doesn't care about it.

THE COURT: All right. Thank you. Mr. Kurtz.

MR. KURTZ: Your Honor, if I could go back to the relief Mr. Benanti has requested. If the Court denies his opportunity to be appointed co-counsel and allow him -- and allows him to -- and

does not allow him to go forward in the limited pro se fashion, the hybrid fashion that you have suggested or thrown out there for us to consider, then I would also suggest to the Court that Mr. Benanti has requested that he be allowed to go pro se fully, and that may be an area of inquiry the Court needs to make before making an ultimate decision on the first part of that motion.

Secondly, Mr. Benanti, I would anticipate, if the Court grants relief in any fashion, is going to want time to file additional briefing on the motion for a new trial.

THE COURT: Say that again.

MR. KURTZ: That if he is allowed to proceed pro se in some fashion, either fully pro se or in a hybrid manner, that he is going to want an opportunity to flush out the legal issues in Document 154 because he has not had access to legal resources. So those are more housekeeping matters.

In terms of --

THE COURT: What legal resources does he need? What's he need to flush out?

MR. KURTZ: He wants to be able to find caselaw.

THE COURT: Pardon?

MR. KURTZ: He wants to be able to find caselaw that supports the proposition for the issues that he's raised in that document. That's something that he hasn't had ready access to. He's had to do it piecemeal. And if he's going to move forward on this issue, he wants to be able to support it with relevant cases that go to that issue.

THE COURT: Well, it sounds like it's going back to your argument about him having some right to law library access or kiosk access. Of course, if a defendant chooses to represent himself, he relinquishes the rights associated with the right to counsel, and the Court is not required to provide adequate access to law libraries.

Now, he can ask you for a case, much like they do in elbow counsel situations, and the Court would expect you to make a Xerox copy of it and get it to him. But he can't say to you, Mr. Kurtz, how about you go do some research and see if you can find me some cases that support my allegations here, because then you'd be representing him, and you won't be representing him.

MR. KURTZ: What about -- Your Honor, my understanding --

THE COURT: You'd just be his paralegal, so

to speak, or his law clerk.

If he finds a case and he wants you to make a copy of it, you can do that. But what -- I mean, that's just too generic for me, he needs to flush out something and he needs legal issues something. I have no idea what that means. I mean, this is a 26-page filing with a 25-page limit, and now he wants to add to it?

MR. KURTZ: Your Honor, that's why I will suggest to the Court that that may be something the Court needs to inquire with Mr. Benanti directly, because that would be, I think, furthering the argument that's in the motion.

THE COURT: Okay. All right. Go ahead. What else?

MR. KURTZ: Well, and, frankly, I hadn't thought of the issue with 2255 until the Court brought it up.

I will say: I'm terribly uncomfortable in proceeding in this fashion, and it's because it's so rare, and it's because I have not been in this situation before. I do not know what to anticipate, in terms of issues that will arise.

The Court's order may be complete and nothing arises. I'd be surprised, however. I

anticipate something is going to arise, and so I'm conflicted by that. But I would say that Mr. Benanti's interest in preserving the issue, I think, trumps my comfort, and so I think that's where I have to leave it.

THE COURT: Okay. Anything else? Mr. Leven?

MR. LEWEN: No, Your Honor.

THE COURT: All right. Out of an abundance of caution, because one of the questions we're talking about are some matters of judicial economy, and I'm not trying to redo everything. I think what I'm going to do is go over a modified McDowell or Faretta inquiry of Mr. Benanti, even though I've not decided how I'm going to rule.

What this is is questions that I would ask anybody in your position, Mr. Benanti, who is considering going pro se.

THE DEFENDANT: Okay.

THE COURT: Because the Court rarely encourages --

THE DEFENDANT: I understand.

THE COURT: -- anyone to do that. In fact, the Court almost always historically discourages people from doing that. In part, for the reasons

that you'll glean from the questions I ask.

But if I decide to let you do this, then I don't want to have to come back for another hearing to have to ask you these questions. And if I decide you can't do this, then having asked the questions will only have taken up the time that it takes to ask them.

THE DEFENDANT: Sounds reasonable, Your Honor.

03:06PM THE COURT: All right. So, first question is: Am I correct in understanding that what you're asking me to do is to allow you to file the Motion For a New Trial based in large measure on the alleged prosecutorial misconduct claim?

THE DEFENDANT: Yes.

THE COURT: And you're asking me to allow you to proceed with that, whether there is a hearing or not, pro se?

THE DEFENDANT: Yes.

03:07PM THE COURT: Representing yourself?

THE DEFENDANT: Yes, Your Honor. I do like the solution that you talked about, asking the counsel to provide me caselaw and things of that nature, where they don't speak and it's my responsibility to handle this motion, and then when

we go back to sentencing, they're in full capacity. That would suit me just fine.

THE COURT: Well, whether it suits you or not, I'm trying to find out if that's, in fact, what you're asking for.

THE DEFENDANT: Yes, sir.

THE COURT: You're not asking to go pro se throughout the entire case, just as to this one motion?

03:08PM THE DEFENDANT: Yes, sir.

THE COURT: You used a good term, "responsible." You understand that you, you and you alone, are responsible for the arguments and the merits of this motion?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that necessarily means that you would be giving up the right to claim ineffective assistance of counsel with regard to such a motion?

03:08PM THE DEFENDANT: Yes, sir.

THE COURT: Have you ever represented yourself or anyone in any capacity before this?

THE DEFENDANT: Well, I help people with legal work, and I've got myself a little paralegal degree. But, no, I've never represented anyone.

THE COURT: Have you ever represented yourself?

THE DEFENDANT: No, sir.

THE COURT: Have you ever represented yourself or anybody in a criminal action?

THE DEFENDANT: No, sir.

THE COURT: Do you realize that you have been convicted of some serious crimes in this case?

THE DEFENDANT: Yes, I do.

03:09PM THE COURT: Do you realize that if I allow you to file this motion and the government responds that that may be all that is done with regard to that issue; in other words, there might not be a hearing like this? The district judge might just rule either in your favor or against you with regard to the motion you filed.

THE DEFENDANT: Do I understand that that's a possibility?

THE COURT: Yes.

03:09PM THE DEFENDANT: I would hope there would be a hearing, but, yes, I understand that.

THE COURT: All right. Do you realize that if you do represent yourself, you're on your own?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that

Mr. Kurtz and Mr. Gaines with regard to this motion are not expected and you may not ask for their legal advice on how to proceed? They're not representing you with regard to this motion.

THE DEFENDANT: I understand.

THE COURT: Okay. You understand the Court can't tell you how to proceed or what you could do better or how to do things right?

THE DEFENDANT: Okay.

03:10PM THE COURT: Do you understand that?

THE DEFENDANT: Now I do, yes.

THE COURT: Do you understand that the Court can't even advise you as to whether you should or shouldn't file this motion?

THE DEFENDANT: Yes, sir.

THE COURT: Are you familiar at all with the Federal Rules of Criminal Procedure?

THE DEFENDANT: No, sir.

THE COURT: Are you familiar at all with

03:10PM the Federal Rules of Evidence?

THE DEFENDANT: No, I wouldn't say I'm familiar.

THE COURT: Do you understand that those rules govern the way in which criminal actions are handled in federal court?

THE DEFENDANT: Yes, sir.

THE COURT: Do you realize that they govern what evidence may or may not be introduced at trial?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you have to abide by those rules?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that those rules, to the extent they benefit you, benefit you, and to the extent you don't comply with them, could be a detriment?

03:11PM

THE DEFENDANT: Absolutely.

THE COURT: Now, ordinarily I, at this point, always advise a defendant that, in my opinion, you'd be far better off being represented by a trained lawyer than by yourself. However, in this case, and the reason this case presents itself to me uniquely, is that I understand that your trained lawyers have already indicated they don't think this issue should be pursued; correct?

03:11PM

THE DEFENDANT: I didn't take it that way. I understood that they didn't want to pursue it. I think --

THE COURT: Is there a difference in those two?

THE DEFENDANT: I think there is. I think the claim is obviously very serious and it's against a member of the court and there is inherent conflict in there, in my opinion.

THE COURT: You feel like you understand the risks inherent in representing yourself?

THE DEFENDANT: I do.

THE COURT: The primary one being you don't know what you're doing?

03:12PM

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that under the caselaw that the Court is not required to provide you with access to a legal library?

THE DEFENDANT: No, I didn't understand that. I thought I -- as any defendant or anybody incarcerated, I thought that we were allowed -- we were supposed to have adequate access to a legal library.

THE COURT: There might be some kernel of truth in that, but, you know, there is a lot of words in there that might be in the eye of the beholder; what you consider access; what you consider adequate access.

03:13PM

In this case, you understand that if you wanted to get a particular case, a copy of it --

THE DEFENDANT: Yes, sir.

THE COURT: -- that you could ask at the jail for them to make you a copy? If they won't, you could ask your lawyers to make you a copy and get that to you.

THE DEFENDANT: The jail has a 50-page limit per month that I've already exceeded, and I'm sure Mr. Kurtz wouldn't have any problem getting one of the cases to me.

03:13PM THE COURT: On the other hand, these lawyers are not responsible for doing your legal research.

THE DEFENDANT: I understand.

THE COURT: Which I gathered from your 26-page filing already, you've done a pretty good amount of.

THE DEFENDANT: It's mostly logic and what I think and how I feel, and the limited knowledge I do have, you know, about prosecutorial misconduct

03:14PM and the law.

But what I'd like to have the opportunity to do is reduce that as much as possible, to re-file it in a much more concise manner and to the point and support it with caselaw.

I was under -- when I realized that

Mr. Kurtz didn't intend on filing a Motion For a New Trial, I was concerned about the time limit. So I just sat there day and night writing what I could, and I just wanted to get it in to preserve the issue.

I really want to preserve the issue for appeal because I believe the issue -- I believe that what I'm bringing to the Court is valid, and I would never be here if I wasn't.

03:14PM And I do -- contrary to Mr. Lewen's opinion, I do have respect for the Court and the law, and I don't intend on making any sort of trouble here. I just want to have my issue heard. That's all.

THE COURT: So how much time would you need to prepare a reduced version of this motion supported by caselaw?

THE DEFENDANT: Excuse me, Your Honor. One second.

03:15PM THE COURT: Yeah, take your time.

THE DEFENDANT: Three weeks, Your Honor. Three weeks from the date of the order, please.

THE COURT: Let me address a few of the things that I heard here today.

THE DEFENDANT: Yes.

THE COURT: To the extent that the jail call indicates you indicating to someone else that you can do whatever you want if you get a pro se status, I hope you've come to the understanding that that's not true.

THE DEFENDANT: Your Honor, I think that that's just -- it's me speaking to my sister candidly.

THE COURT: I'm not asking you who you spoke to or anything about it. I just want to know: Do you understand that is not true?

THE DEFENDANT: Yes, I understand.

THE COURT: Not only can you not do whatever you want, you must do only what the rules allow you to do.

THE DEFENDANT: I understand, Your Honor.

THE COURT: All right. You understand if I allow you to be pro se with regard to this motion, that's exactly what it means; you're on your own representing yourself. And if it goes well, good for you; if it doesn't, you have nobody to blame but yourself.

THE DEFENDANT: Absolutely.

THE COURT: All right. Do you realize that you might say things, if there is a hearing, write

things, if you file a motion, that could hurt you or be to your detriment or to your disadvantage ultimately at any sentencing or appeal?

THE DEFENDANT: No, I didn't understand that. I thought if I was acting as counsel, that would be --

THE COURT: Well, you need to realize that.

THE DEFENDANT: Explain it to me again, sir.

THE COURT: Pardon?

THE DEFENDANT: Anything I write or speak in court can be used against me at sentencing?

THE COURT: Why wouldn't it?

THE DEFENDANT: Fair enough. Go ahead.

THE COURT: I'm not asking you if it's fair enough; I'm just asking you if you understand it.

THE DEFENDANT: I do.

THE COURT: So, for example, let's suppose somebody tried a case and said they didn't do it and they got convicted and they start filing things and say, Well, of course I did it. Then they want to argue, I didn't do it. How do you think that filing would -- help them or hurt them?

THE DEFENDANT: It would hurt them.

THE COURT: Okay. So whatever you put in a

filing, you understand could hurt you; could help you if the judge ruled in your favor, but it could hurt you ultimately?

THE DEFENDANT: Yes, sir, I do understand.

THE COURT: All right. And you understand probably one of the reasons why your lawyers aren't crazy about you filing such a thing.

THE DEFENDANT: Yes, sir.

THE COURT: All right. You understand that you still have a sentencing set for July 25th?

03:21PM

THE DEFENDANT: Yes, sir.

THE COURT: There is no indication that I know of that Judge Varlan has any intention of moving that.

THE DEFENDANT: Yes, sir. It was never my intention to move the sentencing.

THE COURT: All right. If it's okay with the marshals, what I'd like to do is take a break with regard to this and go ahead and take Mr. Benanti back downstairs. And, Counsel, I know it's a little inconvenient, but I'd like to take up the next hearing that I have and do that, and then come take a minute or two to rule on this, and then have you come back and give you the ruling. Is that okay, Mr. Lewen?

03:23PM

MR. LEWEN: That's fine, Your Honor. Thank you.

THE COURT: Mr. Kurtz?

MR. KURTZ: Yes, Your Honor.

THE COURT: I know that's probably not in your schedule, and I apologize for that. It took longer than I thought it would, but I've got other matters today that have come up. And so I'd just as soon get those out of the way and not have them lingering around while I'm waiting.

03:23PM

But if anybody can wait, it would be Mr. Benanti, because he is contemplating. So let me do that. We'll take about a 5-minute recess.

THE COURTROOM DEPUTY: All rise. This honorable court stands in recess.

(Court stands in temporary recess.)

