No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIC V. BARTOLI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

STEVEN D. JAEGER, ESQ.
Counsel of Record for Petitioner
HEMMER WESSELS MCMURTRY
250 Grandview Drive, Suite 500
Fort Mitchell, Kentucky 41017
(859) 344-1188
sjaeger@hemmerlaw.com

SUBMITTED: November 16, 2023

TABLE OF CONTENTS

Page

APPENDIX A – Judgement of the United States District Court of the Northern District of Ohio (December 20, 2016) 1a

APPENDIX B –Opinion of the United States District Court For the Sixth Circuit (March 16, 2018) 9a

APPENDIX C – Memorandum of Opinion and Order of the United States District Court of the Northern District of Ohio (January 03, 2021) 15a

APPENDIX D – Amended Judgment of the United States District Court of the Northern District of Ohio, following resentencing (October 29, 2021) 55a

APPENDIX E – Opinion of the United States Court of Appeals for The Sixth Circuit (August 14, 2023) 63a

APPENDIX F – Opinion of the United States Court of Appeals for The Sixth Circuit, regarding Rehearing *En Banc* (September 14, 2023) 81a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

v.

ERIC V. BARTOLI

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **5:03-CR-00387-JRA(1)**
§ USM Number: **61329-060**
§ **Barry M. Ward**
§ Defendant's Attorney

THE DEFENDANT:

☒	pleaded guilty to count(s)	**1, 2, 3, 4, 5, 8-10.**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:371 Conspiracy	08/27/1999	1
15:78J(B) and 78Ff(A) Securities Fraud	08/27/1999	2
15:77E(A) and 77X Sale Of Unregistered Securities	08/27/1999	3
18:1343 and 2 Wire Fraud	08/27/1999	4
18:1341 and 2 Mail Fraud	08/27/1999	5

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 6 and 7 ☐ is ☒ are dismissed on the motion of the United States

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.

October 9, 2016
Date of Imposition of Judgment

s/John R. Adams
Signature of Judge

John R. Adams, U.S. District Judge
Name and Title of Judge

December 20, 2016
Date

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

ADDITIONAL COUNTS OF CONVICTION

Title & Section / Nature of Offense	Offense Ended	Count
26:7201 Attempted Income Tax Evasion	08/27/1999	8
26:7201 Attempted Income Tax Evasion	08/27/1999	9
26:7201 Attempted Income Tax Evasion	08/27/1999	10

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

IMPRISONMENT

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

60 months as to counts 1, 3, and 8-10; 240 months as to counts 2, 4, and 5 all to run concurrent with credit for time served.

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

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years.**

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. (*check if applicable*)
4.	☒	You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5.	☐	You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work,are a student, or were convicted of a qualifying offense. (*check if applicable*)
6.	☐	You must participate in an approved program for domestic violence. (*check if applicable*)

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.

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

STANDARD CONDITIONS OF 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 for 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 about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside 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 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 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 the 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.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation

The defendant shall submit his person, residence, place of business, computer, or vehicle to a warrantless search, conducted and controlled by the U.S. Probation 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 release; 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 a search pursuant to this condition.

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assesment*	Fine	Restitution
TOTALS	$800.00		$.00	$42,499,302.82

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

See attached sealed pages for restitution payees.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☒ If a restitution balance remains upon release from imprisonment, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments, or at least a minimum of 10% of Defendant's gross monthly income during the term of supervised release and thereafter.

E ☒ If restitution is not paid in full, Defendant shall pay 25% of Defendant's gross income per month while incarcerated through the Federal Bureau of Prisons Inmate Responsibility.

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $800.00 for Counts 1, 2, 3, 4, 5, 8, 9 and 10 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

✠ Joint and Several
See sealed attachment for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

United States v. Bartoli

United States Court of Appeals for the Sixth Circuit

March 16, 2018, Filed

File Name: 18a0142n.06

Case No. 16-4748

Reporter
728 Fed. Appx. 424 *; 2018 U.S. App. LEXIS 6541 **; 2018 FED App. 0142N (6th Cir.); 2018 WL 1357444

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERIC V. BARTOLI, Defendant-Appellant.

Subsequent History: Rehearing, en banc, denied by *United States v. Bartoli, 2018 U.S. App. LEXIS 13250 (6th Cir., May 21, 2018)*

US Supreme Court certiorari denied by *Bartoli v. United States, 139 S. Ct. 1463, 203 L. Ed. 2d 695, 2019 U.S. LEXIS 2381, 2019 WL 1429073 (U.S., Apr. 1, 2019)*

Prior History: **[**1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

United States v. Bartoli, 2016 U.S. Dist. LEXIS 175814, 2016 WL 7369117 (N.D. Ohio, Dec. 20, 2016)

Core Terms

sentence, district court, variance, disparity, upward, plea agreement, cooperation, plain error, recommend, impact statement, victim impact, substantive-reasonableness, plain-error, departure, factors, notice

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Laura McMullen Ford, Assistant U.S. Attorney, Office of the U.S. Attorney, Cleveland, OH.

For ERIC V. BARTOLI, Defendant - Appellant: William W. Fick, Fick & Marx, Boston, MA.

ERIC V. BARTOLI, Defendant - Appellant, Pro se, Loretto, PA.

Judges: BEFORE: KEITH, KETHLEDGE, and THAPAR, Circuit Judges.

Opinion by: THAPAR

Opinion

[*425] THAPAR, Circuit Judge. Eric Bartoli appeals his 240-month sentence for several fraud-related convictions. We affirm.

I.

Twenty years ago, Eric Bartoli founded Cyprus Funds, Inc. Bartoli marketed Cyprus as a mutual fund—*i.e.*, a safe, conservative investment—but it turned out to be nothing more than a Ponzi scheme. By the **[*426]** time the Securities and Exchange Commission caught on, Bartoli and three co-conspirators had conned as many as 700 victims out of about $34 million.

Bartoli did not stick around for the fallout. Instead, he fled abroad to avoid arrest. He set up shop in Peru, where he launched *another* fraud scheme and defrauded investors of $5,588,000. All in all, Bartoli managed to evade detection abroad for over thirteen years. But eventually, his luck ran **[**2]** out. Peruvian police caught him and shipped him back to the United States to face charges.

Upon his return, Bartoli pled guilty to various fraud-related offenses. His plea agreement adopted the 1998 United States Sentencing Guidelines, those "in use at the time of the completion of [his] offense," in computing his Guidelines range. R. 34, Pg. ID 157. This produced a recommended range of 97 months to 121 months. But

Bartoli's pre-sentence investigation report found that his plea agreement overstated the losses he caused, so it recommended a lower range of 87 months to 108 months. The district court accepted the lower Guidelines range, but varied upward and imposed a sentence of 240 months.

II.

Bartoli first claims that the government breached the parties' plea agreement. Since Bartoli failed to make this claim below, he can obtain relief only upon a finding of plain error. Fed. R. Crim. P. 52(b). To clear this hurdle, Bartoli must show (1) error, (2) that the error is plain, (3) that the error "affect[s] substantial rights," and (4) that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (alterations in original) (first quoting Fed. R. Crim. P. 52(b); then quoting United States v. Young, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). Bartoli cannot **[**3]** make this showing.

In Bartoli's plea agreement, the government agreed to recommend a sentence within the Guidelines range and not "recommend or suggest in any way that a departure or variance is appropriate." R. 34, Pg. ID 156. But at sentencing, after the district court notified the parties that it was contemplating an upward variance, the government mentioned the Guidelines only in passing and sought a "significant sentence." R. 56, Pg. ID 433. Bartoli now says that the government failed to keep its word, and that this amounts to plain error.

Even assuming that the government breached the agreement, Bartoli must nevertheless demonstrate prejudice to satisfy the third step of the plain-error inquiry. Puckett v. United States, 556 U.S. 129, 140-41, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). To demonstrate prejudice, Bartoli must make a "specific showing" that his sentence would be shorter but for the government's breach, Olano, 507 U.S. at 735, or at least establish a "reasonable probability" of a more lenient sentence, United States v. Marcus, 560 U.S. 258, 262, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010). Although Bartoli speculates that "the result might well have been different," he fails to explain how a lower sentence was reasonably probable, not simply possible. Reply Br. 8. After all, the district court twice acknowledged the parties' recommended sentence and disregarded **[**4]** it. At sentencing, three different victims asked (one "begg[ed]") the court to impose the statutory maximum (240 months). R. 56, Pg. ID 394, 400, 406. The court relied heavily on this testimony, stating that it had "rarely in all 18 years on the bench seen anyone who's created so much harm to so many people." *Id.* at Pg. ID 440. (The court later observed that it "ha[d] never **[*427]** before seen such massive devastation caused by a financial scheme to defraud." R. 45, Pg. ID 312.) Most tellingly, the court explained its 240-month sentence in part by noting that under the Guidelines in force at the time of sentencing, Bartoli's Guidelines range would have been significantly *higher* than 240 months. Accordingly, the court found that nothing less than the statutory maximum would be sufficient to comply with the sentencing statute. 18 U.S.C. § 3553(a). The record therefore indicates that Bartoli suffered no prejudice. See United States v. Anderson, 604 F.3d 997, 1003 (7th Cir. 2010) (finding no prejudice from a similar alleged breach where "the district court consciously imposed the maximum punishment permitted by law on an individual it viewed as recalcitrant"); United States v. Almly, 352 F. App'x 395, 397 (11th Cir. 2009) (per curiam) (finding no prejudice on similar facts where defendant presented a "mere possibility" that he would **[**5]** have received a shorter sentence). Thus, Bartoli has no claim to relief under the plain-error standard.

III.

Bartoli next challenges the procedural and substantive reasonableness of his sentence. As one would expect, the government defends Bartoli's sentence. According to Bartoli, the very fact that the government is doing so violates his plea agreement. He again points out that the agreement bars the government from "suggest[ing] in any way that a departure or variance is appropriate," R. 34, Pg. ID 156, and argues that this broad language prohibits the government from defending his sentence on appeal. But the plea agreement makes clear that this language concerns only what "the parties agree to recommend [to] the Court"—the *district court*—about Bartoli's sentence. *Id.* The agreement says nothing about what the government can argue on appeal. Nor does the separate "Waiver of Appeal" section restrict the government's appellate rights. That provision imposes various restrictions on *Bartoli's* right to appeal, but not the government's. *Id.* at Pg. ID 159; see United States v. Hammond, 742 F.3d 880, 883 (9th Cir. 2014) (rejecting the notion that courts should imply waiver of government's right to appeal). And the agreement itself warns against reading **[**6]** in this restriction on the government's appellate rights, as it provides that "no other promises or inducements have been made" that are not expressly set out in its text. R. 34, Pg. ID 164.

Bartoli emphasizes that the government did not

expressly reserve its right to defend an above-Guidelines sentence. But he identifies no authority requiring such reservation, and this court has not required it. *United States v. Mason, 410 F. App'x 881, 890 (6th Cir. 2010)*; *see also Huff v. United States, 734 F.3d 600, 610 (6th Cir. 2013)* (holding that government did not breach plea agreement by defending district court's rejection of sentencing adjustment that the government had agreed to). The government's defense on appeal, therefore, does not breach the parties' plea agreement.

A.

Bartoli next claims that the district court's sentencing procedure was flawed in three ways. He concedes, however, that he failed to raise his objections below, either during sentencing or in response to the court's *Bostic* inquiry. *United States v. Bostic, 371 F.3d 865, 872 (6th Cir. 2004)* (requiring district courts, after stating sentence but before ending sentencing hearing, to ask the parties for any objections they have not yet raised). We therefore review Bartoli's procedural objections for plain error. *Id. at 872-73*.

[*428] *Victim Impact Statements.* First, Bartoli asserts that the district court erred by **[**7]** relying on victim impact statements that Bartoli's counsel did not receive until the night before sentencing. As Bartoli points out, relying on such statements without disclosing them to the defendant ahead of time is plain error. *United States v. Hayes, 171 F.3d 389, 394 (6th Cir. 1999)*. But here, the statements *were* disclosed before sentencing. Although Bartoli laments the fact that the statements were not included in the pre-sentence investigation report (evidently because the probation office had not yet received them), he concedes that his counsel obtained copies the night before sentencing. Bartoli fails to identify any rule that this belated disclosure plainly violates.

The record confirms that no plain error occurred. On the morning of sentencing, the district court acknowledged the belated disclosure, notified counsel that it intended to rely on the statements, and offered "whatever time might be needed" for counsel to review the statements with Bartoli. R. 55, Pg. ID 384-86. Notwithstanding the court's admonition that the letters would "be an important consideration in deciding the sentence," *id.* at Pg. ID 385, counsel felt that further review was unnecessary, stating that Bartoli was "ready to proceed" shortly thereafter, R. 56, **[**8]** Pg. ID 390. So counsel's conduct underscores the absence of plain error.

Bartoli further claims that he should have received the statements with victims' identities unredacted. But here again, Bartoli did not raise this issue below. If he had, the district court might have suggested various options, such as permitting review of victims' names *in camera* or requesting that the government seek victims' permission to disclose their names. But, absent a timely objection, no rule plainly requires disclosure of victims' identities. Bartoli tries to divine such a rule from *United States v. Hamad, 495 F.3d 241 (6th Cir. 2007)*.

In *Hamad*, the district court shared a summary of confidential documents with the defendant that "did not refer to any specific incident or name its source(s)," and then relied on that summary at sentencing. *Id. at 250-51*. We held that sharing only this summary, and not the underlying documents, violated *Federal Rule of Criminal Procedure 32. Id.*; *see Fed. R. Crim. P. 32(i)(1)(B)*. But here, unlike in *Hamad*, Bartoli received the victim impact statements (not just a summary) and had an opportunity to review the specific incidents they described. Not only that, but *Hamad* distinguished victim impact statements like those here, explaining that "[t]estimony that primarily describes the impact of a specific **[**9]** instance of a defendant's behavior upon another's emotions . . . frequently may be described particularly without revealing its source (so long as many people witnessed the conduct)." *Hamad, 495 F.3d at 251*; *see also United States v. Clark, 335 F. App'x 181, 184 (3d Cir. 2009)* (noting the absence of authority requiring that impact statements reveal a victim's identity). Bartoli nonetheless argues that knowing the victims' identities might have enabled him to explain his lack of personal involvement with them. But given the number of victims, the weight of their testimony, and Bartoli's role, there is "little that [Bartoli] could have done to effectively rebut the heart-wrenching descriptions of his victims' emotional distress that were recounted in many of the letters." *United States v. Meeker, 411 F.3d 736, 742 (6th Cir. 2005)*. Redacting victims' names from their statements was not plain error.

Culpability Remark. Next, Bartoli quarrels with the district court's remark that his co-conspirators had "roles and involvement **[*429]** [that] were significantly less" than Bartoli's. R. 56, Pg. ID 438. But this argument is dead on arrival. Bartoli was the "founder, fund manager, controlling director, and principal officer of Cyprus." R. 34, Pg. ID 167. Bartoli's co-conspirators, by contrast, were non-controlling "director[s]" with more **[**10]** limited responsibilities. *Id.* at Pg. ID 167-68. Additionally, Bartoli "held a leadership role over" his co-conspirators. R. 38, Pg. ID 225. Accordingly, the district court's

remark was not plainly erroneous.

Notice of Variance. Bartoli's last procedural challenge is that the district court gave insufficient notice of its variance. But no rule requires such notice. *Irizarry v. United States, 553 U.S. 708, 715-16, 128 S. Ct. 2198, 171 L. Ed. 2d 28 (2008)* (holding that no notice is required for variances). While it is improper to vary upward based on undisclosed facts, Bartoli complains not of undisclosed facts, but that he could not have foreseen the district court's emphasis on *known* facts—victim impact—in varying upward. This lack of foresight on Bartoli's part is no basis for relief. *See United States v. Romero, 704 F. App'x 445, 449 (6th Cir. 2017)* (rejecting procedural challenge based on surprise at court's emphasis on a "garden variety consideration" in imposing upward variance (quoting *United States v. Coppenger, 775 F.3d 799, 805 (6th Cir. 2015)*)). The district court's notice, therefore, was not plainly erroneous.

