APPENDIX

A.

No. 18-5288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUIS DERON HEARD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Marquis Deron Heard, a pro se federal prisoner, appeals the judgment of the district court denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. This court construes Heard's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2).

Following a trial at which Heard represented himself, a jury convicted him of conspiracy to distribute five kilograms or more of cocaine, distribution of cocaine, possession with intent to distribute cocaine base, possession of a firearm after being convicted of a felony, and twenty-eight counts of money laundering. The district court sentenced him to a total of 360 months of imprisonment. Heard appealed, arguing that, despite his stipulation to his own competency, the district court should have proceeded with a hearing to determine his competency to stand trial. He also argued that he was not competent to represent himself and that his decision to represent himself was not voluntary. This court found no error and affirmed. *United States v. Heard*, 762 F.3d 538 (6th Cir. 2014). The Supreme Court denied a writ of certiorari.

Heard then timely filed his § 2255 motion to vacate, raising five claims, construed by the district court as alleging that: (1) the trial court erred by concluding that Heard was competent to represent himself at trial; (2) Andrew Stephens, Heard's trial counsel at the time, was ineffective at Heard's competency hearing; (3) Heard was denied his right to counsel at his competency hearing; (4)(a) appellate counsel was ineffective for failing to challenge the sufficiency of the evidence; (4)(b) trial and appellate counsel were ineffective for failing to challenge his indictment as lacking probable cause and based on prosecutorial misconduct; and (5) trial and appellate counsel were ineffective for failing to challenge the admissibility of evidence seized pursuant to invalid search warrants. The magistrate judge ordered that an evidentiary hearing be held as to claim three and appointed counsel for the limited purpose of representing Heard at the hearing. Following the hearing, appointed counsel was relieved of his duties.

Following the hearing, the magistrate judge concluded that Heard's first claim was not sufficiently distinct from what he argued on direct appeal and, thus, he was precluded from relitigating the claim. Analyzing Heard's second and third claims together, the magistrate judge noted that, although the record showed "that Heard was granted permission to represent himself *before* his competency was addressed" by the trial court, any error was harmless because Stephens, acting as standby counsel, conducted an adequate investigation and determined independently that the defendant was competent. Accordingly, the magistrate judge determined that Heard was not denied counsel at the hearing and that counsel was effective. The magistrate judge further determined that the claims underlying Heard's allegations of the ineffective assistance of trial and appellate counsel were meritless; as a result, trial and appellate counsel were not ineffective for failing to raise the claims. The magistrate judge therefore recommended denying Heard's § 2255 motion.

Heard filed objections to the magistrate judge's decision regarding his relitigation of claim one, the findings as to claims two and three involving his competency hearing specifically as to counsel's ineffective assistance, counsel's failure to challenge his indictment, and the authenticity of the search warrants. He did not challenge the magistrate judge's recommendation

regarding appellate counsel's failure to challenge the sufficiency of the evidence or his claim that he was denied counsel at his competency hearing. Over Heard's objections, the district court adopted the magistrate judge's report, denied Heard's § 2255 motion, and denied a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "[A] COA does not require a showing that the appeal will succeed," *id.* at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

In his first claim, Heard argued that the district court erred by concluding that he was competent to represent himself at trial. Heard raised this claim on direct appeal and this court rejected it. Reasonable jurists would not debate the district court's denial of this claim. A movant may not use a § 2255 motion "to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999). In his § 2255 motion, Heard alleged that the trial court misapplied *Indiana v. Edwards*, 554 U.S. 164 (2008), and he also asserted that *Dusky v. United States*, 362 U.S. 402 (1960), and *United States v. Ross*, 703 F.3d 856 (6th Cir. 2012)—as well as cases from outside this circuit—supported his claims. None of the cases, however, constitutes a change in the law since the time of Heard's trial. Accordingly, Heard's first claim does not deserve encouragement to proceed further.

In his second and third claims, which the district court analyzed together, Heard argued that Stephens was ineffective at Heard's competency hearing and that he was denied his right to counsel at his competency hearing. In his objections to the magistrate judge's report, however, he challenged only counsel's effective assistance at the competency proceeding, pointing out that Stephens testified at the evidentiary hearing that he had no strategy for contesting the competency evaluation. Because Heard failed to object to the magistrate judge's finding that he

was not denied counsel at his competency hearing, Heard has forfeited appellate review of that claim, *Thomas v. Arn*, 474 U.S. 140, 155 (1985), and only counsel's alleged ineffective assistance—Heard's second claim—will be considered for certification to appeal.

Generally, an attorney is constitutionally ineffective if his representation was objectively unreasonable and prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Deficient performance is "measured against an 'objective standard of reasonableness . . . under prevailing professional norms.'" *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (quoting *Strickland*, 466 U.S. at 688). To demonstrate prejudice, "[t]he 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." *Strickland*, 466 U.S. at 694.

Regarding the events at Heard's competency hearing, the trial court asked Stephens whether, in light of the competency report, he wanted to stipulate to Heard's competency. Stephens responded that "he lacked authority to answer because Heard refused to speak to him." *Heard*, 762 F.3d at 541. At the evidentiary hearing, Stephens testified regarding this statement, explaining that he did not speak on the topic because Heard had not given him permission to agree with the report or to stipulate to competency. Stephens did not indicate that he was unaware that he could contest the report; rather, he believed that the evaluation was correct and that—without any input from Heard about evidence or witnesses to present—there was no good faith basis to contest the report's findings.

Reasonable jurists would not debate the district court's conclusion that Stephens's performance during the competency hearing was not deficient. As the district court explained, Stephens alerted the court to a potential competency issue based on one instance of bizarre behavior by Heard, he spoke with the examiner on more than one occasion about his impressions of and interactions with Heard, he reviewed the report prior to the competency hearing, and he made a strategic determination that he would not contest the report. Even if Stephens could have acted differently, Heard has not made a substantial showing of prejudice. He has not presented any evidence that would contradict the report's findings or that would demonstrate that the result

of the competency proceeding would have been different but for Stephens's performance. This claim does not deserve encouragement to proceed further.

In his fourth claim, Heard argued that appellate counsel was ineffective for failing to contest the sufficiency of the evidence and that trial and appellate counsel were ineffective for failing to challenge his indictment as lacking probable cause. Heard did not object to the magistrate judge's recommendation regarding the sufficiency-of-the-evidence claim, however. Like his denial-of-counsel claim, review of this sub-part of his fourth claim is therefore forfeited. *Thomas*, 474 U.S. at 155.

In his § 2255 motion, Heard contended that the grand jury issued his indictment "based on speculation and conjecture, not evidence that established probable cause to believe that movant had committed the crime of conspiracy in Count 1." Heard alleged that Special Agent Danielle Barto, who testified before the grand jury prior to Heard's initial indictment as well as his two superseding indictments, informed the grand jury that Heard had already been indicted on the conspiracy count. He also claimed that she misled the grand jury and failed to inform the grand jury of other evidence that would have negated Heard's guilt. Heard did not specify in which proceeding Barto made this statement, and acknowledged that he "d[id] not know for certain if the government presented erroneous information to the grand jury."

