United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 13, 2022
Lyle W. Cayce
Clerk

No. 20-10303

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROBERT HADLEY GROSS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:16-CV-71

Before JONES, SOUTHWICK, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Robert Hadley Gross appeals the district court's judgment denying his 28 U.S.C. § 2255 motion. This court granted Gross a certificate of appealability (COA) on the issue whether his counsel was ineffective for failing to file a notice of appeal based on Gross's argument that there were nonfrivolous grounds for appealing his $100,000 fine. We AFFIRM.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

I.

Gross was charged with 52 counts of health care fraud and pleaded guilty to one of those counts. As part of his plea agreement, Gross agreed to pay over $1.8 million in restitution, over $2,000 in costs incurred by the United States Marshal's Service, and a special assessment of $100. Gross acknowledged that the maximum fine that the district court could impose was $250,000 and further agreed that any fine or other financial obligation imposed would be paid from funds in one of his financial accounts seized by the Government.

At his rearraignment, Gross confirmed his understanding of the maximum statutory fine of $250,000 and that any fine would be paid out of the aforementioned bank account. The presentence report calculated a Sentencing Guidelines range of 57 to 71 months of imprisonment and a fine range of $10,000 to $100,000. The district court sentenced Gross to 71 months of imprisonment, three years of supervised release, and a fine of $100,000 in addition to the agreed-upon restitution amount.

Gross did not appeal his conviction or sentence.[1] He subsequently filed a § 2255 motion, alleging that his trial counsel had provided ineffective assistance by failing to file a notice of appeal despite his explicit request that she do so. After obtaining postconviction counsel, Gross filed an amended § 2255 motion, in which he added an allegation that trial counsel had failed to consult with him regarding an appeal.

At an evidentiary hearing before a magistrate judge (MJ), Gross testified that he told trial counsel immediately after being sentenced, and again during a meeting a month later, that he wanted to appeal. He testified

[1] Gross was released from imprisonment on October 31, 2019.

that he desired to appeal his sentence and "was also very angry about the fine." By contrast, Gross's trial counsel testified that she did not recall Gross ever telling her that he wanted to appeal and stated that she would have filed a notice of appeal had he requested, although she told Gross the case did not present any appealable issues in her opinion.

In a posthearing memorandum, Gross alleged, for the first time, that reasonable trial counsel would have recognized three nonfrivolous bases for appealing the $100,000 fine: procedural unreasonableness, substantive unreasonableness, and unconstitutionality.

The MJ found counsel's testimony more credible than Gross's testimony and recommended that his § 2255 motion be denied. Specifically, the MJ found that Gross had neither informed trial counsel of his desire to appeal nor otherwise reasonably demonstrated an interest in appealing the fine. The district court adopted these findings but referred the case back to the MJ for a determination whether counsel had an independent duty to consult with Gross about an appeal of the fine and whether there existed objectively nonfrivolous grounds for challenging the fine amount.

The MJ found that all of Gross's proffered bases for appealing the fine were frivolous under the plain error standard that would govern the appeal and that no other relevant legal factors supported an appeal of the fine. Therefore, the MJ concluded, trial counsel did not have an independent duty to consult Gross about an appeal. The district court adopted the MJ's findings, overruled Gross's objections thereto, and dismissed his § 2255 motion with prejudice. The court also denied a COA.

Gross timely appealed and moved for a COA in this court. This court granted a COA "solely on the issue whether Gross's trial counsel was ineffective for failing to file a notice of appeal based on Gross's argument that there were nonfrivolous grounds for appealing his $100,000 fine."

II.

In order to prove ineffective assistance of counsel, a defendant must demonstrate (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* at 484. Both the deficient performance and prejudice prongs "may be satisfied if the defendant shows nonfrivolous grounds for appeal." *Id.* at 486 (citation omitted).

Citing *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429, 438 n.10, 108 S. Ct. 1895, 1902 n.10 (1988), a case about the standards applicable to a motion to withdraw under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), Gross contends that an issue should be deemed nonfrivolous for purposes of deficient performance under *Strickland* if it has "*any* basis in law or fact." In the context of whether an appeal is taken in good faith, and thus not frivolous for purposes of in forma pauperis appeals, this court has relied on the *Anders* standard, holding that an appeal is not in bad faith if it involves "'legal points arguable on their merits (and therefore not frivolous).'" *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (quoting *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400). We see no reason to apply a different standard here and, thus, must determine whether there were any "legal points arguable on their merits" for appealing the $100,000 fine imposed by the district court.

III.

Gross argues that an appeal of the substantive reasonableness of the fine would have been nonfrivolous because the district court had already imposed a lengthy prison term and substantial restitution.[2] He relatedly argues that the district court's waiver of statutory interest "suggests inability to pay" the fine. As such, he appears to conclude that his combined sentence is "greater than necessary to accomplish the purposes set forth in 18 U.S.C. § 3553." *United States v. Miller*, 665 F.3d 114, 122 (5th Cir. 2011); *see* U.S. SENT'G GUIDELINES MANUAL § 5E1.2(d)(1), (4) (U.S. SENT'G COMM'N 2021) (stating that in determining the amount of a fine, the district court shall consider "the need for the combined sentence to reflect the seriousness of the offense . . . , to promote respect for the law, to provide just punishment and to afford adequate deterrence" as well as any restitution the defendant has made or is required to make).

As the MJ and district court determined, however, any challenge to the substantive reasonableness of the fine would be subject to plain error review on appeal due to Gross's failure to object to the fine in the district court. *See United States v. Brantley*, 537 F.3d 347, 351 (5th Cir. 2008) (reviewing district court's imposition of fine for plain error where defendant did not object to fine at sentencing). Gross acceded to a plea agreement expressly noting that he could be fined up to $250,000. The $100,000 fine imposed by the district court was far below the statutory maximum and was within the range of the Sentencing Guidelines; therefore, the fine is presumed reasonable. *See United States v. Pacheco-Alvarado*, 782 F.3d 213,

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[2] Gross first argues that trial counsel herself recognized "that Gross 'could have' challenged the reasonableness of the fine on appeal." But he takes counsel's statement out of context; she was merely agreeing that a challenge to the fine was not barred by an appeal waiver, not that such an appeal would have arguable merit.

221 (5th Cir. 2015). The record also established Gross's ability to pay the fine, as he stipulated that any fine would be paid out of the over $500,000 the Government seized from one of his bank accounts.

Given these facts, any argument that the $100,000 fine imposed by the district court was clearly or obviously substantively unreasonable would not have been arguable on its merits. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 1429 (2009); *cf. United States v. McElwee*, 646 F.3d 328, 340 (5th Cir. 2011) (affirming above-guidelines fine on plain error review where fine was well within statutory maximum and defendant failed to show that he was unable to pay it).[3] Thus, Gross has failed to demonstrate that he received ineffective assistance of counsel. *Roe*, 528 U.S. at 486, 120 S. Ct. at 1039.

Based on the foregoing, the district court's judgment denying Gross's § 2255 motion is AFFIRMED.

[3] Gross does not assert, as he did in the district court, that there is any nonfrivolous basis for appealing the procedural reasonableness or constitutionality of the fine; therefore, any such argument is deemed abandoned. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (holding that habeas petitioner abandoned claims by failing to argue them in body of brief).

United States Court of Appeals for the Fifth Circuit

No. 20-10303

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROBERT HADLEY GROSS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:16-CV-71

ORDER:

Robert Gross moves for a certificate of appealability (COA) from the denial of 28 U.S.C. § 2255 motion. He pleaded guilty to one count of Health Care Fraud in violation of 18 U.S.C. § 1347. Pursuant to the plea agreement, the Government moved to dismiss all other counts of the Indictment. Gross was sentenced to 71 months of incarceration in the Bureau of Prisons followed by a three-year term of supervised release. He was also ordered to pay $1,832,869.21 in restitution, and a $100,000 fine. Gross contends that the district court erred by denying his claims of ineffective assistance of counsel. He argues that counsel was ineffective for failing to adequately

consult with Gross about an appeal of his $100,000 fine to the extent there were non-frivolous grounds for doing so.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A petitioner satisfies the standard for obtaining a COA "by demonstrating 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." *Id.* In deciding whether to grant a COA, a court does not undertake a full consideration of the merits underlying a particular claim but rather engages in a threshold inquiry into whether the circuit court may entertain the appeal. *Id.* at 336.

To demonstrate ineffective assistance of counsel under the Sixth Amendment, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) such deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). In *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), the Supreme Court explained how the *Strickland* test applies in the context of counsel's failure to file an appeal. Under *Flores-Ortega*, "[c]ounsel has a constitutionally imposed duty to consult . . . when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 471. Gross's COA application is GRANTED solely on the issue whether Gross's counsel was ineffective for failing to file a notice of appeal based on Gross's argument that there were non-frivolous grounds for appealing his $100,000 fine.

Jennifer W. Elrod

JENNIFER WALKER ELROD
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT HADLEY GROSS,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil Action No. 6:16-cv-00071-P**
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER

The United States Magistrate Judge issued findings and conclusions and recommended denying Robert Hadley Gross's Motion to Vacate, Set Aside or Correct Sentence. *See* FCRs, ECF No. 62. Before the Court is Gross's Objections to the abovementioned findings, conclusions and recommendations (ECF No. 62), filed December 26, 2019. Having considered the FCRs, briefing, and applicable law, the Court concludes that Gross's Objections should be and hereby are **OVERRULED**. The Court accepts the U.S. Magistrate Judge's recommendations and **DENIES** Gross's Motion to Vacate.