B.

Bartoli's final volley is that his sentence is substantively unreasonable. The gist of this challenge is that his sentence is too long in light of the factors enumerated in *18 U.S.C. § 3553(a)*. *See United States v. Tristan-Madrigal, 601 F.3d 629, 632-33 (6th Cir. 2010)*. In conducting substantive-reasonableness review, this court's job is not to subject Bartoli's sentence **[**11]** to "exacting and withering scrutiny," Reply Br. 17, even where, as here, a sentence is above the Guidelines. Rather, substantive-reasonableness review demands "due deference" to the district court. *Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)*. It does not matter if we think a lower sentence is appropriate, so long as the district court reasonably concluded that the *§ 3553(a)* factors "justify the extent of the variance." *Id.* Although large variances require more significant reasons than small ones, no "rigid mathematical formula" is in play. *Id. at 47, 50*. Substantive-reasonableness review embraces an abuse-of-discretion standard. *Id. at 51*.

To preserve a substantive-reasonableness challenge, a defendant need not respond to the district court's *Bostic* inquiry by saying, "My sentence is substantively unreasonable." *United States v. Vonner, 516 F.3d 382, 389 (6th Cir. 2008)* (en banc). But plain-error review still applies to "any arguments for leniency that the defendant does not present to the trial court." *Id. at 392*. Here, Bartoli made few of his arguments below. In this circuit, however, the government forfeits plain-error review by failing to ask for it, and the government has failed to ask for it here. *United States v. Williams, 641 F.3d 758, 763-64 (6th Cir. 2011)*; *but see id. at 770-73* (Thapar, J., concurring) (highlighting various problems with circuit's precedent of allowing government to unilaterally **[**12]** forfeit plain-error review). Abuse-of-discretion review therefore applies.

Victim Impact. Bartoli first asserts that victim impact alone cannot support the district court's variance. He does not dispute that his fraud inflicted devastating harm (both monetarily and emotionally) on an extraordinary number of victims, many **[*430]** of whom were elderly. Nor does he contest that this type of victim impact is appropriate grounds for a variance. *See 18 U.S.C. § 3553(a)(1), (2)(A)* (listing "the nature and circumstances of the offense" and the need "to reflect the seriousness of the offense . . . and to provide just punishment" as pertinent considerations in sentencing); *U.S. Sentencing Guidelines Manual § 2F1.1 cmt. 11(a), (c)* (U.S. Sentencing Comm'n 1998) (explaining that an upward departure may be appropriate in a fraud case where the loss amount "does not fully capture the harmfulness and seriousness of the fraud," including where the fraud caused reasonably foreseeable "substantial non-monetary harm" and "psychological harm"); *see also United States v. Benskin, 926 F.2d 562, 565-67 (6th Cir. 1991)* (affirming upward departure where defendant's fraud inflicted psychological harm on over 600 victims, many of whom were elderly).

Rather, Bartoli maintains that the court gave victim impact too much weight. But a district court may **[**13]** place great weight on a single factor where the facts reasonably warrant such weight. *United States v. Adkins, 729 F.3d 559, 571 (6th Cir. 2013)*. In addition, the district court relied on more than victim impact in varying upward. The court found it "equally" significant that Bartoli fled to avoid arrest, resided in Peru under various aliases, and perpetrated another, similar fraud while there. R. 56, Pg. ID 441. The district court thus reasonably found that a variance was necessary for "deterrence" and to "protect[] the public." *Id.*; *see 18 U.S.C. § 3553(a)(2)(B)-(C)*. And while the loss amount in Bartoli's Guidelines range included the Peruvian fraud scheme, adding this amount did not increase Bartoli's Guidelines range. Thus, the district court reasonably found that range was insufficient to comply with the purposes of *§ 3553(a)*.

Still, Bartoli argues that the variance was just too large. He calls out the government for failing to identify a case involving a similarly sized variance. But this line of

argument is misplaced. *E.g.*, *United States v. Rossi*, 422 F. App'x 425, 435 (6th Cir. 2011) (rejecting reliance on "singular case comparisons"). Although there must be some correlation between the size of a variance and the reasons for it, *Gall*, 552 U.S. at 50, we give deference to the district court's calculation of that correlation, *id.* at 51. Here, even if a smaller **[**14]** variance would have been reasonable, Bartoli's offense conduct, its impact on victims, and his flight to and actions in Peru persuade us that the district court's variance was reasonable as well.

Cooperation and Acceptance of Responsibility. Bartoli next argues that the district court's sentence unreasonably ignores two factors: his cooperation with investigators and acceptance of responsibility. Beginning with cooperation, the district court denied the government's request for a departure based on information that Bartoli provided to law enforcement. Bartoli concedes that this denial "may have [been] within [the court's] discretion," Appellant Br. 51, and so it is difficult to understand why Bartoli believes that discounting the same cooperation under *§ 3553(a)* amounts to an abuse of discretion. This is especially so given that Bartoli's counsel did not raise cooperation as a mitigating factor. *See United States v. Madden*, 515 F.3d 601, 611, 613 (6th Cir. 2008) (observing that a district court is not required to address mitigating factors "raised only in passing," and rejecting substantive-reasonableness challenge based on "weight to accord [to] mitigating factors"). As such, the district court did not abuse its discretion in declining to reward Bartoli's **[**15]** cooperation with law enforcement.

[*431] The same is true regarding Bartoli's acceptance of responsibility. Because he admitted to his conduct and pled guilty, Bartoli received an unopposed, three-level reduction in his Guidelines range. But in his allocution, Bartoli referred to his victims as "clients" and offered little in terms of an apology. R. 56, Pg. ID 427-30. The district court found his statements "a bit disingenuous" and "not quite frankly [a] heartfelt apology." *Id.* at Pg. ID 442. The district court therefore concluded that an upward variance was warranted notwithstanding Bartoli's acceptance of responsibility, given the shallowness of his apology. This too was reasonable. *United States v. Folliet*, 574 F. App'x 651, 659 (6th Cir. 2014) (affirming similar sentencing decision).

Age. Bartoli, who was sixty-two when sentenced, also feels the district court gave his age short shrift in imposing a twenty-year sentence. But Bartoli made no mention of his age below beyond listing it in his sentencing memorandum without argument. Accordingly, the district court did not abuse its discretion in giving his age little weight. *Madden*, 515 F.3d at 611, 613. Moreover, Bartoli's age at sentencing was due in part to the thirteen years he spent on the run. Had he not fled, he would have **[**16]** been younger at sentencing, and his decision to flee and perpetrate an additional fraud scheme in Peru contributed to a longer sentence than he may have otherwise faced. So while age could be an important consideration under different circumstances, *e.g.*, *United States v. Payton*, 754 F.3d 375, 378-79 (6th Cir. 2014) (vacating forty-five year sentence where district court failed to address argument that defendant's age decreased his risk of re-engaging in violent crime), there is good reason to weigh other factors more heavily here. Thus, Bartoli's age is an insufficient basis to second-guess his sentence.

Disparity. Finally, Bartoli contends that his sentence will create an unwarranted sentence disparity. *Section 3553(a)(6)* instructs district courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *18 U.S.C. § 3553(a)(6)*. This provision focuses on "national sentencing disparities rather than sentencing disparities among codefendants." *United States v. Peppel*, 707 F.3d 627, 638 (6th Cir. 2013). Below, however, Bartoli made no argument about a national disparity. It is difficult to see how the district court abused its discretion in failing to consider a disparity argument that Bartoli did not present.

The argument Bartoli now advances is based **[**17]** on this court's decision in *United States v. Peppel*. *See id.* at 638-40. There, this court relied on a collection of fraud sentences compiled by a New York district court in concluding that a fraud sentence was unjustifiably disparate. *Id.* at 639-40 (citing *United States v. Parris*, 573 F. Supp. 2d 744, 751-53, 756-62 (E.D.N.Y. 2008)). Bartoli highlights that in that collection, "[non-cooperating defendants] whose losses were less than $100 million were generally sentenced to single-digit terms." *Id.* (quoting *Parris*, 573 F. Supp. 2d at 753). He stresses that, in addition to causing a loss amount lower than $100 million, he also cooperated with law enforcement. But by focusing solely on his cooperation (which the district court reasonably discounted) and loss amount, Bartoli ignores the other reasons for the variance: the number of victims, the harm that Bartoli's conduct caused, his flight, and his conduct in Peru. Thus, even if there is some disparity here, Bartoli fails to explain how it is unwarranted. Not only that, but as the

district court noted, defendants in Bartoli's position would face a Guidelines range well above 240 months under the **[*432]** 2016 Guidelines, which were in force at the time of Bartoli's sentencing.[1] Bartoli's disparity argument is therefore unavailing.

* * *

We **AFFIRM** Bartoli's sentence.

End of Document

[1] Bartoli argues that the district court miscalculated the low end of his hypothetical 2016 Guidelines range as 360 months. But even with Bartoli's correction, the low end of his hypothetical range would be 292 months. ***U.S. Sentencing Guidelines Manual Ch. 5. Pt. A*** (U.S. Sentencing Comm'n 2016).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ERIC V. BARTOLI, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)))))))))	CASE NOS.: 5:03-cr-00387 5:19-cv-01841 JUDGE JOHN R. ADAMS **MEMORANDUM OF OPINION AND ORDER** (Resolves Docs. 74, 98, 127, and 128 for 5:03-cr-0387)

This matter is before the Court on Petitioner Eric V. Bartoli's ("Bartoli") Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. (Mot. to Vacate, ECF No. 74.)[1] For the reasons discussed, detailed, and analyzed herein Bartoli's motion is granted in part and denied in part.

I. BACKGROUND

Between 1995 and 1999, Bartoli executed an investment scheme where he marketed and sold unregistered securities to hundreds of investors around the world. (Plea Agreement 17-25, ECF No. 34.) Investors' funds were not actually invested, however, but rather diverted to other investment schemes or for Bartoli's and his coconspirators' personal use. (*Id.*) The scheme resulted in Bartoli and his coconspirators obtaining approximately $64.7 million from investors, while only about $30.6 million was returned to investors in the form of redemptions. (*Id.*) Bartoli also filed false and fraudulent income tax return forms grossly understating his taxable income for the 1996 and 1997 tax years and completely failed to file income tax return forms for the 1998 tax year. (*Id.* at 25-26.) In 1999, after the SEC enjoined Bartoli and his coconspirators from operating the

[1] All citations in this Memorandum of Opinion and Order are to the docket for *United States of America v. Bartoli*, Case No. 5:03-cr-00387, N.D. Ohio.

scheme and a receiver was appointed to recover investors' funds, Bartoli abandoned his Ohio residence. (*Id.* at 26.) Around November 1, 2000, Bartoli left the United States. (*Id.*)

On October 15, 2003, a federal Grand Jury indicted Bartoli for the following: Count 1 – Conspiracy to Commit an Offense in violation of 18 U.S.C. § 371 (hereinafter "Conspiracy Charge"); Count 2 – Securities Fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff(a), and 17 C.F.R. § 240.10b-5 (hereinafter "Securities Fraud Charge"); Count 3 – Sale of Unregistered Securities in violation of 15 U.S.C. §§ 77e(a) and 77x (hereinafter "Sale of Unregistered Securities Charge"); Count 4 – Wire Fraud in violation of 18 U.S.C. § 1343 (hereinafter "Wire Fraud Charge"); Count 5 – Mail Fraud in violation of 18 U.S.C. § 1341 ("Mail Fraud Charge"); Count 6 – Money Laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (hereinafter "First Money Laundering Charge"); Count 7 – Money Laundering in violation of 18 U.S.C. § 1957 (hereinafter "Second Money Laundering Charge"); and Counts 8-10 – Attempted Income Tax Evasion in violation of 26 U.S.C. § 7201 (hereinafter, collectively, "Attempted Income Tax Evasion Charges"). (Indictment 1-54, ECF No. 2.) Bartoli was indicted for conduct that occurred between 1995 and August 27, 1999. (*Id.*)

Thereafter, beginning in approximately 2006, Bartoli, while residing in Peru, used aliases such as "Enrico B. Orlandini," "Giuseppe Luigi Borrelli," "Steve Betts," and "Roger Williams" to represent himself as an investment advisor and operator of multiple financial services firms and investment newsletters. (Plea Agreement 26-27, ECF No. 34.) Bartoli ultimately convinced individuals to invest in the funds he claimed to manage. (*Id.*) However, Bartoli never invested the money he was given and instead used it all to enrich himself. (*Id.* at 26-28.) Bartoli defrauded individuals of approximately $5,588,000 in this scheme. (*Id.* at 28.)

On December 11, 2013, Bartoli was arrested by the Peruvian National Police on a warrant related to the indictment in this matter. (*Id.* at 26. *See also* Tr. Sentencing Hr'g 36:19-39:21, ECF No. 56.) At the end of October 2015, Bartoli was arrested by the Federal Bureau of Investigation and extradited to the United States. (Plea Agreement 26, ECF No. 34. *See also* Docket Entry 10/29/2015; Arrest Warrant, ECF No. 30.)

On October 29, 2015, Bartoli appeared before this Court for arraignment where he pled not guilty to the charges against him and was remanded into custody. (Min. 10/29/2015. *See also* Tr. Arraignment Hr'g 3:10-7:21, ECF No. 65.) On July 13, 2016, Bartoli and the government entered into a written plea agreement and attended a change of plea hearing before this Court. (Plea Agreement, ECF No. 34; Min. 7/13/2016. *See also* Tr. Change of Plea Hr'g 2:1-22, ECF No. 53.)

Throughout the change of plea hearing, Bartoli was under oath and not under the influence of any substance that would affect his ability to understand the hearing. (Tr. Change of Plea Hr'g 3:7-21, 4:6-13, ECF No. 53.) At the outset, Bartoli affirmed he fully reviewed the indictment and understood the charges it contained, he had adequate time to discuss and review all the matters related to his case, including possible defenses, with his attorneys, and he was satisfied with his attorneys' performances. (*Id.* at 4:14-5:6, 39:6-15.) Bartoli also affirmed, with respect to the written plea agreement, he had fully read and reviewed it, he understood its terms, and no one had made any promises or threats which persuaded him to sign it. (*Id.* at 5:23-6:16, 7:6-9, 39:6-15, 45:20-22.)

Thereafter, this Court engaged in a lengthy plea colloquy with Bartoli during which the written plea agreement was reviewed paragraph by paragraph – this necessarily included detailing the consequences of pleading guilty and the offenses, along with their associated legal elements, to which Bartoli wished to plead guilty. (*Id.* at 2:23-3:6, 7:10-44:10. *See also* Plea Agreement 1-15,

ECF No. 34.) Of note, while detailing the consequences of pleading guilty, this Court, in accordance with the information contained in the written plea agreement, provided that Count 2, the Securities Fraud Charge, Count 4, the Wire Fraud Charge, and Count 5, the Mail Fraud Charge, each carried a twenty-year statutory maximum term of imprisonment. (Tr. Change of Plea Hr'g 8:16-17, 9:6-7, 9:16-18, ECF No. 53. *See also* Plea Agreement 2-3, ECF No. 34.)