Reasonable jurists would not debate the district court's conclusion that Heard did not make a substantial showing that either trial or appellate counsel was ineffective for failing to challenge his indictment. Heard's own argument on this point is speculative. Further, the jury's guilty verdict remedied any alleged defect in the grand jury's finding of probable cause. *See United States v. Mechanik*, 475 U.S. 66, 73 (1986). Because there was no basis upon which to contest the indictment, Heard's claim that appellate counsel was deficient in this regard does not deserve encouragement to proceed further.

In his final claim, Heard asserted that trial and appellate counsel were ineffective for failing to challenge the admissibility of evidence seized pursuant to invalid search warrants. Heard argued that the affidavit supporting the search warrant for his residence was based on the

testimony of Special Agent Barto, but that her information was "stale and unreliable" and that she relied on hearsay. In his objections to the magistrate judge's report, he argued that the copy of Barto's affidavit, upon which the magistrate judge relied, was inauthentic.

To demonstrate actual prejudice where "counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness," Heard must prove that his "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Reasonable jurists could not debate the district court's conclusion that Heard failed to set forth a "coherent theory" as to why Barto's affidavit failed to establish probable cause to search his residence. The nearly thirty-page affidavit sets forth Barto's credentials, her prior investigative experience, her knowledge of money laundering activities among narcotics traffickers, the facts uncovered during her twelve-month investigation into Heard, the procedures that she believed Heard was using to launder proceeds from narcotics sales, and the places where she believed the evidence would be found. Because Heard has not demonstrated that a Fourth Amendment challenge to Barto's affidavit would have been meritorious, his claim that counsel was ineffective for failing to challenge the warrant does not deserve encouragement to proceed further.

For the foregoing reasons, Heard's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX

B

Appendix

B

No. 18-6261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUIS DERON HEARD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Marquis Deron Heard, a federal prisoner proceeding pro se, appeals the district court's order denying his Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Heard has filed an application for a certificate of appealability (COA) and a motion to amend the COA. The government has filed a response opposing Heard's application. Also pending are Heard's "motion to dismiss indictment for false evidence presented to the grand jury" and motion to proceed in forma pauperis.

Following a 2013 trial at which Heard represented himself, a jury convicted him of conspiracy to distribute five kilograms or more of cocaine, distribution of cocaine, possession with intent to distribute cocaine base, possession of a firearm after being convicted of a felony, and twenty-eight counts of money laundering. The district court sentenced him to a total of 360 months of imprisonment. Heard appealed, arguing that, despite his stipulation to his own competency at a hearing, the district court should have continued the hearing and determined his competency to stand trial. He also argued that he was not competent to represent himself and that his decision to represent himself was not voluntary. This court found no error and affirmed. *United States v. Heard*, 762 F.3d 538 (6th Cir. 2014), *cert. denied*, 136 S. Ct. 376 (2015).

Heard then timely filed his § 2255 motion to vacate, raising five claims, construed by the district court as alleging that: (1) the trial court erred by concluding that Heard was competent to represent himself at trial; (2) Andrew Stephens, Heard's trial counsel at the time, was ineffective at Heard's competency hearing; (3) Heard was denied his right to counsel at his competency hearing; (4)(a) appellate counsel was ineffective for failing to challenge the sufficiency of the evidence; (4)(b) trial and appellate counsel were ineffective for failing to challenge his indictment as lacking probable cause and based on prosecutorial misconduct; and (5) trial and appellate counsel were ineffective for failing to challenge the admissibility of evidence seized pursuant to invalid search warrants. The magistrate judge ordered that an evidentiary hearing be held as to claim three and appointed counsel for the limited purpose of representing Heard at the hearing.

Following the hearing, the magistrate judge concluded that Heard's first claim was not sufficiently distinct from what he argued on direct appeal and that he was thus precluded from relitigating the claim in a § 2255 proceeding. Analyzing Heard's second and third claims together, the magistrate judge concluded that, although Heard was permitted to represent himself before his competency was addressed by the trial court, any error was harmless because Stephens, acting as standby counsel, conducted an adequate investigation and determined independently that the defendant was competent. Accordingly, the magistrate judge determined that Heard was not denied counsel at the hearing and that counsel was effective. The magistrate judge further determined that the claims underlying Heard's allegations of the ineffective assistance of trial and appellate counsel were meritless; as a result, trial and appellate counsel were not ineffective for failing to raise the claims. The magistrate judge therefore recommended denying Heard's § 2255 motion.

Heard filed objections to the magistrate judge's conclusion regarding his relitigation of claim one, the findings as to claim two regarding counsel's ineffective assistance at the competency hearing, counsel's failure to challenge his indictment, and the authenticity of the search warrants. He did not specify any objections to the magistrate judge's recommendation regarding appellate counsel's failure to challenge the sufficiency of the evidence or his claim that

he was denied counsel at his competency hearing. Over Heard's objections, the district court adopted the magistrate judge's report, denied Heard's § 2255 motion, and denied a COA.

Heard appealed the district court's ruling. On the same day that he filed his notice of appeal, Heard filed a Rule 59(e) motion to alter or amend the district court's judgment. While his motion was pending, this court issued a decision denying Heard a COA in his appeal from the underlying judgment. *Heard v. United States*, No. 18-5288 (6th Cir. July 27, 2018) (order). This court also denied Heard's petition for a panel rehearing. In a November 5, 2018, order, the district court denied Heard's Rule 59(e) motion, finding that Heard "provided the [c]ourt with no grounds to alter th[e] judgment," and denied a COA. Heard filed a notice of appeal from that order.

In his COA application, Heard states, "This application comes from the district court[']s judgment and order denying the petitioner[']s 2255 motion." He reiterates his assertion that he was prejudiced by prosecutorial misconduct during the grand jury proceedings and that appellate counsel was ineffective for failing to pursue this issue on appeal, and he reasserts his claims that he was denied the effective assistance of counsel at the competency hearing and that trial counsel was ineffective for failing to challenge the validity of the search warrants. Heard has also filed a motion to dismiss the indictment based on false evidence presented to the grand jury.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "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 (2003).

The function of Rule 59(e) is limited. "Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment." *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008). Further, "Rule 59(e) . . . does not permit parties to effectively 're-argue a case.'" *Id.* (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)). Instead, "[a] court may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or

(4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005).

Heard's Rule 59(e) motion did not purport to rely on either an intervening change in the law or newly discovered evidence. Nor did it argue that the district court made a clear error of law. Instead, Heard made conclusory assertions that denial of relief "would be a great miscarriage of justice" and constitute "plain error." And his argument section of the motion amounted to nothing more than a reiteration of arguments that he had raised in previous filings, including his objections to the magistrate judge's recommendation that his claim that counsel was ineffective for failing to challenge his indictment be denied. Because Heard's Rule 59(e) motion amounted to nothing more than a re-argument of issues already considered, reasonable jurists could not disagree with the district court's denial of the motion.