THE COURTROOM DEPUTY: All rise. This Court is again in session with the Honorable C. Clifford Shirley, Jr., United States Magistrate Judge, presiding. Please come to order and be seated.

04:35PM

THE COURT: All right. Obviously I'm going to put down something in writing with regard to this, but I did want to give you an oral ruling so you could proceed knowing what the ruling is going

to be.

So I'm going to grant Document 153, the pro se motion to be granted co-counsel status or motion to proceed pro se, and Document 158 with regard to the second part of it in which Mr. Benanti asked to clarify his positions in the motions and needing to proceed pro se. I'm going to grant those only in part, and that will be what I want to tell you.

I'm going to exercise my legal discretion
04:36PM to allow the defendant, Michael Benanti, to represent himself with regard to the motions filed for a new trial, but only as to motions for a new trial and limited as follows: Number one, you are not co-counsel per se or in any way, but you are, rather, pro se with regard to that motion or motions only. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you are pro se for the Motion For a New Trial only. Therefore, Mr. Kurtz
04:37PM and Mr. Gaines do not represent you at all in any capacity with regard to that motion. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You're on your own.

THE DEFENDANT: I understand.

THE COURT: Now, Mr. Kurtz and Mr. Gaines, however, do represent you and continue to represent you in regard to all matters involving sentencing. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Consequently, you may not file or participate in any capacity other than as a client in regard to sentencing matters. Do you understand that?

04:37PM THE DEFENDANT: Yes, sir.

THE COURT: All right. What that sort of means for you, Mr. Kurtz, and, Mr. Gaines, is: I expect you, if he asks, to answer any questions with regard to courtroom protocol, procedures, demeanor, those type of generic things. If he has some filing issues or procedural matters that you can advise him on, that's fine. But, otherwise, it's his motion. He makes the decision on it, and you can provide him some technical assistance.

04:38PM With regard to the legal issues, I already covered that. Legal research, he's on his own. If he asks for a specific case and you can make him a copy of it, get it to him. I would expect you to do that. That's more in a technical advisory position than a legal advisory position.

I will put down an order that has more specifics and maybe some more limitations or discussions in it, but I wanted you to generally understand what is going on.

Do you feel like you understand, Mr. Benanti?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Kurtz?

MR. KURTZ: Yes, Your Honor.

04:39PM THE COURT: Okay. Mr. Gaines?

MR. GAINES: I do, except for one small thing. If he was to have a hearing on this, would we attend the hearing, and in what capacity would we be attending the hearing?

THE COURT: It's up to you.

MR. GAINES: Okay.

THE COURT: Now, the second major part of this is the scheduling. The defendant, Mr. Benanti, will have until May 24th to file an Amended Motion

04:39PM For a New Trial.

THE DEFENDANT: Thank you, sir.

THE COURT: I expect it to be what you said, and that is, narrowed and less than more, and it will be deemed to replace whatever you filed previously.

THE DEFENDANT: Yes, Your Honor.

THE COURT: If there is something that you wanted to say that you said previously, you need to say it again.

THE DEFENDANT: Okay.

THE COURT: I don't want you arguing, Oh, well, I argued that at my first one. This one is going to replace. They're going to go away, like an amended pleading in a civil case. Okay?

04:40PM THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lewen, the government will have until June 5th to file a response. And then Mr. Benanti will have until June 12th to file a reply.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right.

MR. KURTZ: Your Honor, would it make more sense for us to facilitate the filing through ECF maybe under a motion to permit filing, something of

04:40PM that nature?

THE COURT: If he wants to send it to you and you want to file it for him, that would be a technical assistance. You can't change it. Okay? Yeah, anything you can do in that regard to accommodate the time would be --

MR. KURTZ: That's what I was thinking. Just the deadlines.

THE COURT: Do you understand that, Mr. Benanti? They can help you with the filing, but not with any of the legal part of it.

THE DEFENDANT: Yes, the arguments are my own and the legal research is my own.

THE COURT: Now, that schedule is probably going to be etched in stone. Don't expect to come back here asking me for more time or additional time or anything like that. That's pushing it about as far as we can to still accommodate the July sentencing, which is going to go.

04:41PM

THE DEFENDANT: Yes, sir.

THE COURT: Okay? Now, July 25th, I think, is the sentencing.

THE DEFENDANT: Thank you.

THE COURT: Now, I also note parenthetically for your benefit, Mr. Benanti, that you have a motion pending for transcription of nine witnesses, the entire jury selection, the pretrial conference; all that. I'm not ruling on that at all today for the simple matter, it hasn't been referred to me.

04:41PM

THE DEFENDANT: Okay.

THE COURT: But I can probably tell you what I think about that. Number one, I'm not going to change the schedule. You might want to think about, to the extent you're going to narrow your motion anyway --

THE DEFENDANT: Uh-huh.

THE COURT: -- what you actually can narrow, as far as what you need for a transcript.

It's usually my position in other cases that what I say is -- you know, and I read your motions in this case. You know what you want to argue and you know what you need to argue. You may not have the exact page and question and answer format. You can always file those later as a supplemental exhibit outside of the time frame, because you're not going to be able to file another brief or anything --

04:42PM

THE DEFENDANT: Right.

THE COURT: -- to explain them.

So, if you say, witness number one, I object to they didn't tell the truth because they said this and the truth is this. Well, if you say, Well, I want their transcript of their direct examination or their cross-examination, whenever they said that, you can always attach that page

04:43PM

where they said that later.

THE DEFENDANT: Can I just clarify so I understand it?

THE COURT: Yes.

THE DEFENDANT: So I can use my trial notes and my memories and say what I think is said, and then if it becomes we need to hear about it, we pull the transcripts later?

THE COURT: Right.

04:43PM THE DEFENDANT: Okay.

THE COURT: So what I'm saying is: Mr. Kurtz and Mr. Gaines, you'll probably want to take that on first and assist in requesting transcripts. But you'll have to get from him what he actually needs, not what he wants, but what he actually needs. And it may be a few days before he can figure that out.

The more you want, the longer it takes. The longer it takes, the less chance you have to get

04:44PM it in front of anybody. It will take a few weeks for that to get done, even on an expedited fashion.

Second, I know that you also noted, to some degree, you were seeking that to be provided to you on an indigent basis. I am not ruling on your indigency at all at this point. You have retained

counsel. That's not very likely. But even if I did, it would be a while before I did.

My suggestion was: You'll probably need to pay for those at this point. So, once again, the more you order, the more it costs. And so you'll just have to weigh those various options against itself.

THE DEFENDANT: May I ask how much the transcripts are per page?

04:45PM THE COURT: I really don't know, and I'm sure Mr. Kurtz and Mr. Gaines can find that out relatively quickly. That's often a function of quantity and speed.

THE DEFENDANT: Right.

THE COURT: If you need it tomorrow, it's a different price than if you need it six months from now.

THE DEFENDANT: I'm pretty clear on what my recollection is, but as long as I put that down -- I

04:45PM mean, what happens if that particular factor becomes a dispute? Then we go to the transcripts later?

THE COURT: Obviously I can't provide you any legal advice on that.

THE DEFENDANT: Right.

THE COURT: But it seems like you might

have it figured out pretty good.

THE DEFENDANT: Thank you, sir.

THE COURT: Candidly, if you say something and the government never says that happened, unless you have something to show that it did or that it was said, then, you know, you're at the judge's mercy on what he wants to do about he said/she said, you know. So that's how it goes.

Again, your lawyers can provide you that kind of technical assistance on what that means, but it's a controverted issue. And you may want the transcript, but, again, that's a function for you -- I just wanted to address that with you because I'm not ruling on it --

04:46PM

THE DEFENDANT: Right. I understand.

THE COURT: -- but I wanted to give you, before you left, my thoughts on it.

THE DEFENDANT: I appreciate that.

THE COURT: All right. Any questions, Mr. Lewen, on what to expect in this thing going forward?

04:46PM

MR. LEWEN: No, Your Honor. Thank you for the preview.

Is it the Court's expectation that any and all briefing will come within the page limit

established by the local rules?

THE COURT: Yes. 25 pages, Mr. Benanti.

THE DEFENDANT: Yes, sir. I --

THE COURT: You're going to narrow it from 26. So that shouldn't be a big problem for you; right?

MR. KURTZ: It is handwritten.

THE COURT: Well --

THE DEFENDANT: May I just have a little leeway, if necessary? I can't even anticipate it.

04:47PM

THE COURT: Well, at this point, 25 pages.

THE DEFENDANT: Yes, sir.

THE COURT: You need to write a little smaller. If you need to start a little higher up on the page. You know, you can do that. You left spaces between headers. Your handwriting is pretty good; I'll give you that. Beats most pro se. One page has eight or nine blank --

THE DEFENDANT: 25 pages will be fine.

04:47PM

THE COURT: -- blank lines. Okay?

THE DEFENDANT: Uh-huh.

THE COURT: And I think if you write a little more succinctly and don't ramble on quite as much, you'll find that you can do that. All right?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Anything else?

MR. LEWEN: No. Thank you, Your Honor.

THE COURT: All right. Mr. Gaines?

MR. GAINES: Nothing. I have nothing.

THE COURT: All right. Mr. Kurtz, any questions?

MR. KURTZ: No, Your Honor.

THE COURT: Mr. Benanti, do you have any questions about my ruling or what to expect?

04:48PM THE DEFENDANT: No, sir.

THE COURT: All right. May 24th is your deadline.

THE DEFENDANT: That's my deadline to get it to the Court or to --

THE COURT: Deadline for it to be filed. These are all deadlines for filing.

THE DEFENDANT: Postmarked?

THE COURT: No, filed. Filed; filed. Because it doesn't do Mr. Lewen any good for you to

04:48PM have stuck it in the mail. His time starts running and he doesn't see it for three or four days.

THE DEFENDANT: Yes, sir. I'll ask Mr. Kurtz to file it.

THE COURT: Accommodate your schedules to meet that, but those are filing deadlines.

All right. Anything else from anybody?

MR. LEWEN: No, Your Honor. Thank you.

THE COURT: All right. Court stands adjourned.

THE COURTROOM DEPUTY: All rise. This honorable court stands adjourned.

(Which were all the proceedings had at the hearing of the above-captioned matter at the time and place specified herein.)

C-E-R-T-I-F-I-C-A-T-E

STATE OF TENNESSEE

COUNTY OF KNOX

I, Teresa S. Grandchamp, RPR, CRR, do hereby certify that I reported in machine shorthand the above proceedings; that the foregoing pages were transcribed under my personal supervision and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties, nor an employee or relative of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand this 25th day of September, 2017.

Teresa S. Grandchamp, RPR, CRR

Digitally signed by Teresa S. Grandchamp, RPR, CRR
DN: cn=Teresa S. Grandchamp, RPR, CRR, o=Eastern District of Tennessee, ou=United States District Court, email=terri_grandchamp@tned.uscourts.gov, c=US
Date: 2017.09.28 08:41:24 -04'00'

TERESA S. GRANDCHAMP, RPR, CRR
Official Court Reporter

EXHIBIT B
DOC 163

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:15-CR-177-TAV-CCS
	)	
MICHAEL BENANTI,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

The Defendant has moved [Docs. 153 & 158] the Court to permit him to participate as co-counsel on a motion for new trial or, alternatively, to allow him to represent himself, while his current defense counsel remain as elbow counsel. This case came before the Court on May 3, 2017, for a motion hearing on Defendant Benanti's pro se Motion to be Granted Co-counsel Status or Motion to Proceed Pro Se [Doc. 153] and Motion to Deny Strike Request [Doc. 158], which were filed on March 24, 2017, and April 26, 2017, respectively, and referred [Docs. 157 & 160] to the undersigned on April 21 and 27, 2017. *See* 28 U.S.C. § 636(b). Assistant United States Attorneys David P. Lewen and Kelly A. Norris appeared on behalf of the Government. Attorneys Robert R. Kurtz and Richard L. Gaines represented the Defendant, who was also present.

Attorneys Kurtz and Gaines have represented Defendant Benanti, since his January 29, 2016 initial appearance in this case, through the litigation of numerous pretrial motions, and at his trial in early February 2017. A jury found Defendant Benanti to be guilty of twenty-three counts, and his sentencing hearing is scheduled for July 25, 2017. On March 8, 2017, Defendant Benanti filed a pro se Motion for [New] Trial – Rule 33 [Doc. 151], and he attempted to amend this motion on March 24, 2017, by filing a pro se Motion to Refile and Amendment the Motion

for New Trial Rule 33 [Doc. 154]. The Government has filed two motions [Docs. 152 & 156] to strike these and Benanti's other pro se filings, because they violate Local Rule 83.4(c), which prohibits an individual from filing in his or her own behalf when represented by counsel. Chief Judge Varlan is holding [Doc. 157] the Defendant's pro se motions [Docs. 148, 149, 150, 151, & 154] and the Government's motions to strike [Docs. 152 & 156] in abeyance, until the matter of the Defendant's representation is resolved.

At the May 3 hearing, Mr. Kurtz stated that he had met with Defendant Benanti and discussed the Defendant's basis for a motion for new trial. He said the Defendant strongly believes that his stated grounds for the motion are well taken and should be heard. Mr. Kurtz said that he and Mr. Gaines do not believe that the Defendant's motion is appropriate, declined to file the motion on behalf of the Defendant, and do not adopt the pro se motion/amended motion[1] filed by the Defendant. Mr. Kurtz said he was unaware of any precedent in this district for a defendant proceeding as co-counsel while represented by counsel. He stated that such an arrangement would create an inherent conflict of interest because his duty to represent the Defendant would conflict with his legal analysis on the issues raised in the pro se motion for new trial. Mr. Kurtz stated that the Defendant has limited access to legal research to support his claims in his motion for a new trial. He said that for four hours per day, the Defendant, along with the other inmates of the jail, has access to a kiosk on which he may conduct legal research. Mr. Kurtz raised the issue of his exposure to an ineffective assistance of counsel claim for assisting the Defendant with legal research, if acting as co-counsel on the Defendant's pro se motion for a new trial.