When this Court sought to determine the factual basis for Bartoli's guilty plea, Bartoli admitted, under oath, that the factual basis contained in the written plea agreement – labeled "Attachment A" – was accurate and truthful. (Tr. Change of Plea Hr'g 44:11-45:7, ECF No. 53.) More specifically, Bartoli affirmed he carefully and thoroughly reviewed the factual materials supporting the government's case against him, he understood the factual recitation, and he admitted to engaging in the illegal activity as written. (*Id.*)

Throughout the change of plea hearing, Bartoli consistently and coherently agreed, under oath, that he wished to waive his rights and plead guilty to the Conspiracy Charge, the Securities Fraud Charge, the Sale of Unregistered Securities Charge, the Wire Fraud Charge, the Mail Fraud Charge, and the Attempted Income Tax Charges against him. (*Id.* at 5:7-22, 12:24-13:11, 40:10-17, 41:9-44:10.) Therefore, after the lengthy and thorough exchange between Bartoli and this Court, Bartoli entered his guilty plea and this Court accepted it with a finding that Bartoli was competent and entered an informed, knowing, and voluntary plea. (*Id.* at 46:6-23.) Likewise, Bartoli's written plea agreement, signed by both Bartoli and this Court, was finalized. (Plea Agreement 16, ECF No. 34.)

On November 9, 2016, Bartoli attended his sentencing hearing where this Court sentenced Bartoli to the custody of the United States Bureau of Prisons for five years each as to Count 1, the Conspiracy Charge, Count 3, the Sale of Unregistered Securities Charge, and Counts 8-10, the

Attempted Income Tax Evasion Charges, and to twenty years each as to Count 2, the Securities Fraud Charge, Count 4, the Wire Fraud Charge, and Count 5, the Mail Fraud Charge, with all sentences to run concurrently, and ordered Bartoli to pay $42,499,302.82 in restitution. (Min. 11/09/2016; Tr. Sentencing Hr'g 3:3-19, 55:20-61:3, ECF No. 56; J. 1-8, ECF No. 44.) Counts 6 and 7, the First Money Laundering Charge and the Second Money Laundering Charge, were dismissed upon the government's motion. (Min. 11/09/2016; Tr. Sentencing Hr'g 60:22-25, ECF No. 56; J. 1, ECF No. 44.) This Court's sentence was affirmed on appeal. *United States v. Bartoli*, 728 F. App'x 424 (6th Cir. 2018). Bartoli's request for rehearing en banc was denied as was his petition for certiorari to the Supreme Court of the United States. *United States v. Bartoli*, No. 16-4748, 2018 U.S. App. LEXIS 13250, at *1 (6th Cir. May 21, 2018); *United States v. Bartoli*, 139 S. Ct. 1463 (2019) (table decision).

On August 13, 2019, Bartoli filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. (Mot. to Vacate, ECF No. 74.) Bartoli's Motion to Vacate sets forth five grounds for relief: (1) ineffective assistance of counsel for failing to identify Ex Post Facto Clause violations; (2) ineffective assistance of counsel for failing to assert Bartoli's Sixth Amendment right to a speedy trial was violated; (3) ineffective assistance of counsel for failing to argue Bartoli's extradition was illegal; (4) ineffective assistance of counsel during Bartoli's sentencing; and (5) "constitutional questions" regarding prosecutorial misconduct and the application of the Ex Post Facto Clause to extradition treaties. (*Id.* at 4-9. *See also* Mem. in Supp. of Mot. to Vacate, ECF No. 74-3.)

In response, the government filed a Response in Partial Concession, conceding that Bartoli must be resentenced due to Ex Post Facto Clause violations that occurred at Bartoli's sentencing. (Resp't's Resp. in Partial Concession 1, 3-6, ECF No. 84.) Accordingly, this Court vacated

Bartoli's sentence and ordered Bartoli's transfer back to the Northern District of Ohio for appointment of counsel. (Order, ECF No. 91.)

Bartoli was subsequently appointed counsel who was awarded time to thoroughly review Bartoli's case and supplement the arguments in Bartoli's original Motion to Vacate. (*See* Docket Entry 04/01/2020; Tr. Apr. 8, 2020 Status Conference, ECF No. 107; Tr. Jun. 9, 2020 Status Conference, ECF No. 122.) Bartoli then filed a Supplemental Memorandum in Support of the Motion to Vacate, which reiterated the five grounds for relief requested in his original Motion to Vacate. (Pet'r's Suppl. Mem., ECF No. 113.) The government filed a Response in Opposition to Petitioner's Motion to Vacate, to which Bartoli filed a Reply and a Supplemental Memorandum to the Reply. (Resp. in Opp'n to Mot. to Vacate, ECF No. 123; Pet'r's Reply, ECF No. 124; Pet'r's Suppl. to Reply, ECF No. 126.) This Court has thoroughly reviewed all arguments before it.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2255, a prisoner "may move the court which imposed the sentence [against him] to vacate, set aside, or correct the sentence." 28 U.S.C.S. § 2255(a). In order for the prisoner to obtain relief under 28 U.S.C. § 2255, he "must allege as a basis for relief: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003) (quoting *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001) (internal quotation marks omitted)).

In the instant matter, as stated previously, Bartoli provided five grounds for relief in his Motion to Vacate pursuant to 28 U.S.C. § 2255. The first four grounds indicate that Bartoli is alleging an error of constitutional magnitude in the form of ineffective assistance of counsel. (Mot. to Vacate 1-9, ECF No. 74.) The fifth ground poses "constitutional questions." (*Id.* at 9.)

III. ANALYSIS

This Court will address each of Bartoli's grounds for relief in chronological order from when he alleges the error occurred.

A. Ground Five – Prosecutorial Misconduct

Ground five of Bartoli's Motion to Vacate poses two "constitutional questions." (Mot. to Vacate 9, ECF No. 74.) The first, "[w]as there prosecutorial misconduct regarding the application of charges against [Bartoli]." (*Id.*) The second, "[c]an Congress make a law containing Ex Post Facto Clause to be applied to the detriment of [Bartoli] as it did in the Treaty used to extradite [Bartoli]." (*Id.*)

With respect to the first question, Bartoli claims his counsel was ineffective for failing to recognize prosecutorial misconduct when Bartoli was indicted and extradited. (Mem. in Supp. of Mot. to Vacate 19, ECF No. 74-3; Pet'r's Suppl. Mem. 18, ECF No. 113.) Specifically, Bartoli claims that the indictment contained an Ex Post Facto Clause violation with respect to Count 2, the Securities Fraud Charge, when it recited the incorrect statutory maximum sentence, indicative of prosecutorial misconduct. (Mem. in Supp. of Mot. to Vacate 19-20, ECF No. 74-3; Pet'r's Suppl. Mem. 18, ECF No. 113.) Bartoli further alleges that the indictment, with respect to Count 4, the Wire Fraud Charge, and Count 5, the Mail Fraud Charge, was modified at least three times, flipping between reciting the incorrect statutory maximum sentence for those charges – which violated the Ex Post Facto Clause – and the correct statutory maximum sentence for those charges for the sole purpose of denying Bartoli his legal rights. (Mem. in Supp. of Mot. to Vacate 19-20, ECF No. 74-3; Pet'r's Suppl. Mem. 18-21, ECF No. 113.) Bartoli argues that this blatant and apparent misconduct raises the question of whether the charges against him are constitutionally

sound. (Mem. in Supp. of Mot. to Vacate 19-21, ECF No. 74-3; Pet'r's Suppl. Mem. 18-21, ECF No. 113.)

Bartoli's arguments focus solely on the indictment and its effect on his extradition. As a threshold matter, "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956). With respect to prosecutorial misconduct as it relates to an indictment, the Sixth Circuit Court of Appeals has made clear that "a court may not order dismissal of an indictment under its supervisory power unless the defendant demonstrates that 'prosecutorial misconduct is a long-standing or common problem in grand jury proceedings in the district'" and "a defendant who seeks dismissal of an indictment also must show that he was prejudiced by the prosecutor's actions." *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir. 1985) (quoting *United States v. Nembhard*, 676 F.2d 193, 200 (6th Cir. 1982)). *See also Bank of N.S. v. United States*, 487 U.S. 250, 255 (1988) (explaining a district court "exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant"). Going further, "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of N.S.*, 487 U.S. at 256 (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986)).

To be clear, Bartoli's arguments first suggest that the indictment itself was constitutionally invalid due to prosecutorial misconduct because it misstated the statutory maximum sentence for certain charges. However, the indictment does not recite statutory maximum sentences for any of the charges. (Indictment 1-54, ECF No. 2.) Although the criminal designation form attached to the indictment does state that Count 2, the Securities Fraud Charge, carries a twenty-year statutory

maximum sentence, this form is not part of the indictment. (Criminal Designation Form 1, ECF No. 2-1.) Pursuant to the Northern District of Ohio Local Criminal Rules, "[t]he United States Attorney shall file a criminal designation form *with each new indictment* . . ." LCrR 55.1 (*emphasis added*). As the local rule states, the criminal designation form is filed with the indictment, which necessarily indicates that it is completed once a grand jury indicts. Certainly, this form cannot be completed until the charges for which the grand jury indicted are known. Therefore, this is not information presented to the grand jury or even part of the indictment.

There is no need for this Court to engage in an analysis regarding whether misstatements contained in an indictment rise to the level of prosecutorial misconduct because the indictment in this matter did not contain misstatements. For clarity, even if Bartoli properly argued and adequately demonstrated long-standing problems in grand jury proceedings in this district – which he clearly has not – he absolutely cannot demonstrate prejudice because the misstatements he alleges were not in the indictment, not presented to the grand jury and, therefore, could not have influenced the decision to indict. Any argument Bartoli advances regarding prosecutorial misconduct due to misstatements of statutory consequences in the indictment is, therefore, meritless. The indictment is valid on its face and shall not be dismissed.

Finally, Bartoli's allegations of constantly changing recitations of statutory maximum sentences and multiple edits to the indictment to elicit his extradition and deprive him of his rights are wholly unfounded. There is zero evidence of any changes to the indictment. The original indictment and criminal designation form, both dated October 15, 2003 and filed the same day, remain the only indictment and criminal designation form in the record for this case. Furthermore, the document Bartoli provided, allegedly from the United States government to Peru when requesting Bartoli's extradition, purporting to demonstrate prosecutorial misconduct states "please

note that Title 18 United States Code, Section 1343, and Title 18 United States Code, Section 1341 were amended in 2002. The text of the statutes included in Exhibit A of the extradition documents is the current, amended version of these statutes. Below, please find the text of these statutes as they were at the time Bartoli's alleged criminal conduct and as will be applicable in his prosecution." (Mem. in Supp. of Mot. to Vacate Ex. 4 at 48, ECF No. 74-4). Correcting a statutory submission is not prosecutorial misconduct. Still, Bartoli has failed to demonstrate how the submission of the proper statutes to Peru prejudiced him during his extradition. In fact, the Supreme Court of Peru, in its extradition opinion for Bartoli, did not mention the statutory maximum sentences Bartoli faced in the United States whatsoever, indicative that any punishment Bartoli faced in the United States had no bearing on the decision to extradite him. (Translated Supreme Court of Peru Extradition Op. 1-6, ECF No. 125-1.)

For all these reasons, this Court finds no prosecutorial misconduct occurred as alleged. Accordingly, this Court will not engage in further analysis regarding the constitutional efficacy of Bartoli's counsel for failing to raise a prosecutorial misconduct argument because a failure to raise "wholly meritless claims cannot be ineffective assistance of counsel." *United States v. Martin*, 45 F. App'x 378, 381-82 (6th Cir. 2002). In conclusion, the indictment, valid on its face and constitutionally sound, shall not be dismissed and Bartoli's extradition shall not be reversed. This first portion of Bartoli's fifth ground for relief in his Motion to Vacate is therefore denied. The second argument of Bartoli's fifth ground for relief will be addressed *infra*.

B. Ground Two – Violations of Sixth Amendment Speedy Trial Rights

In the second ground of his Motion to Vacate, Bartoli claims that his counsel was ineffective for failing to "recognize and object to a violation of [Bartoli's] [sic] Amendment Right to a 'Speedy Trial.'" (Mot. to Vacate 5, ECF No. 74.) Bartoli argues that the twelve-year delay between

indictment, which occurred October 15, 2003, and arraignment, held October 29, 2015, violated his Sixth Amendment right to a speedy trial. (*Id.*)

The Sixth Amendment of the United States Constitution guarantees for ". . . all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI. When determining whether a violation of the Sixth Amendment has occurred, this Court must consider "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). No one factor alone establishes a Sixth Amendment violation, "[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533.

1. *Length of Delay*

The first factor, length of delay, is the threshold issue as the interval between accusation and trial must cross the line from ordinary delay to "presumptively prejudicial" delay to trigger analysis of the remaining factors. *United States v. Jackson*, 473 F.3d 660, 664 (6th Cir. 2007) (quoting *Doggett*, 505 U.S. at 651-52) (internal quotation marks omitted)). *See also United States v. Mundt*, 29 F.3d 233, 235 (6th Cir. 1994). "A delay approaching one year is presumptively prejudicial." *United States v. Robinson*, 455 F.3d 602, 607 (6th Cir. 2006) (citing *Doggett*, 505 U.S. at 652, n.1). Because the delay in this matter, between indictment and Bartoli's first appearance before this Court, was twelve years, it is presumptively prejudicial triggering analysis of the remaining factors.

2. *Reason for the Delay*

The second factor, considering the reasons for the delay, while not dispositive remains "[t]he flag all litigants seek to capture." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). When balancing the reasons, "[g]overnmental delays motivated by bath faith, harassment, or attempts to seek a tactical advantage weigh heavily against the government, while neutral reasons such as negligence are weighted less heavily, and valid reasons for a delay weigh in favor of the government." *Robinson*, 455 F.3d at 607 (citing *Barker*, 407 U.S. at 531). Since "the prosecutor and the court have an affirmative constitutional obligation to try the defendant in a timely manner . . . the burden is on the prosecution to explain the cause of the pre-trial delay." *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999) (quoting *United States v. Graham*, 128 F.3d 372, 374 (6th Cir. 1997) (internal quotation marks omitted)).

As with other litigants, this factor is the flag Bartoli seeks to capture. In fact, Bartoli concludes that responsibility for delay in this case falls squarely on the shoulders of the government as he paints himself innocent of any fault by asserting that he was simply a law-abiding citizen who merely wished to live in Peru and did so with a paper trail leading directly to his front door, which the government failed to knock upon. (Mem. in Supp. of Mot. to Vacate 5-7, ECF No. 74-3; Pet'r's Suppl. Mem. 6-9, ECF No. 113.)

In support of this characterization, Bartoli first claims he left the United States in October 2000 with a valid passport. (Mem. in Supp. of Mot. to Vacate 6, ECF No. 74-3; Pet'r's Suppl. Mem. 7, ECF No. 113.) He denies fleeing. However, court documents reflect that Bartoli was ordered to surrender his passport to the United States District Court for the Southern District of Florida in 1999, which he refused to do until September 21, 2000, when he exchanged his passport for release from a New Hampshire jail. (*See* Resp. to Sentencing Mem. Ex. 1, ECF No. 41-1; Resp. to

Sentencing Mem. Ex. 2, ECF No. 41-2.) Bartoli fails to provide any argument or evidence explaining how he was able to apply for, receive, and use a passport at the same time court documents reflect his passport was in possession of the federal courts.

Even providing Bartoli the widest latitude in assuming that he departed the United States with a valid passport, Bartoli admits to travelling in Europe before settling in Peru in 2001. (*See* Sentencing Mem. 6-7, ECF No. 40.) Bartoli argues that his passport was never flagged by the government – indicative of their negligence. (Mem. in Supp. of Mot. to Vacate 6, ECF No. 74-3; Pet'r's Suppl. Mem. 8, ECF No. 113.) However, there is no evidence Bartoli travelled internationally after 2001. (Pet'r's Reply 15, ECF No. 124 (stating that Bartoli returned to Peru in 2001 where he remained until arrested in 2013).) Bartoli's indictment and arrest warrant were not issued until 2003 – flagging his allegedly valid passport in 2003 would not have provided the government notice of Bartoli's whereabouts since he did not travel internationally after indicted.

