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United States Court of Appeals
For the Third Circuit
[Filed November 1, 2023]
No. 23-1850

UNITED STATES OF AMERICA

v.

ATTICUS SLITER-MATIAS,
Appellant

(W.D. Pa. No. 2-17-cr-00034-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, and MONTGOMERY-REEVES, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

By the Court,
s/ Arianna J. Freeman
Circuit Judge
Date: November 1, 2023
Amr/cc: All counsel of record.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
[Filed October 6, 2023]
C.A. No. 23-1850

UNITED STATES OF AMERICA

VS.

ATTICUS SLITER-MATIAS, Appellant

(W.D. Pa. Crim. No. 2-17-cr-00034-001)

Present: SHWARTZ, MATEY, and FREEMAN, Circuit Judges

Submitted is Appellant's motion for a certificate of appealability under U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for certificate of appealability is denied. See 28 U.S.C. § 2253(c). For substantially the same reasons given by the District Court, jurists of reason would agree, without debate, that Sliter-Matias' claims were previously litigated or are

inexcusably procedurally defaulted, not cognizable under 28 U.S.C. § 2255, or meritless. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 336 (2002); Coleman v. Thompson, 501 U.S. 722, 748 (1991); United States v. Ross, 801 F.3d 374, 380 (3d Cir. 2015); Strickland v. Washington, 466 U.S. 668, 687 (1984).

By the Court,

s/Arianna J. Freeman
Circuit Judge

Dated: October 6, 2023
Lmr/cc: Laura S. Irwin, Esq.
Atticus Sliter-Matias

In The United States District Court
For The Western District of Pennsylvania
[Filed May 4, 2023]

UNITED STATES OF AMERICA	)	
v.	)	Case No. CR 17-34
Atticus Sliter-Matias Defendant.	)	

NOTICE OF APPEAL

COMES NOW, Movant ("the Petitioner"), ATTICUS SLITER-MATIAS, PRO SE, hereby files notice of appeal on the final judgment entered in the United States District Court in the Western District of Pennsylvania on April 14, 2023. This filing hereby constitutes as an application for a certificate of appealability to the District Court.

The Court may deem a document filed by a habeus corpus petitioner that discloses the intent to obtain appellate review to be an application for a certificate of appealability, regardless of its title or form, within 21 days of the order of a District Court denying a certificate. The Petitioner may file a Memorandum in Opposition to the granting of a certificate within 14 days of service of this application. Additionally, the Petitioner may file a reply within 10 days of a service of the response. (L.A.R. 22.1).

CERTIFICATION

This notice of appeal was placed in the mail to be transferred to the custody of the Clerk of Courts in the Western District of Pennsylvania on May 3, 2023.

Respectfully submitted,
s/Atticus Sliter-Matias
ATTICUS SLITER-MATIAS
Movant, PRO SE (Signed)
Date: May 3, 2023
Federal ID # 38352-068
Address:
13781 Cedar Road, # 205
South Euclid, OH 44118
216-269-8783

In The United States District Court
For The Western District of Pennsylvania
[Filed April 14, 2023]

UNITED STATES OF AMERICA	)	
	)	Criminal No. 17-34
v.	)	Civ. A. No. 22-730
	)	Judge Nora Barry Fischer
Atticus Sliter-Matias	)	
Defendant.	)	

MEMORANDUM OPINION

I. INTRODUCTION

This matter is before the Court on a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence filed by pro se Defendant Atticus Sliter-Matias, ("Defendant" or "Sliter-Matias") which is opposed by the Government. (Docket Nos. 142; 150). Defendant seeks to vacate his convictions on two counts of mail fraud for various reasons including that he was provided ineffective assistance by his trial counsel. (Docket Nos. 142; 152). The Government counters that the claims raised by Defendant are barred by the relitigation doctrine, procedurally defaulted and/or otherwise without merit. (Docket Nos. 150; 159). After careful consideration of the parties' positions, and for the following reasons, Defendant's Motion [142] is denied.

II. BACKGROUND

The Court of Appeals set forth the following facts of this matter.

> Using fake names and addresses, Sliter-Matias created thousands of accounts on eBay and PayPal referred to as "stealth accounts." He paired each stealth eBay account with a stealth PayPal account, assigning each pair a unique IP address and email account. Roughly 161 of the stealth eBay accounts he created were involved in fraudulent transactions. In each of these fraudulent transactions he would post an item for sale through one of his eBay accounts. Once a buyer had been confirmed, he would provide a tracking number to the buyer for shipment within the buyer's zip code or mark the item shipped on eBay to prompt eBay to release the buyer's purchase funds to the paired PayPal account. Using those funds, he would purchase items, including gold and silver, and ship them to himself. However, instead of the purchased item, the eBay buyer would receive only a torn or empty envelope from Sliter-Matias, sent through his Click-N-Ship account with the United States Postal Service. By the time the buyer reported the fraud, there would be no funds in Sliter-Matias's

account to refund the buyer, so eBay or PayPal would reimburse the buyer themselves. eBay and PayPal lost over $110,000 from these fraudulent transactions. On July 5, 2016, the United States Postal Inspectors executed a search warrant at Sliter-Matias's home address. Sliter-Matias initially declined to be interviewed, he claimed that he created the eBay accounts with fake names and addresses to sell laptops, that the gold and silver found in his bedroom closet were his mother's retirement assets, and that he sent packages through his Click-N-Ship account for his employer. The Postal Inspectors collected a number of documents from his residence during this search. A significant portion of these documents were lost in transit. Sliter-Matias was ultimately charged with two counts of mail fraud under 18 U.S.C. § 1341.