BACKGROUND

On October 15, 2014, Gross was charged by indictment with multiple counts of the felony offense of Health Care Fraud in violation of 8 U.S.C. § 1347. *See United States v. Robert Hadley Gross,* No. 6:14-CR-38. Criminal Case ECF No. 1. On October 16, 2014, an initial appearance was held before United States Magistrate Judge E. Scott Frost, and Gross was represented at said hearing by retained counsel, Mr. John Young, Esq. *See id.*,

ECF No. 5. On October 27, 2014, Gross was arraigned before United States Magistrate Judge Nancy M. Koenig, while he was still represented by Mr. Young. *See id.* ECF No. 10. On October 28, 2014, Mr. Young filed a Motion to Withdraw as Attorney prior to the hearing on the Government's motion to detain. *See id.* ECF No. 14. Mr. Young's motion cited Gross's inability to afford retained counsel after seizure of his assets. *Id.* The motion to withdraw as attorney was granted (ECF No. 15), and on the same date Judge Koenig appointed the Federal Public Defender's Office ("FPD") to represent Gross. Ms. Sherylynn A. Kime-Goodwin, Esq. filed her notice of appearance that same day. *See id.* ECF Nos. 16, 18. Thus, Gross was represented by retained counsel in this matter solely for his initial appearance and arraignment.

On November 10, 2014, the FPD filed a Motion to Declare Complex Litigation based on the difficulty and expansiveness of the case, which was granted by United States District Judge Sam Cummings. *See id.* ECF Nos. 29, 31. On August 4, 2015, Gross filed a motion to recuse Judge Cummings after his rejection of the Plea Agreement, which was later granted based on possible interference with plea negotiations during the Judge's rejection of the Plea Agreement. *See* ECF Nos. 81, 83–84. The case was reassigned to the Amarillo Division and to United States Senior District Judge Mary Lou Robinson.

On September 23, 2015, a Plea Agreement and Factual Resume was filed, and a re-arraignment hearing was held. *See* ECF Nos. 85–86. Judge Robinson accepted the Plea Agreement and Factual Resume which did not include a waiver of Gross's appellate rights agreement. *See* ECF No. 89. Pursuant to the written Plea Agreement, Gross acknowledged the maximum penalties the Court could impose, stated he understood the Court would

impose the sentence after consideration of the United States Sentencing Guidelines, and that the guidelines were not binding on the Court. *See* ECF No. 119. Gross also acknowledged he had reviewed the guidelines with counsel but understood no one could predict with certainty the outcome of the Court's consideration of the guidelines in his case, acknowledged he would not be allowed to withdraw his plea if his sentence was higher than expected, and that he fully understood the actual sentence imposed was solely in the discretion of the Court. *Id.* Gross averred not only that there had been no guarantees or promises from anyone as to what sentence the Court would impose, but also that he had thoroughly reviewed all legal and factual aspects of his case with his lawyer and was fully satisfied with his attorney's legal representation. *Id.*

On December 16, 2015, Gross was convicted of a single count (number 11) of Health Care Fraud and sentenced to a term of 71 months of incarceration in the Bureau of Prisons with a three-year term of supervised release to follow. *See* ECF No. 98–99. Pursuant to the Plea Agreement, the Government moved to dismiss counts 1–10 and counts 12–52 of the Indictment. *Id.* Gross was also ordered to pay $1,832,869.21 in restitution and allowed to use forfeited and seized funds to pay the restitution. *Id.* An additional $100,000 fine was imposed. *Id.* Property seized pursuant to pre-trial forfeiture notices was ordered forfeited as part of the Final Order of Forfeiture issued on March 23, 2016, and the Amended Final Order of Forfeiture issued June 1, 2016. *See* ECF Nos. 110, 113. Money from a T. Rowe Price Account Number XXXXXXX569-8 was eventually returned as part of the negotiated terms of the guilty plea. At the sentencing hearing, the District Judge advised Gross of his appeal rights. *See* ECF No. 98, 120. The court entered Judgment that

same date. *See* ECF No. 99. Gross did not appeal his conviction and sentence to the United States Court of Appeals for the Fifth Circuit.

On December 19, 2016, Gross filed his original motion to vacate his sentence in the instant action styled *Robert Hadley Gross v. United States* and numbered 6:16-CV-071. *See* ECF No. 1. Gross contends that he wished to appeal his sentence, but that his defense counsel was constitutionally ineffective for failing to recognize and advise Gross of a nonfrivolous basis for appeal. On May 9, 2017, the Government filed its original response in opposition to Gross's motion. *See* ECF No. 14. Gross filed a reply to the Government's response. *See* ECF No. 25. Mr. Brandon Sample, Esq. entered his appearance on behalf of Gross and the Court allowed Gross to file an Amended Motion to Vacate, the instant Motion, and allowed further briefing from the parties. *See* ECF Nos. 37–38. The Government filed its second response on August 27, 2018. *See* ECF No. 44. Gross filed a reply on September 17, 2018. *See* ECF No. 46.

On February 27, 2019, Magistrate Judge Lee Ann Reno issued her findings, conclusions and recommendations. *See* ECF No. 57. On July 20, 2019, Senior Judge Sidney A. Fitzwater adopted in part and re-referred in part Judge Reno's findings, conclusions, and recommendations. *See* ECF No. 59. On December 12, 2019, Judge Reno issued her supplemental findings, conclusions and recommendations. *See* ECF No 62. On December 26, 2019, Gross filed a number of objections to Judge Reno's findings, conclusions, and recommendations. *See* ECF No. 63. The FCRs and Gross's objections are now ripe for review.

ANALYSIS

A. First Objection

Gross's first objection is that Magistrate Judge Reno used the wrong test in determining that his appeal was frivolous. *See* Def.'s Objections ("Objections") at 5. The main issue that the Court must resolve is whether Gross's defense counsel was constitutionally ineffective for failing to recognize and advise Gross of a nonfrivolous basis for appeal. "*Strickland v. Washington* [, 466 U.S. 668 (1984)] provides the proper framework for evaluating a claim that counsel was constitutionally ineffective for failing to file a notice of appeal." *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Under *Strickland,* a defendant must show *first* that counsel's representation "fell below an objective standard of reasonableness," and *second* that counsel's deficient performance prejudiced the defendant. 466 U.S. at 669. Furthermore, "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In addition, the Court in *Strickland* stated that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.*

Instead of following the standard laid out in *Strickland*, Gross proposes that the Court determine whether his counsel scoured the record in search of any nonfrivolous issue to appeal and then advised him of said appeal. *See* Objections at 5. This proposed test directly contravenes the standards established in *Strickland.* Gross goes as far to state that he was denied effective assistance of counsel because his counsel failed to raise a possible

extension of precedent in the context of a fine. *Id*, at 7. If this standard were to be upheld, then every defense counsel in very case would have a constitutional duty to raise possible extensions of precedent. That is an untenable position. Furthermore, the Fifth Circuit has established that counsel is only required to raise "[s]olid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir. 1999).

Gross fails to demonstrate in his objections that his counsel failed to meet the standards of effective counsel with regards to raising appeals elucidated by the Fifth Circuit and the Supreme Court of the United States. Therefore, the Court **OVERRULES** Gross's first objection.

B. Second Objection

Gross next objects to Magistrate Judge Reno's application of the plain-error standard of review in evaluating whether his objections were frivolous. *See* Objections at 6. Gross cites to a case in the First Circuit where that court held that failure to request plain-error review by the government waives the ability of the court to use said standard. *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 584 (1st Cir. 2015). While that might be the law in the First Circuit, the Fifth Circuit—the circuit in which this Court sits—has held that an appellate court may invoke the plain-error standard "sua sponte because no party has the power to control the [appellate court's] standard of review." *United States v. Duhon*, 541 F.3d 391, 394 (5th Cir. 2008) (internal quotations omitted). Therefore, if Gross were to have raised his objections on appeal, his arguments would have been subject to plain-error

review because he failed to object to the fine on any ground. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). As a result, the Court **OVERRULES** Gross's second objection.

C. Third Objection

Gross next objects to Judge Reno's conclusion that he could not, on plain-error review, mount a substantive reasonableness challenge to the $100,000 fine. *See* Objections at 8. Gross first argues that a substantive reasonableness challenge to the fine should not be subject to plain-error review. In support of this argument, Gross states that "while the Fifth Circuit requires a specific substantive unreasonableness objection to avoid plain-error review on appeal, it is the only circuit to do so." *See* Objections at 9. As Fifth Circuit precedent is binding on this Court, the Court is disinclined to ignore it.

Gross then argues that "it would not be frivolous to argue that the $100,000 fine was substantively unreasonable" given his lengthy prison sentence, $1.8 million restitution order, and the waiver of interest on the fine. *See* Objections at 12. While these facts are true, Gross fails to consider other factors that make his argument frivolous, such as the fact that his carefully crafted and complex plea agreement specifically contemplated that the Court might impose a fine and actually designated a portion of the $500,000-plus dollars earmarked for return toward satisfying any such fine. *See Criminal Case*, ECF No. 86. Moreover, on the face of his plea agreement, Gross was financially able to pay the fine, and the fine itself was well below the statutory maximum and well within the Court's broad sentencing discretion. *See United States v. Pacheco-Alvarado*, 782 F.3d 213, 220-21 (5th Cir. 2015). Gross argues that dozens of other defendants have appealed similar fine, but he also admits that "the Fifth Circuit denied relief in each of these cases." *See*

Objections at 13. The Court believes that the failure of dozens of similar appeals demonstrates that Gross's counsel met the threshold of effective service even though she did not raise this appeal with her client. Therefore, the Court **OVERRULES** Gross's third objection.