Next, Bartoli claims he registered his home address with the United States Embassy in 2001 and received an FBI background check in 2002 – Bartoli argues both activities alerted the government of his location in Peru. (Mem. in Supp. of Mot. to Vacate 6, ECF No. 74-3; Pet'r's Suppl. Mem. 7, ECF No. 113.) In support of these arguments, Bartoli provides grainy, illegible copies of two documents. The first is a printout from a website, in Spanish, and, quite clearly, is not from the United States Embassy. (Mem. in Supp. of Mot. to Vacate Ex. 5 at 6, ECF No. 74-5.) What this Court finds especially problematic with respect to this document is that in one instance Bartoli argues it demonstrates registration of his address with the United States Embassy in 2001, and in another instance claims it was "generated by the U.S. Embassy in Peru on November 17, 2009." (Mem. in Supp. of Mot. to Vacate 6, ECF No. 74-3; Pet'r's Reply 16, ECF No. 124.) Despite these shifting facts, this website printout does not evidence knowledge by the United States

government of Bartoli's whereabouts, neither in 2001 nor in 2009. The second document is wholly illegible except for a stamp that reads "No Arrest Record" as of October 2, 2002. (Mem. in Supp. of Mot. to Vacate Ex. 5 at 22-24, ECF No. 74-5.) This Court finds Bartoli's attempts to proffer these records as evidence that the United States government obviously knew his whereabouts disingenuous at best, if for no other reason than these alleged activities occurred well before Bartoli was indicted.[2]

Finally, Bartoli claims that maintenance of bank accounts, credit cards, and a mortgage – none of which are public records – allowed for him to easily be located. (Mem. in Supp. of Mot. to Vacate 6, ECF No. 74-3; Pet'r's Suppl. Mem. 8, ECF No. 113.) Even Bartoli's arguments that public records, such as a driver's license, passport, and land deed, pointed to his exact location fail because the government first needed to know where in the world to begin looking before public records examinations could be fruitful. (Mem. in Supp. of Mot. to Vacate 6, ECF No. 74-3; Pet'r's Suppl. Mem. 8, ECF No. 113.) Bartoli colors the government's failure to locate him as negligent at the very least, arguing the government failed to notify him of the indictment, failed to notify this Court of any difficulties locating him, and failed to seek his arrest prior to 2010 despite him living openly in Peru. (Mem. in Supp. of Mot. to Vacate 5-7, ECF No. 74-3; Pet'r's Suppl. Mem. 7-9, ECF No. 113.)

The record, however, reflects that Bartoli evaded arrest and detection, and it was his actions alone that caused the delay of this matter. If nothing else, Bartoli's use of aliases is damning. If Bartoli was truly unaware of the indictment against him, as he so strenuously argues, why bother

[2] This Court will note that the criminal designation form attached to the indictment recites Bartoli's address as Marshallville, Ohio. (Criminal Designation Form 2, ECF No. 2-1.) Given the requirement of the Northern District of Ohio Local Criminal Rules directing "the United States Attorney shall indicate the name and address of the defendant . . .," the government certainly would have indicated Bartoli's address in Peru had it known at the time of indictment in 2003. LCrR 55.1.

utilizing multiple aliases while executing an investment scheme in Peru with notably similar characteristics as the scheme for which he was indicted in the United States. Bartoli addresses this only once, claiming his aliases were actually "pen names under which [he] wrote various investment articles." (Pet'r's Reply 16, ECF No. 124.) However, this statement, along with Bartoli's persistent assertions he was unaware of the charges pending against him in the United States, fly directly into the face of Bartoli's admission, under oath, that he "used false names to conceal from his investors the fact that he was a fugitive wanted in the United States on multiple counts of fraud related to investment schemes in the Northern District of Ohio." (Plea Agreement 27, ECF No. 34; Tr. Change of Plea Hr'g 44:11-45:7, ECF No. 53.) In addition, and possibly most damning, one of these "pen names" was reflected on identification Bartoli provided to the Peruvian National Police. Bartoli admitted, under oath, that upon arrest by the Peruvian National Police he falsely represented himself to be a native-born Argentine citizen named Giuseppe Borelli and provided personal identification claiming the same. (Plea Agreement 26, ECF No. 34; Tr. Change of Plea Hr'g 44:11-45:7, ECF No. 53.) These are not the activities of a law-abiding citizen merely going about his personal business and living openly. These are the activities of an individual attempting to avoid detection.

When this Court pressed the government to explain the lengthy delay in this matter, the government responded that until Bartoli committed the investment scheme in Peru, he had gone undetected. (Tr. Sentencing Hr'g 39:22-40:10, ECF No. 56.) Once Bartoli's whereabouts were known, as a result of the investment scheme he executed in Peru, the government "immediately began the process to arrest and extricate him back to the United States." (*Id.*) The totality of the evidence before this Court suggests Bartoli in Peru was much like a misplaced cell phone – the cell phone itself knows where it is but cannot be located, despite being searched for, until it rings.

Cf. Doggett, 505 U.S. at 648-53 (finding the government negligent where a defendant fled the country before the indictment, but re-entered the United States unencumbered due to a clerical error and lived openly in the United States for six years); *United States v. Heshelman*, 521 F. App'x 501, 506-07 (6th Cir. 2013) (finding the delay was due to intentional, impermissible government conduct that used a "wait-and-see" strategy rather than "pursuing the available options to retrieve [the defendant] from Switzerland . . . because it wanted to have complete control over the charges that could be tried"); *United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) (finding the government negligent because although defendant went to the Philippines before being indicted, the government spoke with him directly while he was in the Philippines, failed to inform him of the indictment, and waited to arrest him until he returned to the United States).

This Court finds that the government adequately demonstrated Bartoli alone was the cause of the delay. In fact, the record fails to demonstrate bad faith or even negligence on the part of the government in attempting to locate Bartoli. Accordingly, this factor weighs heavily in favor of the government.

3. *Bartoli's Assertion of His Right*

The third factor, analyzing Bartoli's assertion of his right to a speedy trial, first "requires proof by the government that the defendant had knowledge of the federal charges" against him. *Robinson*, 455 F.3d at 608 (citing *Brown* 169 F.3d at 350). It weighs heavily against a defendant when it is demonstrated that the defendant knew of the charges against him but failed to timely assert his right to a speedy trial. *Robinson*, 455 F.3d at 608 (citing *United States v. Schreane*, 331 F.3d 548, 557 (6th Cir. 2003)). There is certainly circumstantial evidence suggesting Bartoli knew of the indictment against him while executing the investment scheme in Peru, and again when he

was arrested in Peru in 2013. Certainly, Bartoli was aware when he was arraigned by this Court in 2015. Yet, Bartoli did not assert his speedy trial right until 2019 through his Motion to Vacate.

However, because Bartoli is claiming that his counsel was ineffective for failing to put forth this argument – and by extension suggesting that this argument would have been timely raised had his counsel been effective – in the interest of justice, this Court will not weigh this factor either against or in favor of Bartoli.

4. *Prejudice to Bartoli*

The final factor, actual prejudice experienced by delay, "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker* 407 U.S. at 532. One of the most important interests, of course, is limiting "the possibility that the defense will be impaired." *Id.* This interest is considered the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious." *Id.* However, "a defendant who evades prosecution is culpable in causing the delay, and the prejudice growing from such delay cannot be weighed in his favor." *Brown*, 169 F.3d at 349.

This Court will presume that some prejudice has occurred given the delay in this matter. Witnesses have likely died, memories fade over time, and it is possible that evidence has become stale. However, but for Bartoli's actions to evade arrest and prosecution, these presumed prejudices would not have occurred. Therefore, this factor is weighed heavily against Bartoli.

Of course, with this speedy trial argument, Bartoli seeks the dismissal of his indictment because "[w]hen a defendant's constitutional right to a speedy trial has been violated, dismissal of the indictment is the only available option even when it allows a defendant who may be guilty of a serious crime to go free." *Id.* at 348 (citing *Barker*, 407 U.S. at 522). Therefore, to be clear, under

the above analysis the first factor weighs in Bartoli's favor; the third factor weighs in neither party's favor in the interest of justice; however, the second and fourth factors weigh heavily against Bartoli and heavily in favor of the government. Given the balancing of these factors and Bartoli's personal responsibility for the delay in this case, this Court concludes Bartoli's speedy trial rights were not violated. Accordingly, this Court will not engage in further analysis regarding the constitutional efficacy of Bartoli's counsel for failing to raise a Sixth Amendment speedy trial argument because a failure to raise "wholly meritless claims cannot be ineffective assistance of counsel." *United States v. Martin*, 45 F. App'x 378, 381-82 (6th Cir. 2002). In conclusion, the indictment shall not be dismissed on the grounds that Bartoli's Sixth Amendment right to a speedy trial was violated. Bartoli's second ground for relief in his Motion to Vacate is therefore denied.

C. Ground Three – Illegal Extradition

In the third ground of his Motion to Vacate, Bartoli claims that his counsel was ineffective for failing to "object to [Bartoli's] illegal extradition." (Mot. to Vacate 7, ECF No. 74.) Bartoli specifically argues that his counsel was ineffective for failing to recognize that his extradition from Peru to the United States, pursuant to an extradition treaty between the two nations, was illegal because: (1) the principal of dual criminality was violated; (2) the rule of specialty was violated; (3) the United States failed to provide Peru with the proper evidence to support extradition; and (4) the extradition treaty violated the Ex Post Facto Clause of the United States Constitution. (*Id.*)

As background, on November 14, 2002, Congress ratified the Extradition Treaty between the United States of America and the Republic of Peru ("Treaty"), signed in Lima on July 26, 2001. 148 CONG. REC. S11057 (daily ed. Nov. 14, 2002). In pertinent part, the Treaty provides that it serves to recall and replace the previous extradition treaty between the United States and Peru as well as an associated agreement signed in 1899 and 1990, respectively. EXTRADITION TREATY

BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF PERU, U.S.-Peru, July 26, 2001, S. Treaty Doc. No 107-6. The Treaty was in effect at the time the United States requested Bartoli's extradition from Peru. (Translated Supreme Court of Peru Extradition Op. 1, ECF No. 125-1.)

1. *Principal of Dual Criminality*

Bartoli's first argument with respect to his extradition is that the principal of dual criminality, as contained in the Treaty, was violated. (Mot. to Vacate 7, ECF No. 74; Mem. in Supp. of Mot. to Vacate 10-12, ECF No. 74-3.) Throughout this argument, Bartoli refers to miscellaneous sections of the Treaty and various articles of Peru's Criminal Code in an attempt to demonstrate that between 1995 and 1999, when Bartoli committed the indicted offenses, Peru's Criminal Code did not punish those same offenses, thus violating the principal of dual criminality. (Mem. in Supp. of Mot. to Vacate 10-12, ECF No. 74-3.)

Article II of the Treaty describes which offenses are considered extraditable offenses. EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF PERU, art. II, U.S.-Peru, July 26, 2001, S. Treaty Doc. No 107-6. So long as an offense is punishable in both the United States and Peru "by deprivation of liberty for a maximum period of more than one year," regardless of whether the laws are categorized or described differently in each nation, it is an extraditable offense. *Id.* Therefore, Article II of the Treaty enumerates the dual criminality requirement, as it "ensures that the charged conduct is considered criminal and punishable as a felony in both the country requesting the suspect and the country surrendering the suspect." *Ordinola v. Hackman*, 478 F.3d 588, 594 n.7 (4th Cir. 2007) (quoting EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF PERU, art. II, U.S.-Peru, July 26, 2001, S. Treaty Doc. No 107-6). Of note, the offenses in question "need not have identical elements" in each country, but rather must be deemed "substantially analogous" to meet the dual

criminality requirement. *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995) (citing *Matter of Extradition of Russell*, 789 F.2d 801, 803 (9th Cir. 1986); *Peters v. Egnor*, 888 F.2d 713, 719 (10th Cir. 1989); *Brauch v. Raiche*, 618 F.2d 843, 851 (1st Cir. 1980)).

The Supreme Court of Peru analyzed the principal of dual criminality for Bartoli's extradition. (Translated Supreme Court of Peru Extradition Op. 1-4, ECF No. 125-1.) At the outset, the Supreme Court of Peru acknowledged that the charges Bartoli faced in the United States were for conduct occurring between January 1, 1995 and August 27, 1999 and found that Count 1, the Conspiracy Charge, Count 6, the First Money Laundering Charge, and Count 7, the Second Money Laundering Charge, "would be included in the crime of 'Conspiracy to commit a crime,' set forth in Article 317 of the [Peru] Criminal Code punishable with imprisonment of no more than six years." (*Id.* at 1, 3 (footnote omitted).) With respect to Count 2, the Securities Fraud Charge, Count 3, the Sale of Unregistered Securities Charge, Count 4, the Wire Fraud Charge, and Count 5, the Mail Fraud Charge, the Supreme Court of Peru concluded that "the conduct/acts performed by the defendant requested for extradition is included framed in the offense of 'swindle' set forth in Article 196 of the [Peru] Criminal Code, which punishes it with a maximum penalty of six years' imprisonment." (*Id.* at 3-4 (footnote omitted).) Finally, for Counts 8-10, the Attempted Income Tax Evasion Charges, the Supreme Court of Peru concluded that Bartoli's "acts would be included in the [Peru] Criminal Tax Law under Tax Defrauding set forth in aggravating circumstances under subsection a) of article four of Legislative Decree No. 813, punishable with a maximum of 12 years' imprisonment." (*Id.* at 4 (footnote omitted).)

This analysis by the Supreme Court of Peru, conducted for the specific purpose of determining whether Bartoli should be extradited to the United States, clearly determined that the principal of dual criminality was met. The Supreme Court of Peru reviewed the dates of Bartoli's crimes, the

charges he faced in the United States, and directly compared these charges with Peru's Criminal Code. More specifically, the Supreme Court of Peru ensured that the conduct, as charged in the United States, was criminal and punishable in Peru by a term of imprisonment of more than one year – thereby finding the offenses were extraditable and the principal of dual criminality was met. As a final note, "in mulling dual criminality concerns, courts are duty bound to defer to a surrendering sovereign's reasonable determination that the offense in question is extraditable." *Saccoccia*, 58 F.3d at 766 (citing *Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992); *United States v. Van Cauwenberghe*, 827 F.2d 424, 429 (9th Cir. 1987)). *See also United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002) ("our courts cannot second-guess another country's grant of extradition to the United States"). This Court sees no reason to, and will in no way, supplant the judgment of the Supreme Court of Peru. The principal of dual criminality was not violated during Bartoli's extradition.

2. *Principal of Specialty*

Bartoli's next argument with respect to his extradition is that the rule of specialty, as contained in the Treaty, was violated. (Mot. to Vacate 7, ECF No. 74. Mem. in Supp. of Mot. to Vacate 12-14, ECF No. 74-3.) Article XIII of the Treaty addresses the rule of specialty. EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF PERU, art. XIII, U.S.-Peru, July 26, 2001, S. Treaty Doc. No 107-6. This article provides:

> 1. A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for:
> (a) an offense for which extradition was granted . . .

Id. With respect to this rule, "[t]he Supreme Court has recognized for more than a century that it is generally accepted that extradited persons, once returned to the requesting country, may be tried only for those offenses for which extradition was granted by the requested country." *Gon v. Holt*,

774 F.3d 207, 211 (4th Cir. 2014) (citing *United States v. Rauscher*, 119 U.S. 407, 416-17 (1886)). *See also United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 64 n.3 (2d Cir. 1975); *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) ("a nation that receives a criminal defendant pursuant to an extradition treaty may try the defendant only for those offenses for which the other nation granted extradition").