At trial, Sliter-Matias denied being involved in the fraudulent transactions. He claimed that he created the stealth accounts to sell to eBay users who wanted to circumvent the limit eBay places on the number of sales a user can make each week and that he was compensated for his stealth accounts, sometimes in the form of gold and silver. He also claimed that he sent the empty

> or torn packages through his Click-N-Ship account to test the stealth accounts and make sure they would work.
>
> Evidence presented at trial indicated that Sliter-Matias maintained a spreadsheet monitoring each fraudulent transaction involving the stealth accounts, that Sliter-Matias was the one who mailed torn or empty envelopes to the buyers after they paid for their purchases, and that the funds released to the stealth accounts were used only on purchases for Sliter-Matias. There was no evidence to suggest that his alleged employer ever existed or that Sliter-Matias ever communicated with anyone regarding the of his stealth accounts.
>
> After a five-day trial, the jury returned a guilty verdict on both counts.

United States v. Sliter-Matias, 837 F. App'x 910, 912 (3d Cir. 2020), cert. denied, 209 L. Ed. 2d 766, 141 S. Ct. 2648 (2021).

This case was initially assigned to this Court but was referred to the Honorable Bill R. Wilson, who presided over the matter at trial, sentencing and other post-trial matters. (See e.g. Docket Nos. 56; 60). Defendant was represented by Mark A. Kaiser, Esq. during pretrial proceedings, at trial and some post-trial proceedings. (Docket Nos. 7;100). To that end,

Attorney Kaiser filed a motion for new trial on Defendant's behalf on June 14, 2018, which was summarily denied by Judge Wilson on June 18, 2018. (Docket Nos. 83; 84). Attorney Kaiser also represented Defendant at an initial session of the sentencing hearing on October 1, 2018, but was dismissed in the interim. (Docket No. 107). For his part, Defendant arrived late to the October 1, 2018 sentencing hearing and was ordered detained at that time. (Id.). Defendant requested the appointment of new counsel and James Kraus, Esq. was appointed to represent him on January 14, 2019. (Docket Nos. 97; 99). A sentencing hearing was held on April 12, 2019 at which time Defendant was sentenced by Judge Wilson to concurrent terms of 46 months' imprisonment and 3 years' supervised release at each of Counts 1 and 2. (Docket No. 114). He was also ordered to pay $379,591.95 is restitution, a $200 special assessment, and forfeit gold and silver bars and coins as well as various electronics used during the scheme. (Docket Nos. 114; 115).

Defendant timely appealed the judgment to the U.S. Court of Appeals for the Third Circuit and Attorney Kraus continued to represent him on appeal. (Docket No. 118). Defendant argued three separate issues on appeal: 1) "the evidence presented at trial was insufficient to sustain his convictions"; 2) "the Government violated his Fifth Amendment right against self-incrimination by introducing testimony at trial that noted his initial invocation of that right to the Postal Inspectors"; and 3) "the indictment should have been dismissed because the government's loss of potentially exculpatory records acquired from the

search of his residence violated his right to due process." (Docket No. 123-1). He also claimed that automated fraud-detection systems used by eBay and PayPal were allegedly insufficient to establish his participation in the fraud. (*See* Docket No. 150 at 9 (citing Defendant's Reply Brief at 10-12)). The Court of Appeals rejected all of Defendant's arguments and affirmed his convictions and sentence in a Memorandum Opinion dated December 2, 2020. *Sliter-Matias*, 837 F. App'x (3d Cir. 2020). The Supreme Court of the United States then denied his petition for writ of certiorari on May 27, 2021. Sliter-Matias, 141 S. Ct. 2648 (2021). After the appeals were completed, Judge Wilson granted a writ of execution to the Government and directed that certain currency and other valuables which were seized by the Government but not forfeited by applied toward the outstanding restitution. (Docket Nos. 131; 132).

Defendant was released from BOP custody on January 6, 2022 and is currently serving his 3-year term of supervised release. (Docket No. 141). His supervised release case has been transferred to the Northern District of Ohio where he resides, he is being supervised in that jurisdiction. (*Id.*).

Defendant submitted the instant Motion to Vacate, Set Aside or Correct Sentence along with a host of supporting exhibits on May 16, 2022. (Docket No. 142). In his Motion, Defendant seeks to vacate his convictions at trial and claims that his trial counsel, Kaiser, provided ineffective assistance. (Id.). He sets forth 10 separate claims, as follows:

