Appendix Table

A). May 10th, 2023, single circuit judge denying Certificate of Appealability.

B). August 23, 2023 order denying panel rehearing.

C). September 7th, 2023 order denying rehearing en banc.

Appendix A

RICHARD LEE DEVITO, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2023 U.S. App. LEXIS 11514
No. 22-4042
May 10, 2023, Filed

Editorial Information: Prior History

United States v. Devito, 2022 U.S. Dist. LEXIS 191374, 2022 WL 10969387 (S.D. Ohio, Oct. 19, 2022)

Counsel **{2023 U.S. App. LEXIS 1}**For RICHARD LEE DEVITO, Petitioner - Appellant: Jeremy Brian Gordon, Law Office, Mansfield, TX.

For UNITED STATES OF AMERICA, Respondent - Appellee: Alexis J. Zouhary, Office of the U.S. Attorney, Cincinnati, OH.

Judges: Before: WHITE, Circuit Judge.

CASE SUMMARY The petitioner's argument that his counsel's pre-plea performance was constitutionally ineffective was meritless because he had no credible evidence that his counsel did not explain what she should have explained and thus, he failed to meet his burden of showing deficient performance.

OVERVIEW: HOLDINGS: [1]-The petitioner's argument that his counsel's pre-plea performance was constitutionally ineffective was meritless because he had no credible evidence that his counsel did not explain what she should have explained and thus, he failed to meet his burden of showing deficient performance; [2]-The petitioner's argument that his appellate counsel was ineffective for failing to argue in the opening brief the involuntariness of his guilty plea was meritless because no prejudice flowed from failing to raise a meritless claim.

OUTCOME: Application for COA denied.

LexisNexis Headnotes

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

A certificate of appealability (COA) shall issue if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C.S. § 2253(c)(2). If the district court denied the 28 U.S.C.S. § 2255 motion on the merits, the applicant must show that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. A COA is improper if any outcome-determinative issue is not reasonably debatable.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Pleas
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

To establish ineffective assistance of counsel claim, the petitioner must show that (1) counsel's performance was deficient-objectively unreasonable under prevailing professional norms-and (2) it

prejudiced the defense. Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. In the guilty-plea context, this means that the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Because the petitioner must satisfy both prongs, the inability to prove either one of the prongs-regardless of which one-relieves the reviewing court of any duty to consider the other.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Trials

In an ineffective assistance of counsel claim, appellate counsel is judged under the same standard as trial counsel, requiring that the petitioner show both deficient performance and prejudice. Prejudice in this context means that he must show a reasonable probability that, but for his counsel's error, he would have prevailed on appeal.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Trials

In an ineffective assistance of counsel claim, no prejudice flows from failing to raise a meritless claim.

Opinion

ORDER

Richard Lee DeVito, a federal prisoner represented by counsel, appeals a district court judgment denying his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. He seeks a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1)-(2). For the reasons discussed below, a COA is denied.

DeVito was indicted on two counts: production of child pornography, *see* 18 U.S.C. § 2251(a), (e), and possession of child pornography, *see* 18 U.S.C. § 2252A(a)(5)(B), (b)(2). Pursuant to an agreement with the Government, DeVito pleaded guilty to only the production count. The production count involved "a minor," but DeVito agreed to a Statement of Facts that provided that the offense involved "at least 25 other minors." The agreement stated that DeVito faced a minimum of 15 years in prison and a maximum of 30 years, but it did not include an estimate of his guideline imprisonment range.

According to DeVito's Presentence Report, the offense conduct involving the 25 additional minors resulted in 25 "pseudocounts" under USSG § 2G2.1(d), which**{2023 U.S. App. LEXIS 2}** the plea agreement had not mentioned. These pseudocounts resulted in a total offense level of 43 and a guideline range of life imprisonment, capped at 360 months by the 30-year statutory maximum. The district court accepted the plea and sentenced him to prison for 30 years. Although the agreement waived DeVito's right to appeal the sentence, with limited exceptions (if it exceeded the statutory maximum and if he claimed ineffective assistance of counsel or prosecutorial misconduct), he took an appeal. This court dismissed the appeal as precluded by the appellate waiver and denied reconsideration.

DeVito timely filed his § 2255 motion, raising two claims: (1) counsel's pre-plea performance was

constitutionally ineffective, and (2) appellate counsel was ineffective for failing to argue the involuntariness of DeVito's guilty plea. After an evidentiary hearing, the magistrate judge issued a report and recommendation ("R&R") that the § 2255 motion be denied. DeVito objected. The magistrate judge issued a supplemental R&R recommending that the § 2255 motion be denied with prejudice, then issued corrections to the supplemental R&R. DeVito objected. The district court overruled the objections, adopted the supplemental**{2023 U.S. App. LEXIS 3}** R&R as corrected, denied the § 2255 motion, and declined to issue a COA. DeVito timely appealed. He applies for a COA on both claims.

A COA shall issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the § 2255 motion on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). A COA is improper "if *any* outcome-determinative issue is not reasonably debatable." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020). DeVito fails to meet this standard.

Both claims raise ineffective assistance of counsel. To establish it, DeVito must show that (1) counsel's performance was deficient-objectively unreasonable under prevailing professional norms-and (2) it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694. In the guilty-plea context, this means that DeVito must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and**{2023 U.S. App. LEXIS 4}** would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). "Because the petitioner must satisfy *both* prongs, the inability to prove either one of the prongs-regardless of which one-relieves the reviewing court of any duty to consider the other." *Nichols v. United States*, 563 F.3d 240, 249 (6th Cir. 2009) (en banc) (citing *Strickland*, 466 U.S. at 697).

In Claim 1, DeVito argues that his counsel's pre-plea performance was constitutionally ineffective. Specifically, "plea counsel failed to advise DeVito prior to the entry of his guilty plea that the [Sentencing] Guidelines would allow for the creation of 'pseudo counts' pursuant to U.S.S.G. § 2G2.1(d)(1) and significantly heighten the consequences of DeVito's guilty plea." DeVito alleges that this omission rendered his guilty plea unknowing and involuntary and avers that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. The district court found this claim meritless. Jurists of reason would not disagree.

At the trial level, DeVito went through several attorneys, two of whom are relevant here: Candace Crouse and Sarah Kovoor. (Ms. Crouse has since become a judge, but she is herein referred to as "Attorney Crouse" or "Crouse.") Attorney Crouse negotiated DeVito's plea agreement. During negotiations, she and the**{2023 U.S. App. LEXIS 5}** Government independently calculated DeVito's likely offense level under the Sentencing Guidelines and arrived at the same number. That calculation included the 25 pseudocounts, which enhanced the offense level by five points. Crouse met with DeVito in jail to discuss the proposed plea agreement and his likely offense level. Later, because she would not agree to file certain pretrial motions, he replaced her with Attorney Kovoor. Kovoor represented DeVito at the guilty-plea hearing.

DeVito contends that Kovoor never went over the Sentencing Guidelines with him, told him about the pseudocounts, or explained how the pseudocounts would increase the penalty to which he was

exposed. His affidavit states:

> Prior to entering my guilty plea to Count One of the Indictment, Ms. Kovoor never went over the Sentencing Guidelines with me and how they would impact my sentence. I extensively researched the Guidelines myself; however, I am a lay person and prior to this case had no knowledge of the federal Guidelines.
>
> Ms. Kovoor did not advise me that even though I was pleading guilty to one count, I would be charged with multiple "pseudo counts" under U.S.S.G. § 2G2.I and that each count would be treated as a separate**{2023 U.S. App. LEXIS 6}** conviction under the Guidelines.

DeVito does not allege that Attorney Kovoor affirmatively misrepresented anything. He complains of a negative: that Kovoor failed to give him certain highly relevant information about the pseudocounts. Even if true, DeVito concedes that Crouse had already told him about the pseudocounts. Further, he does not allege that Crouse affirmatively misrepresented anything either. But, he contends, "she did not explain the specifics on how the pseudo counts would affect the Guidelines range." Thus it is essential to DeVito's argument that he show that Attorney Crouse inadequately explained the pseudocounts to him. Jurists of reason would agree that he fails at that step.