The Supreme Court of Peru made clear, in its extradition opinion, that the United States sought extradition of Bartoli for the ten counts of the indictment. (Translated Supreme Court of Peru Extradition Op. 2, 6, ECF No. 125-1.) Bartoli was never charged, detained, tried, or punished for any other offense. The matter before this Court is, and always has been, for the ten counts of the indictment. Therefore, quite simply, the rule of specialty has not been broken.

Bartoli, however, voices his displeasure at being ordered to pay restitution, having been sentenced to twenty years' imprisonment, and that relevant conduct was considered at sentencing. (Mem. in Supp. of Mot. to Vacate 12-14, ECF No. 74-3.) What Bartoli fails to understand is that the rule of specialty does not affect what sentence may be imposed or what materials may be considered when imposing said sentence. The rule is only to ensure that an extradited individual does not face additional or different charges than those for which he was extradited. The entirety of Bartoli's case before this Court involved the exact charges for which he was indicted and extradited in compliance with the rule of specialty – his dissatisfaction with his sentence is immaterial to the rule. The rule of specialty was not violated.

3. *Evidentiary Support for Extradition*

Bartoli also advances an argument that the requirements for extradition were not met because the United States failed to provide Peru with proper evidence as required by Article VI of the

Treaty. (Mem. in Supp. of Mot. to Vacate 12, ECF No. 74-3.) Accordingly, Article VI of the Treaty provides:

> 3. A request for extradition of a person who is sought for prosecution shall also be supported by:
> . . .
> (c) such evidence as would be sufficient to justify the committal for trial of the person if the offense had been committed in the Requested State.

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF PERU, art. VI, U.S.-Peru, July 26, 2001, S. Treaty Doc. No 107-6. With respect to this article and its requirements, the Supreme Court of Peru specifically stated in its extradition opinion "[t]he Passive Extradition Request including all legal requirements has been formalized by the judicial authority of the United States of America through a document titled 'Request for Extradition,' attaching all pertinent documentation according to provisions set forth in Article six of the Extradition Treaty . . .." (Translated Supreme Court of Peru Extradition Op. 1, ECF No. 125-1.)

The Supreme Court of Peru then recites that Bartoli faced accusations of defrauding hundreds of investors of millions of dollars by executing a Ponzi scheme between 1995 and 1999. (*Id.* at 1-2.) With respect to evidence against Bartoli, the Supreme Court of Peru specifically stated "[t]he charges filed against him have incriminating grounds by having indicated the description of punishable acts filed against the defendant requested for extradition, as well as the information regarding the dates, places and circumstances of their commission, identification of victims and legal classification corresponding to each punishable act . . . the indictment . . . the arrest warrant . . . and the affidavit in support of the Request for Extradition." (*Id.* at 2-3.) Finally, and perhaps most importantly, the Supreme Court of Peru summarized "the passive extradition package contains the procedural pieces necessary for defining the facts object of the charges and the identity

of the defendant, and it allows one to see the existence of sufficient evidence of a crime based on the procedural punishment system of the requesting state." (*Id.* at 5.)

Therefore, despite Bartoli's protests to the contrary – notably without evidence – the United States did supply Peru with the evidence required by the Treaty. Once again, the Supreme Court of Peru thoroughly reviewed the request for extradition and issued a written opinion reciting its findings that extradition of Bartoli to the United States was proper. This Court will not supplant, and in fact sees no reason to question, the legal conclusions reached by the Supreme Court of Peru.

4. *Effect of Ex Post Facto Clause on Extradition*

A few times throughout his Motion to Vacate Bartoli suggests that the Treaty, as applied to his extradition, violates the Ex Post Facto Clause of the United States Constitution. (Mot. to Vacate 7, 9, ECF No 74; Mem. in Supp. of Mot. to Vacate 20-21, ECF No. 74-3; Pet'r's Suppl. Mem. 21-22, ECF No. 113.) As stated many times before, Bartoli's criminal conduct occurred between 1995 and 1999, while the Treaty was signed in 2001 and ratified by the Senate in 2002. Therefore, although not articulated with particularity, it seems Bartoli is arguing that applying the Treaty to his extradition violates the Ex Post Facto Clause of the United States Constitution because the Treaty went into effect after his criminal conduct occurred.

The Constitution of the United States "prohibits both Federal and State Governments from enacting any ex post facto law." *Peugh v. United States*, 569 U.S. 530, 538 (2013) (citations and internal quotation marks omitted). Specific to the federal government, this clause limits the power of Congress to enact criminal laws – international treaties are not criminal laws. *See Johannessen v. United States*, 225 U.S. 227, 242 (1912) (explaining the Ex Post Facto Clause "is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description"). As the Supreme Court of the United States has explained, "the constitutional

prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

Just as treaties are not subject to the restrictions of the Ex Post Facto Clause, neither is extradition. Extradition "is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished." *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893). Extradition, by its nature, is a civil, not criminal, proceeding and is "handled under the civil rules." *DeSilva v. DiLeonardi*, 181 F.3d 865, 868 (7th Cir. 1999). "Extradition proceedings are not in their nature criminal, even if the relator is a criminal; extradition is not punishment for crime, though such punishment may follow extradition . . .." *United States ex rel. Oppenheim v. Hecht*, 16 F.2d 955, 956 (2d Cir. 1927). *See also In re Extradition of McMullen*, 989 F.2d 603, 611 (2d Cir. 1993) ("Although punishment may follow extradition, extradition itself never has been considered punishment."). Because the principles of the Ex Post Facto Clause apply only to criminal matters, and international treaties are extradition are in fact civil constructs, Bartoli's arguments suggesting the Treaty and his extradition violated the Ex Post Facto Clause are meritless.

In sum, Bartoli's extradition was proper following both the principal of dual criminality and the rule of specialty, and the decision of the Supreme Court of Peru to extradite Bartoli shall not be questioned. Furthermore, the application of the Treaty to Bartoli's extradition was not a violation of the Ex Post Facto Clause of the United States Constitution. Accordingly, this Court will not engage in further analysis regarding the constitutional efficacy of Bartoli's counsel for failing to raise arguments that Bartoli's extradition was illegal or unconstitutional because a failure to raise "wholly meritless claims cannot be ineffective assistance of counsel." *United States v. Martin*, 45 F. App'x 378, 381-82 (6th Cir. 2002). Bartoli's request to be returned to Peru is denied

along with the whole of the third ground for relief in his Motion to Vacate and the second portion of his fifth ground for relief.

D. Ground One – Ex Post Facto Clause Violations

The first ground of Bartoli's Motion to Vacate requests relief due to constitutionally ineffective counsel who "failed to identify ex post facto violations permeating every facet of the proceedings . . .." (Pet'r's Suppl. Mem. 1, ECF No. 113. *See also* Mem. in Supp. of Mot. to Vacate 1, ECF No. 74-3; Mot. to Vacate 4, ECF No. 74.) Bartoli claims that the entirety of this matter was tainted from inception because the indictment, petition for extradition, arraignment hearing, change of plea hearing, plea agreement, sentencing hearing, and sentence all either reflected, referred to, or relied upon incorrect statutory maximum terms of imprisonment Bartoli faced, in violation of the Ex Post Facto Clause of the United States Constitution. (Mot. to Vacate 4, ECF No. 74. *See also* Mem. in Supp. of Mot. to Vacate 1-4, ECF No. 74-3; Pet'r's Suppl. Mem. 1-5, ECF No. 113.)

This ground involves the following charges of the indictment: Count 2, the Securities Fraud Charge in violation of 15 U.S.C. §§ 78j(b) and 78ff(a), and 17 C.F.R. § 240.10b-5; Count 4, the Wire Fraud Charge in violation of 18 U.S.C. § 1343; and Count 5, the Mail Fraud Charge in violation of 18 U.S.C. § 1341. Prior to 2002, the Securities Fraud Charge carried a ten-year statutory maximum sentence while the Wire Fraud Charge and Mail Fraud Charge each carried a five-year statutory maximum sentence. *See* Insider Trading and Securities Fraud Enforcement Act of 1988, 100 Pub. L. 704, § 4, 102 Stat. 4677, 4680 (1988) (amending Securities Exchange Act of 1934, 73 Pub. L. 291, § 32, 48 Stat. 881, 904 (1934); Securities Acts Amendments of 1975, 94 Pub. L. 29, § 27, 89 Stat. 97, 163 (1975)); 18 U.S.C. § 1343, 82 Pub. L. 555, § 18, 66 Stat. 722, 722 (1952); 18 U.S.C. § 1341, 80 Pub. L. 772, § 1341, 62 Stat. 683, 763 (1948). In 2002, the Sarbanes-Oxley Act increased the statutory maximum sentence for the Securities Fraud Charge,

the Wire Fraud Charge, and the Mail Fraud Charge to twenty years, each. *See* Sarbanes-Oxley Act of 2002, 107 Pub. L. 204 §§ 903, 1106, 116 Stat. 745, 805, 810 (2002).

The Ex Post Facto Clause of the United States Constitution provides that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. This clause prohibits Congress from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Mo.*, 71 U.S. 277, 325-26 (1867) (internal quotation marks omitted)). It necessarily follows that an Ex Post Facto Clause violation occurs when a criminal law is applied to events that occurred prior to its enactment and the defendant is disadvantaged by such application. *Hill v. Snyder*, 878 F.3d 193, 211 (6th Cir. 2017) (citing *United States v. Kruger*, 838 F.3d 786, 790 (6th Cir. 2016)).

As indicted, Bartoli's criminal conduct occurred between 1995 and 1999. Because Bartoli's criminal conduct concluded prior to enactment of the Sarbanes-Oxley Act, Bartoli faced a ten-year statutory maximum sentence for the Securities Fraud Charge and a five-year statutory maximum sentence each for the Wire Fraud Charge and the Mail Fraud Charge. Bartoli, therefore, argues that Ex Post Fact Clause violations occurred when the statutory maximum sentences prescribed by the Sarbanes-Oxley Act were applied to his criminal conduct, disadvantaging him. (*See* Mot. to Vacate 4, ECF No. 74; Mem. in Supp. of Mot. to Vacate 1-4, ECF No. 74-3; Pet'r's Suppl. Mem. 1-5, ECF No. 113.) Bartoli asks this Court to unwind every thread of this case, find that ineffective assistance of counsel – for failing to recognize said violations of the Ex Post Facto Clause – poisoned this matter from the outset, and vacate the indictment, plea agreement, and sentence. (Mem. in Supp. of Mot. to Vacate 1-4, ECF No. 74-3; Pet'r's Suppl. Mem. 1-5, ECF No. 113.) Accordingly, the threshold issue for this Court to determine is when the statutory maximum

sentences prescribed by the Sarbanes-Oxley Act were applied to the disadvantage of Bartoli thereby violating of the Ex Post Fact Clause of the United States Constitution.

1. *Indictment, Extradition, and Arraignment*

Bartoli claims that the initial violation of the Ex Post Facto Clause occurred in his indictment where "count 2 used a flawed statutory maximum." (Mem. in Supp. of Mot. to Vacate 2, ECF No. 74-3. *See also* Pet'r's Suppl. Mem. 3, ECF No. 113 (citing the criminal designation form rather than the indictment).) However, Count 2 of the indictment does not mention any statutory penalties whatsoever. (Indictment 12-18, ECF No. 2.) In fact, potential penalties, statutory or otherwise, are not recited anywhere within the indictment. (*Id.* at 1-54.) Therefore, the statutory maximum sentences prescribed by the Sarbanes-Oxley Act were not applied to Bartoli's indictment to his disadvantage.[3] The indictment does not violate the Ex Post Facto Clause. Bartoli's request to vacate the indictment for this reason is denied.

Bartoli next argues that violations of the Ex Post Facto Clause occurred in the petition for his extradition from Peru to the United States – arguing again that Count 2 of the indictment recited the incorrect statutory maximum penalty and asserting "[i]n the petition for extradition, all parties acted on the incorrect assumption that the applicable statutory maximums for mail fraud and wire fraud were also 20 years (this was corrected after the fact)." (Mem. in Supp. of Mot. to Vacate 2, ECF No. 74-3; Pet'r's Suppl. Mem. 3, ECF No. 113.) Once again, the indictment did not recite any statutory penalties, let alone an incorrect one. In addition, Bartoli fails to provide any

[3] This precise argument was previously disposed of in the discussion of Bartoli's "constitutional question" regarding prosecutorial misconduct. The indictment does not recite any potential consequences of the indicted charges. The criminal designation form attached to the indictment does incorrectly recite that Count 2, the Securities Fraud Charge, carries a statutory maximum penalty of twenty years' imprisonment. (Criminal Designation Form 1, ECF No. 2-1.) However, as analyzed previously, this criminal designation form is only completed after a grand jury indicts. It is not information presented to the grand jury and, therefore, Bartoli cannot demonstrate disadvantage taking the form of prejudice with respect to a misstatement in what is, in effect, a cover sheet summarizing the charges by a grand jury.

evidentiary support to his bald assertions that the petition for his extradition recited incorrect statutory maximum sentences.

Even if the statutory maximum sentences prescribed by the Sarbanes-Oxley Act were provided in the petition for extradition, Bartoli has provided no evidence that they were applied to his disadvantage, aside from the conclusory statement that "all parties acted" upon the incorrect information. Notably, the Supreme Court of Peru's extradition opinion does not once mention the statutory penalties Bartoli faced in the United States, making clear that its decision to extradite Bartoli did not hinge upon any potential statutory penalties he faced. (Translated Supreme Court of Peru Extradition Op. 1-6, ECF No. 125-1.) Because the statutory maximum sentences prescribed by the Sarbanes-Oxley Act were not applied during Bartoli's extradition to his disadvantage, Bartoli's request that this Court find Ex Post Facto Clause violations occurred during extradition is denied.

Finally, Bartoli, in conclusory fashion, claims Ex Post Facto Clause violations occurred during his arraignment. (Mot. to Vacate 4, ECF No. 74; Mem. in Supp. of Mot. to Vacate 1, ECF No. 74-3; Pet'r's Suppl. Mem. 1, ECF No. 113.) However, statutory penalties were not mentioned or discussed at the arraignment hearing whatsoever. (*See* Tr. Arraignment Hr'g, ECF No. 65.) Therefore, because the statutory maximum sentences prescribed by the Sarbanes-Oxley Act were not applied at Bartoli's arraignment to his disadvantage, Bartoli's request that this Court find Ex Post Facto Clause violations occurred at his arraignment is denied.

In sum, the statutory maximum sentences prescribed by the Sarbanes-Oxley Act were not applied to the disadvantage of Bartoli in violation of the Ex Post Fact Clause of the United States Constitution at the time Bartoli was indicted, extradited, or arraigned. Accordingly, this Court will not engage in further analysis regarding the constitutional efficacy of Bartoli's counsel for failing

to raise Ex Post Facto Clause violation arguments during Bartoli's indictment, extradition, or arraignment because a failure to raise "wholly meritless claims cannot be ineffective assistance of counsel." *United States v. Martin*, 45 F. App'x 378, 381-82 (6th Cir. 2002).