I. Due Process Violation Based on the Government's Alleged Use of a "Third-Party Autonomous Entity"

II. Government "Violated Chain of Custody" with Respect to Seized Electronic Devices

III. Postal Inspector Weckerly Testified Falsely as to Seized Gold and Silver Items

IV. Postal Inspector Weckerly Falsely Testified as to the Exhibit HM5 Thumb Drive Recovered from Defendant's Computer

V. USPIS Forensic Analyst Christopher Wilkins Testified Falsely

VI. Government "Tampered" with Its Witnesses "resulting in the submission of hearsay testimony and fabricated evidence."

VII. Government Had a Conflict of Interest with eBay and PayPal and Violated Due Process

VIII. Government Committed a *Brady* Violation by Redacting Personally Identifiable Information

IX. Government Committed a *Brady* Violation in Failing to Disclose Trial Exhibits

X. Ineffective Assistance by Attorney Kaiser at Trial Due to Alleged Health Conditions

(*Id.*). Defendant does not challenge his sentence nor the representation by Attorney Kraus at his sentencing or on appeal. (Id. At 38 (stating that Attorney Kraus "dutifully conducted himself professionally during sentencing, appeal and throughout all post-trial proceedings.")). In its Response, the Government argues that claims I-IX are barred by the relitigation doctrine and/or have been procedurally defaulted and that claim X alleging ineffective assistance of counsel should be denied without an evidentiary hearing. (Docket No. 150). Defendant's Reply provides further argument and some additional supporting documents. (Docket No. 152). Finally, the Government's Sur-Reply reiterates its position that the Defendant's Motion should be denied. (Docket No. 159).

As all briefing has concluded, Defendant's Motion is now ripe for disposition.

III. LEGAL STANDARD

"A motion to vacate sentence pursuant to 28 U.S.C. § 2255 is the exclusive means to challenge collaterally a federal conviction or sentence." Frazier-el v. Bureau of Prisons, 376 F. App'x 164, 165 (3d Cir. 2010). Under 28 U.S.C § 2255, "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States... may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255.

"[A] petition on supervised release is 'in custody' for purposes of § 2255." *United States v. Baird*, 312 F. App'x 449, 450 (3d Cir. 2008). "As a collateral challenge, a motion pursuant to 28 U.S.C. § 2255 is reviewed much less favorably than a direct appeal of the sentence." *United States v. Travillion*, 759 F.3d 281, 288 (3d Cir. 2014) (citation omitted). Section 2255 relief "is available only when 'the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice, and ... present[s] exceptional circumstances where the need for the remedy afforded by the writ ... is apparent.'" Id. (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974).

Generally, a court must order an evidentiary hearing in a federal habeus corpus case if a criminal defendant's § 2255 allegations raise an issue of material fact. *United States v. Biberfeld*, 957 F.2d 98, 102 (3d Cir. 1992); see also *United States v. Tolliver*, 800 F.3d 138, 140-41 (3d Cir. 2015). But, if there is "no legally cognizable claim or the factual matters raised by the motion may be susceptible of resolution through the district judge's review of the motion and records in the case," the motion may be decided without a hearing. *United States v. Costanzo*, 625 F.2d 465, 470 (3d Cir. 1980); see also *Tolliver*, 800 F.3d at 140-41. If a hearing is not held, the court must accept the criminal defendant's allegations as true "unless they are clearly frivolous on the basis of the existing record." *Gov't of Virgin Islands v. Bradshaw*, 726 F2.d 115, 117 (3d Cir. 1984). In the Court's view, Defendant's motion can be decided after review of the

records in the case, and therefore a hearing is not necessary.

IV. DISCUSSION

As noted, Defendant brings ten separate claims challenging his conviction for two counts of mail fraud in violation of 18 U.S.C. § 1341 but does not contest his sentence. (Docket No. 142). In response, the Government maintains that Defendant's claims I-IX must be denied because they involve issues which were either previously litigated on direct appeal and/or could have been raised on appeal but were not such that they are procedurally defaulted. (Docket Nos. 150;159). The Government further contends that Defendant's claim X alleging ineffective assistance of his trial counsel must be denied without a hearing. (*Id.*). Defendant counters that his claims I-IX are supported by alleged new evidence he was able to locate after he was released from custody and otherwise argues that he is entitled to a hearing on his claims. (Docket Nos. 142; 152). Having carefully considered the parties' positions, the Court concurs with the Government that Defendant's claims are procedurally barred and/or without merit.

A. Claims Previously Litigated; Procedurally Defaulted

With respect to the asserted procedural defects, the U.S. Court of Appeals for the Third Circuit has held that:

> [a] § 2255 motion does not function as a second appeal, see *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), and thus it does not ordinarily allow for re-review of issues raised on direct appeal. *See, e.g., Travillion*, 759 F.3d at 288; *United States v. Orejuela*, 639 F.2d 1055, 1057 (3d Cir. 1981); *see also Kaufman v. United States*, 394 U.S. 217, 227 n.8, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969) ("Where a trial or appellate court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a § 2255 hearing."). At the same time, a claim not raised on direct appeal cannot ordinarily be reviewed under § 2255. *See, e.g., Travillion*, 759 F.3d at 288 n.11; *DeRewal*, 10 F.3d at 105 n.4; *Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). From these standards, collateral attack under § 2255 seems to present [defendants] with a Catch-22: raising an issue on direct appeal may preclude that issue from serving as a basis for § 2255 relief, but not raising an issue on direct appeal may forfeit the [defendant's] ability to seek § 2255 relief on that ground.

United States v. Braddy, 837 F. App'x 112, 115 (3d Cir. 2020). However, as is discussed in the next section of

this Opinion, "[p]recedent has long recognized that 'a § 2255 motion is a proper and indeed the preferred vehicle for a federal [defendant] to allege ineffective assistance of counsel.'" *Id.* (quoting *United States v. Nahodil*, 36 F.3d 323 (3d Cir. 1994) (further citations omitted)).