D. Fourth Objection

Gross objects to Judge Reno's conclusion that a rational defendant would not want to appeal because "Gross pled guilty and received the sentence he bargained for." *See* Objections at 13. While it is true that Gross did not agree to pay a specific-dollar amount for a fine, he did plead guilty with the full understanding that the district judge retained the discretion to impose a fine up to $250,000, and he did make a specific agreement in his plea agreement to pay any such fine with designated funds. *See* Criminal Case ECF No. 86. Gross received everything he bargained for, including a plea agreement, which the government characterized as so favorable that the prior district judge had refused to accept it. On these facts, Judge Reno correctly concluded that a reasonable defendant would not have wanted to appeal and therefore Gross's counsel met the threshold of effective service even though she did not raise this possible appeal with her client. Therefore, the Court **OVERRULES** Gross's fourth objection.

E. Certificate of Appealability

Lastly, Gross requests that if the Court adopts the Magistrate Judge's conclusions and recommendations it should also issue a certificate of appealability. Having considered this request, it is hereby **DENIED.**

CONCLUSION

Following the Court's review of the FCRs, record, and objections, the Court finds that the FCRs are correct. Accordingly, Gross's Objections are hereby **OVERRULED.** Judge Reno's recommendations are hereby **ADOPTED** and this action is **DISMISSED WITH PREJUDICE.**

SO ORDERED on this **28th day** of **January, 2020.**

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ROBERT HADLEY GROSS,	§	
	§	
Petitioner,	§	
	§	
v.	§	6:16-CV-071-P-BR
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

SUPPLEMENTAL FINDINGS, CONCLUSIONS AND RECOMMENDATION TO DENY PETITIONER'S MOTION TO VACATE

Before the Court is the *Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody* ("Motion") filed by petitioner ROBERT HADLEY GROSS ("Gross"). On February 27, 2019, the undersigned issued her Findings, Conclusions and Recommendation to deny the Motion. (ECF No. 57). On March 13, 2019, Gross filed his objections. (ECF No. 58). On July 29, 2019, the Senior District Judge issued a Memorandum Opinion and Order ("Opinion") adopting the Findings and Conclusion, in part, and re-referring the case, in part, to the undersigned for further findings. (ECF No. 59). The case was then reassigned. (ECF No. 61). For the reasons set forth below, the undersigned again recommends that Gross's motion be DENIED.

I.
ORDER RE-REFERRING CASE

The Senior District Judge, in his Opinion, re-referred this matter to the undersigned for further findings and conclusions regarding trial counsel's duty to consult with Gross about an appeal under the rational defendant (objective) standard set forth in the *Flores-Ortega* decision:

> counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing; or (2) *that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal).*

U.S. v. Cong Van Pham, 722 F.3d 320, 324 (5th Cir. 2013) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000)) (emphasis added). In the Opinion, the Senior District Judge determined that:

(1) Gross's trial counsel, Ms. Sherylynn A. Kime-Goodwin ("Kime-Goodwin"), failed to consult with Gross regarding an appeal of the $100,000 fine;

(2) Gross failed to reasonably demonstrate to Kime-Goodwin that he was interested in appealing the $100,000 fine; and

(3) Further findings and conclusions are necessary to determine if a rational defendant would want to appeal the $100,000 fine based on nonfrivolous grounds.

(ECF No. 59, pp. 4–6). The Senior District Judge also re-referred the issue of prejudice regarding any failed duty to consult regarding appeal.

II.
THE RATIONAL DEFENDANT STANDARD: APPEALING THE $100,000 FINE

The Sixth Amendment guarantees "reasonably effective" assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). To show ineffective assistance, the two-prong *Strickland* test requires a defendant to show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) such deficient performance prejudiced the defendant. *Id.* If, as here, counsel failed to consult with the defendant about an appeal, then the question is whether that failure was unreasonable because it breached the duty to consult. *Cong Van Pham*, 722 F.3d at 324. This is where the two-prong test of *Flores-Ortega* must be considered. Since Gross failed to reasonably demonstrate to Kime-Goodwin that he was interested in appealing the $100,000 fine (a subjective standard), the question remains whether a rational defendant (an objective standard) would want to appeal. In order to establish prejudice under *Strickland* for

whether a rational defendant would want to appeal, the absence of a non-frivolous issue may be considered. *Flores-Ortega*, 528 U.S. at 480. Thus, if this Court finds that there were non-frivolous issues Gross could have asserted to appeal the imposition of the $100,000 fine, the Court will presume prejudice arose when Kime-Goodwin did not consult with Gross specifically about appealing the fine.

"Neither the Supreme Court, nor the Fifth Circuit Court of Appeals, have ever expressly set out the standard to apply in considering what a hypothetical rational defendant would want to do," except the Supreme Court has indicated that a rational defendant would want to appeal if there are "non-frivolous grounds" for appeal. *Lara-Ortiz v. United States*, 2017 WL 4570378, at *7 (S.D. Tex. June 21, 2017) (citing *Flores-Ortega*, 528 U.S. at 480). "Other factors to consider are: whether the defendant pled guilty; received a sentence that bargained for in the plea agreement; and whether the defendant waived some or all of his appellate rights." *Id.* (citations omitted).

A. NON-FRIVOLOUS GROUNDS FOR APPEAL

In his Objections to the Findings, Conclusions and Recommendation issued by the undersigned, Gross proffers the following possible grounds for appealing the imposition of the $100,000 fine:

> ...[T]he fine was procedurally and substantively unreasonable. Procedurally, the Court was required to consider a host of factors before imposing the $100,000 fine. U.S.S.G. § 5E1.2(d)(1)-(8) & (e). The sentencing transcript does not reflect the Court's stated consideration of the § 5E1.2(d) & (e) factors. Moreover, the Court's decision to waive statutory interest on the fine was inconsistent with a finding of financial ability to pay and may also have constituted procedural error ... Gross could have also argued that the fine was substantive[ly] unreasonable ... Gross could have additionally argued that the fine was unconstitutional in light of *Southern Union Co. v. United States*, 567 U.S. 343 (2012). *Southern Union* held that it is a violation of the Sixth Amendment to impose a fine in excess of the statutory maximum. While the fine in Gross's case was not in excess of the statutory maximum, ... Gross could have made a nonfrivolous argument for the extension of *Southern Union* to any facts that were used to increase the fine beyond zero.

(ECF No. 58, pp. 10-13). In his Opinion, the Senior District Judge specifically made no determination as to whether these proffered grounds are "nonfrivolous." (ECF No. 59, p. 8 n.7) ("The court neither suggests nor decides that any of Gross's proffered 'non-frivolous' grounds for appeal, is, in fact, non-frivolous. In particular, the validity of his argument based on *Southern Union* appears to be especially dubious.").

Gross did not object to the imposition of a fine during his sentencing hearing, nor did he make specific objections to his Presentence Report to indicate an inability to pay any fine imposed within the guideline range. His worth and assets were before the district court as part of the negotiations regarding restitution and the partial return of seized property. As such, any review by the Fifth Circuit Court of Appeals of the imposition of a fine would be based on plain error review. Rule 51(b)—sometimes called the "contemporaneous objection rule"—advises that a party "may preserve a claim of error by informing the court" at the time of the action or ruling. Fed. R. Crim. P. 51(b). A failure to make such an objection leads to a plain error review. *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994).

The Supreme Court has identified four requirements for reversing a trial court based upon plain error review:

(1) "there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned";

(2) "the legal error must be clear or obvious, rather than subject to reasonable dispute";

(3) "the error must have affected the appellant's substantial rights"; and

(4) "if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Puckett v. United States, 556 U.S. 129, 135 (2009) (citation and internal quotation marks omitted). This standard of review provides the framework to determine whether Gross had any non-frivolous reasons to appeal the imposition of the $100,000 fine.

i. Procedural Errors Proffered by Gross

Gross's first proffered reason for appealing his fine was the alleged procedural error of the sentencing court's failure to consider the U.S.S.G. § 5E1.2(d)(1)-(8) & (e) factors in the imposition of his sentence. Gross's failure to present this procedural error to the district court during sentencing requires a plain error review by the appellate court. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 363–64 (5th Cir. 2009). To meet the four-factor test articulate by the Supreme Court in *Puckett*, Gross must show that a more extensive explanation for his sentence would have resulted in his receiving a different sentence. *Id.* at 362–64. Gross's assertion that the appellate court would be hampered in its ability to review the reasonableness of the fine without consideration of the factors is unavailing. *Id.* at 365. Even if a district judge imposes a sentence at the top end of the guideline range and fails to elaborate on his reasons for imposing that type of sentence, such a mistake would not amount to plain error. *See Hernandez v. United States*, 2015 WL 12803632, at *8 (W.D. Tex. Sept. 8, 2015) (citing *United States v. Tang*, 718 F.3d 476, 482 (5th Cir. 2013)).

Here, Gross failed to articulate how any additional explanation by the sentencing court of its reasons for imposing the fine would have resulted in a different sentence. Further, Gross fails to explain how any error "affect[ed] the fairness, integrity or public reputation of judicial proceedings" such that the appellate court, under plain error review, would not determine such an appeal was frivolous.

Gross's second proffered reason for appealing his fine was the alleged procedural error of the sentencing court's supposedly contradictory finding of the ability to pay versus the waiver of statutory interest on the fine. "Sentencing courts are required to consider a defendant's ability to pay but are not required to make explicit findings on that issue." *United States v. Hays*, 47 F.3d 427, 1995 WL 71388, at *3 (5th Cir. 1995) (per curiam) (citing *United States v. Barndt*, 913 F.2d 201, 204 (5th Cir. 1990)). In *Hays*, the district court did not specifically address Hays's ability to pay but did waive the interest on the imposition of the fine. *See United States v. Hays Brief for the Appellant,* 1994 WL 16140251 at *28 (5th Cir.) (Appellate Brief).