Heard's appeal from the denial of his Rule 59(e) motion also brings up for review the underlying judgment. *See Am. Emp'rs. Ins. v. Metro Reg'l Transit Auth.*, 12 F.3d 591, 594-95 (6th Cir. 1993). And Heard makes clear in his COA application that it is, in fact, the underlying judgment denying his § 2255 motion that he seeks to challenge in this appeal. He also raises the same issues that he raised in that appeal. By the time the district court considered Heard's Rule 59(e) motion, however, this court had already considered Heard's appeal from that ruling and denied a COA on those issues. The law-of-the-case doctrine therefore precludes Heard's appeal. *See Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2651 (2018); *Saro v. Brown*, 20 F. App'x 442, 443 (6th Cir. 2001). Although this court has recognized three exceptional circumstances that would warrant consideration of a previously decided issue—"(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice"—none is present here. *Moody*, 871 F.3d at 426 (quoting *United States v. Rayborn*, 495 F.3d 328, 337 (6th Cir. 2007)). Heard has not presented any new evidence or controlling law and has not shown that this court's prior ruling on his COA application was clearly erroneous.

Accordingly, Heard's COA application and the motion to amend the COA are **DENIED**. The motion to dismiss the indictment is also **DENIED**; and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

CRIMINAL ACTION NO. 11-73-KKC

UNITED STATES OF AMERICA, PLAINTIFF,

v. **ORDER**

MARQUIS DERON HEARD, DEFENDANT.

* * * * * * * * * *

This matter is before the Court on multiple motions by defendant Marquis Deron Heard (DE 339, 340, 346, 348, 349, 353, 356, 361).

Heard was convicted of various counts relating to the distribution of cocaine, money laundering, and being a felon in possession of a firearm. He represented himself at trial and was convicted and ultimately sentenced to a prison term of 360 months (DE 218, Judgment). He appealed the Court's judgment, and the United States Court of Appeals for the Sixth Circuit affirmed the conviction and sentence. (DE 256, Sixth Circuit Opinion.) He further appealed to the United States Supreme Court, which denied his petition for a writ of certiorari. (DE 271, Letter.)

Heard then filed a motion to vacate or correct his sentence under 28 U.S.C. § 2255 (DE 273, Motion.) After conducting a hearing on the motion (DE 335, Transcript), the magistrate judge recommended that the Court deny the motion (DE 335, Recommended Disposition.) Heard objected to that recommendation. (DE 338, Objections.) The Court overruled those objections, denied Heard's §2255 motion, and denied a certificate of appealability. (DE 344, Opinion.) Heard applied to the Sixth Circuit for a certificate of appealability, which would permit him to appeal the Court's decision denying his §2255 motion. The Sixth Circuit denied that request. (DE 358, Order.)

The Court hereby ORDERS as follows with regard to the motions currently pending before the Court:

1) Heard's motions to stay this action (DE 339, 346, 361) are DENIED, there being no deadlines in this action to stay and Heard having filed notices or motions (DE 340, 349, 363, 364) to rescind the motions to stay;
2) Heard's motions to rescind (DE 340, 349) the motions to stay (DE 339, 346) are GRANTED;
3) Heard's motion to alter the Court's judgment (DE 348) denying his §2255 motion is DENIED, Heard having provided the Court with no grounds to alter that judgment;
4) Heard's motion for a certificate of appealability (DE 356) to appeal the Court's judgment denying his §2255 motion is DENIED, the Court and the Sixth Circuit Court of Appeals having already denied a certificate of appealability (DE 344, 345, 358); and
5) Heard's motion for pauper status (DE 353) is DENIED, Heard having no proceedings before this Court.

Dated November 5, 2018.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

APPENDIX D

No. 18-6261

FILED
Jun 03, 2019
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUIS DERON HEARD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

Marquis Deron Heard, a federal prisoner proceeding pro se, 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

No. 18-6261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 18, 2019
DEBORAH S. HUNT, Clerk

MARQUIS DERON HEARD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

Marquis Deron Heard petitions for rehearing en banc of this court's order entered on April 26, 2019, 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

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. MARQUIS DERON HEARD, Defendant/Movant.	)	No. 5:11-CR-73-KKC-HAI-1 RECOMMENDED DISPOSITION & ORDER

*** *** *** ***

Marquis Deron Heard represented himself at his criminal trial and was convicted of (1) conspiracy to distribute five kilograms or more of cocaine; (2) cocaine distribution; (3) possession with intent to distribute 28 grams or more of cocaine base; (4) being a felon in possession of a firearm; (5) conspiracy to commit money laundering; and (6) 28 counts of money laundering. D.E. 218. He was sentenced to a total term of 360 months. *Id.* at 3.

One June 2, 2016, Heard filed a timely motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.[1] D.E. 273. The motion was accompanied by a 77-page memorandum. D.E. 273-1. On July 7, 2016, the government responded to the motion. D.E. 280. Heard replied to the government's response. D.E. 287. But he also moved under Rule 5 for the Court to order the government to respond to all his claims. D.E. 286. The undersigned agreed with Heard that the government had not addressed all the claims in his § 2255 petition, and ordered the government to supplement its response. D.E. 289. The government filed a supplemental

[1] The motion was docketed on June 9, 2016.

response (D.E. 296), and Heard replied (D.E. 300). The undersigned denied an additional Rule 5 motion by Heard. D.E. 299.

Heard's memorandum includes five grounds of alleged constitutional violations, but some grounds include more than one claim. Heard alleges that:

(1) The District Judges committed legal errors in ruling that Heard could represent himself at trial.

(2) Heard's counsel rendered ineffective assistance at his competency hearing.

(3) Heard was denied his statutory and constitutional rights to counsel at his competency hearing.

(4A) Heard's appellate counsel was ineffective for failing to challenge the sufficiency of the evidence at trial.

(4B) Heard's trial and appellate counsel were ineffective for failing to challenge his indictment as lacking in probable cause and based on misconduct before the grand jury.

(5) Heard's trial and appellate counsel were ineffective for failing to challenge the admissibility of evidence seized pursuant to search warrants.

D.E. 273-1. Heard requested an evidentiary hearing. *Id.* at 35, 62.

After the § 2255 motion was fully briefed, the undersigned determined that an evidentiary hearing was warranted on Ground Three, which alleges that Heard was denied his statutory and constitutional rights to counsel at his competency hearing. D.E. 301. Heard filed an objection to this order, apparently misconstruing it as a recommended disposition. D.E. 302. Chief Judge Caldwell overruled the objection. D.E. 303. The undersigned then appointed Brandon Storm to represent Heard for the limited purpose of representing Heard at the evidentiary hearing. D.E.

305, 306. Almost immediately, Heard filed a letter asking to "fire" Mr. Storm. D.E. 308. Mr. Storm accordingly filed a motion for a hearing on Heard's apparent dissatisfaction with counsel. D.E. 309.

During a telephone conference on April 5, 2017, the undersigned ordered Mr. Storm to file a status report after a planned meeting with Heard. D.E. 310. The undersigned also granted the government permission to file a motion to reconsider the order granting an evidentiary hearing. *Id.* Heard filed a letter attempting to waive the evidentiary hearing; its contents suggested he preferred a hearing before Judge Caldwell. D.E. 311. The government filed a motion for reconsideration, asking the Court to cancel the hearing on the ground that Ground Three was plainly meritless and no factual development was needed. D.E. 312. Heard also sought to cancel the hearing through a motion he styled one to dismiss the government's motion for reconsideration (D.E. 317) and a letter to the Court (D.E. 318). Mr. Storm filed his status report, which informed the Court that Heard had refused to meet with him. D.E. 319. Heard then filed a letter which asked that the previous letter "be regarded as an affidavit of bias," apparently in an attempt to have the undersigned removed from the case. D.E. 320.