Here, Defendant has attempted to raise several issues in his claims I-IX which were previously litigated on his direct appeal and rejected by the Court of Appeals. (Docket Nos. 142; 152). To that end, the Court of Appeals denied all of the following: his challenge to the sufficiency of the trial evidence; his claim that automated fraud-detection systems used by eBay and PayPal were allegedly insufficient to establish his participation in the fraud; his allegations that his Fifth Amendment right to avoid self-incrimination was violated by testimony of the Postal Inspectors; and, his assertion that the loss of certain evidence seized from his residence constituted a due process/*Brady* violation by the prosecution. *See Sliter-Matias*, 837 F. App'x 910. Therefore, he cannot utilize a § 2255 motion to attempt to relitigate these issues that have already been resolved against him. In any event, a review of the issues litigated on appeal makes clear that each of Defendant's claims I-IX which allege violations of his rights to due process and under *Brady v. Maryland*, as well as certain evidentiary defects at trial are procedurally defaulted because they could have been raised on appeal but were not. See *Braddy*, 837 F. App'x at 115.

Since Defendant's claims I-IX are procedurally defaulted, it is his burden to show cause and prejudice or actual innocence in order to proceed with those

claims. *See Bousley v. United States*, 523 U.S. 614, 621 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'"). He has failed to carry his burden here. As this Court has held previously,

> [t]o establish cause for the procedural default, a defendant must show that "some objective factor external to the defense impeded counsel's efforts to raise the claim." *McClesky v. Zant*, 499 U.S. 467, 493 (1991) (citation omitted). Examples of external objective factors which have been found to constitute cause include "interference by officials," "a showing that the factual or legal basis for a claim was not reasonably available to counsel," and "ineffective assistance of counsel." *Id.* At 494.
>
> Once a legitimate cause to excuse the procedural default is shown, a defendant must also establish actual prejudice resulting from the errors about which he complains. See United States v. Frady, 456 U.S. 152, 168 (1982). To do so, the defendant must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial

> disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170 (emphasis in original). Accordingly, the defendant must prove that, if not for the error, there is a reasonable probability that the result of the proceeding would have been different. *Strickler v. Greene*, 527 U.S. 263, 289 (1999).

United States v. Gorny, No. CR 13-70, 2018 WL 5044223, at *3 (W.D. Pa. Oct. 17, 2018);

Defendant essentially argues that he has shown sufficient cause to excuse his procedural default because he has presented "new evidence" as part of this § 2255 Motion which was neither available to him nor his appellate counsel due to his incarceration and the alleged ineffectiveness of his trial counsel. (Docket No. 152). In this Court's estimation, the excuses offered by Defendant simply do not establish that some external factor prevented his appellate counsel from raising these issues on appeal. See United States v. Pelullo, 399 F.3d 197, 223 (3d Cir. 2005) ("To establish 'cause' for procedural default, a defendant must show that 'some objective factor external to the defense impeded [his] efforts to raise the claim.'") (internal quotation omitted). As to his own incarceration, the record is clear that Defendant was ordered detained by Judge Wilson after he arrived more than an hour and a half late for the initial session of his sentencing hearing on December 1, 2018 and that he remained detained

through his April 15, 2019 sentencing and appeal. (Docket No. 107 at 2-4, 7). Despite same, Attorney Kraus was appointed as defense counsel on January 14, 2019 and represented him at his sentencing and on appeal. (Docket Nos. 100; 137-38). Defendant has not offered any evidence or argument that some external factor prevent Attorney Kraus from accessing these documents during the eight-month period from his appointment through his filing of the Reply Brief with the Court of Appeals on September 27, 2019. (Docket Nos. 142; 152). Since Defendant does not challenge Attorney Kraus' representation and even admits that he "dutifully conducted himself professionally during sentencing, appeal and throughout all post-trial proceedings," he has failed to establish cause for the failure to raise claims I-IX in the appeal. See *Pelullo*, 399 F.3d at 223.

In addition, even if Defendant had shown cause, he has not establish prejudice resulting from the errors that he complains about in claims I-IX. *See id.* At most, the arguments and documents that Defendant has presented in his § 2255 Motion may have potentially enabled his counsel to better cross-examine Government witnesses at trial, including the Postal Inspectors and representatives of eBay and PayPal. (Docket Nos. 142; 152). But, the documents purportedly showing, among other things, that he: was involved in legitimate sales on eBay which were not discussed at the trial; purchase gold and silver coins from Bullion Direct and/or Liberty Coin prior to his involvement in the fraud; and paid for those items using means other than PayPal, are not sufficient to show that the result of the trial would have been any

different. (Docket Nos. 142; 152). On this latter point, Defendant testified in his own defense at trial and Judge Wilson found that he did not obstruct justice because such testimony was "too far out in left field or maybe in outer space" and could not have influenced the jury. (Docket No. 120 at 5). With that said, the Court of Appeals summarized the many admissions that Defendant made throughout his own trial testimony whereby he conceded the essential elements of the charged offenses.

> At trial, the government presented strong evidence establishing that Sliter-Matias knowingly participated in the fraudulent transactions and acted to further them. Sliter-Matias admitted to maintaining a spreadsheet listing the details of every fraudulent transaction involving the stealth accounts, including the eBay item number, the sale price, the name of the buyer, and the status of each transaction. Sliter-Matias also admitted that he was the one who shipped the torn or empty envelopes to the buyers. In addition, the funds acquired from the fraudulent transactions were used only for his benefit, and they were all spent immediately after they were released to PayPal accounts he created.
>
> Viewed in the light most favorable to the government, the evidence presented permits a rational trier of fact to find

> beyond a reasonable doubt that Sliter-Matias was the sole participant in this scheme and knew that he was being paid for items the buyers would never receive.