It is not inherently contradictory to assess a fine, finding an ability to pay the fine, but waive the statutory interest on the fine, and Gross has failed to articulate any precedent to the Court to establish this alleged contradiction. To establish plain error by the sentencing court, Gross must show that such error is clear and obvious and not subject to reasonable dispute. Gross's failure to provide any authority to support the position that waiver of statutory interest on a fine is in direct contradiction to a determination that a defendant is able to pay a fine, renders such an appeal frivolous under plain error review. Plain error review clearly applies to an unobjected-to fine. *United States v. McElwee*, 646 F.3d 328, 338 (5th Cir. 2011). A challenge to the imposition of a fine under plain error review that fails to show clear error by the sentencing court is meritless. *See United States v. Patel*, 485 Fed. App'x. 702, 720 (5th Cir. 2012).

ii. Substantive Error Proffered by Gross

Gross also proffered as a reason for appealing his fine the argument that such fine was substantively unreasonable. Under plain error review, an appellate court will not remand a case when a district court *could* have imposed the same sentence. *See United States v. Ravitch*, 128 F.3d

865, 869 (5th Cir. 1997). When such an appeal is taken, it is frivolous. *See United States v. Pistole*, 54 Fed. App'x. 795 (5th Cir. 2002).

Here, Gross does not argue that the district court was prohibited from imposing the $100,000 fine for legal or factual reasons. Rather, he states he could have argued that the imposition of any fine was "unreasonable." However, under plain error review, such argument would clearly be frivolous.

iii. Unconstitutional Fine Argument Proffered by Gross

Finally, Gross claims he could have appealed the imposition of the fine in his case based on an extension of the reasoning of *Southern Union*. *See Southern Union Co. v. United States*, 567 U.S. 343 (2012). In *Southern Union*, the Supreme Court held that "any fact that increases a defendant's maximum fine must be found by a jury." *United States v. Simpson*, 741 F.3d 539, 559 (5th Cir. 2014) (citing *Southern Union*, 567 U.S. at 363). Gross argues that he could have argued to extend this reasoning to the imposition of *any* fine in his case. This argument is patently frivolous. Gross has failed to articulate any fact that the sentencing court used to *increase* his sentence beyond the facts he admitted to in his factual resume and plea colloquy. Further, an extension of precedent would not be clear error on the part of the sentencing court under plain error review.

B. OTHER *FLORES-ORTEGA* FACTORS TO CONSIDER

Despite the lack of non-frivolous issues to appeal, the Court also finds that a rational defendant would not have appealed the $100,000 fine based on the remaining *Flores-Ortega* factors. Gross pled guilty and received the sentence that he bargained for, including a specific restitution amount, the return of a portion of the seized funds, the ability to use seized funds to pay restitution, and a sentence within the guideline range. Gross did not bargain for a specific fine

amount, but the fine imposed did not exceed the statutory maximum. Although Gross reserved certain appellate rights, he originally bargained for the waiver of those rights as a part of the same plea bargain ultimately rejected by another district judge.

These additional considerations, coupled with the lack of any non-frivolous issues for appeal, indicate to the Court that a rational defendant would not have wanted to appeal the fine imposed, at the risk of facing a new sentencing hearing where the outcome was not as favorable. This is especially true given the testimony at the Evidentiary Hearing of the complexity of the plea-bargaining negotiations in this case. Ms. Williams, who assisted in the prosecution of this case, described the negotiations in this case as "the most complex, extensive plea negotiations I had ever had in my 25 years with the United States Attorney's Office." (ECF No. 53, p. 32). Furthermore, there was real concern by both the defense and prosecution that the Plea Agreement would not be followed because the district judge's sentencing decisions were so limited by the agreement, which is generally disfavored. *Id.* at p. 32-34. The prosecution was particularly concerned in that regard because Gross had previously engaged in health care fraud in the past. *Id.* at p. 35.

Thus, the Court finds that a rational defendant in Gross's position would not appeal the imposition of the $100,000 fine. As such, the Court finds that Kime-Goodwin's performance was not deficient in her failure to consult with Gross regarding any appeal of the fine. Gross failed to proffer any non-frivolous reason to appeal the fine.

III.
RECOMMENDATION

It is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* filed by petitioner ROBERT HADLEY GROSS be DENIED.

IV.
INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a file marked copy of the Findings, Conclusions and Recommendation to ROBERT HADLEY GROSS and to each attorney of record by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED December 13, 2019.

Lee Ann Reno

LEE ANN RENO
UNITED STATES MAGISTRATE JUDGE

* NOTICE OF RIGHT TO OBJECT *

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the "entered" date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled "Objections to the Findings, Conclusions and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ROBERT HADLEY GROSS,	§	
	§	
Movant,	§	
	§	Civil Action No. 6:16-CV-071-D
VS.	§	(Criminal No. 6:14-CR-38-J(1))
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION
AND ORDER

Before the court is the United States Magistrate Judge's February 27, 2019 findings, conclusions, and recommendation and movant Robert Hadley Gross's ("Gross's") March 13, 2019 objections. After making an independent review of the pleadings, files, and records in this case, and the findings, conclusions, and recommendation of the magistrate judge, the court concludes that the findings and conclusions are correct in part. It is therefore ordered that the findings, conclusions, and recommendation of the magistrate judge are adopted in part, and, to the extent the court disagrees with the magistrate judge's findings, conclusions, and recommendation, the case is re-referred to the magistrate judge for further proceedings.

I

Without suggesting that the court agrees in every respect with the magistrate judge's analysis, the court concludes on plain error review[1] that the magistrate judge is correct in

[1]In his March 13, 2019 objections, Gross does not object to the magistrate judge's findings, conclusions, or recommendation on this ground of his § 2255 motion.

recommending that the court deny Gross's motion for relief under 28 U.S.C. § 2255 on the ground that the pretrial restraint of his untainted assets denied Gross his right to counsel of choice within the meaning of *Luis v. United States*, ___ U.S. ___, 136 S.Ct. 1083 (2016). It is therefore ordered that the recommendation of the United States Magistrate Judge is adopted as to this ground of Gross's motion.

II

Gross also seeks relief under § 2255 on the ground that his appointed trial counsel, Sherylynn A. Kime-Goodwin, Esquire ("Kime-Goodwin"), was ineffective for failing to file an appeal as instructed[2] and for failing to properly consult with Gross about an appeal.

A

The Sixth Amendment guarantees "reasonably effective" legal assistance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). "To show ineffective assistance, the two-prong *Strickland* test requires a defendant to show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) such deficient performance prejudiced the defendant." *United States v. Cong Van Pham*, 722 F.3d 320, 323 (5th Cir. 2013) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000)). "In *Roe v. Flores-Ortega*, the Supreme Court elucidated how the *Strickland* test applies in the context of counsel's failure to file an appeal 'when the defendant has not clearly conveyed his wishes [regarding an appeal] one

[2]The court concludes on plain error review that the magistrate judge is correct in concluding that Gross failed to carry his burden of showing by a preponderance of the evidence that he told and/or instructed Kime-Goodwin to file a notice of appeal. Gross does not object to this finding and conclusion in his March 13, 2019 objections.

way or the other.'" *Id.* (alteration in original) (quoting *Flores-Ortega*, 528 U.S. at 477).

Under *Flores-Ortega* the first *Strickland* prong begins with the question whether counsel "consulted" with the defendant regarding an appeal. *Flores-Ortega*, 528 U.S. at 478. "'Consulting' is a term of art that means 'advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Pham*, 722 F.3d at 323 (quoting *Flores-Ortega*, 528 U.S. at 478). "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Flores-Ortega*, 528 U.S. at 478.

"If, however, counsel failed to consult with the defendant about an appeal, then the question is whether that failure was unreasonable because it breached the duty to consult." *Pham*, 722 F.3d at 324. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480. "The existence of a duty to consult is assessed in light of 'all the information counsel knew or should have known.'" *Pham*, 722 F.3d at 324 (citing *Flores-Ortega*, 528 U.S. at 480). "Whether the conviction followed a trial or a guilty plea is 'highly relevant,' although not determinative, as is whether the defendant waived his right to appeal and whether he received a sentence for which he bargained." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480). "The Supreme Court predicted that district courts

would find a duty to consult 'in the vast majority of cases.'" *Id.* (quoting *Flores-Ortega*, 528 U.S. at 481).

B

In her findings, conclusions, and recommendation, the magistrate judge determined that Kime-Goodwin had sufficiently consulted with Gross regarding an appeal. The magistrate judge found that

> Ms. Kime-Goodwin's discussion of appellate rights *pre*-sentencing, combined with the Court's discussion and Gross's understanding of appellate rights during sentencing *and* Ms. Kime-Goodwin's contact with the defendant immediately following sentencing, all indicate that Gross could have intelligently and knowingly asserted his right to an appeal if he had wanted to do so. The Court finds that Gross, however, realized there was "nothing to gain," by an appeal as discussed at the January 11, 2016 in-person meeting with his attorney post-sentencing.

Mag. J. Rec. at 14.