At the hearing, Attorney Crouse described her standard practice for calculating and explaining the sentencing guidelines to her clients:

> [O]nce I received a plea offer from the Government, I would try to do my own calculation. I would also ask the prosecutor for what they think their calculation is just to see if we're on the same page. And then occasionally, it kind of depended on the complexity of the case, I would go to the, I had a good relationship with the probation department with some of**{2023 U.S. App. LEXIS 7}** the probation officers and I would maybe reach out to one of them to kind of go over the calculations as well just to make sure that I'm correct and the Government's correct. And so once I figured them out, I would take the plea offer and my guideline book and my calculations to meet with my client and go over everything.

Asked what "go[ing] over everything" with the client entailed, she replied:

> I would go over everything. I would go over every last drop of the plea agreement. And I would go over the guidelines, how they worked, you know, starting with the base defense [sic] level. I would discuss all of the enhancements. I would show them the grid, criminal history calculation, all of that. So we would go over in detail because I knew, you know, during the plea hearing, I would be asked and my client would be asked if we did that.In short, her standard practice would have been to specifically explain how the pseudocounts affected the Guidelines range.

DeVito offers two reasons to think Attorney Crouse did not follow her standard practice with him. But neither singly nor cumulatively do they show what DeVito needs them to show.

First, when testifying at the hearing, Attorney Crouse could**{2023 U.S. App. LEXIS 8}** not remember specifically what she told DeVito about pseudocounts.

> I don't remember anything more specific than saying that because there are additional victims that there is this enhancement. It's called a pseudocount enhancement. I remember telling him where it was located in the book. But as far as anything else, I have no memory of.This does not establish that Crouse's explanation was inadequate. By "there is this enhancement," Crouse seems to have meant that she explained to DaVito that the pseudocounts would cause a five-level enhancement. By the time Attorney Crouse testified at the hearing, at least four years had passed since their meeting. It is hardly surprising that she did not remember the specifics of

one meeting with one client.

That leaves DeVito's second contention urging this court to determine that Attorney Crouse failed to adequately explain how the pseudocounts affected the Guidelines range: he *says* she didn't. But after the hearing, the district court specifically found Crouse's testimony credible "and DeVito's not credible," because "his manner of answering questions was evasive." DeVito has not challenged those findings in his COA application, thus forfeiting**{2023 U.S. App. LEXIS 9}** the issue. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000). That leaves him with no credible evidence that Crouse did not explain what she should have explained. Jurists of reason would agree that DeVito fails to meet his burden of showing deficient performance.

In Claim 2, DeVito argues that his appellate counsel was ineffective for failing to argue in the opening brief the involuntariness of his guilty plea. The district court held this claim meritless. Jurists of reason would not disagree.

Appellate counsel is judged under the same standard as trial counsel, *Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000), requiring that DeVito show both deficient performance and prejudice. Prejudice in this context means that he must show a reasonable probability that, but for his counsel's error, he would have prevailed on appeal. *Id.*

The district court held that appellate counsel was not ineffective, because (despite her failure to raise the issue in her opening brief) this court went ahead and found that DeVito's appellate waiver was not involuntary. DeVito objects that that analysis misses the mark because his claim was not that appellate counsel should have raised the involuntariness of the appellate waiver, but that she should have raised the involuntariness of the *guilty plea* itself.**{2023 U.S. App. LEXIS 10}** That does not improve DeVito's position. As discussed under Claim 1, the attack on the guilty plea is meritless. No prejudice flows from failing to raise a meritless claim. *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001).

Jurists of reason could not debate the denial of DeVito's claims. Accordingly, his application for a COA is **DENIED**.

Appendix B

No. 22-4042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 23, 2023
DEBORAH S. HUNT, Clerk

RICHARD LEE DEVITO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: NORRIS, McKEAGUE, and MATHIS, Circuit Judges.

Richard Lee Devito, a pro se federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix C

No. 22-4042

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 7, 2023
DEBORAH S. HUNT, Clerk

RICHARD LEE DEVITO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: NORRIS, McKEAGUE, and MATHIS, Circuit Judges.

Richard Lee Devito petitions for rehearing en banc of this court's order entered on May 10, 2023, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America, Plaintiff, v. Richard Lee DeVito, Defendant.	:	Case No. 1:16-cr-115 Judge Susan J. Dlott Order Denying Motion Under 28 U.S.C. § 2255 to Vacate

Pending before the Court is Defendant Richard Lee DeVito's Motion Under 28 U.S.C. § 2255 to Vacate ("Motion to Vacate") his conviction and sentence. (Doc. 114.) DeVito alleges in the Motion to Vacate that his attorneys provided ineffective assistance of counsel in connection with his decision to plead guilty and during the appeal. Magistrate Judge Michael R. Merz held an evidentiary hearing on May 6, 2022, considered the parties' briefs, and then issued a Report and Recommendation ("R&R") and a Supplemental Report and Recommendation ("Supplemental R&R") in which he recommended dismissing both grounds for relief in the Motion to Vacate. (Docs. 156, 159.)[1] DeVito filed Objections to the Supplemental R&R. (Doc. 162.) Upon consideration of the facts and the law, the Court agrees with Magistrate Judge Merz that DeVito has not established that he received ineffective assistance of counsel. The Court will **OVERRULE** the Objections, **ADOPT** the Supplemental R&R, and **DENY** the Motion to Vacate.

I. PROCEDURAL HISTORY

A. Indictment and Initial Pretrial Proceedings

On December 21, 2016, DeVito was charged in an Indictment with one count of

[1] Magistrate Judge Merz issued Corrections to the Supplemental R&R as well. (Doc. 161.) References herein to the Supplemental R&R are intended to incorporate the Corrections.

production of child pornography and one count of possession of child pornography. (Doc. 10 at PageID 24–25.) He initially pleaded not guilty to the charges. (Doc. 15.) DeVito cycled through four retained attorneys from December 2016 until November 27, 2017 when Candace Crouse was appointed by the Court to represent him pursuant to the Criminal Justice Act. (Docs. 7, 17, 22, 23, 39.)[2]

B. Plea Negotiations and Motions Filed

Attorney Crouse negotiated a plea agreement with the Government on DeVito's behalf. (Doc. 123-2 at PageID 983.) As part of the negotiations, she confirmed the likely offense level calculation under the Sentencing Guidelines with the Government and with a probation officer. (*Id.*) They all agreed the offense level calculation was 49. (*Id.*; Doc. 151 at PageID 1228.) As part of that calculation, the Government identified 25 additional victims who were not named in the Indictment but who would be relevant to his sentence calculation as pseudocounts. (Doc. 151 at PageID 1228–1229.) The pseudocounts were the basis for a five-level enhancement of the base offense level calculation. (*Id.* at PageID 1229.)

Attorney Crouse met with DeVito in jail to discuss the proposed plea agreement and the Sentencing Guidelines calculation. (*Id.* at PageID 1230.) She told him that both she and Government determined that the offense level calculation was 49. (Doc. 151 at PageID 1187, 1189, 1230.) Attorney Crouse showed DeVito her handwritten notes in which she set forth the calculation and the five-level enhancement arising from the pseudocounts. (*Id.* at PageID 1173, 1187–1188, 1230; Doc. 123-3 at PageID 984.) DeVito requested a copy of her handwritten notes, and she mailed a copy to him. (Doc. 151 at PageID 1187–1188, 1230.)

In approximately early April 2018, after Attorney Crouse negotiated the proposed plea

[2] Candace Crouse became a judge for the First District Court of Appeals in Ohio in 2019 after she completed her representation of DeVito. However, for simplicity and clarity in this case record, and without intending any disrespect to Judge Crouse, the Court will refer to her herein as Attorney Crouse.

agreement and discussed the plea and sentencing with DeVito at the jail, DeVito terminated her representation and retained Sarah Kavoor as his attorney. (Doc. 48.) DeVito terminated Attorney Crouse because she would not agree to file two pretrial motions on his behalf, but Attorney Kavoor agreed to file the motions. (Doc. 151 at PageID 1174–1176.) In fact, Attorney Kavoor filed the Motion to Dismiss Count One of the Indictment and the Motion to Suppress on April 30, 2018. (Docs. 49, 50.) She also moved for an evidentiary hearing on both motions. (Doc. 51.) The Court set a hearing on the motions for June 19, 2018. (Doc. 56.)