[1] Mr. Kurtz stated that the Defendant intends for the pro se amended motion for a new trial [Doc. 154] to replace his initial pro se motion for a new trial [Doc. 151].

AUSA Lewen argued that, while the Court could permit the Defendant to represent himself on the pro se motion for new trial, with Mr. Kurtz and Mr. Gaines representing him at sentencing, it should not exercise its discretion to do so. First, he noted that such an arrangement (permitting a defendant to represent himself on a motion that his counsel refuses to bring) subverts defense counsel's ability to screen out frivolous claims. AUSA Lewen asserted that the proposed hybrid representation would create a bad precedent for a defendant choosing "buffet-style" to represent himself on some matters, while being represented by counsel on others. With regard to the instant case, he argued that the pro se motion for a new trial/amended motion for a new trial appears to be merely another basis for objecting to the denial of his motion to suppress evidence, which motion has already been litigated and preserved for appeal.

AUSA Lewen also argued that hybrid representation would deprive him of a clear point of contact with whom to communicate—he cannot communicate with the Defendant directly, because he is represented by counsel, yet the Defendant also represents himself on a matter, on which he has no attorney. Additionally, AUSA Lewen contended that permitting the proposed hybrid representation would create the opportunity for the Defendant to delay the July 25 sentencing hearing. The Government objects to continuing that hearing and forcing the victims, who are ready to testify, to wait even longer for a resolution of this case. Finally, AUSA Lewen argued that the Court should not permit hybrid representation in this case because the Defendant would not adhere to the limits for self-representation carved out by the Court. He played an audio recording of a jail telephone call, in which Defendant Benanti stated that being co-counsel on his case meant that current counsel would be there to help him but he could "do whatever [he] want[ed]." AUSA Lewen said this recording reveals that the limits of any hybrid representation must be sharply drawn to prevent the Defendant from abusing this opportunity.

Mr. Kurtz stated that, if the Court denies his request for hybrid representation, Defendant Benanti is asking to represent himself on the remainder of his case. He said that the Defendant also asks for time to file a brief on his motion for a new trial. He said given the time limitations on Benanti's ability to perform legal research, the Defendant needed additional time to find case law to support his arguments. The Defendant asked the Court for three weeks to revise and narrow his motion for a new trial. Mr. Kurtz said that while he was very uncomfortable with the hybrid representation suggested, the Defendant's interest in preserving the issue raised in his pro se motion for new trial trumped his attorneys' discomfort.

The undersigned conducted a modified *Faretta/McDowell* litany with Defendant to determine whether the Defendant's decision to represent himself on the motion for new trial was knowing and voluntary. *See Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that a criminal defendant may proceed *pro se* if his or her decision to do so is voluntary and intelligent); *United States v. McDowell*, 814 F.2d 245, 251-52 (6th Cir. 1987) (approving a list of questions designed to explain the obligations and difficulties of *pro se* representation). The Defendant stated that he understood that the Court was considering allowing him to represent himself on his motion for new trial based upon prosecutorial misconduct but not permitting him to represent himself at sentencing or otherwise on his case. The Defendant agreed to this arrangement. He said he understood that if he represented himself on the motion for a new trial that he alone would be responsible for the arguments on the merits of this motion, that he was giving up any claim of ineffective assistance of counsel on this motion, and that he was on his own with regard to this motion. The Court instructed the Defendant that his retained counsel could not give him legal advice on the motion for a new trial and could not do legal research for him, although they can get a copy of a case for him, if he provides them with the case name and citation.

In response to the Court's questions, Defendant Benanti stated that he had a paralegal degree, although he had never represented himself in a criminal case. Defendant Benanti said he was not familiar with the Federal Rules of Criminal Procedure or the Federal Rules of Evidence. The Defendant acknowledged that he would have to abide by those rules if he represented himself. The Court advised the Defendant that in representing himself, he could potentially say or write things that would be detrimental to him at sentencing or on appeal. The Court advised him that if he chose to represent himself on the motion for a new trial, it is not required to provide him with any additional access to a law library and that the July 25 sentencing hearing would not be continued. Finally, the Court advised the Defendant that, even though this situation is unique because the Defendant would have to forego the pro se motion for new trial, individuals are always better off being represented by trained counsel.

A criminal defendant in a felony case has a Sixth Amendment right to counsel or to represent himself. *Faretta*, 422 U.S. at 818-19. However, "[i]t is well-settled that there is no constitutional right to hybrid representation." *United States v. Cromer*, 389 F.3d 662, 681 n.12 (6th Cir. 2004).

> The right to defend *pro se* and the right to counsel have been aptly described as "two faces of the same coin," in that waiver of one right constitutes a correlative assertion of the other. While it may be within the discretion of a District Court to permit both a criminal defendant and his attorney to conduct different phases of the defense in a criminal trial, for purposes of determining whether there has been a deprivation of constitutional rights a criminal defendant cannot logically waive or assert both rights.

United States v. Conder, 423 F.2d 904, 908 (6th Cir.) (internal citations omitted), *cert. denied*, 400 U.S. 958 (1970). Thus, the decision whether to permit a defendant to both represent himself and be represented by counsel is a matter of the Court's discretion, *not* a matter of right. *Cromer*, 389

F.3d at 681 n.12; *United States v. Mosely*, 810 F.2d 93, 98 (6th Cir. 1987). Such discretion has very rarely been exercised to permit hybrid representation in this Circuit, and hybrid representation may have never been previously permitted in this district. This extreme reservation about permitting hybrid representation is well warranted:

> There are obvious justifications for the refusal to allow hybrid representation in criminal trials, regardless of the legal experience of the defendant. The potential for undue delay and jury confusion is always present when more than one attorney tries a case. Further, where one of the co-counsel is the accused, conflicts and disagreements as to trial strategy are almost inevitable.

Mosely, 810 F.2d at 98 (affirming the trial court's refusal to allow defendant to participate as co-counsel, even though defendant was a trained attorney and a former judge). The undersigned and counsel for both parties are justifiably concerned about permitting hybrid representation in this case and about setting a precedent for hybrid representation in future cases.

The Court finds that the instant case qualifies as that most rare of occasions in which the Court should exercise its discretion to permit a type of hybrid representation for the following reasons: (1) The request for hybrid representation is for a post-trial motion, so there is no chance for jury confusion. (2) The Defendant is only asking/permitted to represent himself on an isolated issue in a single motion. (3) A motion for a new trial appears to be the only vehicle for the Defendant to get his issue before the Court, outside of a collateral motion alleging the ineffective assistance of counsel in failing to bring this motion after his direct appeal. (4) The Court finds that the Defendant has knowingly and voluntarily waived his right to counsel with regard to the motion for a new trial. (5) The Court finds that the Defendant understands that counsel will not be able to assist him on the motion for a new trial, thus alleviating the concerns about conflicts in strategy between defense counsel and the Defendant. (6) The Court finds that the Defendant understands

that he is waiving a future argument that his counsel were ineffective with regard to the motion for new trial because he is representing himself on that motion. (7) Finally, the Court finds that the Defendant understands that his sentencing hearing *will not be continued or delayed* in order to extend the litigation of the motion for new trial. The finding that hybrid representation is appropriate in this case is based upon the unique facts and circumstances herein.

According, the Defendant's requests [**Docs. 153 & 158**] are **GRANTED in part**, in that the Court exercises its discretion to permit the Defendant to represent himself only on his motion for a new trial [presently Doc. 154]. Attorneys Kurtz and Gaines will continue to represent Defendant Benanti at sentencing and the remainder of this case, and Defendant Benanti will not be co-counsel or engage in hybrid representation on sentencing matters. The Defendant is on his own in representing himself on the motion for new trial, which means that Attorneys Kurtz and Gaines cannot advise him with regard to the substance of this motion, cannot conduct legal research on this motion, and cannot argue this motion for him. Attorneys Kurtz and Gaines are permitted to assist Defendant Benanti in representing himself only as to the technical or procedural aspects of filing his motion for new trial. The Defendant's request [**Doc. 158**] to deny the Government's motions to strike is **DENIED** at this time, because that matter is pending before the District Judge.

The Defendant's oral request for additional time to revise, narrow, and refile his pro se motion for new trial is **GRANTED**. The Defendant must file his amended motion for a new trial on or before **May 24, 2017,** and this filing will *replace* (not supplement) his earlier pro se filings [Docs. 151 & 154]. The Government's deadline for responding to this motion is **June 5, 2017**. The Defendant may file a reply to the Government's response on or before **June 12,**

2017. This schedule is not subject to extension because such would interfere with the July 25 sentencing hearing.[2]

IT IS SO ORDERED.

ENTER:

s/ C. Clifford Shirley, Jr.
United States Magistrate Judge

[2] While the Defendant's pro se motion for transcription [Doc. 150] is not before the undersigned, the Defendant was advised that his deadline for refiling his motion for new trial would not be extended to permit him to wait for transcription. The Court noted that the Defendant should consult with Mr. Kurtz and/or Mr. Gaines about which witnesses' testimony he needs transcribed and supplement the record with that testimony when it becomes available. The Court is not making a determination as to whether the Defendant is indigent at this time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 3:15-CR-177-TAV-CCS-1
	)	
MICHAEL BENANTI,	)	
	)	
Defendant.	)	

ORDER

In accordance with the Court's April 21, 2017, Order [Doc. 157], and seeing as the Honorable C. Clifford Shirley, Jr., United States Magistrate Judge, has resolved the issue of the defendant's representation [Doc. 163], the defendant's pending motions [Docs. 148, 149, 150, 151, 154] and the government's motions to strike [Docs. 152, 156] are no longer held in abeyance. Furthermore, pursuant to 28 U.S.C. § 636(b), it is hereby **ORDERED** that the defendant's motion to appoint counsel [Doc. 148], motion to proceed *in forma pauperis* [Doc. 149], and motion for transcription of trial [Doc. 150] are hereby **REFERRED** to Magistrate Judge Shirley, for his consideration and determination or report and recommendation, as may be appropriate.

IT IS SO ORDERED.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE

Louisville, TN 37777
6554 Clay Street Suite 201
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posits did not affect the outcome of petitioner's trial. Indeed, the government provided not only testimony from dozens of other witnesses but also extensive physical evidence indicating petitioner and Witham committed the offenses, including disguises containing petitioner's DNA and numerous firearms [*See generally* Docs. 145, 147]. Therefore, the Court finds no prejudice.[10]

3. Counsel's Conduct Regarding Petitioner's Motion for a New Trial

Petitioner argues counsel was ineffective because petitioner and counsel had a conflict of interest that caused counsel to refuse to file a motion for a new trial for petitioner and thereby forced petitioner to file a pro se motion for a new trial [*See* Doc. 1 p. 16].[11]

---

[10] Petitioner argues counsel should have allowed petitioner to testify at trial. At the outset, petitioner waived this argument by failing to adequately develop it. *See Thomas v. United States*, 849 F.3d 669, 679 (6th Cir. 2017). Even so, the record reflects that petitioner knowingly and voluntarily waived his right to testify by confirming with the Court he was not interested in testifying [*See* No. 3:15-CR-177-1 Doc. 249 pp. 249–51].

Separately, petitioner argues counsel was ineffective because he had a conflict of interest because counsel prevented petitioner from testifying, did not provide sufficient investigation, did not call any witnesses, and did not challenge actions of the prosecution [Doc. 1 p. 16]. The Court summarily rejects these arguments because they are perfunctory and therefore waived or the Court has already rejected these arguments. *See Thomas*, 849 F.3d at 679. And regardless, petitioner has not shown there was "an actual significant conflict" because petitioner does not explain how the alleged conflict caused counsel to "make bad choices for his client." *See United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996) (citation omitted).

[11] Petitioner argues the Court denied him the right to counsel for the same reason [*See* Doc. 2 p. 54]. The Court rejects this argument as the Sixth Circuit held petitioner waived this argument by failing to raise it on appeal [*See* No. 3:15-CR-177-1 Doc. 311 p. 5].

Similarly, the Court rejects petitioner's arguments that the Court failed to consider his Rule 60 motion as an extension of his Rule 33 motion [Doc. 2 p. 54] and that the Court has not already addressed his arguments in that motion [*Id.* at 60–63] because the Court and Sixth Circuit have already rejected these arguments [No. 3:15-CR-177-1 Doc. 311 p. 4. *See generally* Doc. 285].

A conflict of interest constitutes ineffective assistance of counsel only if the petitioner demonstrates there was "an actual significant conflict" that caused counsel to "make bad choices for his client." *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996) (citation omitted).

The Court finds petitioner has not satisfied this burden. Petitioner demanded that counsel present prosecutorial misconduct claims that counsel felt were inappropriate [No. 3:15-CR-177-1 Doc. 243 p. 3]. When counsel reasonably refused, petitioner agreed to file his motion pro se, and the Court permitted petitioner to do so after conducting a *Faretta* colloquy [*See* No. 3:15-CR-177-1 Docs. 163, 243]. From these facts, the Court concludes no conflict of interest even existed. And even if a conflict existed, the conflict did not cause counsel to make any "bad choices" for petitioner. *See Mays*, 77 F.3d at 908. Indeed, counsel stated he preferred to allow petitioner to proceed pro se because such was in petitioner's best interests [*See* No. 3:15-CR-177-1 Doc. 243 pp. 5–6]. The Court further notes petitioner's decision to file his motion pro se was knowing and voluntary as reflected by his answers during the Court's colloquy [*See generally id.*]. Therefore, the Court finds petitioner has not met his burden to demonstrate ineffective assistance of counsel on this issue.