Sliter-Matias, 837 F. App'x at 913.

All told, none of Defendant's arguments as to claims I-IX undermine the core facts supporting his mail fraud convictions at Counts 1 and 2 which were bolstered by his own admissions and the victim testimony such that he has neither demonstrated prejudice nor his actual innocence. *See id.* His other challenges to the non-custodial aspects of his sentence including the $379,591.95 in restitution, order for forfeiture of currency, silver and gold bars and coins, and the writ of execution which applied the non-forfeited items toward the outstanding restitution are simply not cognizable in § 2255 proceedings. See e.g., *United States v. Davies*, App. No. 19-3929, 2020 WL 3259420, at *1 (3d Cir. May 7, 2020) (citing *United States v. Ross*, 801 F.3d 374, 380 (3d Cir. 2015)) (Defendant's "challenges to the forfeiture and restitution orders are not cognizable under § 2255.").

For all of these reasons, Defendant's claims I-IX are denied and no certificate of appealability shall issue as to such claims.

B. Ineffective Assistance of Counsel

Defendant next argues in claim X that his convictions should be vacated because his trial counsel, Attorney Kaiser, provided ineffective

assistance of counsel as he was suffering from a physical and/or mental health impairment at the time of trial. (Docket Nos. 142; 152). He asserts that he was convicted because his trial counsel was not healthy enough to represent him, became fatigued at times during pretrial meetings, lost certain exhibits after trial, and failed to make consistent objections at trial. (Docket No. 142 at 36-39). Defendant supports such a claim with a photograph of trial counsel purportedly depicting him asleep during a pre-trial meeting, highlights that several continuances were granted due to trial counsel's health conditions, and the fact that Defendant ultimately requested new counsel due to his trial counsel's ill health. (Docket Nos. 142; 152). The Government maintains that Defendant has failed to demonstrate that he was provided ineffective assistance of counsel at trial. (Docket Nos. 150; 195). After evaluating the parties' positions in light of the record evidence, the Court holds that Defendant has not sufficiently alleged that he was prejudiced due to his counsel's physical and/or mental health ailments.

A defendant "seeking relief" on the grounds of ineffective assistance of counsel bears the burden to demonstrate two requirements," *United States v. Seeley*, 574 F. App'x. 75, 78 (3d Cir. 2014). First, a defendant "must establish that (1) the performance of counsel fell below an objective standard of reasonableness, and, (2) counsel's deficient performance prejudiced the defense." *United States v. Otero*, 502 F.3d 331, 334 (3d Cir. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); see also *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000) (citing *Strickland*, 466 U.S. at 688, 694) (same).

The United States Court of Appeals for the Third Circuit has "endorsed the practical suggestion in *Strickland* [that the Court may] consider the prejudice prong before examining the performance of counsel prong 'because this course of action is less burdensome to defense counsel.'" *United States v. Lilly*, 536 F.3d 190, 196 (3d Cir. 2008) (quoting *United States v. Booth*, 432 F.3d 542, 546 (3d Cir. 2005)); *see also Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). The Supreme Court has emphasized that judicial scrutiny of defense counsel's performance is "highly deferential," and a "strong presumption" exists that "counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690.

Most importantly, courts have repeatedly held that "prejudice is not presumed on ineffectiveness claims based on counsel's physical or mental health." *United States v. Donahue*, No. 3:11-CR-33, 2018 WL 1410772, at *5 (M.D. Pa. Mar. 21, 2018), *aff'd*, 792 F. App'x 165 (3d Cir. 2019). Hence, courts have rejected general claims by defendants that they were provided ineffective assistance by counsel in various circumstances, including, allegations that an attorney was: abusing alcohol or drugs during trial, see *United States v. Washington*, 869 F.3d 193, 204 (3d Cir. 2017); suffering from cancer during trial, see *Yarrington v. United States*, No. 12-3108, 2013 WL 2155501, at *3 (C.D. Ill. May 17, 2013); incapacitated due to medications, *see United States v. Henges*, 591 F. App'x. 287, 287 (5th Cir. 2015); using oxycontin and

undergoing chemotherapy during trial, see *United States v. Moses,* No. CR 14-232, 2018 WL 563160, at *3 (E.D. Pa. Jan 25, 2018); and fell asleep during trial and failed to cross-examine one of the government's 32 witnesses, see *United States v. Best*, 831 F. App'x 610, 613 (3d Cir. 2020). Rather, to succeed on ineffective assistance of counsel claim, Defendant must point to specific facts in the trial record supporting the alleged ineffectiveness of his trial counsel and meet both prongs of the *Strickland* test. *See e.g., Washington*, 869 F.3d at 204 ("We agree with the District Court that the general allegations of alcohol use do not require a departure from *Strickland's* two-prong standard" and "alleged substance abuse is not, without more, one of the rare forms of dereliction amounting to the per se denial of a defendant's Sixth Amendment right to the effective assistance of counsel.").