C. June 19, 2018 Hearing, Guilty Plea, and Sentencing

On the day of the hearing, DeVito was told that the Government intended to file a superseding indictment charging him with counts related to other victims if he did not accept the proposed Plea Agreement before the motions hearing began. (Doc. 151 at PageID 1179–1181.) DeVito understood that he would serve the remainder of his life in prison—that he was "going to come out [of prison] in a coffin"—if he did not accept the Plea Agreement. (Doc. 151 at PageID 1179.)

The proposed Plea Agreement required DeVito to plead guilty to Count One of the Indictment—production of child pornography in violation of 18 U.S.C. § 2251(a) and (e). (Doc. 63 at PageID 204.) It explained that the statutory penalty for Count One was fifteen to thirty years of imprisonment. (*Id.*) It also incorporated a Statement of Facts providing the factual basis for the Count One charge, plus facts establishing that DeVito victimized at least twenty-five other minors:

> [U]sing the "ooVoo" application, Devito knowingly induced and persuaded [*sic*] at least 25 other minors to send him similar videos and photographs over the internet that depicted their genitalia or otherwise depicted them engaged in sexually explicit conduct. The minors were typically between the ages of 8 and 12.

(*Id.* at PageID 205, 210.) Finally, the Plea Agreement included a provision requiring DeVito to

waive the right to appeal the sentence imposed with limited exceptions:

> **Waiver of Appeal:** In exchange for the concessions made by the USAO in this plea agreement, the Defendant waives the right to appeal the sentence imposed, except if the sentence imposed exceeds the statutory maximum. However, this waiver shall not be construed to bar a claim by the Defendant of ineffective assistance of counsel or prosecutorial misconduct.

(*Id.* at PageID 207.)

DeVito asked the Assistant United States Attorney ("AUSA") to remove the reference to the twenty-five additional victims from the Statement of Facts in the Plea Agreement. (Doc. 151 at PageID 1190–1191, 1199–2000.) He testified that he "understood" that "if those 25 victims weren't included in the [S]tatement of [F]acts, [his] guideline range could be lower." (*Id.* at PageID 1190.) The AUSA refused to remove the reference to the twenty-five victims. (*Id.* at PageID 1190–1191.) Nonetheless, DeVito signed the Plea Agreement and agreed to plead guilty to Count One. (Doc. 63 at PageID 209.)

During the plea hearing, the Court asked DeVito to confirm his understanding that he faced a term of imprisonment from fifteen to thirty years as a consequence of his guilty plea. (Doc. 80 at PageID 252, 262.) The Court also asked DeVito to confirm that that he had, in fact, induced and persuaded at least twenty-five other minors to send him videos and images that depicted their genitalia or otherwise depicted them engaged in sexually explicit conduct. (*Id.* at PageID 270–272.) DeVito confirmed both. (*Id.* at PageID 252, 272.)

Additionally, the Court discussed with DeVito what he understood about the application of the Sentencing Guidelines:

> THE COURT: Then next, I want to explain to you the Court's method for determining your sentence to make sure that you understand the possible consequences of your plea. Your sentence will be determined by a combination of the advisory sentencing guidelines, any authorized departures from those guidelines, and a number of other statutory sentencing factors.

Have you and Miss Kovoor talked about how the advisory sentencing guidelines might apply to your case?

THE DEFENDANT: We've not talked about that.

MS. KOVOOR: We have. We have.

(Ms. Kovoor conferring with the defendant.)

MS. KOVOOR: Your Honor, he is going to go have a presentence investigation where the --

THE COURT: I'm sorry?

MS. KOVOOR: He is going --

THE COURT: Can you speak into the microphone?

MS. KOVOOR: He is going to undergo a presentence investigation; correct?

THE COURT: Yes, of course.

MS. KOVOOR: Where the guidelines will be enumerated. We have discussed the guidelines.

THE COURT: Have you discussed the guidelines, Mr. DeVito? In other words, there's a chart that your attorney probably showed you where it's got -- on one side it's got the offense level, whatever level this particular crime would have, and on another side of the equation it's got what your criminal history is, and you put all that together in a chart and you come up with an advisory sentencing guideline. Have you looked at something like that with Ms. Kovoor?

THE DEFENDANT: I've looked at them in great length myself, Your Honor.

THE COURT: I'm sorry?

MS. KOVOOR: He's looked at that at great length himself.

THE COURT: Okay. Thank you.

(*Id.* at PageID 254–256.) The Court then accepted DeVito's guilty plea. (*Id.* at 273–274.)

On May 21, 2019, the Court sentenced DeVito to thirty years of imprisonment. (Docs. 89, 94.)

D. Appeal

DeVito filed an appeal in the Sixth Circuit Court of Appeals. (Doc. 93.) He was

represented by Kimberly Penix on the appeal. Attorney Penix did not address the appellate waiver provision contained in the Plea Agreement in the opening brief she filed in the Sixth Circuit. Rather, she simply argued that the Court had made substantive errors in sentencing DeVito. (*United States v. DeVito*, No. 19-3525, Doc. 28 (6th Cir. Oct. 3, 2019).) The Government responded by filing a Motion to Dismiss Appeal based on the appellate waiver provision in the Plea Agreement. (*Id.*, Doc. 29 (Oct. 10, 2019).) Attorney Penix filed a brief in opposition the Motion to Dismiss. (*Id.*, Doc. 31 (Oct. 21, 2019).) She argued that the appellate waiver should not be enforced because it was not knowing or voluntary, and she requested leave to amend her opening brief to address the issue. (*Id.*, Doc. 31 at 5, 8.) The Sixth Circuit rejected that argument and dismissed the appeal pursuant to the appellate waiver provision in the Plea Agreement. (*Id.*, Doc. 33-2 (Nov. 8, 2019).) Attorney Penix then filed a Petition for Reconsideration, but the Sixth Circuit denied that Petition as well. (*Id.*, Doc. 34 (Nov. 22, 2019); *Id.*, Doc. 35-2 (Dec. 11, 2019).)

E. Motion to Vacate

On February 5, 2021, DeVito filed the pending Motion to Vacate. (Doc. 114.) DeVito asserts one claim for ineffective assistance of counsel at the June 19, 2018 change of plea hearing and one claim for ineffective assistance of appellate counsel for failing to argue the voluntariness of his guilty plea. (*Id.* at PageID 919–920.) Both claims arise from the allegation that his attorneys did not advise him that, despite formally pleading guilty to only one count of production of child pornography, he still could be sentenced as if he had been convicted of multiple pseudocounts under Sentencing Guideline 2G2.1(d)(1).[3] He claims that he would not

[3] Sentencing Guideine 2G2.1 applies to the sexual exploitation of a minor by production of sexually explicit visual or printed material. Subsection (d)(1) states as follows:

(d) Special Instruction

have pleaded guilty had he understood the impact of the pseudocounts on the Sentencing Guidelines calculation. He asserts that lack of understanding made his guilty plea, and the Plea Agreement with its appellate waiver provision, unknowing and involuntary.

After the Government filed its Response, Magistrate Judge Merz filed his initial Report and Recommendation on May 17, 2021 recommending that both claims in the Motion to Vacate be denied on the merits. (Docs. 123, 125.) DeVito filed Objections arguing principally that the Magistrate Judge should have conducted an evidentiary hearing and allowed him to examine Attorney Kavoor as to the advice she gave him prior his guilty plea. (Doc. 127 at PageID 1000–1001.) Thereafter, Magistrate Judge Merz withdrew the initial Report and Recommendation and ordered that DeVito depose Attorney Kavoor. (Doc. 128.) Attorney Kavoor then was deposed on November 9, 2021. (Doc. 139-1.)

Subsequently, Magistrate Judge Merz held an evidentiary hearing on May 6, 2022 at which DeVito and Attorney Crouse testified by audio conference. (Doc. 151.) DeVito testified about his meeting at the jail with Attorney Crouse, his request for her notes about the Sentencing Guideline calculations and the pseudocounts, his decision to retain Attorney Kavoor, his request to the AUSA to remove the reference to the other twenty-five victims from the Statement of Facts, and why he pleaded guilty on June 19, 2018. Attorney Crouse testified about her normal procedures for engaging in plea negotiations and determining the likely Sentencing Guideline calculations, her representation of DeVito, and their discussion at the jail about the Sentencing Guideline calculations and pseudocounts.