4. Counsel's Conduct Regarding Sentencing

Petitioner argues counsel should have challenged the Court's application of various provisions of the sentencing guidelines [*See* Doc. 2 p. 118; Doc. 19 p. 25]. First, petitioner argues counsel should have challenged application of U.S.S.G. § 2A4.1(b)(1), which

EXHIBIT D
No 225063

No. 22-5063

FILED
Aug 11, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BENANTI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

D

Before: McKEAGUE, Circuit Judge.

Michael Benanti, 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. He has filed an application for a certificate of appealability (COA) and a motion to proceed in forma pauperis.

From spring 2014 until November 2015, Benanti and his co-conspirator, Brian Witham, engaged in a multi-state conspiracy to rob banks and retail businesses. As part of that conspiracy, Benanti and his co-conspirator kidnapped bank employees and held their family members hostage to compel the bank employees to remove money from the banks. This court's decision on Benanti's direct appeal summarizes the circumstances that led to his arrest:

> On September 3, 2015, two North Carolina State Highway Patrol cars tried to pull over Benanti and Witham (the driver) for speeding. Witham pulled onto the shoulder, but barely out of the traffic lane, and momentarily came to a stop. Then Benanti opened the passenger door. As the troopers pulled behind them, however, Witham sped away and before long struck three other vehicles. Benanti and Witham then fled into the woods on foot, carrying large black duffel bags. Police feared an ambush and gave up the chase.
>
> Trooper Greg Reynolds, a North Carolina Highway Patrol officer, received the dash-cam footage of the September 3rd chase. He reviewed the footage between five and ten times, noting the chase's irregularity. He also noticed the passenger's appearance: white, heavy-set, with a bald spot on the back of his head.

> Meanwhile, FBI agents joined the investigation, suspecting that the two men from the chase were the same men who had kidnapped a bank executive a few months before. The agents recovered a GPS device from the SUV that the men had crashed during the chase. From that device's memory, FBI agents obtained coordinates corresponding to an area near a cabin at 124 Rebel Ridge Road in Maggie Valley, North Carolina. The cabin's property manager told them that two men had rented the cabin and had recently moved to another at 380 Allison Drive.
>
> State and federal agents began surveilling that address. Weeks later, they saw Benanti and Witham leave in a Pathfinder SUV with stolen license plates. The agents notified Reynolds that two men suspected of various bank robberies were traveling in a Pathfinder with stolen plates, and that the men were suspected to be the same ones who had fled on September 3rd. Soon Reynolds spotted the Pathfinder, confirmed that the plates were stolen, and turned on his emergency lights and siren. As in the September 3rd chase, the vehicle pulled over, but barely out of the traffic lane. The passenger door opened. Out came a heavy-set white man with a bald spot on the back of his head. He was holding a large black duffel bag. The Pathfinder then sped back onto the highway, just as the SUV on September 3rd had done. But this time it left the passenger, Benanti, behind.
>
> Reynolds arrested Benanti, thinking that he was the same passenger who had fled on September 3rd. From Benanti's clenched fist, Reynolds took a crumpled piece of paper that listed the names, home addresses, and bank addresses of three bank executives. In the duffle bag, the police found a camera, monocular scope, and rubber gloves. Meanwhile, police caught Witham. Officers searched the Pathfinder and found another GPS device, a smartphone labeled "Operations 1," and black gloves.
>
> Officers then obtained a search warrant for the cabin at 380 Allison Drive, where they found more evidence. Eventually, a federal grand jury charged Benanti with 23 offenses, including conspiracy to commit robbery, armed bank extortion, carjacking, and kidnapping.

United States v. Benanti, 755 F. App'x 556, 558-59 (6th Cir. 2018).

Before trial, Benanti filed motions seeking suppression of, among other things, evidence obtained as a result of his arrest and evidence seized from 380 Allison Drive. Benanti argued that officers lacked probable cause to make a warrantless arrest and that the search warrant affidavit for 380 Allison Drive did not establish a sufficient nexus between that address and the evidence sought. In addition, Benanti argued that the affidavit included a material misrepresentation with respect to the race of one of the two perpetrators of an April 28, 2015, kidnapping and attempted robbery. A magistrate judge recommended that Benanti's motion to suppress evidence obtained

at 380 Allison Drive be denied, finding that the search warrant affidavit sufficiently linked the bank robberies and kidnappings alleged in the affidavit and the September 3 car chase to the cabin at 380 Allison Drive. The magistrate judge also rejected Benanti's claim that the search warrant contained a material misrepresentation and concluded that he was not entitled to a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to contest the truthfulness of the statements in the affidavit. The magistrate judge further recommended that Benanti's motion to suppress evidence based on the illegal arrest be denied, concluding that Reynolds had probable cause to arrest Benanti immediately upon encountering him on the side of the road. Over Benanti's objections, the district court adopted the magistrate judge's reports and recommendations and denied the motions to suppress.

Benanti proceeded to trial. The jury convicted him of one count of conspiracy to commit Hobbs Act robbery and extortion, in violation 18 U.S.C. § 1951; one count of possession of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); two counts of attempted armed bank extortion, in violation of 18 U.S.C. § 2113(a); nine counts of use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); three counts of carjacking, in violation of 18 U.S.C. § 2119; three counts of kidnapping, in violation of 18 U.S.C. § 1201(a)(1); three counts of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1); and one count of armed bank extortion, in violation of 18 U.S.C. § 2113(a).

After trial—while he was still represented by counsel—Benanti was granted leave to file a pro se motion for a new trial. In his motion, Benanti argued that the prosecutor engaged in misconduct by including false statements in a search warrant affidavit, concealing evidence of a third perpetrator, and improperly vouching for Witham's credibility. The district court denied the motion. The court sentenced Benanti to an aggregate term of life imprisonment for the Hobbs Act robbery conspiracy, attempted armed bank extortion, kidnapping, felon-in-possession, armed bank extortion, and carjacking convictions; consecutive sentences totaling 155 years for seven of the § 924(c) convictions; and three consecutive life sentences for the remaining § 924(c) convictions. This court affirmed the district court's judgment. *Benanti*, 755 F. App'x at 562.

While his direct appeal was pending, Benanti filed a motion, pursuant to Federal Rule of Civil Procedure 60(b), asserting prosecutorial misconduct and asking the district court to treat the motion as a motion for reconsideration of his motion for a new trial. The district court denied the motion. This court affirmed. *United States v. Benanti*, No. 19-5805 (6th Cir. July 22, 2020) (order).

Benanti filed a § 2255 motion in the district court, claiming that (1) counsel was ineffective in challenging the constitutionality of his arrest, (2) counsel was ineffective in challenging the affidavit supporting the search warrant for 380 Allison Drive, (3) counsel was ineffective for failing to challenge Witham's false testimony concerning the "two-man enterprise," (4) counsel had a conflict of interest that caused him to refuse to file a motion for a new trial and deprived Benanti of his right to counsel at a critical stage of the proceedings, (5) counsel was ineffective for failing to object to the district court's misapplication of the Sentencing Guidelines, (6) the prosecutor committed various acts of misconduct, (7) the district court improperly admitted evidence that Benanti had frequented a strip club, cheated on his girlfriend, embezzled from his business, and engaged in fraudulent schemes, (8) he is entitled to relief from his mandatory consecutive sentences for his § 924(c) convictions under § 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, (9) the district court improperly enhanced his sentence under the Armed Career Criminal Act ("ACCA") because his prior convictions for robbery and attempted murder are not ACCA predicates under *Johnson v. United States*, 576 U.S. 591 (2015), and (10) seven of his § 924(c) convictions must be vacated in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), because the predicate offenses upon which the convictions were based no longer qualify as crimes of violence within the meaning of § 924(c). Benanti requested an evidentiary hearing.

The district court granted Benanti's motion in part and denied it in part. The court granted the motion with respect to Benanti's *Davis* claim and vacated the seven challenged § 924(c) convictions. It concluded that the remainder of Benanti's motion was "entirely meritless." The court declined to issue a COA.

Benanti has now applied for a COA from this court. "To obtain a certificate of appealability, a prisoner must 'demonstrat[e] 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.'" *Banks v. Dretke*, 540 U.S. 668, 705 (2004) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003)). He identifies the following issues for appeal: "(1) whether counsel was ineffective for [not] challenging facts learned after the arrest and improper use of collective knowledge to find probable cause to arrest"; (2) whether counsel "failed to properly raise recklessly false statements and request[] a *Franks* hearing in relation to the search warrant affidavit"; (3) "whether counsel failed to make critical arguments concerning the probable cause to search 380 Allison Dr[ive]"; (4) "whether counsel and/or the district court failed to obtain a valid waiver of counsel"; (5) "whether counsel failed to correct testimony he knew to be perjured"; (6) whether counsel was ineffective in failing to object to the prosecutor's improper arguments to the jury in his closing argument; (7) "whether counsel failed to challenge or the court failed to correct the sentence based on misapplications of the sentencing guidelines" and failure to apply the First Step Act; and (8) whether counsel failed in his representation under *United States v. Cronic*, 466 U.S. 648 (1984). Benanti has forfeited review of any claims presented to the district court that he did not raise in his COA application. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

Several of Benanti's claims allege a violation of his Sixth Amendment right to effective assistance of counsel. 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, 688, 691-92 (1984).

Benanti claimed that counsel was ineffective in challenging the probable cause to support his arrest on the basis that Reynolds initiated the traffic stop of the Pathfinder before he would have been able to observe its occupants. Thus, Reynolds's observation that one of the occupants of the Pathfinder was similar in appearance to the individual depicted in the dash cam footage from

the September 3 chase—heavy-set, white male with a bald spot—could not be used to establish probable cause for the arrest. According to Benanti, "In this case Reynolds cannot see the individual until after the arrest is initiated so he cannot rely on observations made later, even a few seconds later as the case would have it, to establish probable cause."

In denying this claim, the district court determined that Benanti could not establish that he was prejudiced by counsel's failure to raise this argument. Explaining that there was other evidence to support a finding of probable cause even before Reynolds initiated the arrest, *see Benanti*, 755 F. App'x at 559, and that Reynolds had separate probable cause to initiate the traffic stop because the Pathfinder had stolen Maryland license plates, the court concluded that, even had counsel raised the argument, the result of the suppression motion would not have been different. Reasonable jurists would not debate this determination.

Benanti also argued that counsel should have objected to the use of the collective knowledge doctrine to establish probable cause. He contended that, pursuant to that doctrine, Reynolds was authorized to conduct only a traffic stop of the Pathfinder and not an arrest and that, even applying the doctrine, he was not subject to arrest merely for being a passenger in a vehicle with stolen plates. Reasonable jurists would not disagree with the district court's rejection of these arguments. Even if the collective knowledge doctrine provided probable cause for only the stop, as the district court and this court have explained, the facts and circumstances that arose after the stop established probable cause for Reynolds to arrest Benanti. *See id.* Reasonable jurists would agree that Benanti's claims that counsel was ineffective in challenging the constitutionality of his arrest do not deserve encouragement to proceed further.

Benanti next argued that, in challenging the search warrant affidavit supporting the application for a warrant to search 380 Allison Drive, counsel should have argued that the affidavit incorrectly stated that (1) the GPS found in the Pathfinder had "a track to the address of 124 Rebel Ridge Rd, Canton North Carolina," (2) "two males placed a deposit on [the cabin at 380 Allison Drive] to be occupied on Nov. 16, 2015" when only one man rented the cabin, (3) "a surveillance team had observed a gray Nissan Pathfinder occupied by two white males" when the surveillance notes made no mention of white males, and (4) the officer involved in the September 3 car chase

positively identified Witham as the driver when no identification was disclosed during discovery. Benanti also argued that counsel was ineffective for not requesting a *Franks* hearing, for failing to argue that the search warrant affidavit did not establish a nexus between the robberies and 380 Allison Drive, and for failing to challenge the officers' reliance on the search warrant affidavit in executing the search. Because the district court and this court had already rejected the arguments that Benanti faulted counsel for not raising, the district court concluded that Benanti failed to establish that he was prejudiced by counsel's alleged failures. Reasonable jurists could not disagree with this conclusion. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial.").

Benanti further argued that counsel was ineffective for failing to challenge the search warrant on the ground that the search warrant affidavit made several omissions, including that the GPS data included four start and end points and a different address labeled "home," that Benanti is a resident of a different address, and that Benanti was not seen at the place to be searched. Benanti has failed to make a substantial showing that, had counsel pointed out these omissions, his motion to suppress the evidence obtained from the search of 380 Allison Drive would have been granted. Indeed, an "affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000). Reasonable jurists would agree that this claim does not deserve encouragement to proceed further.

The next issue for which Benanti seeks a COA is "whether counsel and/or the district court failed to obtain a valid waiver of counsel." This court construes this as relating to Benanti's claim that the district court denied him counsel at a critical stage of the proceedings when counsel refused to represent him on his motion for a new trial due to a conflict of interest. The district court declined to consider this claim because, on appeal from the denial of Benanti's Rule 60(b) motion, this court held that Benanti had waived the claim by failing to raise it in his direct appeal. Reasonable jurists would not debate the district court's decision not to consider the claim. *See United States v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997) ("The law-of-the-case doctrine bars

challenges to a decision made at a previous stage of the litigation which could have been challenged in a prior appeal, but were not.").

Next, Benanti seeks a COA on "whether counsel failed to correct testimony he knew to be perjured" and "whether counsel failed to challenge and the government engaged in improper argument to the jury in closing arguments." Although Benanti now couches these issues as claims of ineffective assistance, he appears to be referring to his claims that the prosecutor improperly allowed Witham to present perjured testimony and made improper remarks during closing argument. The district court determined that these claims of prosecutorial misconduct were either procedurally defaulted or previously litigated and therefore not subject to review under § 2255.