On May 19, 2017, the undersigned issued an order clarifying for Mr. Heard that it was necessary to conduct the hearing, that it was necessary that he be represented by counsel, and that the hearing would be before the undersigned in accordance with this District's practice of referring § 2255 motions to Magistrate Judges. D.E. 321. Mr. Storm then filed a memorandum in response to the government's motion for reconsideration. D.E. 322. The government replied (D.E. 324), and its motion for reconsideration was denied (D.E. 325).

The evidentiary hearing was held on July 28, 2017, in London. D.E. 330; D.E. 331 (transcript). The undersigned found that no follow-up briefing was necessary, and relieved Mr. Storm of further duties in the case. *Id.* Thus, Heard's § 2255 motion is ripe for review.

I. Background

Heard was originally indicted in June 2011, and he appeared at his arraignment with retained counsel William Butler. D.E. 1, 10. Shortly thereafter, the government obtained and executed a search warrant for Heard's residence, two storage units, his mother's residence, and two vehicles. *See* D.E. 229 at 20-21. The indictment was soon superseded (D.E. 13), and in August 2011, Mr. Butler moved to withdraw as counsel (D.E. 26). Mr. Butler stated in his motion that "a conflict" had arisen between himself and Heard. *Id.* At about the same time, Heard sent a letter to Magistrate Judge Wier complaining that Mr. Butler refused to file motions as Heard directed. D.E. 29. District Judge Coffman granted Mr. Butler's motion to withdraw. D.E. 32. Because Heard initially refused to complete a financial affidavit, he was ordered to retain new counsel. D.E. 33. Thereafter, Heard filed a series of motions *pro se*. D.E. 36, 39, 40, 42, 45, 46, 47, 48, 50.

In November 2011, the Grand Jury issued a second superseding indictment. D.E. 57. At the arraignment, the Court appointed Andrew Stephens to represent Heard under the Criminal Justice Act and denied without prejudice Heard's pending *pro se* motions. D.E. 62, 66, 67. Even though he was represented by counsel, Heard filed another *pro se* motion. D.E. 68. He also sent the Court a copy of a letter to Mr. Stephens demanding that Mr. Stephens file a motion identical "word for word" to his *pro se* motion. D.E. 72. Heard further sent the Court a notice that he had instructed Mr. Stephens to file a request for a bill of particulars within three days.

D.E. 73. Shortly thereafter, Heard wrote the Court to complain that Mr. Stephens had not done as instructed and should withdraw. D.E. 74.

On November 23, 2011, Mr. Stephens moved to withdraw. D.E. 78. According to the motion, Mr. Stephens's refusal to "file superfluous and unnecessary motions" generated "hostility" from Heard that included being "verbally abusive" on the telephone and threatening to assault Mr. Stephens if he appeared at the jail. *Id.* The Court scheduled a hearing on Mr. Stephens's motion to withdraw. D.E. 89. Heard continued to file motions, which were denied. D.E. 93. Mr. Stephens's motion to withdraw was also denied on December 12, 2011. *Id.*

On December 27, 2011, Mr. Stephens filed a motion to assess Heard's mental competency. D.E. 97. Mr. Stephens noted that Heard's attitude had "changed remarkably" from his formerly cooperative disposition. *Id.* at 3. He described a recent situation in which Heard had acted bizarrely and had refused to communicate productively. *Id.* at 3-4. The government did not object to the request for a mental evaluation (D.E. 101, 103), and the Court ordered that it be initiated (D.E. 104). Heard was evaluated at the Federal Medical Center in Lexington, Kentucky. On March 21, 2012, Dr. Judith Campbell completed Heard's evaluation report, which was filed in the record on April 11, 2012. D.E. 124. The report diagnosed Heard as having an unspecified personality disorder with antisocial, paranoid, and narcissistic features. *Id.* at 9. But the evaluator found that Heard was competent to stand trial. *Id.* at 11.

Judge Coffman held a pretrial hearing concerning the competency evaluation on May 1, 2012. D.E. 127; D.E. 240 (transcript). At the hearing, Heard stipulated to the report's conclusions and "repeatedly expressed his desire to proceed pro se." D.E. 129. Judge Coffman allowed Heard to proceed *pro se* with Mr. Stephens as his legal advisor. *Id.* In December 2012, the case was transferred from Judge Coffman to Judge Caldwell. D.E. 175. At the pretrial

conference on January 7, 2013, Chief Judge Caldwell found "sufficient evidence in the record to support" Judge Coffman's finding that Heard was competent to stand trial and that his waiver of the right to counsel was knowing and voluntary. D.E. 184. Heard then represented himself at trial and was convicted. Judgment was entered May 6, 2013. D.E. 218.

Heard appealed, and the Court of Appeals appointed appellate counsel. D.E. 223. Heard argued that (1) the District Court improperly failed to conduct a competency hearing; (2) his waiver of his right to counsel was not knowing and voluntary; and (3) he was not competent to represent himself. *United States v. Heard*, 762 F.3d 538, 539 (6th Cir. 2014); D.E. 287 at 2-3.[2] The appellate court found that, although Heard was diagnosed with a personality disorder, this disorder did not render him incompetent to stand trial, and he "otherwise lack[ed] any basis to show that the district court had reason to doubt his competency." *Id.* at 542. The appellate court also found, under the *de novo* standard of review, that "Heard's waiver of his right to counsel was both knowingly and intelligently made" and "knowing and intelligent." *Id.* at 542-43. The Court found that Judge Coffman's inquiry on self-representation substantially complied with the *Bench Book*, and affirmed. *Id.* at 543.

II. Legal Standards

Under 28 U.S.C. § 2255, a federal prisoner may seek habeas relief because his sentence violates the Constitution or federal law, the federal court lacked jurisdiction to impose such a sentence, or the sentence exceeds the maximum authorized by law. 28 U.S.C. § 2255. To prevail on a § 2255 motion alleging constitutional error, a defendant must establish that the error had a "substantial and injurious effect or influence on the proceedings." *Watson v. United States*,

[2] Heard's appellate brief framed the issues as: "Whether Heard was competent to stand trial" and "Whether Heard knowingly and intelligently waived his right to counsel and to proceed without counsel." *United States v. Heard* (appellate brief), 2013 WL 5593253, at 2.

165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). A § 2255 movant bears the burden of proving his or her allegations by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (per curiam).

The Court recognizes that Heard's motion and reply were filed *pro se*, without the assistance of an attorney. The Court construes *pro se* motions more leniently than other motions. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Castro v. United States*, 540 U.S. 375, 381-83 (2003).

To successfully assert an ineffective-assistance-of-counsel claim, a defendant must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). To prove deficient performance, a defendant must show "that counsel's representation fell below an objective standard of reasonableness" as measured under "prevailing professional norms" and evaluated "considering all the circumstances." *Strickland*, 466 U.S. at 688. But "a court must indulge a strong presumption that counsel's conduct falls within the 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." *Id.* at 689 (internal quotations omitted).