On August 1, 2022, Magistrate Judge Merz issued the R&R recommending that the

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(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

U.S.S.G § 2G2.1(d)(1).

Motion to Vacate be denied. (Doc. 156.) He determined that the first claim—ineffective assistance of counsel in regard to the guilty plea—failed on the merits. (*Id.* at PageID 1279.) He further determined that the second claim—ineffective assistance of appellate counsel on appeal—had been abandoned because "it was not briefed and no testimony was offered in support." (*Id.* at PageID 1268.) DeVito, represented by counsel, filed Objections to the R&R. (Doc. 157.) He argued that his first claim should not have been denied on the merits, and he disputed that he had abandoned the second claim for relief. Magistrate Judge Merz then issued the Supplemental R&R on August 26, 2022 again recommending that both claims for relief be denied. (Doc. 159.) Finally, he issued Corrections regarding two factual misstatements in the Supplemental R&R that were not material to the core recommendations. (Doc. 161.) DeVito filed Objections to the Supplemental R&R on September 7, 2022. (Doc. 162.)

II. STANDARDS OF LAW

Magistrate judges are authorized to decide dispositive and non-dispositive matters pursuant to 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. The district judge must conduct a de novo review of a magistrate judge's recommendation on a dispositive motion when an objection is filed. *Baker v. Peterson*, 67 F. App'x 308, 310 (6th Cir. 2003) (citing 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b)). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1) (substantially similar).

Section 2255 provides that a federal prisoner may move to vacate, set aside, or correct his sentence when it is "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). It instructs a district court to "grant a prompt hearing thereon, determine the

issues and make findings of fact and conclusions of law" unless the case record "conclusively show[s] that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).

III. ANALYSIS

A. First Ground for Relief

In the first ground for relief, DeVito asserts that he would not have pleaded guilty but for the ineffective assistance of his legal counsel. To prove a constitutional claim for ineffective assistance of counsel sufficient to reverse a conviction, the defendant must show both that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defendant." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). DeVito must establish preliminarily that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The Magistrate Judge determined that this claim failed on the merits.

The core of DeVito's claim is that neither Attorney Crouse nor Attorney Kavoor adequately explained to him how the pseudocounts could be used to enhance his sentence under the Sentencing Guidelines. He testified at the May 6, 2022 evidentiary hearing testimony that Attorney Crouse merely provided him with a copy of her handwritten notes about the Guidelines calculation, but she did not discuss the Guidelines with him or how they applied to his case. (Doc. 151 at PageID 1188–1189.) DeVito also testified that Attorney Kavoor did not discuss with him the effect of the pseudocounts on his sentence before he pleaded guilty. (Doc. 151 at PageID 1183–1184.) He further asserted that he would have proceeded to trial if Attorney Kavoor had discussed the impact of the pseudocounts with him. (*Id.* at 1184.)

These narrow assertions, however, do not overcome DeVito's own statements and testimony that amply demonstrate that he understood the impact of the pseudocounts and the

applicable Sentencing Guidelines calculation before he pleaded guilty. The Statement of Facts in the Plea Agreement to which he agreed discussed that he had induced twenty-five other minors to send him images or videos that depicted their genitalia or depicted them engaged in other sexually-explicit conduct. (Doc. 63 at PageID 205, 210.) He confirmed these facts again on the record at his plea hearing. (Doc. 80 at PageID 270–272.) Finally, he confirmed at the May 26, 2022 evidentiary hearing that he understood that the inclusion of the pseudocounts increased the Guidelines calculation based on his review of Attorney Crouse's handwritten notes.

> Q. So specifically in [Attorney] Crouse's notes that she sent you a copy of, do you see the part at the top that says 25 additional victims, pseudocounts used to increase guidelines?
>
> A. I do see that. I also see --
>
> Q. You can read and write; is that correct?
>
> A. I can read and write. But I also see where it says if not in statement of facts. And based on her notes, it looked to the five points at the bottom that are tied to it are not in the statement of facts were not included in that number. So again, it was these subtle --
>
> Q. So you understood that to mean that if those 25 victims weren't included in your statement of facts, your guideline range could be lower?
>
> A. Yes.

(Doc. 151 at PageID 1189–1190.)

In fact, DeVito asked the AUSA to remove the reference to the twenty-five additional minor victims from the Statement of Facts on the day he pleaded guilty. (*Id.* at PageID 1190.) He testified that the AUSA refused to remove the additional victims, but he still signed the Plea Agreement. (*Id.* at PageID 1191.) DeVito's testimony is consistent with the testimony of Attorney Crouse at the evidentiary hearing that she reviewed her handwritten notes and explained the Guidelines calculation with DeVito when she met with him in prison. (*Id.* at PageID 1230.)

Finally, there is substantial evidence that DeVito understood that he faced a sentence of fifteen years to thirty years of imprisonment if he pleaded guilty regardless of whether he understood the specific impact of the psuedocounts on that sentencing range. The following exchanges took place at the sentencing hearing:

> THE COURT: All right. Then, next, I want to talk with you about the possible consequences of your plea. Do you understand that the maximum penalty under Count 1 is a term of a minimum of 15 years imprisonment but not more than 30 years imprisonment --
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: Do you understand that if the Court accepts your plea of guilty, it can impose the maximum penalties?
>
> THE DEFENDANT: Yes.

(Doc. 80 at PageID 252.) Additionally, the Plea Agreement that DeVito signed explained the Court would have discretion to sentence him anywhere within the range of fifteen to thirty years of imprisonment. (*Id.* at 262, 266–267; Doc. 63 at PageID 204, 208.)

For these reasons, the Court finds that DeVito has not established that his attorneys rendered constitutionally-deficient representation to him in connection with his decision to plead guilty. He made his plea with full knowledge and understanding about the sentence he faced. The Court will deny the first ground for relief on the merits.

B. Second Ground for Relief

In the second ground for relief, DeVito asserts that his appellate counsel, Attorney Penix, rendered ineffective assistance of counsel by not arguing that the appellate waiver provision in the Plea Agreement had been involuntary. The Magistrate Judge first concluded that this ground for relief had been abandoned, but following DeVito's initial Objections, he concluded in the Supplemental R&R that it failed on the merits. (Doc. 156 at PageID 1268; Doc. 159 at PageID

1293–1295.)

"[T]he failure of counsel to raise a meritorious issue can amount to constitutionally ineffective assistance." *Henness v. Bagley*, 644 F.3d 308, 317 (6th Cir. 2011). "To evaluate a claim of ineffective assistance of appellate counsel, then, the court must assess the strength of the claim that counsel failed to raise." *Id.* "Counsel's failure to raise an issue on appeal amounts to ineffective assistance only if a reasonable probability exists that inclusion of the issue would have changed the result of the appeal." *Id.* "[B]y definition, appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001). Here, for the reasons explained below, the Court agrees with Magistrate Judge Merz that the Sixth Circuit necessarily found that the appellate waiver provision in the Plea Agreement was knowing and voluntary when it dismissed DeVito's appeal.

DeVito contends that Attorney Penix did not argue in the appellate briefs before the Sixth Circuit that the appellate waiver provision in the Plea Agreement had been involuntary, but instead only requested leave to amend the opening brief to make that argument. The Court disagrees. Attorney Penix expressly argued to the Sixth Circuit that a court can "not enforce a defendant's waiver of appellate rights where the waiver is not knowing and voluntary." (*United States v. DeVito*, No. 19-3525, Doc. 31 at 5 (6th Cir. Oct. 21, 2019).) She further argued on DeVito's behalf that his plea was not knowing or voluntary because the Government provided additional facts and details concerning the pseudocounts during sentencing proceedings that had not been explicitly set forth in the Statement of Facts in the Plea Agreement. (*Id.*, Doc. 31 at 4–8.)

The Sixth Circuit rejected this specific argument:

> The record establishes that the district court complied with Rule 11, and DeVito does not argue otherwise. Rather, *DeVito argues that his appellate waiver was*

> *unknowing and involuntary because the presentence report, which held him responsible for conduct not described in the parties' stipulation of facts, had not yet been prepared and disclosed. Our precedent, however, requires us to reject this argument. See, e.g., United States v. Tutt*, 165 F.3d 29, at *3 (6th Cir. 1998) (per curiam) (Table). We have also upheld appellate waivers, like DeVito's, that broadly foreclose appeals from the district court's sentencing decision. *See United States v. Beals*, 698 F.3d 248, 255–56 (6th Cir. 2012).
>
> DeVito's valid appellate waiver precludes him from appealing his sentence unless it exceeds the statutory maximum sentence of thirty years. He was sentenced to that statutory maximum. His appeal—challenging the district court's consideration of facts not found by a jury or admitted by him and the district court's application of USSG § 2G2.1(d)(1)—is therefore precluded by his appellate waiver.