Reasonable jurists would not disagree with the district court's denial of relief on these claims of prosecutorial misconduct. Absent exceptional circumstances or an intervening change in the case law, a prisoner may not use a § 2255 motion to relitigate an issue previously raised. *Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999). Benanti raised these claims in his motion for a new trial. The district court denied the claims, and this court affirmed the denial of the motion on direct appeal. *See Benanti*, 755 F. App'x at 561-62. Because Benanti unsuccessfully raised these claims in his motion for a new trial and on direct appeal, and because he does not rely on an intervening change of law or make a substantial showing of exceptional circumstances, no reasonable jurist could debate the district court's rejection of them.

Benanti's next claim challenged counsel's failure to object to the application of certain enhancements under the Sentencing Guidelines. He argued that counsel should have objected to the application of (1) an enhancement under USSG § 2A4.1(b)(1) for the three kidnapping convictions because they involved a ransom demand, (2) a vulnerable-victim adjustment under USSG § 3A1.1(b)(1), and (3) an enhancement for his leadership role under USSG § 3B1.1. With respect to the enhancement under § 2A4.1(b)(1), defense counsel, in fact, objected, arguing that it should not apply because there was no proof that a ransom demand was made on an uninvolved third party. Benanti does not demonstrate that the objection that he believes counsel should have made—that the enhancements for abduction and carjacking under the robbery guideline, § 2B3.1, should have been applied instead—would have been successful and resulted in a lesser sentence.

Defense counsel also objected to the vulnerable-victim enhancement with respect to one victim. Benanti's conclusory assertion that "the crime was not committed because of the so called vulnerable victim, nor was that person a target of the crime [or] particularly susceptible to the criminal conduct" does not establish that counsel's decision to object to the enhancement as to another victim was deficient or prejudicial. Similarly, with respect to counsel's failure to object to the leadership role adjustment, Benanti's unsupported assertion that, "according to the testimony, Benanti [and] Witham were equal partners" does not show ineffective assistance under *Strickland*. Reasonable jurists would agree that Benanti's claims that counsel was ineffective for failing to challenge certain guidelines enhancements do not deserve encouragement to proceed further.

Benanti also seeks a COA on his claim that the mandatory 25-year consecutive sentences for his § 924(c) convictions are invalid under § 403 of the First Step Act. The First Step Act of 2018 amended § 924(c) to provide that a second or subsequent conviction carries a mandatory minimum 300-month sentence only if the defendant's prior § 924(c) conviction is already final. *See United States v. Richardson*, 948 F.3d 733, 745 (6th Cir. 2020). A defendant without a prior, final § 924(c) conviction is not subject to the 300-month mandatory minimum when he is convicted of multiple § 924(c) counts in the same proceeding. *See id.* That change, however, does not apply retroactively. *Id.* at 745-46; *see* First Step Act § 403(b). Because Benanti was sentenced prior to the enactment of the First Step Act, no reasonable jurist would disagree with the district court's determination that he was not entitled to relief under § 403.

Finally, Benanti seeks a COA for his claim that counsel's representation was ineffective under *Cronic*. Under *Cronic*, prejudice due to deficient performance of counsel is presumed in certain circumstances, including, as Benanti alleged here, where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *See Bell v. Cone*, 535 U.S. 685, 695-96 (2002). The presumption of prejudice based on counsel's failure to subject the prosecution's case to meaningful adversarial testing applies only where counsel's failure is complete. *Id.* at 696-97. Thus, counsel's failure to oppose the prosecution only at specific points in a proceeding does not give rise to the presumption. *Id.* In support of his *Cronic* claim, Benanti set forth a list of 49

alleged failures of counsel with no supporting facts, citations to the record, or developed argument. This perfunctory list failed to establish a complete failure on the part of counsel that would allow for a presumption of prejudice under *Cronic*. To the extent Benanti raised these 49 allegations as separate allegations of ineffective assistance under *Strickland*, reasonable jurists could not disagree with the district court's determination that Benanti waived the undeveloped claims in the list because they were conclusory and failed to make a showing of deficient performance and prejudice. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 343 (6th Cir. 2012) ("Merely conclusory allegations of ineffective assistance . . . are insufficient to state a constitutional claim.").

For these reasons, Benanti's application for a COA is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 22-5063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BENANTI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: SILER, MOORE, and WHITE, Circuit Judges.

Michael Benanti petitions for rehearing en banc of this court's order entered on August 11, 2022, 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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

MICHAEL BENANTI,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos.: 3:20-CV-194-TAV-DCP
	)	3:15-CR-177-TAV-DCP-1
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

This action is before the Court on petitioner Michael Benanti's voluminous pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 [Doc. 1].[1] The government filed a response [Doc. 13], and petitioner filed a reply [Doc. 19]. Additionally, petitioner's counsel filed a supplemental motion [Doc. 34] and supplemental reply [Doc. 39] on the *Davis*[2] issue discussed *infra* Part II.G, the sole issue for which the Court appointed counsel [Doc. 6].

After considering the entire record in this case, the Court finds that seven of petitioner's § 924(c) convictions must be vacated in light of *Davis*. With that exception, the Court finds petitioner's motion entirely meritless. Accordingly, petitioner's motion [Doc. 1] will be **GRANTED in part** and **DENIED in part**.

[1] Citations in this opinion refer to petitioner's civil case unless otherwise noted. *But see infra* note 3.

[2] *United States v. Davis*, 139 S. Ct. 2319 (2019).

I. Background[3]

Between 2014 and 2015, petitioner and codefendant Brian Witham ("Witham") engaged in a conspiracy to rob financial institutions and retail stores [Doc. 197 ¶¶ 29–39]. Petitioner and Witham held employees of these businesses and their families—including young children—at gunpoint and demanded that the employees rob the businesses [*Id.*]. During the offenses, petitioner and Witham wore expensive disguises [*Id.* ¶¶ 33, 36–37] and violently threatened the victims [*Id.* ¶¶ 31, 34, 36; *see also* Doc. 249 pp. 116–17 (noting that petitioner and Witham informed one employee that if he did not complete the robbery within twelve minutes, for "[e]very minute that he was late, they would cut off [his wife's] fingers" and that if he refused to comply, "they would send [his] daughter [to him] . . . in pieces")]. Petitioner served as the "prolific idea guy," formulating complex strategies, and Witham conducted physical labor and surveillance [Doc. 241 pp. 126–27, 216]. Petitioner retained most of the proceeds from the offenses [Doc. 197 ¶¶ 31, 35–36].

On September 3, 2015, officers engaged in a high-speed pursuit of petitioner and Witham, who were driving a stolen Ford Edge [Doc. 246 pp. 104–08]. Ultimately, petitioner and Witham escaped on foot each carrying black bags [*Id.* at 111–13]. Officers obtained from their abandoned vehicle, *inter alia*, a GPS containing historical tracks to 124 Rebel Ridge Road, a North Carolina address coinciding with a rental cabin at Premier

[3] Citations in this Part only refer to petitioner's criminal case unless otherwise noted. This opinion presumes familiarity and thus only recounts facts pertinent to petitioner's § 2255 motion.

Vacation Rentals, where petitioner and Witham rented a cabin for a period of time [Doc. 87 pp. 119, 143–44, 147].

In November 2015, petitioner and Witham began renting a cabin at 380 Allison Drive in North Carolina (also known as "Southern Comfort"), and law enforcement conducted surveillance of the premises [*Id.* at 149–51]. During this surveillance, officers repeatedly observed two white men and a Nissan Pathfinder with a stolen Maryland license plate [*Id.* at 119, 151].

On November 25, 2015, Trooper Greg Reynolds ("Reynolds") followed the Pathfinder because it had a stolen license plate, and based on Reynolds's personal knowledge and information received from other law enforcement, Reynolds believed its occupants had committed numerous bank robberies and were the assailants in the September 3 chase [*Id.* at 35, 41–44]. In light of this information, Reynolds initiated a traffic stop [*Id.* at 44–46]. Reynolds noticed the Pathfinder stopped slowly and barely pulled onto the shoulder and that petitioner stepped out with a black bag, and Reynolds identified these characteristics as similar to those during the September 3 chase [*Id.* at 48–50; *see* Doc. 88 p. 20]. Reynolds arrested petitioner and officers eventually searched the cabin at 380 Allison Drive where they discovered considerable evidence connecting petitioner and Witham to the robberies, including firearms, surveillance equipment, and numerous disguises containing petitioner's and Witham's DNA [Doc. 238 pp. 99–100; 109–12, 141, 144–46, 164–65; Doc. 239 pp. 41–42].

Before trial, petitioner filed motions to suppress evidence, arguing probable cause did not support his arrest and that the search warrant for 380 Allison Drive contained false information and did not sufficiently detail the nexus between the offenses and the cabin [*See* Docs. 58, 65]. Based on Reynolds's testimony and other evidence, the magistrate judge found that petitioner's arrest was supported by probable cause [Doc. 58 pp. 28–35]. The magistrate judge emphasized that Reynolds knew the circumstances of the September 3 chase when he arrested petitioner [*Id.* at 30–31]. Moreover, the magistrate judge applied the collective knowledge doctrine and held that knowledge of Agent Jeff Blanton—who personally had probable cause to believe the occupants of the Pathfinder were the assailants in the September chase—could be imputed to Reynolds because Agent Blanton conferred with Reynolds before he arrested petitioner [*Id.* at 32–35].

Further, the magistrate judge found that probable cause supported the search warrant because several factors linked petitioner and Witham's offenses to the cabin, including that: (1) the offenses involved armed, disguised gunmen who kidnapped employees and their families; (2) the perpetrators forced the employees to rob their employers; (3) the perpetrators held the employees' families hostage while requiring the employees to commit the robberies; (4) the GPS obtained from the September 3 chase had traces to the cabin at 124 Rebel Road, and the owner of that cabin informed officers that its occupants had moved to the cabin at 380 Allison Drive; and (5) the circumstances of the September 3 chase were nearly identical to the circumstances of the November 25 stop [Doc. 65 pp. 6–9]. Furthermore, the magistrate judge held that petitioner did not establish the search warrant

affidavit contained false information to support a *Franks*[4] hearing [*Id.* at 19–20]. Petitioner filed objections to the magistrate judge's findings both as to his arrest and the search of the cabin at 380 Allison Drive, but the Court adopted the magistrate judge's findings as is relevant here [Docs. 88, 89], and the Sixth Circuit affirmed the Court's decision [Doc. 275].

At trial, Witham testified against petitioner and confirmed that petitioner and Witham committed the offenses [*See generally* Doc. 241]. Further, the government introduced testimony from dozens of other witnesses as well as physical evidence, including firearms and disguises bearing petitioner's DNA [*See* Docs. 145, 147]. Moreover, over petitioner's objection, the Court allowed introduction of evidence that petitioner "frequented a strip club, cheated on his girlfriend, embezzled from his business, and engaged in fraudulent schemes" [Doc. 275 p. 7]. Petitioner appealed the Court's decision to admit this evidence, and the Sixth Circuit concluded the Court improperly admitted the evidence but that such was a harmless error [*Id.* at 8–9].

Ultimately, the jury convicted petitioner on all counts of the superseding indictment [Doc. 30], that is: (1) conspiracy to commit robbery and extortion in violation of 18 U.S.C. § 1951 (Count One); (2) possession of a firearm in furtherance of the offense in Count One in violation of 18 U.S.C. § 924(c) (Count Two); (3) two counts of attempted bank extortion in violation of 18 U.S.C. § 2113 (Counts Three and Seventeen); (4) bank extortion in violation of 18 U.S.C. § 2113 (Count Ten); (5) three counts of using a firearm in furtherance of the offenses in Counts Three, Ten, and Seventeen in violation of 18 U.S.C.

[4] *Franks v. Delaware*, 438 U.S. 154 (1978).

§ 924(c) (Counts Four, Eleven, and Eighteen); (6) three counts of carjacking in violation of 18 U.S.C. § 2119 (Counts Five, Twelve, and Nineteen); (7) three counts of using a firearm in furtherance of the offenses in Counts Five, Twelve, and Nineteen in violation of 18 U.S.C. § 924(c) (Counts Six, Thirteen, and Twenty); (8) three counts of kidnapping in violation of 18 U.S.C. § 1201 (Counts Seven, Fourteen, and Twenty-one); (9) three counts of using a firearm in furtherance of the offenses in Counts Seven, Fourteen, and Twenty-one in violation of 18 U.S.C. § 924(c) (Counts Eight, Fifteen, and Twenty-two); and (10) three counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922 and 924 (Counts Nine, Sixteen, and Twenty-three) [Doc. 143].

After trial, while represented, petitioner filed a motion [Doc. 153] seeking leave to file a pro se motion for a new trial. During a hearing on this motion, petitioner's counsel stated he believed that if petitioner was granted co-counsel status, counsel may have an "inherent conflict of interest" with petitioner because he and petitioner might inevitably disagree as to the best course of action as to petitioner's representation [Doc. 243 pp. 5–6]. Moreover, petitioner's counsel indicated that, accordingly, it would be in petitioner's interests to proceed pro se for purposes of his new trial motion [*See id.*].

Ultimately, the magistrate judge authorized petitioner to file a pro se motion for a new trial after conducting a modified *Faretta*[5] hearing to verify petitioner's pro se representation was knowing and voluntary [*See generally* Docs. 163, 243], and petitioner subsequently filed his pro se motion for a new trial [Doc. 169]. The Court denied

[5] *Faretta v. California*, 422 U.S. 806 (1975).

petitioner's pro se motion and specifically rejected petitioner's arguments that: (1) the search warrant affidavit in the application for a warrant to search 380 Allison Drive contained intentionally or recklessly false information; (2) the government knowingly concealed the possibility that more than two persons were involved in the offenses; and (3) the government improperly bolstered Witham's testimony during trial [*See generally* Doc. 199]. On appeal, the Sixth Circuit affirmed the Court's denial of petitioner's pro se motion for a new trial [Doc. 275; *see also* Doc. 311].