Although, following *de novo* review, the court does not disagree with the magistrate judge's conclusion that Kime-Goodwin "consulted" with Gross regarding his right, generally, to file an appeal, the court is unable to conclude on the present record that Kime-Goodwin sufficiently "consulted" with Gross regarding an appeal of the $100,000 fine. In fact, the record suggests, and the government does not argue otherwise, that Kime-Goodwin never discussed with Gross the advantages and disadvantages of taking an appeal of the $100,000 fine and never made any effort to discover Gross's wishes regarding an appeal based on that

component of his sentence.[3]

C

Having concluded that Kime-Goodwin did not consult with Gross regarding the advantages and disadvantages of appealing the $100,000 fine, the court must next consider whether Kime-Goodwin had a duty to do so.[4] Under *Flores-Ortega*

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[3]In his objections, Gross appears to argue that Kime-Goodwin failed to "consult" with him because she did not discuss the procedure and time limits involved in filing an appeal or Gross's right to appointed counsel on appeal. *See* Objs. 5-6, 9. Assuming *arguendo* that Kime-Goodwin failed to consult with Gross on these matters and that she had a duty to do so, Gross has failed to establish that he was prejudged as a result of the alleged failure to consult regarding the procedure, time limits, or right to counsel on appeal. Gross presented no evidence that he would have timely filed an appeal had he been informed of the proper procedure or time limits or had he been informed of his right to appointed counsel on appeal.

[4]In *Flores-Ortega* the Court rejected "a bright-line rule that counsel must always consult with the defendant regarding an appeal," noting that such a holding would be inconsistent with *Strickland* and common sense. *Flores-Ortega*, 528 U.S. at 479-80. The Court explained:

> For example, suppose that a defendant consults with counsel; counsel advises the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years' imprisonment *as expected* and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and *counsel concludes that there are no nonfrivolous grounds for appeal*. Under these circumstances, it would be difficult to say that counsel is 'professionally unreasonable,' as a constitutional matter, in not consulting with such a defendant regarding an appeal.

Id. at 479 (emphasis added)(citation omitted). Unlike the hypothetical posed by the Court in *Flores-Ortega*, there is no indication here that the $100,000 fine was an expected component of the sentence, and, moreover, as discussed below, *see infra* § II(C), Gross contends that he has at least two non-frivolous grounds for appeal.

> counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think *either* (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), *or* (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Flores-Ortega, 528 U.S. at 480 (emphasis added).

The magistrate judge did not specifically conclude, under the second prong of *Flores-Ortega*, that Gross did not reasonably demonstrate to counsel that he was interested in appealing. But she did make sufficient factual findings, to which Gross does not object, to support such a conclusion.[5] Having conducted *de novo* review, the court adopts the magistrate judge's findings and concludes, based on the credible evidence, that Gross did not reasonably demonstrate to Kime-Goodwin that he was interested in filing an appeal.

The court's analysis, however, does not end here. A constitutionally-imposed duty to consult may *independently* arise if there is reason to think, on an objective basis, that a rational defendant in Gross's position would want to appeal.[6] *Id.* And *Flores-Ortega*

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[5]For example, the magistrate judge noted that "both [Kime-Goodwin and FPD appellate counsel Brandon Beck, Esquire ("Beck")] indicated that Gross never expressed a desire to appeal, asked about appeal, or otherwise indicated dissatisfaction with the plea deal or sentence" during telephonic conversations with Gross after his sentencing, and found the testimony of Kime-Goodwin and Beck to be more credible than Gross's testimony to the contrary. Mag. J. Rec. at 12.

[6]This prong of *Flores-Ortega* incorporates an objective "rational defendant" standard and does not consider whether the defendant in the particular case indicated any desire to appeal. *See United States v. Sturgill*, 2018 WL 6003864, at *2 (E.D. Ky. Nov. 15, 2018) ("The 'rational defendant' standard is objective, not based on whether Mr. Sturgill himself would want to appeal a decision."); *see also Lara-Ortiz v. United States*, 2017 WL 4570378, at *6 (S.D. Tex. June 21, 2017) (describing second prong of *Flores Ortega* as an "objective

suggests that a rational defendant would want to appeal if there were non-frivolous grounds for doing so. *Id.*; *see also Lara-Ortiz v. United States*, 2017 WL 4570378, at *7 (S.D. Tex. June 21, 2017) ("Neither the Supreme Court, nor the Fifth Circuit Court of Appeals, have ever expressly set out the standard to apply in considering what a hypothetical rational defendant would want to do. The Supreme Court has, however, noted that a rational defendant would want to appeal if there are 'non-frivolous grounds' for appeal. Other factors to consider are: whether the defendant pled guilty; received a sentence that was bargained for in the plea agreement; and whether the defendant waived some or all of his appellate rights." (citations omitted)), *rec. adopted*, 2017 WL 4539843 (S.D. Tex. Oct. 11, 2017); *Valletto v. United States*, 195 F.Supp.2d 643, 646 n.3 (D.N.J. 2002) (noting that in the "'objective' determination, the Supreme Court indicated that the most important consideration is the presence or absence of non-frivolous grounds for appeal," and that "[i]n this case, there are, almost without question, non-frivolous grounds for appeal," but deciding case on subjective inquiry under *Flores-Ortega* because " the Court is unable, based on the record currently before it, to determine the non-frivolousness of the[] asserted errors").

Gross contends that he has at least two non-frivolous grounds for appealing the fine in this case:

> First, Gross could have argued that the fine was procedurally and substantively unreasonable. Procedurally, the Court was required to consider a host of factors before imposing the $100,000 fine. U.S.S.G. § 5E1.2(d)(1)-(8) & (e). The

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standard"), *rec. adopted*, 2017 WL 4539843 (S.D. Tex. Oct. 11, 2017).

> sentencing transcript does not reflect the Court's stated consideration of the § 5E1.2(d) & (e) factors. Moreover, the Court's decision to waive statutory interest on the fine was inconsistent with a finding of financial ability to pay and may also have constituted procedural error. . . . Gross could have also argued that the fine was substantive[ly] unreasonable. . . . Gross could have additionally argued that the fine was unconstitutional in light of *Southern Union Co. v. United States*, 567 U.S. 343 (2012). *Southern Union* held that it is a violation of the Sixth Amendment to impose a fine in excess of the statutory maximum. While the fine in Gross's case was not in excess of the statutory maximum, . . . Gross could have made a nonfrivolous argument for the extension of *Southern Union* to any facts that were used to increase the fine beyond zero.

Objs. 10-13.[7] In her findings, conclusions, and recommendation, the magistrate judge did not address these allegedly non-frivolous ground for appeal or consider whether a rational defendant in Gross's position would have wanted to file an appeal based on any such grounds.

D

Accordingly, the court re-refers this matter to the magistrate judge for a determination of whether there is reason to think that a rational defendant in Gross's position would have wanted to appeal in this case, for example, because there are non-frivolous grounds for appeal. *See Flores-Ortega*, 528 U.S. at 480. And because a finding that there are non-frivolous grounds for appeal may impact the court's conclusion regarding prejudice, *see, e.g., id.* at 485-86 ("We recognize that the prejudice inquiry we have described is not wholly

[7]The court neither suggests nor decides that any of Gross's proffered "non-frivolous" grounds for appeal is, in fact, non-frivolous. In particular, the validity of his argument based on *Southern Union* appears to be especially dubious. But that is not his only asserted ground.

dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place; specifically, both may be satisfied if the defendant shows nonfrivolous grounds for appeal."), the court also re-refers this matter to the magistrate judge for a determination of whether Gross has established prejudice. *See, e.g., United States v. Gentry*, 429 F.Supp.2d 806, 814 (W.D. La. 2006) ("Counsel argued that a duty arose nonetheless because a rational defendant would want to appeal because, if properly and effectively advised, he would be aware of the non-frivolous ground for appeal with respect to the loss issue that could reduce the guidelines range by several months. The undersigned agrees that, given the length of the sentence imposed and the nonfrivolous ground for appeal, counsel had a duty under the circumstances to consult with his client about an appeal and determine with certainty his client's wishes on the subject. . . . [And] [j]ust as the existence of that ground helped give rise to a duty to consult, it also establishes prejudice because a client made aware of that ground and counseled about an appeal would have wanted to appeal."), *rec. adopted*, 429 F.Supp.2d 806 (W.D. La. 2006).

* * *

For the reasons explained, the court adopts in part the magistrate judge's findings, conclusions, and recommendation that Gross's motion for relief under 28 U.S.C. § 2255 be denied on the ground that the pretrial restraint of his untainted assets denied Gross his right to counsel of choice within the meaning of *Luis*. The court otherwise declines to adopt the recommendation and re-refers this matter to the magistrate judge for further proceedings. Without limiting the magistrate judge's discretion concerning how to proceed, the court

specifically directs the magistrate judge, using an objective standard, to consider whether a reasonable defendant in Gross's position would have wanted to appeal based on the existence of non-frivolous grounds for appeal and whether, considering the existence of any non-frivolous grounds for appeal, Gross has sufficiently demonstrated prejudice.

SO ORDERED.

July 29, 2019.

SIDNEY A. FITZWATER
SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

ROBERT HADLEY GROSS,	§	
	§	
Petitioner,	§	
	§	
v.	§	6:16-CV-071-D-BR
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION TO DENY PETITIONER'S MOTION TO VACATE

Before the Court is the *Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody* ("Motion") filed by petitioner ROBERT HADLEY GROSS ("Gross") on July 1, 2018[1]. For the reasons set forth below, Gross's motion should be DENIED.