In order to prove prejudice, a movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Thus, "[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. When evaluating prejudice, courts generally must consider the "totality of the evidence." *Strickland*, 466 U.S. at 695. Courts may approach the

Strickland analysis in any order, and an insufficient showing on either prong ends the inquiry. *Id.* at 697.

III. Ground One

Heard's first ground centers on the District Judges' decision to allow him to represent himself at trial. D.E. 273-1 at 10-48. The government argues that because this claim is similar to what he raised on appeal, he is procedurally barred from raising it in a § 2255 motion. D.E. 280 at 3. Absent an exceptional circumstance, such as an intervening change in the law, petitioners may not use a § 2255 motion to relegate an issue that was raised on appeal. *Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999); *DuPont v. United States*, 76 F.3d 108, 110 (6th Cir. 1996).

In 2014, the Sixth Circuit denied Heard's claims that (1) the District Court improperly failed to conduct a competency hearing; (2) Heard's waiver of his right to counsel was not knowing and voluntary; and (3) Heard was not competent to represent himself. *United States v. Heard*, 762 F.3d 538, 539 (6th Cir. 2014); D.E. 256. The current motion alleges similar legal errors, namely that the District Judges (1) were unaware they had discretion to deny his motion to represent himself, and (2) mistakenly applied the *Dusky* competency standard to the issue of whether Heard was competent to represent himself. D.E. 273-1 at 10-35.

Heard leans heavily on *Indiana v. Edwards*, 554 U.S. 164 (2008), in which the Supreme Court found that a state was authorized to deny a defendant's request to represent himself, even though the defendant was competent to stand trial, if the court found he was insufficiently competent to conduct the harder work of representing himself. The Supreme Court held that the state court's decision to require representation did not violate the schizophrenic defendant's constitutional right to self-representation. *Id.* at 167. Thus, under *Edwards*, even if a defendant

is competent to stand trial under the *Dusky* standard, a court may nevertheless find that he lacks the mental capacity to do a more complicated thing—act as his own attorney. *Id.* at 174, 178.

Heard argues that the Court erred by letting him represent himself despite the fact that he was competent to stand trial under *Dusky*. D.E. 273-1 at 10, 32. He suggests the District Judges and Mr. Stephens were "oblivious of the applicable law and . . . unaware of *Edwards*." *Id.* at 32; *accord* D.E. 300 at 7.

Heard's attempt to frame his question in a way that circumvents the procedural bar fails. His Ground One is not sufficiently distinct from what he argued on appeal to survive the second-bite-at-the-apple rule. One of the questions before the Court of Appeals was Heard's argument that he "was not competent to represent himself," and he specifically relied upon *Edwards*. *United States v. Heard*, 762 F.3d 538, 543 (6th Cir. 2014). This is essentially the same question as Heard's current Ground One. The Court of Appeals found *Edwards* distinguishable from Heard's case because the defendant in *Edwards* was psychotic. *Id.* The Court of Appeals analyzed Heard's competency report and held that Heard "lacks any basis to show that the district court had reason to doubt his competency." *Id.* at 542. The Court of Appeals also held that "Heard's waiver of his right to counsel was both knowingly and intelligently made." *Id.* at 543. In light of these findings, the appellate court "defer[red] to the district court's determination" that Heard did not suffer from the type of mental illness that rendered him incompetent to conduct his own trial. *Id.* (citing *Edwards*, 554 U.S. at 178).

Thus, citing specifically to *Edwards*, the Court of Appeals affirmed the decision that Heard was competent not only to stand trial, but *to represent himself*. *Heard*, 762 F.3d at 543. Heard now asks the Court to revisit his competency to conduct his own trial. This the Court cannot do. As established in *Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999), and

DuPont v. United States, 76 F.3d 108, 110 (6th Cir. 1996), a claim raised on appeal cannot be relitigated in a § 2255 petition absent an intervening change in law, which Heard does not allege. Ground One is procedurally barred.

Heard includes another argument within Ground One, namely that he was deprived of a fair trial because Judge Caldwell "failed to revisit the competency issue prior to trial." D.E. 273-1 at 36. Heard acknowledges that Judge Caldwell and Heard's standby counsel had a brief discussion regarding his competency at the pretrial conference on January 7, 2013. *Id.* But he argues that, in light of his own "tirades," Judge Caldwell "should have stepped in and put an end to [Heard]'s self-representation." *Id.* at 42.

This sub-claim also goes to the merits of Heard's competency to represent himself. Again, because the Court of Appeals has held that Heard's waiver was knowing and voluntary and that the *Faretta* hearing was properly conducted, this sub-claim is procedurally barred.

IV. Grounds Two and Three

Heard's second and third grounds can be discussed together. Heard's second ground is that his appointed counsel rendered ineffective assistance at his competency hearing. D.E. 273-1 at 49. His third ground is related: he argues that he was denied his statutory and constitutional rights to representation at his competency hearing. *Id.* at 56.

Section 4247 of Title 18 governs competency hearings in criminal matters, and its language is mandatory: "At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing *shall be represented by counsel*[.]" 18 U.S.C.A. § 4247(d) (emphasis added). This statute creates "a non-waivable right to counsel during competency proceedings." *United States v. Kowalczyk*, 805 F.3d 847, 861 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1230 (2016)). Lack of counsel during competency proceedings requires automatic reversal

without a showing of prejudice. *United States v. Ross*, 703 F.3d 856, 873-74 (6th Cir. 2012). The Sixth Circuit has explained that "a defendant cannot represent himself at his own competency hearing, the purpose of which is to determine whether a defendant understands and can participate in the proceedings in the first place." *Id.* at 869. Thus, a trial court must appoint counsel "'—whether defendant has attempted to waive it or not—and counsel must serve until the resolution of the competency issue.'" *Id.* (quoting *United States v. Purnett*, 910 F.2d 51, 56 (2d Cir. 1990)).

Heard did not raise this claim on appeal. His appellate brief makes no reference to section 4247 or the corresponding non-waivable constitutional right to counsel at a competency hearing. *United States v. Heard* (appellate brief), 2013 WL 5593253. Nevertheless, Circuit Judge White noted the issue in a concurring opinion. Judge White stated:

> I note also that Heard should have been represented by counsel at the competency hearing. *United States v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012); 18 U.S.C. § 4247(d). However, the record shows that standby counsel provided adequate representation and was familiar with the competency report and Heard's ability to understand and cooperate.

United States v. Heard, 762 F.3d 538, 544 (6th Cir. 2014) (White, J., concurring). Unlike the majority opinion, Judge White's opinion is not binding on this Court. *See Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 394 n.6 (6th Cir. 2016). So Judge White's analysis does not control, and her concurrence does not prevent Heard from raising this issue in his § 2255 motion.

Although § 4247 establishes a right to counsel at the "hearing," the Sixth Circuit has construed the right more broadly. As the Court in *United States v. Martin*, 608 F. App'x 340 (6th Cir. 2015), recently summarized: "When a criminal defendant's competency to stand trial has been challenged, the validity of the defendant's waiver of counsel is suspended until the issue of his or her competency is resolved." *Id.* at 343. The Court in *Ross* held that the trial

court committed error when, "upon granting a competency hearing, it failed to reappoint full-time counsel to represent Ross until the issue of competency was resolved." *Ross*, 703 F.3d at 866. The Court explained that "determination of the need for a [competency] hearing . . . should have triggered appointment of counsel at least until the competency to stand trial issue was resolved." *Id.* at 869. "[A] defendant may not be permitted to waive counsel while the issue of competency is pending." *Id.* "Such a defendant may not proceed *pro se* until the question of her competency to stand trial has been resolved." *Id.* at 870.