Applying these principles to Defendant's allegations that his trial counsel provided ineffective assistance, the Court finds that the Defendant has plainly not met the *Strickland* standards for several reasons. *See Otero*, 502 F.3d at 334. First, he has not established that he was prejudiced by his trial counsel allegedly falling asleep during pretrial meetings and misplacing exhibits after the trial because he has not demonstrated that either activity affected the outcome of the trial of his case. See Best, 831 F. App'x at 613. Indeed, he admits that exhibits were available during the trial and makes no allegations that his trial counsel slept during any portion of the trial. (Docket Nos. 142; 152). Second, Defendant assets that his trial counsel did not make consistent objections at trial but

has not pointed to any specific evidence which was admitted without an objection and affected the outcome of his case. See United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000) ("vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation.").

Third, Defendant maintains that his trial counsel was ineffective because he was supposedly lost and unavailable to provide him advice during a recess which took place while he was testifying. (Docket Nos. 142; 152). However, the Supreme Court has held that:

> when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.

Perry v. Leeke, 488 U.S. 272, 281 (1989). The Supreme Court also found that prohibiting communications between a lawyer and his testifying client during a brief trial recess was distinguishable from its prior decision in *Geders v. United States* which held that a prohibition on all communications between a lawyer and client during an overnight recess violated the defendant's right to counsel. 425 U.S. 80, 82 (1976). Here, the record reflects that the lunchtime recess during Defendant's testimony was approximately one

hour and 11 minutes. (Docket No. 105 at 81 ("Luncheon recess taken 11:50 a.m.-1:01 p.m.")). Thus, Defendant's general complaint that his counsel did not consult with him over the lunch hour while he was testifying is insufficient to demonstrate that he was provided with ineffective assistance of counsel. *See Otero*, 502 F.3d at 334.

Finally, while this Court did not preside over the trial of the case, the record reflects that trial counsel was an active participant in the trial as he: gave an opening statement; cross-examined each of the Government's witnesses; lodged objections during trial; presented his client's testimony on direct; argued points for charge, and provided closing arguments. (See e.g., Docket Nos. 102 at 62, 94, 114, 150, 169; 103 at 3, 33, 44, 111, 133; 104 at 17, 39, 110, 158, 161, 188; 105 at 6, 43-44, 50, 71, 74, 77, 138, 151, 178). The record further reveals that Defendant never complained about his trial counsel to Judge Wilson during the trial proceedings as he did not raise any issues until several months after he was convicted and detained. Overall, after reviewing the trial record, the Court concludes that Defendant has not sufficiently alleged that he was provided ineffective assistance of counsel at trial due to his trial counsel's infirmities because he has not cited to any instances in the record where counsel's performance fell below an objective standard of reasonableness nor established a likelihood that the outcome of his trial would have been any different but for the alleged ineffectiveness. *See Donahue*, 792 F. App'x at 167-68. Accordingly, Defendant's claim X must also be denied and a

certificate of appealability will not issues as to this claim.

V. CONCLUSION

Based on the foregoing, Defendant's motion to vacate his sentence under 28 U.S.C. § 2255 [142] is denied, with prejudice. The Court further holds that Defendant has failed to make a substantial showing of the denial of a Constitutional right and is not entitled to a certificate of appealability. An appropriate Order follows.

s/Nora Barry Fischer
Nora Barry Fischer
Senior U.S. District Judge

Dated: April 14, 2023

Cc/ecf: All counsel of record

Atticus Sliter-Matias
13781 Cedar Road, # 205
South Euclid, OH 44118
(via regular and certified mail)

In The United States District Court
For The Western District of Pennsylvania

UNITED STATES OF AMERICA	)	
	)	Criminal No. 17-34
v.	)	Civ. A. No. 22-730
	)	Judge Nora Barry
Atticus Sliter-Matias	)	Fischer
Defendant.	)	

ORDER OF COURT

AND NOW, this 14th day of April, 2023, in accordance with the foregoing Memorandum Opinion,

IT IS HEREBY ORDERED that Defendant Atticus Sliter-Matias' Motion Under28 U.S.C. 2255 to Vacate, Set Aside or Correct Sentence (Docket No. 142) is DENIED;

IT IS FURTHER ORDERED that Defendant is not entitled to a certificate of appealability; and,

FINALLY, an appropriate Judgment follows at Civ. No. 22-730.

s/Nora Barry Fischer
Nora Barry Fischer
Senior U.S. District Judge

cc/ecf: All counsel of record

Atticus Sliter-Matias
13781 Cedar Rd, #205
South Euclid, OH 44118
(via regular and certified mail)

In The United States District Court
For The Western District of Pennsylvania

UNITED STATES OF AMERICA	)	
	)	Civ. A. No. 22-730
v.	)	Judge Nora Barry Fischer
Atticus Sliter-Matias Defendant.	)	

JUDGMENT

AND NOW, this 14th day of April, 2023, the Court having denied Defendant Atticus Sliter-Matias' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence,

IT IS HEREBY ORDERED that final judgment of this Court is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

s/Nora Barry Fischer
Nora Barry Fischer
Senior U.S. District Judge

cc/ecf: All counsel of record

Atticus Sliter-Matias
13781 Cedar Rd, #205
South Euclid, OH 44118
(via regular and certified mail)

In The United States District Court
For The Western District of Pennsylvania
[Filed January 31, 2018]

UNITED STATES OF AMERICA	)	
	)	Civ. A. No. 22-730
v.	)	Judge Nora Barry Fischer
Atticus Sliter-Matias Defendant.	)	