(*Id.*, Doc. 33-2 at Page 2 (emphasis added).)[4] Attorney Penix filed a Petition for Reconsideration arguing that the Sixth Circuit had misconstrued her argument, but the Sixth Circuit denied it. (*Id.*, Docs. 34, 35-2.) The Court concludes that because the Sixth Circuit expressly determined that appellate waiver provision in the Plea Agreement was not involuntary, Attorney Penix did not render ineffective assistance of counsel by failing to raise the issue. The Court will deny the second ground for relief on the merits as well.

C. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Proceedings requires this Court to determine whether to grant or deny a certificate of appealability. The certificate of appealability should only be issued if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That means showing that reasonable jurists could debate whether relief should have been granted." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020) (internal quotation and citation omitted). Here, the Court finds that reasonable jurists would not debate whether relief should have been granted because DeVito has not made a

[4] During the plea colloquy at his plea hearing, DeVito agreed that no one threatened him to accept the Plea Agreement, except to the extent that the Government stated that it would file a superseding indictment if he did not plead guilty. (Doc. 80 at PageID 267–268.) He also agreed that he was "pleading guilty of [his] own free will because [he] was guilty." (*Id.* at PageID 268.)

substantial showing that his constitutional rights were denied. The Court will not issue a certificate of appealability.

IV. CONCLUSION

For the foregoing reasons, the Motion to Vacate (Doc. 114) is **DENIED**, the Supplemental R&R (Doc. 159) is **ADOPTED**, and the Objections (Doc. 162) are **OVERRULED**. The Court **DECLINES** to issue a certificate of appealability. The Clerk of Court is **DIRECTED** to enter judgment for the Government and close the case.

IT IS SO ORDERED.

BY THE COURT:

S/Susan J. Dlott
Susan J. Dlott
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 1:16-cr-115
Also 1:21-cv-093

District Judge Susan J. Dlott
- vs - Magistrate Judge Michael R. Merz

RICHARD LEE DeVITO,

Defendant. :

REPORT AND RECOMMENDATIONS

This case is pending on Defendant's Motion under 28 U.S.C. § 2255 to Vacate his conviction and sentence (ECF No. 114). That Motion is ripe for decision after an evidentiary hearing (Transcript, ECF No. 151) and post-hearing briefing (Defendant's Brief at ECF No. 152; (Government Response, ECF No. 155)[1].

[1] Neither of these filings is compliant with the Court's record citation rule, S. D. Ohio Civ. R. 7.2(B)(3), because it does not include the required PageID number. Instead, both counsel have used the typescript number from the transcript as furnished to them by the court reporter. That is not a valid excuse for not following a court-ordered citation system. S. D. Ohio Civ. R. 7.2(b)(2) requires citation to Supreme Court decisions to the Official Reports when published and has since before the undersigned was admitted to practice. Do counsel suppose substitution of the Government Printing Office Advance Sheet citation is acceptable? The PageID numbers are as available to counsel as to the Court. Rather than delay a decision, the Court has elected to make the translation itself. Future non-compliant filings will be stricken.

Litigation History

Defendant was indicted on December 21, 2016, by the grand jury for this District on one count of production of child pornography and one count of possession of child pornography (Indictment, ECF No. 10). DeVito initially retained Attorney Edward Perry and entered a not guilty plea before Magistrate Judge Karen Litkovitz on December 30, 2016 (Minute Entry, ECF No. 15). The case was assigned to District Judge Susan Dlott at the time of indictment. On January 19, 2017, Attorney Mark Jon Wieczorek replaced Mr. Perry and shortly thereafter Judge Dlott granted a joint motion to continue the trial from March to July, 2017 (ECF Nos. 17 & 18). On May 1, 2017, Adam Boyd Bleile replaced Attorney Wieczorek as DeVito's counsel (ECF No. 22). Two weeks later, Judge Dlott allowed William Butler, an attorney from Kentucky, to appear *pro hac vice* as co-counsel (ECF No. 23). Then on November 27, 2017, Messrs. Bleile and Butler withdrew, apparently because DeVito lacked funds to retain them further, and Attorney Candace Crouse, on recommendation of the Federal Defender, was appointed under the Criminal Justice Act (ECF Nos. 39, 41, and 42). Then on April 5, 2018, Sarah Kovoor was retained and replaced Attorney Crouse (ECF No. 48).

On June 19, 2018, DeVito entered into a Plea Agreement with the United States (ECF No. 63) in which he agreed to plea guilty to one count of production of child pornography (¶ 1). He acknowledged that the minimum sentence would be fifteen years and the maximum thirty years (¶ 3(a)). He also waived his right to appeal unless the sentence exceeded the statutory maximum (¶ 10). DeVito pleaded guilty pursuant to the Plea Agreement the same day (Minute Entry, ECF No. 62; Transcript, ECF No. 80).

A week before sentencing Attorney Kovoor attempted to withdraw because of DeVito's refusal to cooperate (ECF No. 87). Judge Dlott denied the motion (ECF No. 88) and proceeded on May 21, 2019, to sentence DeVito to the thirty-year sentence he is now serving (Minute Entry, ECF No. 89; Judgment, ECF No. 90).

Despite his waiver of the right to appeal in the Plea Agreement, DeVito appealed and the Sixth Circuit appointed Attorney Kimberly Penix to represent him (ECF No. 96). Upholding the appeal waiver on the Government's motion, the Sixth Circuit dismissed the appeal. *United States v. DeVito*, Case No. 19-3525 (6th Cir. Nov. 8, 2019)(copy at ECF No. 111). Represented by new counsel, DeVito filed his Motion to Vacate on February 5, 2021, in which he pleads the following claims for relief:

> **Ground One:** Counsel's Pre-Plea Counsel's Pre-Plea Performance Was Constitutionally Ineffective; But For Counsel's Errors, DeVito Would not have pled guilty and would have proceeded to trial.
>
> **Ground Two:** Appellate Counsel Was Ineffective For Failing To Argue The Voluntariness Of DeVito's Guilty Plea In His Opening Brief.

(ECF No. 114). Ground Two has effectively been abandoned; it was not briefed and no testimony was offered in support.

Believing the Motion to Vacate could properly be decided on an expanded paper record, the Magistrate Judge denied Defendant's request for an evidentiary hearing (ECF No. 144), but Judge Dlott reversed that ruling on appeal (ECF No. 146). She noted two bases for the reversal.

First of all, the undersigned had noted the difficulty in conducting an in-person proceeding during the depths of the COVID-19 pandemic, particularly given the serious shortage of United

States Marshal personnel (ECF No. 144, PageID 1150-51). Judge Dlott found this difficulty obviated by DeVito's agreement to conduct the hearing remotely (ECF No. 146, PageID 1963).[2]

Secondly, Judge Dlott relied on the traditional preference for live rather than paper testimony.

> DeVito correctly points out that an evidentiary hearing will better allow the Magistrate Judge to assess his credibility than the written record. This could be critical as DeVito contends there is a dispute of fact as to what Attorney Kavoor [sic] told him and what he understood about the application of the Sentencing Guidelines to his misconduct.

(ECF No. 146, PageID 1163).

Summary of Testimony

The evidentiary hearing was held May 6, 2022, and the testimony has been transcribed (ECF No. 151). Defendant testified himself, but presented no exhibits or any other live witnesses. He related that he had first been represented by Attorney Zenaida Lockard but eventually came to be represented by Attorney Candace Crouse.[3] She came to the Hamilton County Jail to discuss a proposed plea agreement which included something called "pseudocounts" which were written on a sheet of yellow notebook paper (Transcript, ECF No. 151, PageID 1172-73.) This initial discussion of the plea deal was not very deep and did not last more than forty-five minutes, according to DeVito. *Id.* at PageID 1173.

> Q. [by Attorney Gordon] Now, to your knowledge, did you receive a detailed letter from now Judge Crouse explaining the impact of the pseudocounts?