This observation is significant because the record indicates that then-Chief Judge Coffman never conducted a competency "hearing" under § 4247. That section contemplates an evidentiary hearing during which the defendant "shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 USC § 4247(d).

Before Heard waived his right to counsel and stipulated to the findings of the psychological report, he was instructed to decide whether he wanted "a hearing on competency" or whether he would "stipulate" that he was competent. D.E. 240 at 10. Heard subsequently waived his right to a competency hearing. *Id.* at 25. The Court of Appeals majority likewise noted that the court did not "conduct a competency hearing" in this case. *Heard*, 762 F.3d at 541. Judge White, however, described the May 1, 2012 proceeding as a "competency hearing." *Id.* at 544 (White, J., concurring).

Because there was no evidentiary hearing as contemplated by § 4247, it is not clear whether the statutory right attached. But the case law establishes a broader non-waivable right to counsel that Heard contends was violated.

The fact that Heard did not raise Ground Three on appeal would normally mean that it was procedurally defaulted. A court can usually hear a defaulted claim only if the defendant establishes (1) cause and prejudice for the default or (2) actual innocence. *Bousley v. United States*, 523 U.S. 614, 622 (1998). However, lack of counsel during competency proceedings is most likely a structural error—the type of error that requires automatic reversal without any inquiry into prejudice.[3]

The Sixth Circuit appears to hold that a structural error survives a procedural default created by failure to raise an issue on appeal. In *Johnson v. Sherry*, 586 F.3d 439 (6th Cir. 2009), the Court remanded the case for a hearing on a procedurally defaulted claim of the denial of the right to a public trial. *Id.* at 447-48. Although the Supreme Court recently held in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), that denial of the right to a public trial does not warrant automatic reversal, this holding would not affect the *Johnson* Court's stance on procedural default. Similarly, the Court in *Quintero v. Bell*, 256 F.3d 409, 413-15 (6th Cir. 2001), affirmed a conditional writ of habeas corpus on a claim of a biased jury. *Id.* at 413-16 ("[S]ince the structural nature of the tainted jury error warrants a presumption of prejudice that is exempt from harmless error analysis, sufficient cause and prejudice existed for the district court to reach the merits of Quintero's procedurally defaulted Sixth Amendment claim."), *judgment vacated*, 535 U.S. 1109 (2002), *judgment reinstated*, 368 F.3d 892, 893 (6th Cir. 2004); *see also*

[3] The rule is "established" that "complete deprivation of counsel during a critical stage warrants automatic reversal without consideration of prejudice." *United States v. Ross*, 703 F.3d 856, 873 (6th Cir. 2012). Thus, the Court in *Ross*, finding that lack of counsel during competency proceedings could constitute "complete deprivation . . . during a critical stage," remanded for a determination of whether the deprivation was "complete" or whether standby counsel had provided "meaningful adversarial testing" in regard to the competency issue. *Id.* Although the Court in *Ross* did not explicitly describe the error as "structural," it cited a law review article on structural error and "joined" the Circuit courts discussed in the article. *Id.* at 874. The *Ross* Court also cited two Sixth Circuit cases that discussed "structural" errors. *Id.* (citing *Van v. Jones*, 475 F.3d 292, 311-12 (6th Cir. 2007); *French v. Jones*, 332 F.3d 430, 438 (6th Cir. 2003)). Relying on *Ross*, the Sixth Circuit later explained that "a competency hearing is a 'critical stage,'" and that complete deprivation of counsel during competency proceedings "can be remedied only by reversal of the judgment without consideration of prejudice." *Martin*, 608 F. App'x at 346.

Owens v. United States, 483 F.3d 48, 63-66 (1st Cir. 2007) (reviewing a claim of denial of the right to a public trial in a § 2255 case despite procedural default); *abrogated by Weaver*, 137 S. Ct. at 1907. The Court thus believes that this claim regarding lack of counsel during competency proceedings can proceed despite Heard's failure to raise it on appeal.

To assess Grounds Two and Three, the Court will detail what happened during Heard's 2011-2012 competency proceedings, discuss the relevant case law, summarize the recent evidentiary hearing, and recommend a disposition of Heard's claims.

A.

On December 27, 2011, Heard's appointed attorney Andrew Stephens filed a motion to assess Heard's mental competency. D.E. 97. The government did not object to the request for a mental evaluation (D.E. 101, 103), and the Court ordered that it be initiated (D.E. 104). Heard was evaluated at the Federal Medical Center in Lexington, Kentucky. On March 21, 2012, Dr. Judith Campbell completed an evaluation report, which was filed in the record on April 11, 2012. D.E. 124. The report diagnosed Heard as having an unspecified personality disorder with antisocial, paranoid, and narcissistic features. *Id.* at 9. But Dr. Campbell found that Heard was competent to stand trial. *Id.* at 11.

Then-Chief Judge Jennifer Coffman conducted a proceeding concerning competency on May 1, 2012. Heard refused to cooperate with his attorney, even to the point of physically threatening him. D.E. 240 at 3-5, 10. The Marshals separated lawyer and client by setting two chairs between them. *Id.* at 3-5.

At the hearing, Mr. Stephens informed the Court that, after he received the psychological report, he "wrote to Mr. Heard" and "advised him as to what the conclusions were." Mr. Stephens did not send a copy of the report to Heard on account of the "case-sensitive information

in it." *Id.* at 3. Mr. Stephens reported, "I have not had contact with him since. He has been provided a copy of the report today. I presume he has read it. I do not know." *Id.* Nor had they spoken that day. *Id.* at 5.

Heard told the Court he was not willing to talk to Mr. Stephens other than to discuss the Court's jurisdiction. D.E. 240 at 6. Heard asked to waive his right to counsel. *Id.* Judge Coffman held a recess and directed Heard to "discuss the competency report" with Mr. Stephens and to decide "whether you want a hearing on competency or whether you're going to stipulate that you are competent." *Id.* at 10.

After the recess, Mr. Stephens reported that Heard

> will not speak to me about the merits of what Your Honor is asking. Obviously, now that a report is being granted, he is entitled to a hearing. He has not provided me any witnesses that would render any opinions contrary to that. I don't have the authority to agree that he is competent because he will not discuss that with me.

D.E. 240 at 11. Judge Coffman's attention then turned to Heard's waiver of his right to counsel. After discussing the matter with Heard, she allowed Heard to represent himself, but kept Mr. Stephens on the case as a legal advisor:

> I am going to allow you to represent yourself. But, Mr. Stephens, I'm keeping you on as a legal advisor. You won't be speaking for him, but you're there for him to consult if he needs advice. And so I want you to step back into the gallery. I want [Heard] to take his seat at counsel table.

Id. at 24. Judge Coffman then turned to the question of whether there would be a competency hearing. *Id.* Heard, now representing himself, made clear that he believed himself to be competent and waived his right to a competency hearing. *Id.* at 25.