On July 18, 2017, the Court sentenced petitioner as follows: (1) concurrent sentences of life imprisonment as to Counts Three, Seven, Nine, Ten, Fourteen, Sixteen, Seventeen, Twenty-one, and Twenty-three (with Counts Nine, Sixteen, and Twenty-three merged); (2) 240 months of imprisonment as to Count One to be served concurrently with the preceding sentences; (3) 180 months of imprisonment as to Counts Five, Twelve, and Nineteen to be served concurrently with the preceding sentences; (4) 60 months of imprisonment as to Count Two (petitioner's first § 924(c) conviction) and 25 years of imprisonment as to Counts Four, Six, Eleven, Thirteen, Eighteen, and Twenty, all to be served consecutively to each other and the preceding sentences; and (5) sentences of life imprisonment as to Counts Eight, Fifteen, and Twenty-two to run consecutively to each other and the preceding sentences [Doc. 204 pp. 1–3]. As to petitioner's merged felon-in-possession convictions as to Counts Nine, Sixteen, and Twenty-three, the Court applied an enhancement under § 924(e) of the Armed Career Criminal Act ("ACCA")

[*See id.*; *see also* Doc. 197 ¶¶ 87, 121]. Additionally, the Court applied various upward adjustments under the sentencing guidelines [*See, e.g.*, Doc. 197 ¶¶ 66, 70, 72].

Since sentencing, petitioner has filed an overwhelming number of pro se motions, including a § 2255 motion for which the pro se briefing alone easily exceeds 700 pages. In this opinion, the Court addresses petitioner's § 2255 motion [No. 3:20-CV-194 Doc. 1].[6]

II. Analysis

The Court must vacate, set aside, or correct a prisoner's sentence if it finds that "the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack . . . ." 28 U.S.C. § 2255. To obtain relief under § 2255 because of a constitutional error, the error must be one of "constitutional magnitude which had a substantial and injurious effect or influence on the proceedings." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993)).

The petitioner has the burden to prove he is entitled to relief by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). The petitioner "must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982). Particularly, the petitioner must demonstrate a "'fundamental defect' in the proceedings which necessarily results in a complete

[6] The Court addresses petitioner's other motions in contemporaneously-filed orders.

miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998) (citation omitted).

The Court notes that petitioner is acting pro se except for purposes of the *Davis* issue. "It is . . . well-settled that '[t]he allegations of a pro se habeas petition . . . are entitled to a liberal construction . . . .'" *Porter v. Genovese*, 676 F. App'x 428, 440 (6th Cir. 2017) (alteration in original). Therefore, the Court will liberally construe petitioner's motion.

Petitioner's motion raises numerous issues. First, petitioner asserts he is entitled to an evidentiary hearing on his § 2255 motion. Second, petitioner argues his trial and appellate counsel were ineffective. Third, petitioner asserts direct claims for prosecutorial misconduct. Fourth, petitioner challenges an evidentiary determination of the Court during his trial. Fifth, petitioner challenges his § 924(c) convictions under § 403 of the First Step Act. Sixth, petitioner challenges his enhancement under the ACCA in light of *Johnson*.[7] Finally, petitioner challenges seven of his § 924(c) convictions in light of *Davis*.

A. Evidentiary Hearing

Petitioner requests an evidentiary hearing to determine whether he is entitled to relief and argues there are "critical facts in dispute" [Doc. 1 p. 20; Doc. 2 p. 1]. Petitioner requests that the Court appoint counsel if the Court orders a hearing [Doc. 2 p. 127].

An evidentiary hearing is not required on a § 2255 motion if the motion, files, and record conclusively show that the petitioner is not entitled to relief or if the petitioner's assertions are "contradicted by the record [or] inherently incredible." *Woolsey v. United*

[7] *Johnson v. United States*, 576 U.S. 591 (2015).

States, 794 F. App'x 469, 474–75 (6th Cir. 2019) (citation omitted); *see* 28 U.S.C. § 2255(b); *see also Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (citation omitted).

Based on the record and as discussed *infra*, it plainly appears petitioner is entitled to relief insofar as his *Davis* claims are concerned. However, it plainly appears petitioner is not entitled to relief as to his other claims because they are "contradicted by the record [and] inherently incredible." *See Woolsey*, 794 F. App'x at 474–75 (citation omitted). In sum, despite petitioner's conclusory allegations, there are no facts in dispute, and this Court and the Sixth Circuit have repeatedly rejected petitioner's assertions to the contrary. Therefore, the Court finds it is not necessary to hold an evidentiary hearing.

Accordingly, petitioner's request for an evidentiary hearing will be **DENIED** and his request for counsel during such hearing will be **DENIED AS MOOT**.

B. Ineffective Assistance of Counsel

Petitioner asserts several claims for ineffective assistance of counsel, and these claims are cognizable under § 2255. *See Massaro v. United States*, 538 U.S. 500, 508–09 (2003). A petitioner alleging ineffective assistance of counsel must satisfy the two-part test set forth in *Strickland v. Washington*. 466 U.S. 668, 687 (1984). First, the petitioner must identify specific acts or omissions to prove that counsel's performance was deficient as measured by "prevailing professional norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). Counsel is presumed to have provided effective assistance, and the petitioner bears the burden of showing otherwise. *Mason v. Mitchell*, 320 F.3d 604, 616–17 (6th Cir. 2003);

see also Strickland, 466 U.S. at 689 (providing that a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

Second, a petitioner must establish "a reasonable probability that, but for [counsel's deficient acts or omissions], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691; *see also Smith v. Robbins*, 528 U.S. 259, 285–86 (2000). Because a petitioner "must satisfy *both* prongs [of *Strickland*], the inability to prove either one of the prongs—regardless of which one—relieves the reviewing court of any duty to consider the other." *Nichols v. United States*, 563 F.3d 240, 249 (6th Cir. 2009) (en banc).

1. Counsel's Conduct Regarding Petitioner's Motion to Suppress

Petitioner argues counsel committed errors when preparing for petitioner's motions to suppress. Petitioner's arguments relate to: (1) whether probable cause existed for petitioner's arrest; and (2) whether the warrant application affidavit contained false information and demonstrated probable cause to search 380 Allison Drive.

a. Probable Cause to Arrest Petitioner

Petitioner argues counsel was ineffective in challenging the constitutionality of petitioner's arrest on November 25, 2015 [Doc. 2 pp. 6–14].

First, petitioner suggests the facts supporting petitioner's arrest were primarily that Reynolds saw that the person exiting the vehicle was heavy set, had a bald spot, and held a black bag and that Reynolds considered these facts to be similar to those during the September 3 chase [*Id.* at 6, 8]. And petitioner argues counsel should have objected to this basis because Reynolds arrested petitioner by initiating the stop before he could see petitioner [*See id.* at 6–14].

The Court finds no prejudice because there is no reasonable probability that the result of the proceeding would have been different had counsel made this argument. Ample other evidence supported probable cause even before Reynolds initiated the traffic stop. As the Sixth Circuit stated:

> Benanti argues that . . . when Reynolds arrested him, Reynolds knew only that Benanti had been a passenger in an SUV with stolen plates. But Reynolds knew more than that. His supervisor had just informed him that the two men in the SUV were suspects from the September 3rd chase, and that they were on the road only fifty miles from where the chase had occurred. Moreover, after Reynolds pulled over the SUV, he noticed several similarities to the September 3rd encounter: both involved SUVs with stolen plates; both involved two white men; in both, the SUV stopped momentarily just outside the traffic lane . . . . These common circumstances gave Reynolds ample reason to think that Benanti was the same passenger who had fled from police in the chase on September 3rd.

[No. 3:15-CR-177-1 Doc. 275 p. 5]. Moreover, Reynolds had separate probable cause to initiate the stop based on the fact that the Pathfinder had stolen Maryland plates [*See* No. 3:15-CR-177-1 Doc. 88 p. 22]. Therefore, the Court finds no prejudice and abstains from addressing whether counsel's performance was deficient.

Second, petitioner avers counsel should have argued against the magistrate judge's use of the collective knowledge doctrine because: (1) while Reynolds had permission to

stop the vehicle under the doctrine, he did not have permission to arrest petitioner under the doctrine; and (2) even applying the doctrine, probable cause did not exist because petitioner was not subject to arrest merely because he was in a stolen vehicle [Doc. 2 pp. 9–12, 14].

Regarding petitioner's first argument, the Court finds no prejudice because petitioner is incorrect that the collective knowledge doctrine only applies to traffic stops. *See United States v. Lyons*, 687 F.3d 754, 765–66 (6th Cir. 2012); *see also United States v. Duval*, 742 F.3d 246, 253 (6th Cir. 2014) (search warrant context). Regarding petitioner's second argument, as stated above, the stop was supported by probable cause with or without the doctrine [*see also* No. 3:15-CR-177-1 Doc. 88 pp. 20–23]. Therefore, even assuming counsel had presented these arguments, there is no probability the Court would have ruled for petitioner. Thus, the Court finds no prejudice.

Finally, petitioner provides a conclusory list of alleged acts of ineffective assistance [Doc. 2 p. 14]. This list includes the following: (1) "counsel failed to object to and raise the improper use of evidence"; (2) "counsel failure [sic] to raise prosecutorial misconduct for [failing to object to improper use of evidence]"; (3) "counsel failure [sic] to call witnesses and investigate for [a hearing]"; and (4) "counsel [did] not [investigate and challenge] the contents of the surveillance reports" [*Id.*].

"A party waives issues that he adverts to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *Thomas v. United States*, 849 F.3d 669, 679

(6th Cir. 2017) ("[The petitioner] does not articulate how these actions specifically were deficient or how they specifically prejudiced the outcome of the case. Instead, they are tacked on to a list of the failed ineffective assistance of counsel arguments [and therefore are waived]."). Here, petitioner does not explain how any alleged actions of counsel in his list were deficient or how alternative courses of action would have changed the outcome. Thus, petitioner has waived the arguments in the list.

b. Probable Cause in the Search Warrant Affidavit

Petitioner argues counsel was ineffective in challenging the search warrant affidavit in the government's application for a warrant to search 380 Allison Drive [Doc. 2 pp. 15–53].

First, petitioner argues counsel should have raised the following issues: (1) the affidavit improperly included that the GPS recovered from the September 3 chase had "a track to the address of 124 Rebel Ridge Road" [*Id.* at 16–17]; (2) the affidavit improperly included that "two males placed a deposit on Southern Comfort" because the "affiant knew . . . that only one male rented" the property [*Id.* at 19]; (3) the affidavit improperly included that "a surveillance team had observed a gray Nissan Pathfinder occupied by two white males" because the affiant had not in fact seen two white males [*Id.* at 21–22]; (4) the affidavit improperly included that the officer who conducted the September 3 chase identified Witham because no identification was disclosed during discovery [*Id.* at 22–23];

(5) counsel should have requested a *Franks* hearing [*Id.* at 24–25, 29];[8] (6) the nexus between robberies and 380 Allison Drive because the affidavit did not support such a nexus [*Id.* at 32, 36–37, 39, 42–53]; and (7) the officers' unreasonable reliance on the affidavit [*Id.* at 38].

However, the Court and/or the Sixth Circuit have already rejected all of these arguments on the merits [*See generally* No. 3:15-CR-177-1 Docs. 89, 199, 275]. Therefore, the Court finds there is no possibility that counsel further raising these arguments would have changed the outcome. Accordingly, the Court finds no prejudice.

Second, petitioner avers counsel should have argued the following statements should have been included in the warrant affidavit: (1) "[t]he GPS data contained four start and end points . . . in the same general area [as 124 Rebel Road]" [Doc. 2 pp. 17–18]; (2) "[t]he GPS data also contained [a different address] labeled 'home'" [*Id.* at 18]; (3) "Benanti is a resident of [a different address]" [*Id.* at 20–21]; (4) "a date or time frame when the FBI" "found a track to 124 Rebel Road" [*Id.* at 32–33]; (5) "Southern Comfort, the place to be searched, was not the defendants [sic] home" [*Id.* at 33–34]; and (6) "Benanti was not seen at the place to be searched" [*Id.* at 35]. Petitioner argues that under *Franks*, these statements were recklessly or intentionally omitted and that probable cause would have been absent had these statements been in the affidavit [*See id.* at 15].

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[8] Separately petitioner requests a post-conviction *Franks* hearing to prove the warrant affidavit contained false information. However, petitioner is not entitled to a hearing because, as noted below, the Court and the Sixth Circuit have repeatedly held petitioner cannot show "the offending information [was] essential to the probable cause determination." *See Ajan v. United States*, Nos. 2:02-CR-71, 2:06-CV-24, 2009 WL 1421183, at *11 (E.D. Tenn. May 20, 2009) (citation omitted).

But an "affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000) (en banc). Accordingly, argument by counsel for the above inclusions would have been rejected and thus would not have changed the outcome. Consequently, the Court finds no prejudice.

Third, petitioner argues counsel erroneously conceded that petitioner rented the cabin at 124 Rebel Road in petitioner's objections to the magistrate judge's findings on petitioner's motion to suppress [Doc. 2 pp. 35, 39]. However, the Court has reviewed the record and concludes counsel never conceded that petitioner rented the cabin. Rather, counsel indicated that the persons who rented the cabin at 124 Rebel Road did not do so until late July; counsel did not, however, actually concede that petitioner and Witham were the persons who rented the cabin [*See* No. 3:15-CR-177-1 Doc. 76 p. 17]. The Court notes petitioner cannot demonstrate prejudice from a concession that never even occurred.[9]

Fourth, petitioner argues counsel improperly conceded the Court could connect the GPS to the cabin at 124 Rebel Road [*Id.* at 35]. However, the Sixth Circuit found probable cause existed independent of this concession [*See generally* No. 3:15-CR-177-1 Doc. 275]. Therefore, the Court finds no prejudice.