2. *Plea Agreement*

Bartoli next argues that an Ex Post Facto Clause violation occurred when his plea agreement recited the statutory maximum sentences prescribed by the Sarbanes-Oxley Act for Count 2, the Securities Fraud Charge, Count 4, the Wire Fraud Charge, and Count 5, the Mail Fraud Charge, and his counsel was ineffective with respect to plea negotiations for failing to identify these flaws. (Mot. to Vacate 4, ECF No. 74; Mem. in Supp. of Mot. to Vacate 2, ECF No. 74-3; Pet'r's Suppl. Mem. 3, ECF No. 113.) There is no question that the statutory maximum sentence of twenty years each for the Securities Fraud Charge, the Mail Fraud Charge, and the Wire Fraud Charge prescribed by the Sarbanes-Oxley Act were recited in the written plea agreement and by this Court during the change of plea hearing, effectively applying the Sarbanes-Oxley Act to events that occurred prior to its enactment. (Plea Agreement 2-3, ECF No. 34; Tr. Change of Plea Hr'g 8:16-17, 9:6-7, 9:16-18, ECF No. 53.) The question, however, is whether the application disadvantaged Bartoli.

Although Bartoli does not clearly articulate any disadvantage he suffered from the misstatements in the written plea agreement, he does glancingly argue that because the plea agreement considered an "illegal sentence," he should be permitted to withdraw his guilty plea. (Pet'r's Reply 10, ECF No. 124. *See also* Pet'r's Suppl. Mem. 14-15, ECF No. 113.) The argument is more clearly stated in Bartoli's separately filed Motion to Withdraw Guilty Plea where he argues that the application of the Sarbanes-Oxley Act to the written plea agreement disadvantaged him

because the misstatements did not allow him to make a knowing or intelligent guilty plea. (Mot. to Withdraw Guilty Plea 1-2, ECF No. 128.)

The law is clear that a entering a guilty plea must be done voluntarily, knowingly, and intelligently "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Federal Rule of Criminal Procedure 11 also makes clear that before accepting a guilty plea, a court "must verify that 'the defendant's plea is voluntary and that the defendant understands his or her applicable constitutional rights, the nature of the crime charged, the consequences of the guilty plea, and the factual basis for concluding that the defendant committed the crime charged.'" *United States v. Dixon*, 479 F.3d 431, 434 (6th Cir. 2007) (quoting *United States v. Webb*, 403 F.3d 373, 378-79 (6th Cir. 2005)).

Notably, Bartoli has not previously challenged the validity of his guilty plea, neither before this Court nor on appeal, and is only doing so now through collateral attack. This Court, therefore, will only withdraw his plea if the plain error standard is met. *United States v. Kennedy*, 493 F. App'x 615, 616 (6th Cir. 2012) (citing *United States v. Vonn*, 535 U.S. 55, 73-74 (2002)). *See also United States v. Hogg*, 723 F.3d 730, 738 (6th Cir. 2013) ("plain error review is avoided so long as a defendant raises a claim of Rule 11 error in the course of the district court proceedings and prior to sentencing"). To demonstrate plain error, Bartoli must "establish (1) an error (2) that was 'obvious or clear' and (3) 'affected [his] substantial rights'" and further establish that the error undermined "'the fairness, integrity, or public reputation of the judicial proceedings.'" *Kennedy*, 493 F. App'x at 616 (quoting *United States v. Houston*, 529 F.3d 742, 750 (6th Cir. 2008)).

Kennedy is instructive for determining whether Bartoli's guilty plea should be withdrawn. In *Kennedy*, the defendant was charged with conspiracy to commit an offense along with the underlying substantive offense. *Kennedy*, 493 F. App'x at 616. The parties and the district court

all believed, and the plea agreement reflected, that the defendant faced a maximum possible sentence of fifteen years for the underlying offense. *Id.* With this understanding, the defendant pled guilty. *Id.* However, all involved were mutually mistaken about the statutory maximum sentence – it was five years, not fifteen. *Id.* Although the Sixth Circuit Court of Appeals found that the defendant met the first two prongs of the plain error test, he failed to establish that the error affected his substantial rights because he failed to demonstrate that "but for the error, [he] would not have entered the plea." *Id.* (quoting *United States v. Dominquez Benitez*, 542 U.S. 74, 83 (2004) (internal quotation marks omitted)). The *Kennedy* court concluded "while [defendant] claims to want to withdraw his plea, he fails to maintain that he would not have pled guilty in the first place or even that he would not plea guilty today . . .. By definition, that means [defendant] cannot show the error made a difference to him." *Kennedy*, 493 F. App'x at 616 (citing *Dominquez Benitez*, 542 U.S. at 84-85). *See also Pitts v. United States*, 763 F.2d 197, 201 (6th Cir. 1985) (holding that "affirmative misstatements of the maximum possible sentence" may "invalidate a guilty plea" if the misstatement was material to the defendant's decision to plead guilty).

Much like *Kennedy*, the parties and this Court believed, as was reflected in the plea agreement, that Bartoli faced a maximum sentence of twenty years each for the Securities Fraud Charge, the Wire Fraud Charge, and the Mail Fraud Charge. With this understanding, Bartoli pled guilty. However, all involved were mutually mistaken, as Bartoli only faced a maximum sentence of ten years for the Securities Fraud Charge and five years each for the Wire Fraud Charge and the Mail Fraud Charge. Therefore, Bartoli has met the first two prongs of the plain error test – an error occurred, and it was obvious or clear. However, Bartoli cannot establish that this error affected his substantial rights because he has not demonstrated, or even argued, that but for the error he would

not have entered his guilty plea. He fails to even advance the argument that if this Court withdraws his guilty plea, he would not plead guilty today and instead would insist on trial.

Instead, Bartoli claims he was mischarged. (Mem. in Supp. of Mot. to Vacate 2, ECF No. 74-3; Pet'r's Suppl. Mem. 4-5, ECF No. 113.) For the first time, Bartoli claims innocence with respect to violating 15 U.S.C. § 78ff(a) and, interestingly, asserts he is instead guilty of violating 15 U.S.C. § 78ff(c) and should have been charged appropriately. (Mem. in Supp. of Mot. to Vacate 2, ECF No. 74-3; Pet'r's Suppl. Mem. 4-5, ECF No. 113.) Bartoli makes this argument because, as applied to Bartoli's criminal conduct between 1995 and 1999, 15 U.S.C. § 78ff(c) carried a statutory maximum sentence of five years. *See* Omnibus Trade and Competitiveness Act of 1988, 100 Pub. L. 418, § 5003, 102 Stat. 1107, 1419 (1988). Bartoli argues that had he "known at the time that the maximum sentences for counts two, four, and five were five years each; he would have never signed a plea agreement and would have proceeded to trial." (Pet'r's Reply 8, ECF No. 124.) This argument entirely fails to address the actual charges Bartoli faced – namely, violations of 15 U.S.C. § 78ff(a), not 15 U.S.C. § 78ff(c). Bartoli's assertion that he would not have pled guilty had he faced five-year statutory maximum penalties is not enough to demonstrate that but for the error contained in the plea agreement he would not have pled guilty – especially given Bartoli did not face only five-year statutory maximum penalties.

This Court will not entertain Bartoli's hypothetical further except to address Bartoli's sudden claim of innocence and tangential argument that this Court failed to determine the factual basis for his plea. (Mem. in Supp. of Mot. to Vacate 2, ECF No. 74-3; Pet'r's Suppl. Mem. 5, ECF No. 113.) Despite Bartoli's recent post-sentencing assertions that he is innocent of violating 15 U.S.C. § 78ff(a), Bartoli's sworn statements to this Court "carry a strong presumption of truthfulness." *United States v. Rennick*, 219 F. App'x 486, 489 (6th Cir. 2007) (citing *Blackledge v. Allison*, 431

U.S. 63, 74 (1977)). The record is clear – Bartoli admitted to this Court, under oath, that he reviewed the indictment, understood the charges against him along with their legal elements, engaged in the illegal conduct supporting the charges against him as recited in the plea agreement, and pled guilty to the charges against him, which necessarily included 15 U.S.C. § 77ff(a). (Tr. Change of Plea Hr'g 4:14-20, 13:12-23, 44:11-46:16, ECF No. 53.) Bartoli's "post plea claims of innocence mock his courtroom declarations of guilt under oath." *United States v. Goodloe*, 393 F. App'x 250, 255 (6th Cir. 2010) (quoting *United States v. Mise*, 27 F. App'x 408, 414 (6th Cir. 2001) (internal quotation marks omitted)). Bartoli's newfound claims of innocence, that he was mischarged, and that this Court failed to determine the factual basis for his plea are meritless.

In sum, this Court finds that Bartoli has not demonstrated that but for the errors misstating the statutory maximum sentences in the written plea agreement, he would not have pled guilty. This necessarily leads to the conclusion that Bartoli has not demonstrated that the errors affected his substantial rights. Therefore, the plain error standard for determining whether Bartoli's guilty plea should be withdrawn has not been met – this Court's determination that Bartoli's guilty plea was entered voluntarily, knowingly, and intelligently stands. Given this determination, Bartoli has failed to demonstrate that the application of the Sarbanes-Oxley Act to his plea agreement disadvantaged him, leading to the conclusion that an Ex Post Facto violation did not occur when Bartoli pled guilty and this Court accepted his guilty plea and the written plea agreement.

This Court will note that Bartoli's umbrella argument is that his counsel was ineffective for failing to recognize the incorrect statutory maximum sentences recited in his plea agreement. (Mot. to Vacate 4, ECF No. 74. *See also* Mem. in Supp. of Mot. to Vacate 1-4, ECF No. 74-3; Pet'r's Suppl. Mem. 1-5, ECF No. 113.) Successful ineffective assistance of counsel claims must prove two components. First, Bartoli "must show that counsel's performance was deficient," which

"requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, Bartoli "must show that the deficient performance prejudiced" him. *Id.* Both components must be proved, otherwise it cannot be stated that there was a "breakdown in the adversary process that renders the result unreliable." *Id.*

For the first component, "the proper standard for attorney performance is that of reasonably effective assistance." *Id.* Therefore, to be deemed deficient, counsel's representation of Bartoli must have fallen below an "objective standard of reasonableness." *Id.* at 688. In other words, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

For the second component, where Bartoli must demonstrate that counsel's deficient performance prejudiced him, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Therefore, Bartoli must do more than simply show that his counsel's "errors had some conceivable effect on the outcome of the proceeding" because then "[v]irtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693. Bartoli is required to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Undeniably, "[t]he constitutional right to counsel 'extends to the plea-bargaining process.'" *Ugochukwu v. United States*, No. 17-3073, 2018 U.S. App. LEXIS 10756, at *3 (6th Cir. Apr. 26,

2018) (quoting *Lafler v. Cooper*, 566 U.S. 156, 162 (2012)). Given the above defined standards, to succeed on his ineffective assistance of counsel claim Bartoli must demonstrate that his counsel's performance during the plea-bargaining process and while he entered his guilty plea was objectively, professionally unreasonable ***and*** that there is a reasonable probability that but for his counsel's objectively, professionally unreasonable performance, he would not have entered a guilty plea. *See id.* (quoting *Lafler*, 566 U.S. at 163, which states that a "'defendant must show [that] the outcome of the plea process would have been different with competent advice'"). *See also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (explaining that in the context of a guilty plea, for the prejudice prong of an ineffective assistance of counsel claim, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial").

Even without analysis of the first prong of the test, it is clear Bartoli cannot prevail as he cannot demonstrate but for his counsel's performance he would not have entered a guilty plea. For all the reasons previously articulated and thoroughly discussed, Bartoli fails to unequivocally assert, or even adequately demonstrate, that had the written plea agreement recited the correct statutory maximum sentences, he would not have pled guilty and instead would have insisted on going to trial.

In sum, although the record is clear that the plea agreement and the discussion held at the change of plea hearing reflect a mutual misunderstanding by Bartoli's counsel, the government's counsel, and this Court that Bartoli was subject to a statutory maximum sentence of twenty years each for the Securities Fraud Charge, the Wire Fraud Charge, and the Mail Fraud Charge, Bartoli fails to adequately argue that he would not have pled guilty had the correct information been supplied to him. Because Bartoli does not establish that but for the error he would not have pled

guilty, Bartoli cannot establish either ineffective assistance of counsel or that the application of the Sarbanes-Oxley Act to his plea agreement disadvantaged him in violation of the Ex Post Facto Clause. Bartoli's guilty plea stands – Bartoli's motion to withdraw his guilty plea is therefore denied as is Bartoli's request that his plea agreement be vacated.

3. *Sentencing*

Bartoli's final argument is with respect to the sentences imposed by this Court. (Mot. to Vacate 4, ECF No. 74. *See also* Mem. in Supp. of Mot. to Vacate 1-4, ECF No. 74-3; Pet'r's Suppl. Mem. 1-5, ECF No. 113.) Bartoli claims that an Ex Post Facto Clause violation occurred when he was sentenced to twenty years each, to run concurrently, for the Securities Fraud Charge, the Wire Fraud Charge, and the Mail Fraud Charge and his counsel was ineffective for failing to identify and object to this violation. (Mot. to Vacate 4, ECF No. 74; Mem. in Supp. of Mot. to Vacate 2, ECF No. 74-3; Pet'r's Suppl. Mem. 3, ECF No. 113.)

Once again, Bartoli's criminal conduct occurred between 1995 and 1999. Under the statutes in effect at that time, Bartoli faced a ten-year statutory maximum sentence for the Securities Fraud Charge and a five-year statutory maximum sentence each for the Wire Fraud Charge and the Mail Fraud Charge. There is no question that the statutory maximum sentences of twenty years each for the Securities Fraud Charge, the Wire Fraud Charge, and the Mail Fraud Charge prescribed by the Sarbanes-Oxley Act were applied at Bartoli's sentencing. (J. 3, ECF No. 44.) Accordingly, the Sarbanes-Oxley Act was applied to events that occurred prior to its enactment. There is also no question that the application disadvantaged Bartoli as he was sentenced to a statutory maximum penalty for each count that was longer than that which he actually faced.

Although inadvertent, it is clear the Ex Post Facto Clause was violated as the current law was applied to events that occurred prior to its enactment and Bartoli was disadvantaged. As this Court

previously vacated Bartoli's sentence due to this violation, the proper remedy has already been awarded Bartoli. No further discussion is necessary except to reiterate that Bartoli's request to vacate his sentence due to violations of the Ex Post Facto Clause is granted.

E. Ground Four – Ineffective Assistance of Counsel During Sentencing

The fourth ground for relief of Bartoli's Motion to Vacate asserts that his counsel was ineffective during sentencing for: (1) failing to identify and object to breaches of the plea agreement – including the failure of both government's counsel and defense counsel to ask for a sentence within the advisory sentence guideline range; (2) failing to object to the inclusion and consideration of victim impact letters; (3) failing to object to this Court's comments regarding Bartoli's co-conspirators; and (4) failing to object to the sentence imposed by this Court. (Mot. to Vacate 8, ECF No. 74; Mem. in Supp. of Mot. to Vacate 16-18, ECF No. 74-3; Pet'r's Suppl. Mem. 12-18, ECF No. 113.) Because these allegations only involve conduct at Bartoli's sentencing, even if this Court were to find Bartoli's counsel was ineffective through analysis, Bartoli's sentence has already been vacated – there is no other relief this Court could grant. Therefore, this Court need not engage in said analysis for Bartoli's arguments as this entire ground for relief is rendered moot by the rulings of this Court.

F. Miscellaneous Motion Practice

Currently pending before this Court, in addition to Bartoli's Motion to Vacate, is a Second Motion for Reconsideration and a Second Motion for Judicial Notice. (Second Mot. for Recons., ECF No. 98; Second Mot. for Judicial Notice, ECF No. 127.) These pending motions request that this Court make findings of fact and conclusions of law with respect to Bartoli's Motion to Vacate as well as take judicial notice that the government engaged in extreme and outrageous conduct warranting the dismissal of this case entirely. (Second Mot. for Recons., ECF No. 98; Second Mot.

for Judicial Notice, ECF No. 127.) However, these motions do not provide additional legal arguments based in established, properly supported evidence. Instead, these arguments just rehash arguments Bartoli has already made, just under different title. This Court has fully analyzed every argument and factual assertion Bartoli reiterates in these motions within this Memorandum of Opinion and Order. Therefore, these pending motions are denied.