After Heard raised this issue in his § 2255 motion, the undersigned conducted an evidentiary hearing because the record shows that Heard was granted permission to represent himself *before* his competency was addressed by Judge Coffman. *See* D.E. 301. Under case law

that will be discussed below, this error can be harmless if standby counsel conducted an adequate investigation and determined independently that the defendant was competent. The record on this point was not fully developed, which necessitated the evidentiary hearing. *Id.*

B.

The leading case from this Circuit is *United States v. Ross*, 703 F.3d 856 (6th Cir. 2012). In *Ross*, the government had filed a motion for a competency evaluation. The defendant was already proceeding *pro se*, and the district court allowed him to represent himself at the competency hearing, with standby counsel present. *Id.* at 866, 868.

The Court of Appeals held that the District Court "committed error in failing to appoint counsel to represent Ross at the hearing." *Ross*, 703 F.3d at 869. This error violated both § 4247(d) and the Sixth Amendment right to counsel. *Id.* at 869-69. The appellate court noted that "[t]he threshold for finding that a defendant may be incompetent to stand trial is *lower* than the baseline for competency to represent oneself." *Id.* at 869 (citing *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008)). When a question is raised as to a defendant's competency to stand trial, this triggers the need for mandatory appointment of counsel. *Id.* The appellate court cited cases from other Circuits that "support a common-sense viewpoint that a defendant cannot represent himself at his own competency hearing, the purpose of which is to determine whether a defendant understands and can participate in the proceedings in the first place." *Id.*

> "Logically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." *Purnett*, 910 F.2d at 55. Thus, a trial court should "appoint counsel—whether defendant has attempted to waive it or not—and counsel must serve until the resolution of the competency issue." *Id.* at 56.

Id. The appellate court noted that, when the defendant's competency is at issue,

> both the Constitution and governing statutes require that the defendant be represented by counsel whose duty it is to assure that the evidence supporting competency is closely examined. Assurance that the defendant has counsel is especially important where, as here, the steadfast belief of the defendant in his own competency—both to stand trial and to represent himself—is belied by his continuing bizarre behavior.

Id. at 870. Furthermore,

> Assuming that the defendant is, in fact, incompetent, the lack of a defense attorney to conduct an adequate investigation into the matter could prevent any flaws in the pro-competency position from coming to light. This is particularly true when, as here, the pro se defendant believes and argues that he is competent, leaving no one to examine and challenge the evidence. Accordingly, we hold that the Constitution requires a defendant to be represented by counsel at his own competency hearing, even if he has previously made a knowing and voluntary waiver of counsel.

Id. at 871.

However, the Court in *Ross* also recognized that "participation by standby counsel during a competency hearing may be sufficient to overcome a denial of counsel claim." *Ross*, 703 F.3d at 871. The appellate court held that this occurs when standby counsel's participation satisfies the "meaningful adversarial testing" standard of *United States v. Cronic*, 466 U.S. 648, 656-57 (1984). *Id.* at 872. In Ross's case, the appellate court found the record insufficient because it did not contain "clear evidence of meaningful adversarial testing or investigation of the evidence by standby counsel." *Id.*

Surveying the record, the appellate court noted that standby counsel "shared conflicting thoughts on Ross's competence" at the hearing. *Id.* at 872-73. Standby counsel provided documents for the psychiatrist to review. *Id.* at 873. But at the hearing, standby counsel "did not participate to any meaningful degree" and "declined multiple opportunities to argue." *Id.*

> His only statements consisted of acknowledging that he received a copy of the report and forwarded it to Ross, agreeing that he had not requested Dr. Nixon's presence, declining to present any evidence with respect to Ross's competence to stand trial, and telling the court that he would not present evidence with respect to

> Ross's competence to represent himself but would instead "defer to Dr. Nixon's conclusions."

Id. Nevertheless, the appellate court considered it "conceivable" that standby counsel "did satisfy the minimum standard by adequately investigating, undertaking appropriate preparation for the hearing and then making an independent, strategic decision not to contest competency." *Id.* According to the appellate court, meeting that standard required

> evidence, at a minimum, that standby counsel (1) conducted an adequate investigation into Ross's competency, including reading and analyzing Dr. Nixon's report, and preparing for the hearing and (2) chose not to contest Ross's competency based on his own strategic decision rather than a belief that he simply had no obligation to do so over Ross's instructions.

Id. at 874. Thus, the appellate court remanded for an evidentiary hearing. *Id.*

On remand, the district court found that standby counsel had satisfied the *Cronic* test, and Ross appealed. *United States v. Ross*, 619 F. App'x 453 (6th Cir.), *cert. denied*, 136 S. Ct. 520 (2015). At the post-remand hearing, standby counsel testified that he submitted relevant documents to the psychiatrist and "discussed them over the phone with him." *Id.* at 456. He told the psychiatrist that he believed Ross was not only competent, but "very sophisticated." *Id.* After the psychiatrist released his report, standby counsel studied it and discussed it with the psychologist. *Id.* He discussed the report twice with Ross before the hearing. *Id.* Standby counsel testified that he, Ross, and the psychiatrist all agreed Ross was competent, and that he "had nothing to add" at the competency hearing. *Id.*

The appellate court held that standby counsel had no duty to argue for incompetency "simply for the sake of playing devil's advocate and airing that perspective in court." *Ross*, 619 F. App'x at 456. Thus, Ross received adequate representation because standby counsel "adequately consider[ed] Ross's competency on his own," cooperated with the psychiatrist, analyzed the report, and prepared for the hearing. *Id.* The appellate court further found that

standby counsel's "decision not to contest the report was based on his agreement with it, rather than a belief that he simply had no obligation to do so." *Id.*

The Sixth Circuit returned to this issue in the case of Francisco Martin, in which the Court granted a new trial. *United States v. Martin*, 608 F. App'x 340, 341 (6th Cir. 2015). The Court found that no remand was necessary because the record was conclusive that standby counsel did not meet the *Cronic* standard. *Id.* at 344. Nothing in the record evidenced "that Martin's standby counsel ever expressed any position on his client's competence; nor does the record indicate that standby counsel ever reviewed any documents related to Martin's competency, including the mental health evaluation." *Id.* at 345. All the record showed was that the psychiatric examiner consulted standby counsel. *Id.* Further, the magistrate judge's instructions to standby counsel "effectively barred her from presenting any conclusions she may have drawn from this investigation, because those instructions foreclosed any action by standby counsel on Martin's behalf beyond answering Martin's legal questions and filing pleadings he drafted." *Id.* "[T]he judge directed his questions to Martin alone." *Id.*

Another case that follows *Ross* is *United States v. Amir*, 644 F. App'x 398 (6th Cir. 2016). In that case, the government had moved for a competency examination. Amir, representing himself, asserted at the ensuing hearing that he was competent, as the psychologist's report found. *Id.* at 399. As in *Ross*, the case was remanded for a hearing on standby counsel's performance. On remand, standby counsel testified that

> he met with Amir several times before his competency hearing; that he communicated to Amir that he did not believe Amir's jurisdictional defense would succeed; that he nonetheless believed Amir to be competent because he could rationally and logically discuss his case; that he discussed with Amir the process involved in a competency evaluation; that he met with Dr. Brannen to discuss the findings in Dr. Brannen's report; that he agreed with the report's findings; and that he delivered the report to Amir, discussed its conclusions with Amir, and encouraged Amir to stipulate to it.