[2] DeVito had not made this offer prior to the appeal.
[3] By the time of the hearing, Ms. Crouse had been elected Judge of the Ohio First District Court of Appeals.

A. No.

Q. Did now Judge Crouse hand you a detailed letter at the jail explaining the impact of the pseudocounts on the guidelines?

A. Detailed, no. Again, I was shown the yellow piece of paper and when she had left the jail I did ask for a copy of it.

(*Id.* at PageID 1174).

DeVito terminated Judge Crouse's representation because he wanted a motion filed to dismiss the production count on a legal basis he had learned of from Attorney William Butler. He eventually hired Attorney Sarah Kovoor who did file that motions and a motion to suppress for violation of *Miranda*. *Id.* at PageID 1178.

On June 19, 2018, DeVito came to Court for what he thought was to be a hearing on his motion to suppress. *Id.* at PageID 1178. He learned when he arrived that if he insisted on going forward with the hearing, the United States would indict him on sufficient superseding counts to ensure life imprisonment. *Id.* He wanted to have a hearing on his motion, but it was made to clear to him that if Judge Dlott took the bench, the previously offered plea agreement would be withdrawn. *Id.* at PageID 1181. Attorney Kovoor did not explains to him, he said, the impact of the pseudocounts. *Id.* Concluding, he testified he believed on June 19, 2018, when he signed the Plea Agreement, he was "signing for one victim over five days." *Id.* at PageID 1185. He asserted Ms. Kovoor never discussed the Sentencing Guidelines with him. *Id.* at PageID 1186. He admits Judge Crouse told him that her Sentencing Guidelines calculation matched the Government's with a number 49. *Id.* at PageID 1189. He admits seeing in Judge Crouse's notes a reference to twenty-five additional victims. *Id.* He understood if they were part of the statement of facts, they would increase his sentence. He tried unsuccessfully to have them removed from the Statement of Facts. *Id.* Indeed he refused several times to sign but eventually gave in. *Id.* at PageID 1191.

His plan at sentencing was to try to get Judge Dlott to sentence him to fifteen years; but even if that had happened he would still have tried to withdraw his guilty plea "Because I didn't agree to plea to that day. The plea agreement had been rescinded and I had asked for a hearing of the motions that I filed in my case and did not receive". *Id.* at PageID 1195.

He admitted none of his attorneys ever recommended going to trial. The two motions on which he had hoped to have a hearing on the date he eventually pleaded were a motion to suppress for violating *Miranda v. Arizona* and a motion to dismiss the production count.

The United States then called Candace Crouse as a witness. She had been practicing criminal defense law almost exclusively for more than ten years when she was appointed to represent DeVito in the Fall of 2017. *Id.* at PageID 1214. Her standard practice over the hundreds of federal criminal cases she handled was

> once I received a plea offer from the Government, I would try to do my own calculation. I would also ask the prosecutor for what they think their calculation is just to see if we're on the same page. And then occasionally, it kind of depended on the complexity of the case, I would go to the, I had a good relationship with the probation department with some of the probation officers and I would maybe reach out to one of them to kind of go over the calculations as well just to make sure that I'm correct and the Government's correct. And so once I figured them out, I would take the plea offer and my guideline book and my calculations to meet with my client and go over everything.

(Transcript, ECF No. 151, PageID 1215-16). She did not just drop the plea agreement off at the jail as DeVito had described, but

> I would go over everything. I would go over every last drop of the plea agreement. And I would go over the guidelines, how they worked, you know, starting with the base defense level. I would discuss all of the enhancements. I would show them the grid, criminal history calculation, all of that. So we would go over in

> detail because I knew, you know, during the plea hearing, I would be asked and my client would be asked if we did that.

Id.

Turning to Mr. DeVito's case particularly, there had already been a plea offer made by the Government to one production count and a possession count. Mr. Healey was willing when she came on the case to allow a plea to one production count. *Id.* at PageID 1218. Because of the numerous additional victims, Judge Crouse wanted to check her Guideline calculation with Laura Jensen of the U.S. Probation Office.[4] Finding that the Government's calculations accorded with those of Ms. Jensen, she went to discuss the results with Mr. DeVito. *Id.* at PageID 1220. As to DeVito's testimony that she just dropped off her calculation sheet, she responded:

> Gosh, I never do that. I never did that. I always spent, when it was a plea and I had to go over guidelines, I always spent a significant period of time with my clients.
>
> I would go over everything. I would go over every last drop of the plea agreement. And I would go over the guidelines, how they worked, you know, starting with the base defense level. I would discuss all of the enhancements. I would show them the grid, criminal history calculation, all of that. So we would go over in detail because I knew, you know, during the plea hearing, I would be asked and my client would be asked if we did that.

Id. at PageID 1221. Having had that discussion, she recommended DeVito accept the Plea Agreement. *Id.*

She confirmed the Government's threat to indict on additional victims if the Plea Agreement were not accepted. Having seen the evidence which would support additional counts, she believed the threat of conviction on additional counts was very credible.

[4] Ms. Jensen has since retired.

Judge Crouse then identified and authenticated the Government's exhibits. She identified DeVito as a difficult client, but she believed he understood the Guidelines, although he did not think even the mandatory minimum sentence (15 years) was fair. *Id.* at PageID 1236.

Arguments of the Parties

DeVito's argument in his post-hearing brief repeats the claim he has made since filing the Motion to Vacate: the ineffective assistance of trial counsel Sarah Kovoor in failing to explain the Sentencing Guidelines means his guilty plea was not knowing, intelligent, and voluntary (ECF No. 152, PageID 1246, 1252).

The Government's Response is that Judge Crouse should be believed on the level of discussion of the enhancements she had with DeVito. There is no testimony to the effect that Attorney Kovoor told DeVito anything different from Judge Crouse about the Guidelines. Although Attorney Kovoor did not testify at the evidentiary hearing, she was deposed and the parties have treated her deposition testimony as available on the merits. She testified that after taking the case:

> Upon talking to Devito, he provided her with *United States v. Schock* and other material concerning the pseudo-counts which they discussed. (PageID# 1097 & 1104.) She believed "[h]e understood the pseudo-counts. He understood the sentencing guidelines." (PageID# 1106-07.) She also explained how Devito instructed her to try to negotiate the removal of the pseudo-counts from the plea agreement. (PageID# 1081.) In an effort to do so, she explained that "I went back, and Assistant U.S. Attorney Healey said no, there's absolutely no way they would do it, they wouldn't budge. I mean, at that point, I think they had 25 or 29 [victims]." *Id.* After pleading guilty, she stated Devito was not shocked or surprised when the initial guideline report was provided by probation. (PageID# 1121.) She stated that Devito went into the sentencing "with the hope that

> he would get 15 to 20 years." (PageID# 1084.) Further, when asked about DeVito's assertions regarding the pseudo-counts she stated "[DeVito] is so well read, thorough, intelligent, to wait four years now to allege that I didn't tell him about the pseudo-counts, I find really disingenuous, I find it shocking. Because this guy would have said it right away." (PageID# 1085.)

(ECF No. 155, PageID 1261). Ultimately the Government argues DeVito pleaded guilty not because of any lack of information about the Guidelines, but because neither he nor his counsel could convince the Government to remove the pseudocounts.

Analysis

Governing Standard

The governing standard for ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. In other words, to establish ineffective assistance, a defendant must show both deficient performance and prejudice. *Berghuis v. Thompkins,* 560 U.S. 370, 389 (2010), *citing Knowles v. Mirzayance,* 556 U.S.111 (2009).

With respect to the first prong of the *Strickland* test, the Supreme Court has commanded:

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainwright*, 477 U.S. 168, 184 (1986), *citing Strickland, supra.*; *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998), *citing Strickland, supra*; *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987), *quoting Strickland,* 466 U.S. at 687. "The likelihood of a different result must be substantial, not just conceivable." *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011), *quoting Harrington v. Richter*, 562 U.S. 86, 111-12 (2011).

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the

> outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See *Wong v. Belmontes*, 558 U.S. 15, 27, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009) (per curiam); *Strickland*, 466 U.S., at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. Id., at 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.*, at 693, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Harrington v. Richter, 562 U.S. 86, 111-112 (2011).