IV. CONCLUSION

This Memorandum is, in sum and substance, a recitation and disposition of every single post-conviction issue Bartoli has brought before this Court. Despite Bartoli's attempts to classify every single layer of this case as poisoned, neither the facts nor the law, support this contention. Neither Bartoli's indictment, extradition, plea agreement, nor guilty plea suffer from the taint Bartoli believes they do. Bartoli's conviction, unequivocally, stands.

The only constitutional violation Bartoli endured was that of the Ex Post Facto Clause when this Court unintentionally, yet improperly, utilized the statutory maximum sentence of twenty years for Count 2, the Securities Fraud Charge, Count 4, the Wire Fraud Charge, and Count 5, the Mail Fraud Charge, at Bartoli's sentencing. Because this is the only portion in the entirety of Bartoli's case before this Court that is blemished, this is the only portion that is vacated.

For concision, clarity, and all the reasons detailed throughout this Memorandum, with respect to Petitioner Eric V. Bartoli's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence: (1) Bartoli's first ground for relief is GRANTED IN PART and DENIED IN PART – this Court hereby VACATES **only** Bartoli's **sentence**; (2) Bartoli's second, third, and fifth grounds for relief are DENIED; (3) Bartoli's fourth ground for relief is DENIED AS MOOT. (Mot. to Vacate, ECF No. 74.) In addition, this Order substantively resolves the pending Motion for Reconsideration, Motion for Judicial Notice, and Motion to Withdraw Guilty Plea, and all are

DENIED as such. (Second Mot. for Recons., ECF No. 98; Second Mot. for Judicial Notice, ECF No. 127; Mot. to Withdraw Guilty Plea, ECF No. 128.) Bartoli's multiple requests that the entirety of this matter be dismissed with prejudice are DENIED. (*See* Mot. to Vacate 12, ECF No. 74; Pet'r's Suppl. Mem. 23, ECF No. 113; Pet'r's Reply 3-5, ECF No. 124.) Bartoli will be resentenced by this Court.

Finally, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith and there is no basis upon which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

DATE: January 3, 2021

/s/ John R. Adams
Judge John R. Adams
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

v.

ERIC V. BARTOLI
Date of Original Judgment: 12/20/2016

§ **AMENDED JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **5:03-CR-00387-JRA(1)**
§ USM Number: **61329-060**
§ **Gregory S. Robey**
§ Defendant's Attorney

THE DEFENDANT:

☒	pleaded guilty to count(s)	**1,2,3,4,5, 8-10.**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:371 Conspiracy	08/27/1999	1
15:78J(B) and 78Ff(A) Securities Fraud	08/27/1999	2
15:77E(A) and 77X Sale Of Unregistered Securities	08/27/1999	3
18:1343 and 2 Wire Fraud	08/27/1999	4
18:1341 and 2 Mail Fraud	08/27/1999	5
26:7201 Attempted Income Tax Evasion	08/27/1999	8-10

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 6 & 7 ☒ are dismissed on the motion of the United States

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.

October 29, 2021
Date of Imposition of Amended Judgment

s/John R. Adams
Signature of Judge

John R. Adams, U. S. District Judge
Name and Title of Judge

November 9, 2021
Date

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
60 months as to Counts 1,3,8,9,and 10 concurrent, 120 months as to Counts 2 and 4 concurrent, 120 months as to Count 5 consecutive to all other counts with credit for federal time served.

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

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years terms to run concurrent as to Counts 1,2,3,4,5,8-10.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

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. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.)
   as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

STANDARD CONDITIONS OF 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 for 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 about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside 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 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. If not in compliance with the condition of supervision requiring full-time occupation, you may be directed to perform up to 20 hours of community service per week until employed, as approved or directed by the pretrial services and probation officer.
8. You must not communicate or interact with someone you know 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 the court.
12. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and/or shall permit the probation officer to make such notifications, and/or confirm your compliance with this requirement.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not possess a firearm, destructive device or any dangerous weapon.

Financial Disclosure

The defendant shall provide the U.S. Pretrial Services & Probation Officer with access to any requested financial information.

Financial Restrictions

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the U.S. Pretrial Services & Probation Officer.

Financial Windfall Condition

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.

Search and Seizure

The defendant shall submit his/her person, residence, place of business, computer, or vehicle to a warrantless search, conducted and controlled by the probation 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 release; 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 a search pursuant to this condition.

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

CRIMINAL MONETARY PENALTIES

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$800.00	$42,499,302.82	$.00	$.00	

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

***See attached sealed pages for restitution payees, addresses, and the amounts.**

The defendant must pay the total criminal monetary penalties under the schedule of payments page.
If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☒ The defendant must pay 25% of defendant's gross income per month, through the Federal Bureau of Prisons Inmate Financial Responsibility Program.

E ☒ If a restitution balance remains upon release from imprisonment, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in monthly payments of at least a minimum of 10% of defendant's gross monthly income during the term of supervised release and thereafter as prescribed by law.

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $800.00 for Counts 1, 2, 3, 4, 5 and 8 , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several: Please see page #1 of the attached restitution payee list. This will show the amounts of the restitution joint and several with defendants Peter Esposito and Douglas R. Shisler from case 5:03CR98.
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: ERIC V. BARTOLI
CASE NUMBER: 5:03-CR-00387-JRA(1)

REASON FOR AMENDMENT

(Not for Public Disclosure)

REASON FOR AMENDMENT:

- ☐ Correction of sentence on remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed.R.Crim.P.35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed.R.Crim.P.36)
- ☐ Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) top the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- x Direct Motion to District Court Pursuant to
  x 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 14, 2023

Eric V. Bartoli
F.C.I. Loretto
P.O. Box 1000
Cresson, PA 16630

Mr. Steven D. Jaeger
Hemmer Wessels McMurtry
250 Grandview Drive, Suite 500
Ft. Mitchell, KY 41017

Mr. Steven Richard Jaeger
The Jaeger Firm
23 Erlanger Road
Erlanger, KY 41018

Mr. Daniel R. Ranke
Office of the U.S. Attorney
801 W. Superior Avenue, Suite 400
Cleveland, OH 44113

Re: Case No. 21-4045, *United States v. Bartoli*
Originating Case No. : 5:03-cr-00387-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Laurie A Weitendorf
Opinions Deputy

cc: Ms. Sandy Opacich

Enclosures

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0373n.06

Case No. 21-4045

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 14, 2023
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA Plaintiff-Appellee, v. ERIC V. BARTOLI, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO OPINION

Before: COLE, READLER, and DAVIS, Circuit Judges.

COLE, Circuit Judge. On appeal from an amended judgment following post-conviction proceedings, Eric Bartoli argues that (1) the sentence imposed at his resentencing is unlawful and (2) he received ineffective assistance of counsel throughout his proceedings. We vacate and remand Bartoli's sentence, as it was imposed in violation of the Ex Post Facto Clause for the second time. But as we find neither a certificate of appealability nor reassignment to be appropriate, we withhold review of Bartoli's other habeas claims and cabin relief to his illegal sentencing claim.

I. BACKGROUND

On October 15, 2003, a federal grand jury indicted Eric Bartoli for conspiracy, securities fraud, the sale of unregistered securities, wire fraud, mail fraud, money laundering, and three counts of attempted income tax evasion. The charges stem from Bartoli's fraud schemes over a period of four years, spanning from 1995 to 1999. Bartoli left the country prior to being charged,

but was ultimately arrested by the Peruvian National Police in Peru in 2013 and was extradited to the United States in 2015.

After the conclusion of Bartoli's fraud-related conduct, but before his legal proceedings began, Congress passed the Sarbanes-Oxley Act. Prior to the Sarbanes-Oxley Act, the relevant statutory maximum sentence for securities fraud was ten years and the statutory maximum for wire and mail fraud was five years. 18 U.S.C. §§ 1341, 1343 (1994), *both amended by* Pub. L. 107–204, Title IX, § 903(b), 116 Stat. 805 (2002). Effective with the Act's passage on July 30, 2002, the statutory maximum for all three of these fraud counts increased to twenty years. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745. As our ex post facto jurisprudence requires courts to apply the penalties at the time of the relevant conduct, not at the time of punishment, all documents should have referred to the pre-Sarbanes-Oxley statutory maximums. *See United States v. Davis*, 397 F.3d 340, 347 (6th Cir. 2005) ("The ex post facto clause is implicated where a law . . . 'changes the legal consequences of acts completed before its effective date.'" (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)).

After Bartoli's indictment, the government filed a criminal designation form including the possible maximum penalties for each of the ten counts. The parties later realized this form misstated the potential punishment for his securities fraud charge, listing the statutory maximum as twenty years as opposed to ten.

After initially pleading not guilty, Bartoli pleaded guilty to all of the charges against him other than the money laundering counts, which the government agreed to dismiss. Like the criminal designation form, the plea agreement also misstated the potential statutory penalties Bartoli faced, this time including two additional mistakes: incorrectly listing the statutory maximums for securities, wire, and mail fraud as twenty years each. The presentence investigation

report ("PSR") repeated this same error. At no point yet had the probation office, court, government, or defense counsel flagged the errors.

Based on the parties' sentencing memoranda, the plea agreement, and the PSR, the district court sentenced Bartoli to a total of 240 months' imprisonment: concurrent terms of 60 months on the conspiracy, sale of unregistered securities, and tax evasion charges plus 240 months on the securities, wire, and mail fraud charges—the post-Sarbanes-Oxley maximums. His sentence reflected a substantial upward variance from the Guidelines range of 87 to 108 months.

Bartoli appealed, claiming various sentencing errors, which this court rejected. *United States v. Bartoli*, 728 F. App'x 424 (6th Cir. 2018). But appellate counsel did not raise the use of three incorrect statutory maximums. Bartoli then petitioned for rehearing en banc and moved to stay resolution of that petition to reopen the appeal and raise a claim regarding this error for the first time. At that point, the government conceded and agreed not to contest Bartoli's accurate assertion that the pre-Sarbanes-Oxley Act statutory maximums for securities, wire, and mail fraud were in effect when Bartoli committed his offenses. The government asked the court to direct Bartoli to raise this issue through a 28 U.S.C. § 2255 motion to the district court, and this court subsequently denied Bartoli's outstanding motion and petition.

Bartoli then filed his § 2255 motion to vacate, set aside, or correct his sentence in the district court. He argued that his trial and appellate counsel had been constitutionally ineffective in, among other things, allowing the court to apply the wrong statutory maximums for the securities, wire, and mail fraud charges; that he faced a speedy trial violation and prosecutorial misconduct; and that the treaty used to extradite him from Peru was improper. The government again conceded that Bartoli should be resentenced under the appropriate, lower statutory maximums in effect from 1995 to 1999. The district court agreed and ordered resentencing.

With the help of appointed counsel, Bartoli filed a supplement to his pro se § 2255 motion. Reframing and adding to his prior arguments, Bartoli raised four cognizable issues: (1) that his sentence violated the Ex Post Facto Clause due to the use of higher, inaccurate statutory maximum sentences on three counts; (2) ineffective assistance of counsel ("IAC") during the trial and appellate stages of the proceedings related to those statutory maximum sentences and his plea agreement; (3) a speedy trial violation; and (4) breach of the plea agreement. The government continued to concede the Ex Post Facto Clause issue but opposed relief on the other issues. Bartoli also filed a pro se motion to withdraw his guilty plea, arguing that his plea agreement should be set aside due to his illegal sentence and that his counsel was ineffective in failing to discover the issues raised in his § 2255 motion and in misinforming him of the consequences of his plea.

In its ruling on Bartoli's supplemental § 2255 petition, the district court reiterated its agreement with the parties that use of the Sarbanes-Oxley Act's heightened maximum sentences violated the Ex Post Facto Clause and that such use disadvantaged him at sentencing. Accordingly, the court granted Bartoli's request for vacatur of his sentence and resentencing but denied his other claims and his motion to withdraw his plea. In so doing, the district court rejected Bartoli's assertion that "every single layer of this case [i]s poisoned" by the sentencing error and stated that there was no basis upon which to issue a certificate of appealability (COA). (Memo. Op. & Order, R. 129, PageID 938–39.) Bartoli twice attempted to appeal the district court's order denying the unsuccessful parts of his § 2255 petition, but the first was dismissed for lack of jurisdiction, and the second for want of prosecution.

In preparation for resentencing, both parties submitted sentencing memoranda, but the government again listed the statutory maximum penalties incorrectly, attributing five years to

securities fraud and ten years to both mail and wire fraud when it should have been ten years as to securities fraud and five years as to the latter two.

At resentencing, the district court re-imposed the same 240-month sentence. Using the original PSR (known to have the improperly inflated statutory maximums for the three counts) and the government's sentencing memorandum (also including the punishment errors), the court applied a ten-year statutory maximum to each of Bartoli's securities, wire, and mail fraud charges. Leading up to the pronouncement of his sentence, both Bartoli and Bartoli's counsel raised the error of the ten-year maximums on wire and mail fraud, noting that those maximums should be five years. Bartoli also objected to the procedural and substantive reasonableness of his sentence, the restitution award, the upward variance, and the Guidelines calculation, and the court addressed each as necessary, noting when issues should be raised on appeal.

In the face of the lower (yet still incorrect) ten-year statutory maximums for wire and mail fraud, the district court crafted the same sentence by running the 120-month terms consecutively, instead of concurrently, to again reach 240 months. As with the original sentence, this sentence reflects a substantial upward variance.

Bartoli now appeals, arguing that his new sentence also poses an ex post facto error and challenging the denial of his IAC claims.

II. ANALYSIS

A. Jurisdiction

The federal habeas statute authorizes district courts to "vacate, set aside or correct" a petitioner's unlawful sentence. 28 U.S.C. § 2255(a). The end result of a successful § 2255 proceeding must be vacatur of the unlawful sentence and one of the following remedies: discharge, a new trial, resentencing, or correction of the sentence. *Id.* § 2255(b). A petitioner can appeal

only "a final judgment on application for a writ of habeas corpus," *id.* § 2255(d), which brings us to the first issue: whether or to what extent we are authorized to consider the multiple issues in Bartoli's appeal.

A § 2255 resentencing "bears traits of both a § 2255 proceeding and a criminal action[.]" *United States v. Hadden*, 475 F.3d 652, 664 (4th Cir. 2007). In this way, an order finalizing a § 2255 resentencing is "a hybrid order that is both part of the petitioner's § 2255 proceeding and part of his criminal case." *United States v. Burton*, 802 F. App'x 896, 903 (6th Cir. 2020) (quoting *Hadden*, 475 F.3d at 664). To "avoid 'piecemeal appeals' in federal habeas cases," this hybrid order "serves as a basis to appeal both the legality of his new sentence as well as the district court's denial of [his other claims for relief related to his § 2255 petition.]" *Id.* (quoting *Andrews v. United States*, 373 U.S. 334, 340 (1963)). So, a district court's order that enters the result of a resentencing—like the district court's amended judgment here—completes the § 2255 proceeding and is therefore an immediately appealable "final judgment." *Andrews*, 373 U.S. at 338–40 (interpreting 28 U.S.C. § 2255(d)); *see United States v. Lawrence*, 555 F.3d 254, 258 (6th Cir. 2009) (applying *Andrews*).

While the judgment as a whole is appealable, exercise of our appellate jurisdiction varies between the two components of the hybrid order. Because there is no absolute entitlement to appeal a district court's denial of § 2255 relief, "federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners" until a COA has been issued. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). As such, while Bartoli properly appealed his amended criminal judgment to challenge the denial of his other claims for § 2255 relief, he may not pursue these claims without a COA. *See Burton*, 802 F. App'x at 903 ("Although Burton may appeal from the amended judgment, he may not pursue the Rule 43 issue in his appeal until he obtains a

certificate of appealability[.]"). The district court declined to issue a COA, but we are empowered to issue one sua sponte in certain circumstances. *See* 28 U.S.C. § 2253(c)(2).