I. BACKGROUND

On October 15, 2014, Gross was charged by Indictment with multiple counts of the felony offense of Health Care Fraud in violation of 8 U.S.C. § 1347. *United States v. Robert Hadley Gross,* No. 6:14-CR-38; [ECF 1]. On October 16, 2014, an initial appearance was held before United States Magistrate Judge E. Scott Frost. [*Id.* at ECF 5]. At that hearing, Gross was represented by retained counsel, Mr. John Young, Esq. *Id.* On October 27, 2014, Gross was arraigned before United States Magistrate Judge Nancy M. Koenig, while still represented by Mr. Young. [*Id.* at ECF 10]. On October 28, 2014, Mr. Young filed a Motion to Withdraw as Attorney, prior to the hearing on the Government's motion to detain. [*Id.* at ECF 14]. Mr. Young's motion

[1] Gross originally filed his Motion to Vacate *pro se* on December 19, 2016. The timeliness of his claims is not in question.

cited Gross's inability to afford retained counsel after seizure of his assets. *Id.* The motion to withdraw as attorney was granted, [*Id.* at ECF 15], and on equal date therewith the magistrate judge appointed the Federal Public Defender's Office ("FPD") to represent Gross. Ms. Sherylynn A. Kime-Goodwin, Esq. filed her notice of appearance that same day. [*Id.* at ECF 16, 18]. Thus, Gross was represented by retained counsel in this matter solely for his initial appearance and arraignment.

On November 10, 2014, the FPD filed a motion to declare complex litigation based on the difficulty and expansiveness of the case, which was granted by United States District Judge Sam Cummings. [*Id.* at ECF 29, 31]. On August 4, 2015, Gross filed a motion to recuse Judge Cummings after his rejection of the Plea Agreement, which was later granted based on possible interference with plea negotiations during the rejection of the Plea Agreement by the judge. [*Id.* at ECF 81, 83-84]. The case was reassigned to the Amarillo Division and to United States Senior District Judge Mary Lou Robinson.

On September 23, 2015, a Plea Agreement and Factual Resume was filed and a Rearraignment Hearing was held. [*Id.* at ECF 85-86]. Judge Robinson accepted the Plea Agreement and Factual Resume after Gross's appellate rights were restored by striking the waiver from the agreement. [*Id.* at ECF 89]. Pursuant to the written Plea Agreement, Gross acknowledged the maximum penalties the Court could impose, stated he understood the Court would impose the sentence after consideration of the United States Sentencing Guidelines and that the guidelines were not binding on the Court. [*Id.* at ECF 119, transcript]. Gross also acknowledged he had reviewed the guidelines with counsel but understood no one could predict with certainty the outcome of the Court's consideration of the guidelines in his case, acknowledged he would not be allowed to withdraw his plea if his sentence was higher than expected, and that he fully understood

the actual sentence imposed was solely in the discretion of the Court. *Id.* Gross averred not only that there had been no guarantees or promises from anyone as to what sentence the Court would impose, but also that he had thoroughly reviewed all legal and factual aspects of his case with his lawyer and was fully satisfied with his attorney's legal representation. *Id.*

On December 16, 2015, Gross was convicted of a single count (number 11) of Health Care Fraud and sentenced to a term of 71 months incarceration in the Bureau of Prisons with a three-year term of supervised release to follow. [*Id.* at ECF 98-99]. Pursuant to the Plea Agreement, the Government moved to dismiss counts 1-10 and counts 12-52 of the Indictment. *Id.* Gross was also ordered to pay $1,832,869.21 in restitution and allowed to use forfeited and seized funds to pay the restitution. *Id.* Further, a $100,000 fine was imposed. *Id.* Property seized pursuant to pre-trial forfeiture notices was ordered forfeited as part of the Final Order of Forfeiture issued on March 23, 2016, and the Amended Final Order of Forfeiture issued June 1, 2016. [*Id.* at ECF 110, 113]. Money from the T. Rowe Price Account Number XXXXXXX569-8 was eventually returned as part of the negotiated terms of the guilty plea. At the Sentencing Hearing, the district judge advised Gross of his appeal rights. [*Id.* at ECF 98, 120, transcript]. The court entered Judgment that same date. [*Id.* at ECF 99].

Gross did not appeal his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. On December 19, 2016, Gross filed his original motion to vacate his sentence. *Robert Hadley Gross v. United States*, 6:16-CV-071. [ECF 1]. On May 9, 2017, the Government filed its original response in opposition to Gross's motion. [ECF 14]. On July 3, 2017, Gross filed a reply to the Government's response.[2] [ECF 25]. On May 3, 2018, Mr. Brandon Sample, Esq. entered his appearance on behalf of Gross. The Court allowed Gross to file an Amended Motion

[2]In his original reply, Gross was proceeding *pro se*.

to Vacate, the instant Motion, and allowed further briefing from the parties. [ECF 37, 38]. The Government filed its second response on August 27, 2018, [ECF 44], and Gross filed a reply on September 17, 2018. [ECF 46].

Following these filings, the Court scheduled an Evidentiary Hearing. [ECF 47]. After the Evidentiary Hearing on January 3, 2019, the parties each submitted supplemental briefing. [ECF 55, Gross's supplemental briefing; ECF 56, Government's supplemental briefing]. The Court has considered all arguments presented in Gross's Motion, the parties' responses, replies, and supplemental briefings, as well as testimony and evidence presented at the Evidentiary Hearing.

II.
EVIDENTIARY HEARING

Testimony was presented at the Evidentiary Hearing from Ms. Kime-Goodwin (FPD trial counsel for Gross), Denise Williams (former supervising AUSA involved in negotiating the Plea Agreement), Brandon Beck (FPD appellate counsel for Gross), and from Gross himself. Additionally, three exhibits were admitted by Gross's counsel.

A. Gross's Testimony

Gross testified that at his initial appearance following his arrest, he told the magistrate judge that "he desired to have private counsel represent him, but there [were] no funds [available for such representation]". [ECF 53, p. 9]. Gross testified he did not have access to any funds that were not frozen by the Government. *Id.* Shortly after his arrest, Gross was served with a divorce petition that further limited his access to any funds. *Id.* at p. 10-11. Gross went on to testify extensively about the funds that were frozen as part of the asset seizure prior to his initial appearance. *Id.* at p. 11-16. Of import to Gross's Motion, T. Rowe Price Account Number XXXXX596-8 was not listed in the criminal forfeiture notice, but was rather pursued in a civil forfeiture proceeding. *Id.* at p. 15-17.

Gross testified that on December 16, 2015, he was sentenced in federal court. *Id.* at p. 17. Gross testified that while Ms. Kime-Goodwin was walking back toward the counsel table, he stated he wanted to appeal. *Id.* Gross stated this was a quick interaction and he was immediately taken away by the U.S. Marshals. *Id.* Gross further testified that he met with Ms. Kime-Goodwin on January 11, 2016 and again expressed his desire to appeal his case. *Id.* at p. 18. He claimed he was arguing and shouting with Ms. Kime-Goodwin during this interaction. *Id.* Gross claims Kime-Goodwin and he did not discuss appealing the fine in this case at that meeting. *Id.* Under cross-examination, Gross admitted to convictions for fraud and making a false statement to the United States. *Id.* at 20. In response to why the Court should consider his testimony truthful, Gross replied, "I do the best I can with … I try not to, and I … this is something I remember." *Id.* Gross further claimed there were "extenuating circumstances" surrounding any past deceptions. *Id.*

Gross acknowledged the district judge followed the Plea Agreement when sentencing him. *Id.* at p. 21. He also acknowledged not only that he understood the Plea Agreement, but also that Ms. Kime-Goodwin had explained such agreement might *not* be followed and was in fact rejected by a previous district judge. *Id.* at p. 21-22. Gross also acknowledged he never told the district judge at sentencing or his rearraignment that he did not want to proceed because he wanted to hire private counsel. *Id.* at p. 28.

B. Williams's Testimony

Denise Williams also testified. Ms. Williams was the Assistant United States Attorney who was supervising other AUSAs assigned to prosecute Gross's case. *Id.* at p. 30. Ms. Williams was very familiar with the negotiations involved in the Plea Agreement for Mr. Gross, due to the complex nature of the case. *Id.* at p. 30-31. Ms. Williams stated that when an account is comingled with "tainted" funds, such account is initially seized after probable cause is established by the

forfeiture department of the U.S. Attorney's Office. *Id.* at p. 31. Ms. Williams described the negotiations in this case as "the most complex, extensive plea negotiations I had ever had in my 25 years with the United States Attorney's Office." *Id.* at p. 32. Furthermore, there was real concern by both the defense and prosecution that the Plea Agreement would not be followed because the district judge's sentencing decisions were so limited by the agreement, which is generally disfavored. *Id.* at p. 32-34. The prosecution was particularly concerned in that regard because Gross had previously engaged in health care fraud in the past. *Id.* at p. 35.