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[9] Petitioner also argues appellate counsel improperly conceded during oral argument that the affidavit stated petitioner was at the cabin at 124 Rebel Road [Doc. 2 p. 35]. The Court summarily rejects this argument because in petitioner's own exhibit, there is a clear dispute whether counsel actually made this concession [*See* Doc. 2-32]. Regardless, even if appellate counsel made this concession, the Court finds such a slight misstatement nonprejudicial given the complete record before the Sixth Circuit, including the affidavit itself. *See United States v. Valentine*, 488 F.3d 325, 338 (6th Cir. 2007) (noting a petitioner is entitled to relief due to an error by appellate counsel only if the error "changed the result of the appeal").

Finally, petitioner includes yet two more lists that together provide 33 independent alleged acts of ineffective assistance with absolutely no explanation as to deficiency or prejudice [Doc. 2 pp. 29–31, 53]. As the Court has noted, "[a] party waives issues that he adverts to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *Thomas v. United States*, 849 F.3d 669, 679 (6th Cir. 2017). The arguments in these lists are conclusory and undeveloped or otherwise have already been addressed. Moreover, petitioner does not explain how the actions in these lists were deficient or how alternative courses of action would have changed the outcome. Thus, petitioner has waived the arguments in these lists.

2. Counsel's Conduct During Trial

The Court now considers petitioner's arguments that trial counsel's assistance was ineffective.

First, petitioner argues counsel should have challenged Witham's testimony that petitioner and Witham's offenses were part of a "two man enterprise" and argued that Witham committed perjury [Doc. 2 p. 67]. Petitioner reasons that the "two man enterprise" theory was the "focal point of the trial" and that Witham's testimony was the only evidence supporting that theory [*Id.*]. Separately, petitioner argues counsel should have conducted further cross-examination or called other witnesses to establish that more than two persons committed the offenses [*See id.* at 67–68].

The Court finds that prejudice does not exist because the evidence overwhelmingly supported the jury's verdict, and therefore, counsel's failure to take the actions petitioner

posits did not affect the outcome of petitioner's trial. Indeed, the government provided not only testimony from dozens of other witnesses but also extensive physical evidence indicating petitioner and Witham committed the offenses, including disguises containing petitioner's DNA and numerous firearms [*See generally* Docs. 145, 147]. Therefore, the Court finds no prejudice.[10]

3. Counsel's Conduct Regarding Petitioner's Motion for a New Trial

Petitioner argues counsel was ineffective because petitioner and counsel had a conflict of interest that caused counsel to refuse to file a motion for a new trial for petitioner and thereby forced petitioner to file a pro se motion for a new trial [*See* Doc. 1 p. 16].[11]

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[10] Petitioner argues counsel should have allowed petitioner to testify at trial. At the outset, petitioner waived this argument by failing to adequately develop it. *See Thomas v. United States*, 849 F.3d 669, 679 (6th Cir. 2017). Even so, the record reflects that petitioner knowingly and voluntarily waived his right to testify by confirming with the Court he was not interested in testifying [*See* No. 3:15-CR-177-1 Doc. 249 pp. 249–51].

Separately, petitioner argues counsel was ineffective because he had a conflict of interest because counsel prevented petitioner from testifying, did not provide sufficient investigation, did not call any witnesses, and did not challenge actions of the prosecution [Doc. 1 p. 16]. The Court summarily rejects these arguments because they are perfunctory and therefore waived or the Court has already rejected these arguments. *See Thomas*, 849 F.3d at 679. And regardless, petitioner has not shown there was "an actual significant conflict" because petitioner does not explain how the alleged conflict caused counsel to "make bad choices for his client." *See United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996) (citation omitted).

[11] Petitioner argues the Court denied him the right to counsel for the same reason [*See* Doc. 2 p. 54]. The Court rejects this argument as the Sixth Circuit held petitioner waived this argument by failing to raise it on appeal [*See* No. 3:15-CR-177-1 Doc. 311 p. 5].

Similarly, the Court rejects petitioner's arguments that the Court failed to consider his Rule 60 motion as an extension of his Rule 33 motion [Doc. 2 p. 54] and that the Court has not already addressed his arguments in that motion [*Id.* at 60–63] because the Court and Sixth Circuit have already rejected these arguments [No. 3:15-CR-177-1 Doc. 311 p. 4. *See generally* Doc. 285].

A conflict of interest constitutes ineffective assistance of counsel only if the petitioner demonstrates there was "an actual significant conflict" that caused counsel to "make bad choices for his client." *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996) (citation omitted).

The Court finds petitioner has not satisfied this burden. Petitioner demanded that counsel present prosecutorial misconduct claims that counsel felt were inappropriate [No. 3:15-CR-177-1 Doc. 243 p. 3]. When counsel reasonably refused, petitioner agreed to file his motion pro se, and the Court permitted petitioner to do so after conducting a *Faretta* colloquy [*See* No. 3:15-CR-177-1 Docs. 163, 243]. From these facts, the Court concludes no conflict of interest even existed. And even if a conflict existed, the conflict did not cause counsel to make any "bad choices" for petitioner. *See Mays*, 77 F.3d at 908. Indeed, counsel stated he preferred to allow petitioner to proceed pro se because such was in petitioner's best interests [*See* No. 3:15-CR-177-1 Doc. 243 pp. 5–6]. The Court further notes petitioner's decision to file his motion pro se was knowing and voluntary as reflected by his answers during the Court's colloquy [*See generally id.*]. Therefore, the Court finds petitioner has not met his burden to demonstrate ineffective assistance of counsel on this issue.

4. Counsel's Conduct Regarding Sentencing

Petitioner argues counsel should have challenged the Court's application of various provisions of the sentencing guidelines [*See* Doc. 2 p. 118; Doc. 19 p. 25]. First, petitioner argues counsel should have challenged application of U.S.S.G. § 2A4.1(b)(1), which

provides an upward adjustment when the offense involves a ransom demand [Doc. 19 p. 25]. *See* U.S.S.G. § 2A4.1(b)(1) (2018). The Court finds petitioner has not met his burden to establish counsel's performance was deficient on this issue because counsel challenged application of this adjustment on other grounds [*See* 3:15-CR-177-1 Doc. 185 pp. 2–3], and petitioner does not explain how counsel's alternative argument was suboptimal. *See Strickland v. Washington*, 466 U.S. 668, 690–91 (1984) ("[S]trategic choices . . . are virtually unchallengeable.").

Second, petitioner argues counsel should have challenged application of the role adjustment under U.S.S.G. § 3B1.1 and the vulnerable victim adjustment under U.S.S.G. § 3A1.1(b)(1) [Doc. 19 p. 25]. *See* U.S.S.G. §§ 3A1.1(b)(1), 3B1.1 (2018). However, petitioner provides no explanation regarding either how his attorney's decision not to challenge these adjustments constituted deficient performance or how there is a reasonable probability that the Court would not have applied the adjustments had counsel challenged them. Regardless, the Court finds no prejudice because the Court properly applied these adjustments based on the full record, which establishes that: (1) petitioner served in a leading role as he directed Witham's actions and received most of the proceeds from his and Witham's offenses; and (2) the crimes involved vulnerable victims as they involved young children [*See* No. 3:15-CR-177-1 Doc. 197 ¶¶ 31, 35–36; Doc. 241 pp. 126–27, 216]. *See United States v. Myree*, 89 F. App'x 565, 566–67 (6th Cir. 2004) (finding the district court properly applied the vulnerable victim adjustment when the offense involved

young children held at gunpoint). Therefore, petitioner has not demonstrated counsel was ineffective for failing to challenge these adjustments.[12]

5. Waiver of Undeveloped Claims

At the end of his motion, petitioner provides yet another list containing 49 conclusory grounds for ineffective assistance of counsel [*See* Doc. 2 pp. 119–23]. As with the arguments in petitioner's other lists, every single ground in this final list is either an argument the Court has already addressed or an argument comprised of a single, conclusory sentence stating counsel was ineffective for an undeveloped reason.

With respect to the grounds the Court has already addressed, the Court relies on its already-stated reasoning. With respect to the grounds not already addressed, the Court repeats that "[a] party waives issues that he adverts to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *Thomas v. United States*, 849 F.3d 669, 679 (6th Cir. 2017). The Court finds that petitioner waived the undeveloped arguments in this final list because they are conclusory and petitioner provides no explanation as to how each action by counsel was defective or how alternative action could have changed the outcome.

[12] Petitioner asserts and the government rebuts that appellate counsel was ineffective for several reasons [*See* Doc. 13 pp. 53–56]. However, the Court sees no need to devote an entire section addressing these arguments. To the extent petitioner challenges appellate counsel's effectiveness on grounds already addressed as to trial counsel, the Court relies on its reasoning as to trial counsel's effectiveness in holding that appellate counsel's representation was not ineffective. Additionally, other than petitioner's argument that appellate counsel was ineffective for making an erroneous concession—which the Court addressed *supra* note 9—petitioner's arguments that are specific to appellate counsel are perfunctory and therefore waived [*See, e.g.*, Doc. 2 p. 31]. *See Thomas v. United States*, 849 F.3d 669, 679 (6th Cir. 2017).

6. Conclusion as to Ineffective Assistance of Counsel

For the foregoing reasons, petitioner has not demonstrated any action of counsel constituted ineffective assistance. Therefore, all of petitioner's claims for ineffective assistance of counsel will be **DENIED**.

C. Prosecutorial Misconduct

Petitioner argues counsel for the government committed prosecutorial misconduct for various reasons [Doc. 2 pp. 85–104]. The Court need not discuss these specific arguments because they are procedurally defaulted.

"Section 2255 is not a substitute for a direct appeal, and thus a defendant cannot use it to circumvent the direct appeal process." *Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003) (citation omitted). Therefore, with limited exceptions, claims not asserted on direct appeal are procedurally defaulted and therefore may not be asserted via a § 2255 motion. *See Peveler v. United States*, 269 F.3d 693, 698–700 (6th Cir. 2001). However, there are exceptions to procedural default where the petitioner demonstrates "cause and prejudice or actual innocence" as to the underlying charges. *Id.*

The Court finds that petitioner's claims for prosecutorial misconduct are procedurally defaulted and/or were previously litigated and are therefore not subject to the Court's review. *See Lundgren v. Mitchell*, 440 F.3d 754, 777–78 (6th Cir. 2006) (holding prosecutorial misconduct claims were procedurally defaulted when the petitioner failed to present them on direct review). The Court notes that ineffective assistance of counsel did not cause procedural default because, as this Court recognized in a previous order, even

petitioner's claims that have not been previously litigated for prosecutorial misconduct are meritless [*See generally* No. 3:15-CR-177-1 Doc. 199].

Consequently, petitioner's prosecutorial misconduct claims will be **DENIED**.

D. The Court's Evidentiary Determination

Petitioner next challenges this Court's decision to admit evidence that petitioner "frequented a strip club, cheated on his girlfriend, embezzled from his business, and engaged in fraudulent schemes" [Doc. 2 pp. 106–13]. Petitioner recognizes that the Sixth Circuit found the Court's admission of this evidence was a harmless error [*Id.* at 106–07].

It is axiomatic that this Court is bound by the decisions of the Sixth Circuit. *See Woods v. United States*, Nos. 2:07-CV-232, 2:03-CR-69, 2011 WL 284618, at *12 (E.D. Tenn. Jan. 25, 2011). As petitioner recognizes, the Sixth Circuit held admission of the challenged evidence constituted a harmless error [No. 3:15-CR-177-1 Doc. 275 pp. 7–9]. The Court therefore will not and indeed cannot disrupt that decision.

Therefore, petitioner's evidentiary challenge will be **DENIED**.

E. First Step Act § 403

In petitioner's motion to appoint counsel [Doc. 9], petitioner avers his 25-year mandatory consecutive sentences for his § 924(c) convictions are invalid in light of § 403 of the First Step Act. The government responds that § 403 does not apply because petitioner was sentenced before Congress enacted § 403 and § 403 does not apply retroactively [Doc. 13 pp. 55–56, 65].

Prior to the First Step Act, § 924(c) required mandatory minimum 25-year consecutive terms where the defendant was convicted under § 924(c) and had at least one other § 924(c) conviction, and even a different § 924(c) conviction in the same prosecution qualified. *United States v. Mackenzie*, No. 3:00-CR-4-DJH-HBB, 2021 WL 4991516, at *2 (W.D. Ky. Oct. 27, 2021). However, after the First Step Act, a 25-year mandatory minimum consecutive sentence for a subsequent § 924(c) conviction applies only if the defendant has a prior § 924(c) conviction in a prior proceeding. *Id.* at *3.

Regardless, only "[d]efendants sentenced after December 21, 2018, may benefit from [§ 403;] defendants sentenced before that date cannot." *United States v. Richardson*, 948 F.3d 733, 748 (6th Cir. 2020); *see also* First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222. Here, the Court sentenced petitioner on July 18, 2017 [No. 3:15-CR-177-1 Doc. 203], well before December 21, 2018. Thus, § 403 provides petitioner no basis for relief.

Therefore, petitioner's § 403 claim will be **DENIED**.

F. ACCA Enhancement Claims and *Johnson*

Petitioner argues the Court improperly enhanced his sentence under the ACCA [Doc. 1 p. 14; Doc. 2 pp. 117–18; Doc. 19 pp. 24–25]. Specifically, petitioner argues his prior convictions for robbery and attempted murder are not ACCA predicates in light of *Johnson*, which held that the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague [Doc. 2 pp. 117–18]. The government argues *Johnson* provides

no basis for relief because petitioner was not sentenced under the residual clause [Doc. 13 p. 55].

It is true that the Court enhanced petitioner's sentence under the ACCA as to Counts Nine, Sixteen, and Twenty-three. But it is not clear that the Court relied on the residual clause in imposing these enhancements such that *Johnson* provides a basis for relief. The judgment only indicates the Court sentenced petitioner under § 924(e) [*See* No. 3:15-CR-177-1 Doc 204 p. 2]; it does not specify whether petitioner was sentenced under the residual clause or the still-effective force or enumerated offenses clauses.