On the evidence adduced, the Magistrate Judge recommends the Court adopt the following findings of fact and conclusions of law.

Richard DeVito is a college graduate in psychology from the University of Cincinnati. This case represents his first conviction for a crime of any degree. Consistent with society's strong disapproval of child sexual abuse, it is not surprising that Congress has attached very severe penalties to not only engaging in such behavior, but creating visual images of it.

DeVito had a number of appointed or retained counsel in the case. All of them advised him against taking the case to trial even on the indictment as initially returned by the grand jury, apparently because the Government possessed strong physical evidence. With the case in that posture, the only viable strategy was to negotiate the best possible plea agreement and argue strongly in mitigation. This is the strategy Judge Crouse adopted. When she took over the representation, DeVito was charged with one production count and one possession count and she was able to negotiate down to the one production count.

However, the Sentencing Guidelines would require the Court to consider that there were twenty-five more victims beyond the indictment, although the relevant Guideline capped that consideration at five additional victims. DeVito understood that: at one point he attempted to negotiate directly with AUSA Healey to take the extra names out, but Healey would not agree and DeVito went ahead with the guilty plea nonetheless (ECF No. 155, PageID 1259, quoting transcript).

Viewing the evidence as a whole, the Court should conclude DeVito accepted the Plea Agreement because it was the best deal he could get and not because he did not understand the impact of the Sentencing Guidelines. If he did not accept it when he did (i.e., on the date set for the suppression hearing), the Government was prepared to rescind the offer and seek a superseding indictment on more production counts on which it had good evidence. DeVito testified he felt pressured, but the pressure arose from his objective circumstances and not from any overreaching by the Government.

DeVito's claims about not being informed of or understanding the effect of the pseudocounts are not credible. Judge Crouse gave a detailed account of her standard practice in defending federal criminal cases for more than ten years before her elevation to the bench; she specifically recounted what she did in this case. DeVito pled pursuant to the same Plea Agreement Judge Crouse had negotiated. The importance DeVito was led to attribute to the pseudocounts is attested by his comment that he spent many hours studying them himself and by the fact, confirmed by his testimony at the evidentiary hearing, that he tried to negotiate directly with AUSA Healey to get them removed.

The whole tenor of DeVito's testimony shows the wisdom of deciding witness credibility on the basis of spoken words. DeVito was continually evasive, often having to be called back to

answer the precise questions put by the examiner. Although it was he who insisted on a live hearing, the result did not enhance his credibility in the Magistrate Judge's ears.

Because DeVito's testimony about what Attorneys Crouse and Kovoor told him about the Sentencing Guidelines is not credible, he has not established the deficient performance prong of the *Strickland* test.

Effect of Plea Colloquy

Entirely apart from evaluation of the DeVito's interaction with attorneys Crouse and Kovoor, his Rule 11 plea colloquy with the Court defeats his § 2255 Motion. He assured Judge Dlott that he understood the Plea Agreement and that it was the only source of promises made to him to induce the plea. He acknowledged the threat of superseding indictments, but averred that there were no other threats (Transcript of Plea, ECF No. 80, PageID 268). Having conducted the plea colloquy, Judge Dlott found:

> [T]he defendant is fully competent and capable of entering an informed plea; the defendant is aware of the nature of the charges and the consequences of his plea, is aware of all plea negotiations undertaken on his behalf, and that the plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The plea is therefore accepted, and the defendant is now adjudged guilty of that offense.

Id. at PageID 273-74. Even assuming Attorney Kovoor conveyed misinformation or none at all about the pseudocounts, the properly-conducted plea colloquy forecloses any finding of prejudice, the second prong of the *Strickland* test.

When an ineffective-assistance claim is based on misleading information regarding the consequences of a plea, a proper plea colloquy is generally deemed to cure any misunderstanding the defendant may have had about the consequences of the plea. It thus forecloses any prejudice. *United States v. Pola*, 703 F. App'x 414, 423 (6th Cir. 2017), citing *Ewing v. United States*, 651 Fed.Appx. 405, 410 (6th Cir. 2016) (citing *Ramos v. Rogers*, 170 F.3d 560, 565 (6th Cir. 1999)). The court's proper advisement of rights is thus deemed to "foreclose" any showing of actual prejudice attributed to counsel's erroneous advice, because the defendant is deemed bound by his statements in response to the court's inquiry. *Id.* Otherwise, the plea colloquy process would be rendered meaningless if a defendant could reopen the record by later asserting that actually, he misunderstood. *Ramos*, 170 F.3d at 566.

Conclusion

DeVito has established neither the deficient performance nor the prejudice prong of the *Strickland* test. It is therefore respectfully recommended that his Motion to Vacate under 28 U.S.C. § 2255 be denied. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Defendant be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond

to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

August 1, 2022.

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 1:16-cr-115
Also 1:21-cv-093

District Judge Susan J. Dlott
- vs - Magistrate Judge Michael R. Merz

RICHARD LEE DeVITO,

Defendant. :

SUPPLEMENTAL REPORT AND RECOMMENDATION

This case is before the Court on Defendant's Objections (ECF No. 157) to the Magistrate Judge's Report and Recommendations (ECF No. 156) recommending Defendant's Motion to Vacate under 28 U.S.C. § 2255 (ECF No. 114) be denied. District Judge Dlott has recommitted the case for reconsideration in light of the Objections (ECF No. 158). The United States has not responded to the Objections and its time to do so has expired.

Defendant was indicted on one count of production of child pornography and one count of possession of child pornography. He was represented by a number of attorneys pre-trial, but Attorney Candace Crouse was able to negotiate a plea agreement whereby DeVito would plead to the production count and the other charge would be dismissed. Although it had not yet sought an

indictment on additional charges, the United States had developed sufficient evidence to indict and, in the opinion of DeVito's counsel convict, on twenty-five additional victims.

While represented by Attorney Sarah Kovoor, DeVito came to court on June 19, 2018. He expected a hearing on his motion to suppress. Instead he was advised that this would be his last chance to accept the negotiated plea agreement. If he did not, the United States was prepared to seek a superseding indictment. DeVito was persuaded that the result would be a sentence of life imprisonment. Although he pleaded guilty as agreed, he tried several times to withdraw the plea and appealed from Judge Dlott's refusal to allow the withdrawal. His plan at sentencing was to seek a minimum fifteen-year sentence, but he testified that even if he received that sentence, he would still have tried to withdraw his plea because he believed the plea offer had been rescinded and he was entitled to a hearing on his motion.

He did not plead that lack of a hearing as a ground for relief. Instead, he asserted through present counsel:

> **Ground One:** Counsel's Pre-Plea Performance Was Constitutionally Ineffective; But For Counsel's Errors, DeVito would not have pled guilty and would have proceeded to trial.

(Motion to Vacate, ECF No. 119, PageID 919).

This Supplemental Report analyzes the Objections in the order of the Grounds for Relief, rather than in the order they are presented in the Objections.

Ground One: Ineffective Assistance of Counsel in Plea Negotiations

At the direction of the District Court, the undersigned conducted an evidentiary hearing on May 6, 2022. Defendant was the sole witness to appear on his side of the case. The sole witness

for the United States was Attorney[1] Candace Crouse. The key factual issue tried was whether DeVito had been properly advised by his counsel of the effect of twenty-five "pseudo-counts" for additional victims which would be used to calculate a Sentencing Guidelines score. On this issue the undersigned found Judge Crouse's testimony credible and DeVito's not credible. This finding grounded a recommendation to deny relief (Report, ECF No. 156, PageID 1277, *et seq.*).

DeVito objects to the Report's credibility determination, asserting it to "be at least partially motivated by DeVito's previous objection–which this Court sustained–to denying an evidentiary hearing". (Objections, ECF No. 157, PageID 1284). Not so. As Judge Dlott projected in ordering the evidentiary hearing, holding it gave the undersigned an opportunity to observe aurally[2] DeVito's demeanor. That is what led to the conclusion that his manner of answering questions was evasive.

DeVito also accuses the Magistrate Judge of accepting Judge Crouse's testimony over his own testimony because all criminal defendants are nervous when testifying and an attorney's testimony should not automatically be credited over that of her former client. Both of those propositions are plausible, but not controlling here. DeVito was not just "nervous"; the undersigned found he repeatedly (in the course of a short appearance) tried to answer the questions he wanted to answer, rather than the questions actually put to him. And of course competent and experienced counsel are likely not to be nervous. More importantly in judging counsel's credibility when she or he has been accused of ineffective assistance is whether there is evident effort at self-justification or excusing language; the undersigned found none of this in Judge Crouse's testimony.