C. Kime-Goodwin's Testimony

Ms. Kime-Goodwin testified that she has been an attorney since 1995, with twenty years of practice when engaging in negotiations for this case. *Id.* at p. 39. Since 2000, Ms. Kime-Goodwin's practice has been 100 percent criminal federal defense. *Id.* Ms. Kime-Goodwin reviewed the forfeiture documents associated with Gross's criminal case, despite these matters being ancillary to the criminal matter, because Gross's Plea Agreement and corresponding negotiation revolved also around the money involved in this case. *Id.* at p. 41-44. Further, her review of the forfeiture documents left her with the understanding that "there was nothing that I found in the course of my discovery that led me to believe that we had an argument to say, hey, the government should not have seized [any] particular account." *Id.* at p. 42. During the case, Ms. Kime-Goodwin fought to have some funds returned to Gross. *Id.*

Ms. Kime-Goodwin extensively explained the complexity of this case and indicated the amount of negotiation that went into lowering the ultimate restitution amount, reducing her client's incarceration exposure by decreasing the loss amount calculations, fighting for the return of seized assets, and allowing seized assets to be used for restitution, in addition to other negotiations typical of a criminal case. *Id.* at p. 43-47. Ms. Kime-Goodwin was in regular telephone contact with Gross,

with occasional in-person visits, during the negotiation stage of proceedings. *Id.* Ms. Kime-Goodwin testified that she went over the intricacies of the Plea Agreement with Gross several times. *Id.* at p. 48-49. She further indicated she believed Gross understood the agreements. *Id.* at p. 49. Ms. Kime-Goodwin stated she specifically advised Gross that because the parties negotiated such a specific Plea Agreement, removing so much of the district judge's discretion, that if the agreement were followed, "there wouldn't be anything left to appeal." *Id.* She further stated, "his giving up that appeal right, you know, that's part of the deal for getting --- for getting the deal that he did." *Id.* However, after the case was transferred to the Amarillo Division, the new district judge crossed out the appellate waiver in the Plea Agreement. *Id.* at p. 49-50.

Ms. Kime-Goodwin explained the new district judge's policy against appellate waivers. *Id.* at p. 50. She told Gross "this is good, you know. If things don't go our way, this gives us an avenue." *Id.* Ms. Kime-Goodwin testified she was "relieved" after the sentencing hearing because the Plea Agreement was entirely followed. *Id.* at p. 54. She further testified Gross looked "happy" and she jokingly stated, "we are not appealing this case," to which Gross made no response. *Id.* Ms. Kime-Goodwin stated filing a Notice of Appeal is a very simple, administrative task, requiring less than five minutes of effort. *Id.* at p. 55. She further stated that if Gross had said anything about appeal, if he had even hinted about wanting to appeal, she would have immediately filed such appeal. *Id.* at p. 55-56. She testified that after the sentencing, she spoke to Gross by telephone on several occasions and he never indicated a desire to appeal. *Id.* at p. 56.

On January 11, 2016, Ms. Kime-Goodwin went to see Gross in custody at the Randall County Jail. *Id.* at p. 57. At this meeting, Ms. Kime-Goodwin stated she spoke to Gross about his appellate rights and told him "everything has gone the way that we wanted to in this case. I don't see any issues for us to appeal. I don't think there's anything to appeal." *Id.* at p. 58. Ms. Kime-

Goodwin told Gross she was not planning on filing an appeal and "[Gross] seemed okay with that." *Id.* Ms. Kime-Goodwin acknowledged this conversation took place outside of the fourteen-day window to timely file an appeal, but stated she would have filed an untimely notice, along with a *mea culpa* apology to the Court, had Gross requested she file an appeal or otherwise indicated a desire to appeal at the in-person meeting. *Id.* at p. 58-60.

D. Beck's Testimony

Finally, the Government called Mr. Brandon Beck. Mr. Beck explained the complexity of this case and how easily and consistently the FPD files an appeal if asked to do so by the defendant after sentencing. *Id.* at p. 70. In fact, he stated the FPD will file meritless appeals if requested to do so by the defendant. *Id.* Mr. Beck spoke with Gross after he was sentenced, and Gross never asked about filing an appeal or indicated a desire to appeal his case. *Id.* at p. 70-72.

III.
GROSS'S ALLEGATIONS

In this Motion, Gross contends his sentence is in violation of the Constitution and laws of the United States for the following reasons:

> Gross was denied effective assistance of counsel in his criminal proceeding because counsel failed to file an appeal; or, in the alternative, Gross's trial counsel was ineffective for failing to discuss his appellate rights with Gross post-conviction.
>
> Gross was denied the counsel of his choice in violation of the Sixth Amendment when the government seized untainted funds and failed to release those funds for Gross to retain his own counsel.

IV.
MERITS

In its response filed May 9, 2017, the Government thoroughly and accurately briefed statutory authority and case law regarding the applicable standards of review for relief under 28 U.S.C. section 2255 proceedings, and for reviewing claims of ineffective assistance of counsel

under *Strickland v. Washington*, 466 U.S. 668, 689 (1984) and its progeny. [ECF 6 at 2-3]. The Court notes its obligation to follow these clearly established standards without the need of repeating the Government's briefing. The standards for Gross's claims under the Sixth Amendment regarding his counsel of choice claim are outlined below.

Following conviction and exhaustion or waiver of the right to direct appeal, the Court presumes that a petitioner stands fairly and finally convicted. *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998). Under 28 U.S.C. § 2255, a petitioner ordinarily can collaterally challenge his conviction only on constitutional or jurisdictional grounds. *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991) (*en banc*).

A. Failure to Appeal or Discuss Appellate Rights

In his first claim, Gross contends his attorney, Ms. Kime-Goodwin, failed to file a notice of appeal as he requested post-sentencing. This claim is based on events occurring after Gross's guilty plea. Therefore, this Court can review the merits of the claim. *See Tollett v. Henderson*, 411 U.S. 258, 266 (1973).

The Supreme Court has long held "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). When a defendant fails to specifically ask his attorney to file a notice of appeal, however, a reviewing court must determine whether counsel consulted with the defendant, "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* at 478. If the attorney did consult with the defendant, the attorney "performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.*

If counsel has not consulted with the defendant regarding whether to appeal, the question then becomes "whether counsel's failure to consult with the defendant itself constitutes deficient performance." *Id.* Counsel's failure to consult with a defendant about an appeal is not necessarily unreasonable. *White v. Johnson*, 180 F.3d 648, 652 (5th Cir. 1999). "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal *when there is reason to think* either (1) that a rational defendant would want to appeal ... or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480 (emphasis added). Thus, the Supreme Court has indeed "reject[ed] a bright-line rule that counsel must always consult with the defendant regarding an appeal." *Id.*

Counsel's duty to consult with a defendant regarding appeal depends on all information that counsel knew or should have known. *Id.*

> Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Id. As cited by the Government in response to Gross's claims, a factually similar situation resulted in a finding by the Supreme Court that counsel acted reasonably despite not consulting with the defendant regarding an appeal,

> For example, suppose that a defendant consults with counsel; counsel advised the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years' imprisonment as expected and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and counsel concludes that there are no nonfrivolous grounds for appeal. Under these circumstances, it would

> be difficult to stay that counsel is "professionally unreasonable," as a constitutional matter, in not consulting with such a defendant regarding an appeal.

Id. at 479.

Once a defendant establishes counsel's performance was deficient, he then must demonstrate he suffered prejudice because of the deficient performance. To demonstrate prejudice in the context of counsel's failure to file a notice of appeal, a defendant must show that "but for counsel's deficient performance, he would have appealed." *Id.* at 484. He is not required to show that the appeal would have been successful. *Id.* at 459.

In this case, the Court finds Gross has failed to carry his burden of showing by a preponderance of the evidence that he told and/or instructed his trial counsel, Ms. Kime-Goodwin, to file a notice of appeal. *See Montoya v. Johnson*, 226 F.3d 399, 408 (5th Cir. 2000). In a section 2255 proceeding "contested fact issues ordinarily may not be decided on affidavits alone, unless the affidavits are supported by other evidence in the record." *United States v. Hughes*, 635 F.2d 449, 451 (5th Cir. 1981); *see also United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992) (hearing is required on section 2255 review unless the "motions, files, and records of the case conclusively show that the prisoner is entitled to no relief"). In this case, trial counsel's affidavit conflicted with petitioner's accounts regarding instructions to file an appeal. Thus, the undersigned magistrate judge conducted an Evidentiary Hearing to evaluate the credibility of movant and his trial counsel. *See United States v. Giacomel*, 153 F.3d 257, 258 (5th Cir. 1998) (magistrate judge may make credibility findings based on evidence presented at Evidentiary Hearing in section 2255 case).

At the Evidentiary Hearing, the Court heard evidence and testimony to determine whether Gross had indeed requested his trial counsel appeal his conviction and sentence or whether, in the alternative, his trial counsel was deficient in failing to adequately consult with Gross regarding

such appeal. Gross testified that immediately following sentencing, while being ushered from the courtroom by U.S. Marshals, he told Ms. Kime-Goodwin, "I want to appeal." Ms. Kime-Goodwin testified that she approached Gross after sentencing and he "seemed happy," and she even joked about not filing an appeal, because the Plea Agreement was entirely followed. Gross testified that he also expressed his desire to appeal approximately one month after his sentencing during an in-person meeting. His account of that interaction differed from Ms. Kime-Goodwin's account, with Gross indicating there was arguing and shouting while his attorney described him as "being okay" with not appealing.

Ms. Kime-Goodwin and FPD appellate counsel Mr. Beck both indicated they had telephonic discussions with Gross following sentencing. Both counsel indicated that Gross was concerned with money issues during these conversations, particularly as to when certain portions of a particular account that had been seized would be returned to him pursuant to the Plea Agreement. However, both attorneys indicated that Gross never expressed a desire to appeal, asked about appeal, or otherwise indicated dissatisfaction with the plea deal or sentence during these conversations. Of note, Ms. Kime-Goodwin and Mr. Beck both indicated the ease of filing a notice of appeal, even in a meritless appeal situation. Further, both stated that it is a simple and routine administrative task and that the notice is regularly filed if *any* indication of a desire to appeal is expressed by a defendant.

Ms. Kime-Goodwin testified that Gross received a substantial benefit from the Plea Agreement, including the dismissal of all but one count of the 52-count Indictment, the ability to use seized and forfeited funds for restitution, the return of a portion of seized funds, a controlled guideline calculation by a stipulation to actual loss versus intended loss, and limited judicial discretion in sentencing. The Court finds Ms. Kime-Goodwin's testimony more credible than

Gross's testimony.