MEMORANDUM ORDER

This white collar fraud case is set for jury selection and trial to commence on March 12, 2018 at 9:30 a.m. as to the two pending counts of mail fraud against Defendant Atticus Sliter-Matias. (Docket No. 39). This matter is before the Court on a series of pretrial motions filed by Defendant, (Docket Nos. 40; 41; 42; 43; 44; 45; 47), and the Government's omnibus response thereto, (Docket No. 48). Having reviewed these matters in light of the deadlines set forth by the Court in the Pretrial Order, the Court makes the following summary rulings:

1. Defendant's Motion for Pretrial Access to Witnesses [40] is DENIED, as moot, the Government having provided the requested information during discovery and supplied additional detail in its response advising of the locations of the specific information about which Defendant requests, (including the identities of the two victims, and the data from

the seized hard drives), within such materials, (*see* Docket No. 48 at 6-8). Insofar as defense counsel is unable to locate such materials, the attorney shall meet and confer in order to resolve the issue prior to bringing same to the attention of the Court;

2. Defendant's Motion in Limine Regarding Government's Notice of Intent to Use evidence of Other Crimes Wrongs or Acts Under Federal Rule 404(b) [41] is DENIED, as premature and without prejudice, the Court having set a deadline in its Pretrial Order for the Government to provide Rule 404(b) notice to the defense by February 21, 2018, (see Docket No. 39 at ¶4);
3. Defendant's Motion for Interviews of Government Witnesses [42] is DENIED, as moot, the Government having agreed to provide its witness list to the defense in advance of trial, (despite the Court's order permitting such lists to be filed *ex parte* and under seal), (see Docket No. 48 at 10), and Defendant citing no authority in support of his request that the Government supply contact information for such witnesses;
4. Defendant's Motions for Dismissal of the Indictment or Request for Bill of Particulars, filed at [43] and [44] are DENIED, as Defendant ahs been provided with sufficient discovery materials to understand the charges against him and prepare for trial such that a bill of particulars is unnecessary. *See e.g.*, *United States v. Manfredi*, 628 F. Supp. 2d 608, 634 (W.D. Pa. Jan 21, 2009) (quoting *United*

States v. Rosa, 891 F.2d 1063, 1066 (3d Cir. 1989)) (denying bill of particulars because "Defendants have not demonstrated that the allegations in the indictment, when considered in light of the significant discovery; the Government's proffers as to its chosen method of proof at trial and its presentation of voluminous evidence related to the allegedly unlawful transactions at trial, are so general as to 'significantly impair' their ability to prepare for their defense or that the denial of their motion will lead to 'prejudicial surprise at trial.'"); *United States v. Urban*, 404 F.3d 754, 771 (3d Cir. 2006) (where a defendant has access to information being relied upon by the Government to construct its case, a request for a bill of particulars is significantly weakened). Further, there is no basis to dismiss the Indictment on vagueness grounds as the charges are sufficiently pled consistent with the pleading standards set forth in the Federal Rules. *See United States v. Taylor,* 232 F. Supp 3d 741, 748-750 (W.D. Pa. Feb 2, 2017) (quoting *United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011) ("[A]n indictment [is] sufficient so long as it '(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant fo what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a formal acquittal or conviction in the event of a subsequent prosecution.'")) (internal quotation omitted).

5. Defendant's Motion for Government to Divulge Confidential Informants [45] is denied, as moot, insofar as the Government asserts that it ahs not utilized confidential informants in this prosecution, (see Docket No. 48 at 14-15), and, as premature and without prejudice, to the extent that Defendant seeks the production of Brady materials, the Court having established a deadline for same of February 21, 2018, (see Docket No. 39 at ¶4); and,
6. Defendant's Motion to Dismiss the Indictment for Destroying Evidence [47] is DENIED, as Defendant has failed to demonstrate the circumstances of the lost evidence in this case violated his due process rights. To this end, he bears a heavy burden to show: (1) "the potentially exculpatory nature of the evidence was apparent at the time of destruction or loss,"; (2) "there is a lack of 'comparable evidence by other reasonably available means,'"; and, (3) "the government acted in 'bad faith.'" *United States v. Kennedy*, No. 15-4009, 2017 WL 6422348, at *3 (3d Cir. Dec. 18, 2017) (quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) and *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). Here, Defendant has not specifically alleged that the materials were exculpatory; the Government has advised that the case agents have located photographs of some of the evidence such that the lost materials may be available, albeit in a different form, (see Docket No. 48 at 15, n.3); and most

importantly, there is no indication that law enforcement acted in bad faith by placing the materials in the mail to send to its processing center for the purpose of scanning the materials for ease of use, as is documented in the Memo attached to the Government's response. *See e.g., Youngblood*, 488 U.S. at 58 ("unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); *Kennedy*, 2017 WL 6422348, at *3-4 (finding that loss of a dashcam video did not violate the defendant's due process rights because the defendant "does not even contend the officers intentionally destroyed the video, but only that the loss of the footage indicates a failure to follow standard procedure, and that the attempts to recover the data were insufficient."). Accordingly, this motion must be denied.

s/Nora Barry Fischer
Nora Barry Fischer
U.S. District Judge

Dated: January 31, 2018

cc/ecf: All counsel of record.