A court should address the merits of a petitioner's *Johnson* arguments only "[w]here it is unclear which ACCA clause [the] court relied on to enhance a sentence" and the movant shows "that the sentencing court *might have* relied on the residual clause." *See Chaney v. United States*, 917 F.3d 895, 899–900 (6th Cir. 2019). Where a court sentences a defendant years after a landmark decision such as *Johnson* that renders unconstitutional only a portion of a statute, it can be inferred that the court was aware of that landmark decision and acted in accordance with it. *See United States v. Jones*, No. 2:15-CR-DLB-1, 2016 WL 11212438, at *1, *1 n.1 (E.D. Ky. June 20, 2016) (suggesting the defendant was not entitled to *Johnson* relief because the defendant was sentenced after *Johnson* but addressing the merits only "out of an abundance of caution"); *see also United States v. McElroy*, 673 F. App'x 896, 897 (10th Cir. 2017) (on request for a certificate of appealability, noting that the petitioner's *Johnson* claim was meritless partially because the petitioner was "sentenced after *Johnson*").

Here, the Court finds there is no possibility that the Court relied on the residual clause in sentencing petitioner. The Supreme Court decided *Johnson* two years before petitioner's sentencing hearing, and given the importance of *Johnson*, this Court was well aware of *Johnson* when it sentenced petitioner. Thus, petitioner has not shown the Court "*might have*" relied on the residual clause. Therefore, the Court refuses to address the merits of petitioner's claims. *See id.*[13]

Accordingly, petitioner's *Johnson* claims will be **DENIED**.

G. Section 924(c) Claims and *Davis*

Petitioner argues his convictions as to Counts Two, Four, Eight, Eleven, Fifteen, Eighteen, and Twenty-two must be vacated in light of *Davis* [Doc. 2 pp. 113–17; Doc. 34]. The government concedes these convictions must be vacated [Doc. 13 pp. 59–66].

Section 924(c) imposes criminal liability upon one who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). Section 924(c)(3) defines "crime of violence" as a felony that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) . . . by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the

[13] In *Chaney*, the Sixth Circuit held that the petitioner showed that the sentencing court "*might have*" relied on the residual clause primarily because the petitioner had been sentenced *before* (rather than after) *Johnson* and the record was unclear whether the petitioner was convicted under the residual clause or the force clause. *Chaney v. United States*, 917 F.3d 895, 899–900 (6th Cir. 2019). *Chaney* is readily distinguishable because, here, petitioner was sentenced *after Johnson*. Moreover, in *Chaney*, the record somewhat supported that the court relied on the residual clause. *Id.*

offense." *Id.* § 924(c)(3). In 2019, the Supreme Court decided *Davis*, where it held that § 924(c)(3)(B)'s residual-clause definition for "crime of violence" was unconstitutional. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). Thus, after *Davis*, an offense qualifies as a "crime of violence" only if it satisfies the other provisions of § 924(c)(3). *Davis* applies retroactively on collateral review; thus, petitioner's claims are cognizable. *See generally In re Franklin*, 950 F.3d 909 (6th Cir. 2020).

Turning to petitioner's *Davis* claims, petitioner was convicted of Count Two under § 924(c) based on his underlying conviction for conspiracy to commit robbery and extortion in violation of 18 U.S.C. § 1951 in Count One [No. 3:15-CR-177-1 Docs. 30, 204]. The parties recognize that conspiracy to commit robbery and extortion in violation of § 1951 no longer qualifies as a § 924(c) predicate offense after the Sixth Circuit's decision in *United States v. Ledbetter*. 929 F.3d 338, 361 (6th Cir. 2019). Therefore, the Court finds that petitioner's conviction as to Count Two must be vacated.

Additionally, petitioner was convicted of Counts Eight, Fifteen, and Twenty-two under § 924(c) based on his underlying convictions for kidnapping in Counts Seven, Fourteen, and Twenty-one [No. 3:15-CR-177-1 Docs. 30, 204]. The parties recognize that kidnapping no longer qualifies as a § 924(c) predicate offense after the Sixth Circuit's decision in *Knight v. United States*. 936 F.3d 495, 497–98 (6th Cir. 2019). Therefore, the Court finds that petitioner's convictions as to Counts Eight, Fifteen, and Twenty-two must be vacated.

Finally, petitioner was convicted of Counts Four and Eighteen under § 924(c) based on his underlying convictions for attempted armed bank extortion in Counts Three and Seventeen [No. 3:15-CR-177-1 Docs. 30, 204]. Petitioner was further convicted of Count Eleven under § 924(c) based on his underlying conviction for armed bank extortion in Count Ten [No. 3:15-CR-177-1 Docs. 30, 204]. While the parties have some dispute as to petitioner's convictions as to Counts Four, Eleven, and Eighteen, the parties ultimately agree that these convictions must be vacated. Therefore, the Court finds that petitioner's convictions as to Counts Four, Eleven, and Eighteen must be vacated.[14]

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[14] Petitioner suggests his convictions as to Counts Four, Eleven, and Eighteen were for "bank robbery" under § 2113(a) [*See* Doc. 34 p. 5]. Petitioner argues § 2113(a) "bank robbery" is a single, indivisible offense under the categorical approach that can be accomplished by any one of three listed means: (1) force and violence; (2) intimidation; and (3) extortion [*Id.* at 6–7]. From there, petitioner argues the second variant—bank robbery by intimidation—does not qualify as a "crime of violence" under § 924(c) because it criminalizes merely negligent conduct [*Id.* at 8]. Thus, because petitioner argues that "bank robbery" is indivisible and bank robbery by intimidation is not a "crime of violence," petitioner concludes that "bank robbery" as a whole—even under the first and third variants—does not qualify as a predicate offense [*Id.* at 15].

The government responds that § 2113(a) is a divisible offense and cites cases from other circuits in accord [Doc. 13 pp. 60–61]. Specifically, the government argues that "bank robbery" occurs only by force and violence or by intimidation and that this definition of "bank robbery" under § 2113(a) is divisible from the crime of "bank extortion" under § 2113(a) [*Id.* at 60–61]. The government argues that "bank robbery" under this definition remains a § 924(c) predicate offense after *Davis* [*Id.* at 61–62]. However, the government argues that "bank extortion" as defined is not a § 924(c) predicate. Thus, the government concedes the Court should dismiss the § 924(c) charges because they are based on "bank extortion" rather than "bank robbery" [*Id.* at 62].

Because the parties ultimately agree that petitioner's convictions as to Counts Four, Eleven, and Eighteen must be vacated, the Court will not address the merits of whether "bank extortion" is divisible from "bank robbery" as the government defines them and, if so, whether petitioner's convictions for "bank extortion" as the government defines it constitutes a "crime of violence." *See Allen v. Parker*, 542 F. App'x 435, 436 (6th Cir. 2013) (stating that courts may accept even an unmeritorious concession of the government in the § 2254 context); *see also Maxwell v. United States*, 617 F. App'x 470, 473 (6th Cir. 2015) (same in the § 2255 context).

In light of the foregoing, petitioner's convictions in Counts Two, Four, Eight, Eleven, Fifteen, Eighteen, and Twenty-two will be **VACATED**.

III. Remedy

As discussed *supra*, petitioner is entitled to relief only insofar as his *Davis* claims are concerned, and therefore, petitioner's convictions as to Counts Two, Four, Eight, Eleven, Fifteen, Eighteen, and Twenty-two must be vacated. While the parties agree these convictions must be vacated, they disagree as to the proper remedy.

The government argues the Court should simply vacate these convictions and corresponding sentences and then correct petitioner's sentence by imposing a sentence with terms essentially identical to those listed in the initial judgment [Doc. 13 pp. 62–64]. Petitioner avers that the Court should vacate petitioner's entire sentence and then resentence petitioner on all counts at a resentencing hearing [Doc. 39]. Petitioner reasons that after the Court vacates seven of petitioner's § 924(c) convictions, he will be guilty of fewer total counts, and this may cause the Court to conclude a lesser sentence is appropriate [*Id.*].

When a court concludes that a petitioner is entitled to § 2255 relief, the court may "resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). "[A] court imposing a corrected sentence will have discretion to impose a corrected sentence based on a brief order, a hearing that resembles a de novo sentencing proceeding, or anything in between" so long as the sentence is reasonable. *United States v. Nichols*, 897 F.3d 729, 738 (6th Cir. 2018). "When the court imposes a

corrected sentence that is largely consistent with the rationale of the original sentence, a de novo resentencing would be largely redundant and wasteful." *Id.* If the court corrects a sentence, "the court does no more than mechanically vacate . . . unlawful convictions (and accompanying sentences)." *United States v. Stewart*, No. 1:07CR289-1, 2020 WL 60194, at *2 (N.D. Ohio Jan. 6, 2020) (omission in original) (quoting *United States v. Flack*, 941 F.3d 238, 241 (6th Cir. 2019)).[15]

The Court finds an appropriate remedy is to correct petitioner's sentence without a de novo resentencing and hearing. Petitioner's offenses are extremely serious, involving multiple instances of kidnapping adults and children and holding them at gunpoint. The fact that seven § 924(c) counts must be vacated does not change the severe and violent nature of petitioner's offense conduct. *See Stewart*, 2020 WL 60194, at *3 (correcting the petitioner's sentence rather than resentencing the petitioner where, like here, the petitioner's offenses were "extreme—'something pretty much out of Hollywood'—and warranted a high[] sentence." (citation omitted)). The Court considered in full detail at the initial sentencing hearing the severity of petitioner's offenses and does so again in reaching the conclusion that a corrected sentence is appropriate [*See* No. 3:15-CR-177-1 Docs. 197, 205]. Therefore, the Court finds that correcting petitioner's sentence is "consistent with the rationale of the original sentence [and therefore] a de novo resentencing would be largely redundant and wasteful." *See Nichols*, 897 F.3d at 738.

[15] The Court notes that petitioners have no right to a resentencing hearing or allocution. *Pasquarville v. United States*, 130 F.3d 1220, 1223 (6th Cir. 1997).

Accordingly, the Court will **DIRECT** the clerk to correct petitioner's sentence as stated in Part IV below.

IV. Conclusion

For the foregoing reasons, petitioner's 28 U.S.C. § 2255 motion [Doc. 1] and petitioner's counsel's supplemental motion [Doc. 34] will be **GRANTED in part and DENIED in part**. Petitioner's convictions as to Counts Two, Four, Eight, Eleven, Fifteen, Eighteen, and Twenty-two will be **VACATED**. The Clerk will be **DIRECTED** to **CORRECT** petitioner's sentence as follows:

- Petitioner shall retain life sentences as to Counts Three, Seven, Nine, Ten, Fourteen, Sixteen, Seventeen, Twenty-one, and Twenty-three (with Counts Nine, Sixteen, and Twenty-three to be merged) to be served concurrently;
- Petitioner shall retain a sentence of 240 months as to Count One to be served concurrently with the above counts;
- Petitioner shall retain a sentence of 180 months as to Counts Five, Twelve, and Nineteen to run concurrently with each other and the above counts; and
- Petitioner shall be sentenced to a 60-month term of imprisonment as to Count Six and shall retain two 25-year terms of imprisonment as to Counts Thirteen and Twenty, all to be served consecutively to each other and the above counts.

Thus, in sum, petitioner's sentence will be corrected to an aggregate term of imprisonment of life in addition to 55 years of imprisonment, which will run consecutively to petitioner's other sentences.

This action will be **DISMISSED**. The Court will **CERTIFY** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** petitioner leave to proceed *in forma pauperis* on appeal. *See* Fed. R. App. P. 24. Moreover, because petitioner has not made a substantial showing of the denial of a constitutional right and jurists of reason would not dispute the above conclusions, a certificate of appealability **SHALL NOT ISSUE**. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A separate order will enter.

ENTER:

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

MICHAEL BENANTI,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos.: 3:20-CV-194-TAV-DCP
	)	3:15-CR-177-TAV-DCP-1
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT ORDER

For the reasons stated in the memorandum opinion filed contemporaneously, petitioner's 28 U.S.C. § 2255 motion [Doc. 1] and petitioner's counsel's supplemental motion [Doc. 34] are hereby **GRANTED in part and DENIED in part**. Petitioner's convictions as to Counts Two, Four, Eight, Eleven, Fifteen, Eighteen, and Twenty-two are hereby **VACATED**. The Clerk is **DIRECTED** to **CORRECT** petitioner's sentence as follows:

- Petitioner shall retain life sentences as to Counts Three, Seven, Nine, Ten, Fourteen, Sixteen, Seventeen, Twenty-one, and Twenty-three (with Counts Nine, Sixteen, and Twenty-three to be merged) to be served concurrently;
- Petitioner shall retain a sentence of 240 months as to Count One to be served concurrently with the above counts;
- Petitioner shall retain a sentence of 180 months as to Counts Five, Twelve, and Nineteen to run concurrently with each other and the above counts; and

- Petitioner shall be sentenced to a 60-month term of imprisonment as to Count Six and shall retain two 25-year terms of imprisonment as to Counts Thirteen and Twenty, all to be served consecutively to each other and the above counts.

Thus, in sum, petitioner's sentence shall be corrected to an aggregate term of imprisonment of life in addition to 55 years of imprisonment, which will run consecutively to petitioner's other sentences.

This action is **DISMISSED**. The Court **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, any application by petitioner for leave to proceed in forma pauperis on appeal is **DENIED**. *See* Fed. R. App. P. 24. Any appeal from this order will be treated as an application for a certificate of appealability, which is hereby **DENIED** because petitioner has not made a substantial showing of the denial of a constitutional right and jurists of reason would not dispute the above conclusions. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

ENTER:

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

LeAnna R. Wilson
CLERK OF COURT

Additional material from this filing is available in the Clerk's Office.