Because the Court finds the preponderance of the credible evidence does not establish that Gross instructed his attorney to file a notice of appeal, the Court must determine whether Ms. Kime-Goodwin consulted with Gross regarding an appeal or was otherwise ineffective regarding Gross's appellate rights. *See Flores-Ortega*, 528 U.S. at 478. In that regard, Gross further contends that the post-sentencing consultation was inadequate because counsel did not advise him of the right to appeal the fine imposed or challenge any other issues. Gross asserts counsel failed to discuss the advantages and disadvantages of appealing. The Court cannot assess counsel's consultation in a vacuum without considering the proceedings that led to Gross's decision to plead guilty. *See id.* at 480. ("Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings."). By virtue of his guilty plea, Gross received a reduction in his sentence and his sentencing exposure, dismissal of 51 of the 52 counts of the Indictment, the return of a portion of seized funds, and fully paid restitution. In an extremely favorable turn of events for the defense, the district court allowed a Plea Agreement to supremely curtail the court's sentencing discretion and accepted that agreement.

The Court notes that Gross received all the benefits from the Plea Agreement and the one issue he contests, the fine amount, was within the guideline range. In fact, the district court could have imposed a maximum $250,000 fine, but instead imposed a $100,000 fine. Additionally, the rearraignment and sentencing transcripts also indicate that Gross was aware of his appellate rights post-sentencing. During the rearraignment before the district judge, Gross's Plea Agreement was altered to restore his appellate rights, and Ms. Kime-Goodwin indicated she thoroughly reviewed

this with Gross prior to conclusion of the plea proceedings. Also, during Gross's testimony at the Evidentiary Hearing, it was clear Gross understood his appellate rights and the reservation of his rights at the time of the plea, and such was not challenged during the hearing on this matter. At the sentencing, the district judge explained Gross's appellate rights prior to the conclusion of the hearing. The Court finds that Ms. Kime-Goodwin's discussion of appellate rights *pre*-sentencing, combined with the Court's discussion and Gross's understanding of appellate rights during sentencing *and* Ms. Kime-Goodwin's contact with the defendant immediately following sentencing, all indicate that Gross could have intelligently and knowingly asserted his right to an appeal if he had wanted to do so. The Court finds that Gross, however, realized there was "nothing to gain," by an appeal as discussed at the January 11, 2016 in-person meeting with his attorney post-sentencing.

Even assuming *arguendo* that Gross can establish that his counsel did not sufficiently consult with him about filing an appeal, and that counsel had a duty to do so, Gross cannot demonstrate prejudice. *See Flores-Ortega*, 528 U.S. at 484. The record does not support a finding that there is a "reasonable probability" that Gross would have appealed but for his counsel's deficient failure to consult. *Id.* "A defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal," but this "evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." *Id.* at 486. As evidenced by Ms. Kime-Goodwin's testimony concerning the January 11, 2016 conversation with counsel, Gross did not indicate a wish to appeal even after Ms. Kime-Goodwin discussed this option with him post-sentencing.[3] Although such an appeal would have been out-of-time, the lack of an expressed desire to appeal at this stage indicates

[3] Although Gross testified he did express his desire to appeal (for the second time) at this in-person meeting, the Court has already found his testimony lacking in credibility.

Gross did not contemplate a timely appeal, and his testimony to the contrary is not credible. Additionally, Gross waited an entire year after sentencing and judgment to file his original Motion to Vacate, a post-sentencing action that "indicate[s] [the defendant] was unlikely to have" timely appealed. *See United States v. Bejarano*, 751 F.3d 280, 287 (5th Cir. 2014) (citing *Johnson v. United States*, 364 Fed. Appx. 972, 977 (6th Cir. 2010)).

B. Counsel of Choice

In his other ground, Gross claims he was denied counsel of his choice in violation of his Sixth Amendment rights. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of counsel for his defense." U.S. Const. amend. VI. The Sixth Amendment grants a defendant the right to effective assistance of counsel, but also the "fair opportunity to secure counsel of [one's] own choice." *See Buck v. Davis*, --- U.S. ---, 137 S.Ct. 759, 775 (2017); *see also Powell v. Alabama*, 287 U.S. 45, 53 (1932). If a defendant does not require appointed counsel, he is guaranteed the right "to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). A defendant's right to counsel of choice is not absolute and "has limits." *Luis v. United States*, --- U.S. ---, 136 S.Ct. 1083, 1089 (2016). "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice." *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 626 (1989). Where funds are in the defendant's possession unlawfully, or "tainted," his Sixth Amendment right to choose counsel is not violated when those funds are seized. *Id.*

In *Luis*, the plurality of the Supreme Court held that the government's "pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Luis*, 136 S.Ct. at 1088. The Court looked to *Caplin & Drysdale* and *United States v. Monsanto*,

491 U.S. 600, 616 (1989), to determine the type of impermissible restraint that violates the Sixth Amendment. *Id.* at 1085. Notably, the government did not dispute in *Luis* that *entirely untainted* asserts were seized, and the defendant required those assets to retain counsel of his choice. *Id.*

Gross's judgment of conviction was entered on December 17, 2015, prior to the March 30, 2016 Supreme Court opinion in *Luis*. In Gross's original September 17, 2018 reply, Gross argues that "*Luis* is retroactively applicable to cases on collateral review." [ECF 46, p. 1]. However, this Court is unable to find *any* case that has ever held *Luis* to be retroactively applicable to cases on collateral review.

> Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Such rules are retroactive only if the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. The Supreme Court has instructed that a new rule qualifies for watershed status only if it (i) is necessary to prevent an impermissibly large risk of an inaccurate conviction and (ii) alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. This class of rules is extremely narrow, and it is unlikely that any has yet to emerge.

United States v. Olvera, 775 F.3d 726, 730 (5th Cir. 2015) (footnotes, punctuation and quotations omitted). The Supreme Court, in drafting *Luis*, did not conclude that it fell within the "watershed status" exception. District courts have also found that *Luis* does not meet this watershed status. *See Valencia-Truillo v. United States*, 2017 WL 3336491 (M.D. Fla., Aug. 4, 2017).

Further, a new rule applies retroactively only "when it breaks new ground or imposes a new obligation on the States or the Federal Government" or "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. A "case does *not* announce a new rule, [when] it [is] merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013) (quoting *Teague*, 489 U.S. at 307) (emphasis in original). Because the *Luis* Court applied

Caplin & Drysdale and *Monsanto* to a new set of facts where funds were indisputably "untainted," all courts who have since considered the issue of the retroactive application of *Luis* have found it does not create a new rule and is not retroactively applicable.

> The Supreme Court's opinion in *Luis* was based primarily on the application of two existing cases: *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) and *U.S. v. Monsanto*, 491 U.S. 600 (1989). For this reason, courts have consistently held that *Luis* is not retroactively applicable on review. *See Thaw v. United States*, 2016 WL 4623053 (N.D. Tex., Aug. 16, 2016) (unpublished); *Noel v. United States*, 2017 WL 548985 (W.D. N.C., Feb. 8, 2017) (unpublished); *Valencia-Truillo v. United States*, 2017 WL 3336491 (M.D. Fla., Aug. 4, 2017) (unpublished); *Clark v. Harmon*, 2017 WL 2493271, at *2 (N.D. Tex., May 10, 2017) (unpublished); *Farkas v. Andrews*, 2017 WL 4518684 (E.D. N.C., Oct. 10, 2017) (unpublished); *Rand v. United States*, 2018 WL 1114376 (N.D. Tex., Jan. 8, 2018) (unpublished); *United States v. Watson*, 2017 WL 4698962 (S.D. Tex., Oct. 19, 2017) (unpublished).

United States v. Hopkins, No. 2:09-cr-000863 MCA, 2018 WL 1393780 (D. N.M. Mar. 19, 2018). The Fifth Circuit has also rejected the contention that *Luis* is retroactive on collateral review. *See Fleming v. Upton*, No. 4:16-CV-1042-Y, 2018 WL 488724, at *2 (N.D. Tex. Jan. 19, 2018).[4]

V.
RECOMMENDATION

It is the RECOMMENDATION of the United States Magistrate Judge to the United States Senior District Judge that the *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* filed by petitioner ROBERT HADLEY GROSS be DENIED.

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[4] This case provides additional reasons why Gross's reliance on *Luis* is unavailing. First, Gross's argument is procedurally defaulted for failing to file a direct appeal of this issue, corresponding to this Court's findings on Gross's first point-of-error. Second, the Court agrees that Gross signed an agreement containing a clause acknowledging probable cause existed to seize *all* seized funds, including the funds eventually negotiated for release. The Court is not persuaded by Gross's argument that the negotiations to release some of the funds prior to reaching a plea is evidence that such funds were "untainted," but rather evidence of the complexity of the negotiations involved in this case. Further, Gross never sought a traceability hearing to determine if such co-mingled funds were, in fact, untainted, and he did not present such evidence at the Evidentiary Hearing. However, this Court does not reach the issue of whether truly "untainted" funds existed because it finds *Luis* does not apply retroactively on collateral review, and, in the alternative, Gross procedurally defaulted on these claims.

VI.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a file marked copy of the Findings, Conclusions and Recommendation to ROBERT HADLEY GROSS and to each attorney of record by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED February 27, 2019.

Lee Ann Reno

LEE ANN RENO
UNITED STATES MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the "entered" date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled "Objections to the Findings, Conclusions and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir. 1988).