In The United States District Court
For The Western District of Pennsylvania
[Filed April 12 and April 15, 2019]

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
v.	)	Case Number: CR 17-34-1
Atticus Sliter-Matias	)	USM Number: 38352068
	)	James W. Kraus, Defendant's Attorney

THE DEFENDANT:

Was found guilty on count(s) 1 & 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

18 U.S.C. 1341 Mail Fraud 11/16/2015

18 U.S.C. 1341 Mail Fraud 12/9/2015

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special

assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Judgment: 4/12/2019

Signature of Judge: s/Billy R. Wilson

Name and Title of Judge: Bill R. Wilson, Senior United States District Judge

Date: 4/12/2019

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

- 46 months at each of Counts 1 & 2 with such terms to run concurrently.

The court makes the following recommendations to the Bureau of Prisons:

- Defendant shall receive mental health treatment while imprisoned.
- The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

- 3 years at Counts 1 & 2 with such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
    - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.
5. You must cooperate in the collection of DNA as directed by the probation officer.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS ON SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations of your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside in without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where

you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow for the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know who is engaged in criminal activity. If you know someone has been

convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of this court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

ADDITIONAL SUPERVISED RELEASE TERMS

14. The defendant shall report any change of address within 30 days to the United States Attorney's Office while any portion of the restitution remains outstanding.
15. The defendant is prohibited from incurring new credit charges or opening additional lines of credit without prior written approval of the probation officer.
16. The defendant shall participate in a mental health assessment and/or treatment program approved by the probation officer, until such time as the defendant is released from the program by the Court. The defendant shall be required to contribute to the costs of services in an amount determined by the Probation Office. These costs shall not exceed the actual cost of the service. The Probation Office is authorized to release the defendant's presentence report to the treatment provider if so requested.
17. The defendant shall pay restitution that is imposed by this judgment that remains unpaid at the commencement of the term of supervised release at a rate of not less than 10 percent of his gross monthly earnings. The first payment shall be due within 30 days from the defendant's release from the custody of the Bureau of Prisons.
18. The defendant is permitted to possess or use a computer and is allowed access to the Internet. The defendant shall consent to the installation of any hardware or software to monitor any

computer, or any other electronic communication or data storage devices used by the defendant to confirm compliance with this condition. The defendant shall pay the monitoring costs as directed by the probation or pretrial services officer. Furthermore, the defendant shall consent to periodic unannounced examinations by the probation or pretrial services officer of any computers, cell phones, or other electronic communication or data storage devices that the defendant has access to, to confirm compliance with this condition. Additionally, the defendant shall consent to the seizure and removal of hardware and data storage media for further alaysis by the probation or pretrial services officer, based upon reasonable suspicion of a violation of the conditions imposed in this case, or based upon reasonable suspicion of unlawful conduct by the defendant. Failure to submit to the monitoring or search of computers and other electronic communication or data storage devices used by the defendant may be grounds for revocation.

19. If the defendant's employment requires the use of a computer, the defendant may use a computer in connection with the employment approved by the probation or pretrial services officer, provided the defendant notifies their employer of the nature of the conviction or charge. The probation or pretrial services officer shall confirm compliance with this notification requirement.

20. The defendant shall provide the U.S. Probation Office with accurate information about the defendant's entire computer system (hardware or software) and other electronic communication or data storage devices or media to include all passwords used and the name of the Internet Service Provider(s). The defendant also shall abide by the provisions of the Computer Restrictions and Monitoring Program approved by the Court.
21. The defendant shall submit his person, property, house, residence, vehicle, papers, business or place of employment to a search, conducted by a United States Probation or Pretrial Services Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to searches pursuant to this condition.
22. The defendant shall provide the probation officer with access to any requested financial information.
23. The Defendant shall cooperate in the collection of DNA as directed by the probation officer, pursuant to 28 C.F.R. § 28.12, the DNA Fingerprint Act of 2005, and the Adam Walsh Child Protection and Safety Act of 2006.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS:
Assessment: $200.00
Restitution: $379,591.95

Name of Payee:

eBay Inc.
Attn: GAP Ref: Case614712
583 West eBay Way
Draper, UT 84020
Restitution Ordered: $292,630.00

PayPal Inc.
c/o Janina Hillgruber
9999 N. 90th Street
Scottsdale, AZ 85258
Restitution Ordered: $86,158.46

Wilfred Rodriguez
4036 McClure Drive
Oakwood, GA 30566-3210
Total Loss: $803.49

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The defendant shall make restitution payments from any wages he/she may earn in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from Imprisonment shall be paid as a condition of supervised release. The victim's recovery is limited to the amount of its loss, and the defendant's liability for restitution ceases if and when the victim received full restitution. The defendant shall apply all moneys received from income tax refunds, lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to the outstanding court ordered financial obligation within 10 days of receipt, unless excused from doing so by Order of the Court. The Court finds that the defendant does not have the ability to pay interest. Therefore, it is waived.

ADDITIONAL TERMS FOR FORFEITED PROPERTY

Pursuant to 18 U.S.C. 981(a)(1)(C) and 28 U.S.C. § 2461(c), the defendant will forfeit to the government all property constituting, or derived from, proceeds obtained directly or indirectly as a result of such offenses, including but not limited to: specific property, which includes $116,141.32 in United States currency and numerous gold and silver coins and bars, all of which were seized from the defendant's residence on July 5, 2016; and, a money judgment equal to at least

approximately the total amount of proceeds in United States currency from the fraud described in Counts 1 and 2.