To the contrary, a petitioner need not obtain a COA to appeal his "new criminal sentence," so we are free to hear Bartoli's challenge to the legality of his amended sentence. *Burton*, 802 F. App'x at 903–04 (quoting *Ajan v. United States*, 731 F.3d 629, 631 (6th Cir. 2013)); 18 U.S.C. § 3742(a) (providing for appellate jurisdiction over a "final sentence" entered by the district court without a COA requirement); 28 U.S.C. § 1291 (providing for appellate jurisdiction over "final decisions" of the district court).

B. Certificate of Appealability

1. Legal Standards

We can sua sponte issue a COA only if Bartoli "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). Showing as much requires "a demonstration that . . . reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)) (defining the "substantial showing" standard).

Bartoli's challenges on appeal rest on Sixth Amendment violations for IAC at various stages of his case: first, during his plea agreement, entry of plea, and sentencing at the trial level for counsel's failure to "recognize the elements of charged offenses or the actual maximum penalties to which his client is exposed"; and second, appellate counsel's failure to raise "[t]he clear and obvious sentencing error imposing . . . sentences in excess of statutory maximums[.]" (Corrected Appellant Br. 39, 43.) He also takes issue with the district court's handling of his IAC

claims. As the crux of our COA analysis is whether reasonable jurists could find the district court's assessment of his claims—here, the IAC claims—"debatable or wrong," we conduct a preliminary, though not definitive, review of the merits of Bartoli's IAC claims. *Slack*, 529 U.S. at 484.

A defendant's right to effective assistance of counsel attaches at the initiation of the adversarial proceedings and remains through all critical stages of the criminal proceedings, including arraignment, post-indictment plea negotiations, entry of the plea, and sentencing. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (attaches at initiation of adversarial judicial proceedings); *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (all critical stages); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (post-indictment plea negotiations); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) (guilty plea); *Benitez v. United States*, 521 F.3d 625, 630 (6th Cir. 2008) (sentencing).

We review IAC claims under the familiar two-part *Strickland* standard: Bartoli "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense," such that "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). We may conduct the analysis in either order, meaning we need not determine whether counsel's performance was deficient if the petitioner's allegations are insufficient to demonstrate prejudice resulting from any allegedly ineffective assistance. *Id.* 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.").

Strickland's prejudice requirement varies slightly depending on the stage at which the petitioner asserts counsel's error(s) occurred, inasmuch as the petitioner must "allege the kind of 'prejudice' necessary" in the context of their claim. *Hill v. Lockhart*, 474 U.S. 52, 60 (1985). In the context of guilty pleas, we evaluate whether "there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

2. Analysis

Bartoli alleges multiple errors at multiple stages, beginning at the indictment phase and continuing through sentencing, including claims relating to counsel's assistance as to the substantive elements of his offenses and relating to his possible sentence. We review them sequentially.

Neither the criminal designation form nor his indictment is a proper basis for an IAC claim in this context. While the criminal designation form contained part of the now-apparent error and counsel failed to alert the court of the error, this form is completed *after* the grand jury has returned an indictment. This form, then, would have no bearing on either the grand jury's deliberation or Bartoli's indictment, so we cannot say that this error "caus[ed] him to plead guilty rather than go to trial." *Hill*, 474 U.S. at 59. As the indictment does not include reference to the potential statutory penalties, it necessarily did not list the incorrect statutory maximum sentences for his securities, wire, and mail fraud counts. Bartoli also alleges that his counsel was ineffective in failing to correct other information in the indictment, such as prosecutorial misconduct relating to his indictment. But the indictment, which did not include the statutory penalty errors, was not erroneous, as it was "returned by a legally constituted and unbiased grand jury" and was "valid on its face." *Costello v. United States*, 350 U.S. 359, 363 (1956). Bartoli therefore fails to demonstrate how he was prejudiced by any of counsel's alleged errors as to these two documents.

Next, his challenge to counsel's knowledge of the elements of the offenses to which he pleaded guilty is barred by his plea because "[a] defendant waives his right to appeal constitutional violations occurring prior to a plea of guilty once the defendant enters his plea." *United States*

v. Lalonde, 509 F.3d 750, 757 (6th Cir. 2007). As Bartoli "already plead[ed] guilty" to the charges relating to the alleged errors and "as he raised no objection" to this prior to his appeal, he has waived any challenges not relating to the voluntary and intelligent nature of his plea. *Id.* Even if we were to find that Bartoli has not waived this issue, his challenge fails on the merits, as he is unable to draw a connection between the elements of securities fraud and his decision to plead guilty. *See id.* at 757–58.

The bulk of Bartoli's argument challenges counsel's effectiveness in failing to correct the statutory maximum sentences for his securities, wire, and mail fraud counts, including in his plea agreement, at the entry of his guilty plea, and at sentencing. But at baseline, Bartoli has not demonstrated that he would instead have proceeded to trial if he had known the correct, lesser statutory maximums. He argues that he should be permitted to withdraw his guilty plea due to the incorrect information in order to "ma[ke] an informed decision whether to accept the plea agreement and enter a plea or proceed to trial." (Corrected Appellant Br. 48.) But this is not "the kind of 'prejudice' necessary" in the context of his guilty plea IAC claim. *Hill*, 474 U.S. at 60. That one would reconsider his plea decision does not show "there is a reasonable probability that, but for counsel's errors, he . . . would have insisted on going to trial." *Id.* at 59.

In sum, Bartoli's generalized assertions do not convince us that he was disadvantaged by counsel's errors at any stage. He therefore fails to demonstrate either (1) a "substantial showing of the denial of a constitutional right" or (2) that the district court's assessment of his claims was "debatable or wrong." So as we decline to issue a COA, we cannot hear Bartoli's other claims related to his § 2255 petition.

C. Ex Post Facto Violation

As noted, we can consider Bartoli's challenge to the legality of his amended sentence without a COA. *See Burton*, 802 F. App'x at 903–04. Here, the parties unequivocally agree that the district court's imposition of a ten-year sentence on the wire and mail fraud offenses violated the Ex Post Facto Clause.

Despite the same judge facing this issue once before, Bartoli's resentencing fared no better than the first as to the statutory maximum applied to the wire and mail fraud counts. At the time of Bartoli's conduct, the statutory maximums for Bartoli's wire and mail fraud counts was five years each. 18 U.S.C. §§ 1341, 1343 (1994), *both amended by* Pub. L. 107–204, Title IX, § 903(b), 116 Stat. 805 (2002). As established, the probation office and district court erroneously used the Sarbanes-Oxley Act's twenty-year statutory maximums for the securities, wire, and mail fraud counts during his first round of sentencing. The error was brought to the court's attention by both parties during post-conviction proceedings. But the district court failed to correct itself, instead using different, yet still erroneous, statutory maximums: This time, the court utilized ten-year statutory maximums for wire and mail fraud, again exceeding both counts' five-year maximum sentence.

So, for the same reason his 2016 sentence was illegal, Bartoli's newly imposed sentence continues to be illegal under the ex post facto doctrine. As such, we agree with Bartoli's unopposed assertion that "[t]he 2021 sentence imposed must be vacated because it is unconstitutional." (Corrected Appellant Br. 30.) The district court must impose a long overdue constitutional sentence, considering the statutory maximums in effect at the time of the conduct for which Bartoli was convicted: ten years for securities fraud and five years for each mail and wire fraud.

But the parties diverge on what exactly should be resentenced: only the unlawful parts of his sentence—those posing an ex post facto problem—or all of his counts—referred to as his "sentencing package." A sentencing package exists "where sentences imposed on the multiple counts are interdependent." *Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997). Under the sentencing package doctrine, "when a defendant is found guilty on a multicount indictment, there is a strong likelihood that . . . the sentences on the various counts form part of an overall plan, and that if some counts are vacated, the judge should be free to review the efficacy of what remains[.]" *United States v. Townsend*, 178 F.3d 558, 567 (D.C. Cir. 1999) (cleaned up).

While case law has not specifically defined "interdependent"—also described as "interrelated"—we are not bereft of guidance. *See Maxwell v. United States*, 617 F. App'x 470, 478–79 (6th Cir. 2015) (collecting cases). When offenses are "components of a single comprehensive sentencing plan," a court is authorized to "reevaluate the entire aggregate sentence." *Id.* at 478 (quoting *Pasquarille*, 130 F.3d at 1222). "The appeals court, in such instances, may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors[.]" *Greenlaw v. United States*, 554 U.S. 237, 253 (2008).

So, the scope of the district court's second resentencing turns on whether Bartoli's sentences are interrelated or interdependent. On one hand, Bartoli asserts that his "sentences are not part of any package because [he] is simply sentenced to what the district court erroneously conclude[d] were the statutory maximums for each count of the indictment." (Corrected Appellant Br. 29.) On the other hand, the government contends that "a defendant's multi-count sentence, like the one Bartoli received here, is a 'package' because 'the district court is likely to fashion [an overall sentence] in which sentences on individual counts are interdependent'" such that the entire

package should be "unbundled" at resentencing. (Appellee Br. 27 (quoting *United States v. Hicks*, 146 F.3d 1198, 1202 (10th Cir. 1998) (alteration in original).)

We look to the record to answer this question, analyzing the district court's consideration of Bartoli's course of conduct, history, and personal characteristics; the sentencing factors; and whether the offenses at issue were discussed individually or as aggregated conduct or sentences. *See Maxwell*, 617 F. App'x at 479–80; *United States v. Mainville*, 9 F. App'x 431, 436–37 (6th Cir. 2001) (per curiam); *see also United States v. Ehle*, 640 F.3d 689, 698–99 (6th Cir. 2011) (remanding for vacatur on one count and resentencing on the other count).

The language throughout the resentencing suggests that the court was considering Bartoli's sentences as an interrelated whole rather than as discrete figures assigned to each count. The district court did not discuss the convictions as though they were separate courses of conduct or separate crimes. Rather, the court discussed Bartoli's continuous management of the "Ponzi scheme" and "fraud scheme," and referred to the victims and the impact on them in aggregate.

The court's handling of the calculation during the resentencing also lends support to the view that the sentences were interrelated. The district court indicated that nothing had changed about his analysis of Bartoli's sentence except the "corrected" lower statutory maximum for the counts in question. And despite acknowledging the lower maximums, the district court expressed a strong desire to maintain the same 240-month sentence via another substantial upward variance regardless of any potential change to the guidelines sentence.

Adapting to the different (yet still incorrect) statutory maximums for wire and mail fraud, the district court simply reconfigured the concurrent or consecutive nature of the sentences to reach 240 months. While it is impossible to ascertain its specific reason for doing so, the district court stacked the mail fraud's (incorrect) statutory maximum on top of the wire fraud's (also incorrect)

statutory maximum. This is further evidence that the district court viewed the sentences as an aggregate "bundle" to reach a specific outcome, regardless of the exact bundle formulation.

Outside of the resentencing, the majority of the underlying counts—including the two at issue here—are also substantively interrelated. The conspiracy count is the conspiracy to commit other charged offenses and is therefore directly related to the sale of illegal securities and securities, wire, and mail fraud. The wire and mail fraud counts are based on the fraud schemes underlying the securities fraud and sale of illegal securities counts. So not only did the court treat the offenses as interrelated while sentencing Bartoli, but the offenses capture the various aspects of conduct that make up the same schemes.

A defendant no longer has a "legitimate expectation of finality in any discrete part of an interdependent sentence after a partially successful appeal or collateral attack," as such a challenge "place[s] the validity of his entire sentence at issue." *Pasquarille*, 130 F.3d at 1222–23 (quoting *United States v. Harrison*, 113 F.3d 135, 138 (8th Cir. 1997), then citing *United States v. Rodriguez*, 114 F.3d 46, 48 (5th Cir. 1997)). As Bartoli "challenged [at least] one count of his . . . interrelated convictions," reconsideration of his sentencing package poses neither a double jeopardy nor a finality issue. *Id.* at 1222–23. Therefore, a general remand for resentencing is the most appropriate remedy.

D. Reassignment

As resentencing is warranted, we consider Bartoli's final issue on appeal: whether the case should be reassigned to a different district judge on remand. *See Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 580 (6th Cir. 2013) (stating that "this [c]ourt has the power, under 28 U.S.C. § 2106, to order the reassignment of a case on remand"). The principal factors considered in determining whether reassignment is appropriate include:

> (1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his or her mind previously expressed views or findings; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Solomon v. United States, 467 F.3d 928, 935 (6th Cir. 2006) (citing *Sagan v. United States*, 342 F.3d 493, 501 (6th Cir. 2003)). Reassignment is an "extraordinary power." *Id.* (quoting *Sagan*, 342 F.3d at 501).

We agree with Bartoli that the ex post facto errors resulted from "easily discoverable statutory maximum sentences," and appreciate his frustration. But if we reassigned the case every time a district judge misstated a statutory maximum, "reassignment would surely cease to be 'an extraordinary power . . . rarely invoked.'" *Sagan*, 342 F.3d at 501–02 (alteration in original) (quoting *Armco, Inc. v. United Steelworkers of America, AFL-CIO, Local 169*, 280 F.3d 669, 683 (6th Cir. 2002)). It is true that the district court committed the same error twice, but this is not an "appropriate limiting principle" that "would justify reassignment here but not in most other cases" where we remand for resentencing for ex post facto violations. *Sagan*, 342 F.3d at 502.

Bartoli takes issue with the district judge's "multiple comments about Bartoli" and alleged "substantial difficult[y] putting his previously expressed views or findings out of mind." (Corrected Appellant Br. 54.) While "judicial remarks . . . that are critical or disapproving of, or even hostile to . . . the parties, or their cases, ordinarily do not support a bias or partiality challenge[,] . . . they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis removed).

We cannot say this is the case here. The district judge's "comments about Bartoli" include analysis of appropriate sentencing factors under 18 U.S.C. § 3553(a), such as the length of time

over which Bartoli's conduct occurred, number of impacted individuals, and aggregate amount of monetary harm. The statutory maximum correction is separate and distinct from the factual context, both of which are appropriate considerations in fashioning a lawful sentence. Asking another judge to "familiarize himself with the case in preparation for resentencing," known well by the presiding judge, is unnecessary. *United States v. Robinson*, 778 F.3d 515, 525 (6th Cir. 2015). So, while the collective failure of the district court, the probation office, and the government to recognize defense counsel's clarification of the appropriate statutory maximum on two or three of Bartoli's counts is disappointing, it does not justify the "extraordinary" remedy of reassignment.

III. CONCLUSION

For the foregoing reasons, we vacate and remand for resentencing, but we decline to consider the substance of Bartoli's other § 2255 claims or reassign the case to a different district judge.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-4045

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC V. BARTOLI,

Defendant - Appellant.

FILED
Aug 14, 2023
DEBORAH S. HUNT, Clerk

Before: COLE, READLER, and DAVIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Akron.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is VACATED and REMANDED for resentencing consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 21-4045

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 14, 2023
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC V. BARTOLI,

Defendant-Appellant.

ORDER

BEFORE: COLE, READLER, and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: September 14, 2023

Mr. Steven D. Jaeger
Hemmer Wessels McMurtry
250 Grandview Drive
Suite 500
Ft. Mitchell, KY 41017

Re: Case No. 21-4045, *USA v. Eric Bartoli*
Originating Case No.: 5:03-cr-00387-1

Dear Mr. Jaeger,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Steven Richard Jaeger
Mr. Daniel R. Ranke

Enclosure