[1] Since her appearance as counsel in this case, Ms. Crouse has been elected as a Judge of the Ohio First District Court of Appeals.

[2] The hearing had to be conducted without video.

At the end of this portion of the Objections, DeVito "requests the Court sustain his objection to the R&R's credibility determination based on the evidentiary hearing record" (Objections, ECF No. 157, PageID 1285). Both the Sixth Circuit and judges of this Court have held the credibility determination of a Magistrate Judge who has heard live testimony is entitled to deference. *Blankenburg v. Gray*, 2020 U.S. App. LEXIS 29871 (6th Cir. Sept. 17, 2020); *United States v. Williams,* 2019 U.S. Dist. LEXIS 169724 (S.D. Ohio Oct. 1, 2019)(Dlott, J.); *Blankenburg v. Warden*, 2019 U.S. Dist. LEXIS 167492 (S.D. Ohio Sep. 29, 2019)(Barrett, J.), citing *Peveler v. United States*, 269 F.3d 693, 702 (6th Cir. 2001). Indeed, the Eleventh and Ninth Circuits have held a magistrate judge's credibility findings in a report and recommendations cannot be reversed without first rehearing the disputed testimony. *United States v. Cofield*, 272 F.3d 1303 (11th Cir. 2001); *United States v. Thoms*, 684 F.3d 893 (9th Cir. 2012).

The Report also concluded that the Court's thorough plea colloquy foreclosed any claim of prejudice arising from any misinformation or lack of information DeVito may have obtained from counsel (ECF No. 156, PageID 1278-79). DeVito objects. He acknowledges that a thorough plea colloquy creates a presumption that the plea is valid, but it does not create an insurmountable barrier to relief. Instead, a plea that is the "product of such factors as *misunderstandings*, duress, or *misrepresentation by others* as to make the guilty plea a constitutionally inadequate basis for imprisonment." (Objections, ECF No. 156, PageID 1285, quoting *Blackledge v. Allison*, 431 U.S. 63, 75 (1997)).

DeVito has raised a theoretical possibility unsubstantiated by facts. He has not shown anyone misrepresented any relevant facts to him. He plainly understood how important the additional victims were: he negotiated directly with the Assistant United States Attorney in an unsuccessful effort to get the additional victims' names removed. The only threat to which he was

subjected was to indict him on additional counts which his own attorneys believed the Government could prove.

Ground Two: Ineffective Assistance of Appellate Counsel

In his Second Ground for Relief, DeVito claimed his appellate attorney provided ineffective assistance of appellate counsel by not arguing the involuntariness of DeVito's guilty plea in his opening brief. The Report treated this claim as abandoned because "it was not briefed and no testimony was offered in support." (ECF No. 156, PageID 1268).

DeVito does not contradict those two observations, but says he briefed this claim in his original § 2255 Motion and never thereafter explicitly abandoned it, so that it is now ripe for decision (Objections, ECF No. 157, PageID 1283).

The Magistrate Judge filed a Report and Recommendations early in the case which recommended the following as to the Second Ground for Relief:

> In his Second Ground for Relief, DeVito asserts he received ineffective assistance of appellate counsel when his appointed counsel, Attorney Kimberly Penix failed to claim in the opening brief that DeVito's guilty plea was involuntary. Admitting that she raised several non-frivolous arguments in that brief, DeVito claims she should have addressed his appellate waiver there as well in the opening brief (Supporting Memorandum, ECF No. 114-1, PageID 941). The Government moved to dismiss the appeal on the basis of the waiver. Attorney Penix then claimed the waiver was unenforceable because DeVito had not voluntarily waived his right to appeal regarding the pseudo counts. *Id.* DeVito now claims that the **order** in which his involuntariness-of-the-waiver argument was made to the Sixth Circuit constituted ineffective assistance of appellate counsel, i.e., that it would have been successful if made in the opening brief, but was unsuccessful because made later.

To evaluate this argument, it is necessary to examine the sequence of filings in the Sixth Circuit's Case No. 19-3525. Despite having waived his right to appeal, DeVito filed a Notice of Appeal in this Court on May 29, 2019 (ECF No. 93). The Notice of Appeal was docketed in the Sixth Circuit on June 5, 2019 (6th Cir. ECF No. 1). Appellate counsel for the United States entered his appearance the next day (6th Cir. ECF No. 2). Attorney Penix was appointed and entered her appearance June 17, 2019 (6th Cir. ECF No. 8, 9). On July 23, 2019, the Sixth Circuit set a deadline for appellant's brief of September 3, 2019 (6th Cir. ECF No. 25). Given a month's extension, Ms. Penix filed that brief on October 3, 2019 (6th Cir. ECF No. 28). It was only a week later that the United States moved to dismiss the appeal on the basis of the waiver (6th Cir. ECF No. 29).

Tellingly, Assistant United States Attorney Zouhary misstated the terms of the waiver, asserting it did not apply to claims of ineffective assistance of trial counsel or prosecutorial misconduct whereas those claims are not excepted in § 10 of the Plea Agreement. Although the Sixth Circuit had upheld blanket waivers, Attorney General Holder had directed United States Attorneys not to seek waivers of claims of ineffective assistance of trial counsel and prosecutorial misconduct. Despite all the other rollbacks of Obama Administration actions during the Trump Administration, the Magistrate Judge is not aware this policy was ever changed. Attorney Zouhary apparently believed it was still in effect in 2018 when DeVito pleaded.

Because the United States had not moved to dismiss on the basis of the waiver in the four months before Appellant's Brief was filed, Attorney Penix could reasonably have assumed either that the United States was not going to rely on the waiver or that if it did, she would get a chance to respond. She did indeed get the opportunity to respond and argued precisely what DeVito now says she should have argued in the opening brief: that his plea was not enforceable because it was not knowing, intelligent, and voluntary because the pseudo counts had not been revealed pre-plea (6th Cir. ECF No. 31). Only in the alternative did she seek leave to amend the opening brief. *Id.*

> The Sixth Circuit decided the Motion to Dismiss on the merits and not based on some hypothetical procedural claim that DeVito had waived his voluntariness claim by not making it in his opening brief (6th Cir. ECF No. 33).
>
> A criminal defendant is entitled by the Sixth Amendment to effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Penson v. Ohio*, 488 U.S. 75 (1988); *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008). Ineffective assistance of appellate counsel claims are measured against the *Strickland* standard. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Burger v. Kemp,* 483 U.S. 776 (1987). To evaluate a claim of ineffective assistance of appellate counsel, then, the court must assess the strength of the claim that counsel failed to raise. *Henness v. Bagley*, 644 F.3d 308 (6th Cir. 2011), *citing Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008). Counsel's failure to raise an issue on appeal amounts to ineffective assistance only if a reasonable probability exists that inclusion of the issue would have changed the result of the appeal. *Id.*, *citing Wilson.*
>
> The Sixth Circuit's decision on the Motion to Dismiss clearly shows it found no merit in DeVito's claim that his plea, including the appeal waiver, was invalid. It cannot be ineffective assistance of appellate counsel to fail to make an argument that the appellate court decides is without merit. *A fortiori*, it cannot be ineffective assistance of appellate counsel to fail to make that argument at some particular point in the appellate proceedings, especially when the appellate court has given no weight to the point in the proceedings when the argument was made.
>
> Accordingly, DeVito's Second Ground for Relief is without merit and should be dismissed.

(Report, ECF No. 125, PageID 992-950). Both the United States and the Defendant objected to this Report and the Magistrate Judge withdrew it to allow the deposition of Attorney Kovoor (ECF No. 128). Defendant never renewed those objections or re-briefed the issues involved with Ground Two. Having considered those earlier objections now, the Magistrate Judge stands by the analysis quoted above and again recommends Ground Two be dismissed on the merits.

Conclusion

Having reconsidered the case as instructed by the Recommittal Order, the Magistrate Judge again concludes the Motion to Vacate is without merit and should be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

August 25, 2022.

s/ *Michael R. Merz*
United States Magistrate Judge