Id. at 399-400. Standby counsel also testified "that he made a strategic decision not to challenge the psychological evaluation report, or cross-examine Dr. Brannen because he agreed with the report and because his own independent assessment was that Amir was competent." *Id.* at 400. Finding this case "very similar" to *Ross*, the appellate court affirmed Amir's conviction. *Id.* at 401-02.

C.

Regarding Heard's motion, this Court held an evidentiary hearing because the record at the time was similar to the pre-remand record in *Ross*. D.E. 301. Particularly concerning was Mr. Stephens's statement at the competency hearing, "I don't have the authority to agree that [Heard] is competent because he will not discuss that with me." D.E. 240 at 11. This statement potentially implicated the last component of the *Ross* standard, which requires (1) evidence that standby counsel conducted an adequate investigation into the defendant's competency, "including reading and analyzing [the] report, and preparing for the hearing" and (2) evidence that standby counsel chose not to contest the defendant's competency "based on his own strategic decision rather than a belief that he simply had no obligation to do so over [the defendant]'s instructions." *Ross*, 703 F.3d at 874.

Additionally, the fact that the trial judge told Mr. Stephens that "he won't be speaking for" Mr. Heard (D.E. 240 at 24) resembled the important factor in *Martin* wherein the magistrate judge's instructions "effectively barred" standby counsel from presenting her own conclusions at the evidentiary hearing. *Martin*, 608 F. App'x at 345.

However, having conducted the hearing, the record in this case now aligns with the post-remand record in *Ross* and *Amir*. As explained below, the record now supports a finding that Mr. Stephens's representation met the *Cronic* standard of meaningful adversarial testing in

regard to Heard's competency. Mr. Stephens conducted a more than adequate investigation into Heard's competency, relayed all of his knowledge on the subject to the examiner, and came to his own conclusion that the report was correct. It is also obvious that the only reason Mr. Stephens did not discuss the report with Heard was that Heard refused to cooperate.

D.

At the evidentiary hearing, Mr. Stephens explained that he filed the motion for a competency examination in 2012 because of a particular incident in a holdover cell in Lexington. D.E. 331 at 10-12; D.E. 97. This was "absolutely the triggering [event]." D.E. 331 at 58. "I don't think I ever really considered the competency issue seriously until I saw what I saw in the holdover at Courtroom A." *Id.* at 53. On that day, Heard seemed to be in "mental distress." *Id.* Mr. Stephens agreed that Heard's behavior in the holdover cell was the entire basis for the motion. *Id.* at 58.

Mr. Stephens testified that he was "intimately" familiar with the report prior to the May 1, 2012 proceeding. D.E. 331 at 13-14. He reviewed it "thoroughly" and in "critical detail." *Id.* at 22, 35. He said he had twice discussed Heard's issues with Dr. Campell before the report was completed. *Id.* at 14. When asked by the undersigned whether he had relayed to Dr. Campbell every concern that caused him to file the competency motion, Mr. Stephens responded that he had. *Id.* at 61.

Mr. Stephens testified that the report's findings "did not surprise [him] in the least." D.E. 331 at 14. The report "found no issue of competency whatsoever." *Id.* However, Mr. Stephens was not able to have "any actual or meaningful interaction with Mr. Heard about the report" after it was issued because Heard refused to communicate with him. *Id.* at 14-15.

The record of the competency proceeding shows Mr. Stephens did not send Heard a copy of the report as soon as it was available. He told Judge Coffman, "after I got the report, I wrote to Mr. Heard and did not send the report to him because I thought there was some case-sensitive information in it." D.E. 240 at 3. At the recent evidentiary hearing, however, Mr. Stephens initially believed he had sent a copy of the report to Heard in jail prior to the competency proceeding. D.E. 331 at 17-18, 37. The undersigned reminded Mr. Stephens of what he told Judge Coffman in 2012, and this refreshed Mr. Stephens's recollection. *Id.* at 57-58. Mr. Stephens also testified that he mailed a summary of the report to Mr. Heard, but he did not have a copy of the transmittal letter. *Id.* at 15, 35-36, 57.

Why was Mr. Stephens not surprised that the report found Heard competent? Mr. Stephens explained that, when he first met Heard, Heard was "bright," "articulate," and "pretty savvy" regarding his case. D.E. 331 at 19. "When I first met Mr. Heard," he said, "there was absolutely no question in my mind that he was competent." *Id.* at 33. Heard "knew exactly what he was doing" and was "very insistent on being very active in his defense." *Id.* Mr. Stephens had met "several times" with Heard because the discovery was "voluminous." *Id.* at 50.

Mr. Stephens testified that he had no independent evidence to refute the report's finding that Heard was competent. D.E. 331 at 19. The findings "were just about as consistent as what I would have presumed them to be." *Id.* at 20. The report "was consistent with [his] interactions with Mr. Heard." *Id.* at 22. He said "the report basically came back as I would have forecast it to come back." *Id.* at 37. He was "confident" that it was correct. *Id.* at 44. He had no reason to challenge Heard's stipulation to his competency. *Id.* at 56.

Mr. Stephens testified, "I didn't have available to me any evidence of any sort or form that would have contradicted Dr. Campbell's report." D.E. 331 at 25. He had no grounds on

which to challenge the report. *Id.* at 36. He had no grounds to ask for additional witnesses. *Id.* at 37. When asked if he made a "strategic decision" regarding the report, Mr. Stephens said he did "[t]entatively," but would have wanted Heard's input before making a final decision. *Id.* Mr. Stephens also testified that nothing that happened after the issuance of the report caused him to doubt Heard's competency. *Id.* at 43.

Additionally, Mr. Stephens explained his extensive experience with forensic evaluations of competency and criminal responsibility. D.E. 331 at 21. A former magistrate judge had appointed him to work on 50 to 75 such matters in the past. *Id.* Or it may have been "75 to 100 over about a ten-year period." *Id.* at 31. Mr. Stephens became "very, very familiar with the mechanics of how [competency and criminal responsibility evaluations work]." *Id.* at 21. He had reviewed competency reports "[m]any times." *Id.* at 29. This includes "many" reports by Dr. Campbell. *Id.* at 35.

But what about Mr. Stephens's statement at the May 1, 2012 hearing that he lacked the "authority to agree that [Heard] is competent?" D.E. 240 at 11. Mr. Stephens explained that he believed Heard had not given him the right to agree that he was competent. D.E. 331 at 20. He said, "I don't think it's appropriate, without the client's input, to do anything like that." *Id.* This was because Heard would not speak with him at all at that point. *Id.* at 21.

Comparing this case to the Sixth Circuit's decisions in *Ross*, *Martin*, and *Amir* reveals that standby counsel satisfied the *Cronic* "meaningful adversarial testing" standard. Mr. Stephens conducted an adequate investigation and made an independent judgment that the report was correct. Like standby counsel in *Ross*, Mr. Stephens discussed his client's competency over the phone with the mental examiner during the evaluation (in this case, twice, D.E. 331 at 14) and relayed all of his concerns to the examiner (D.E. 331 at 60-62). *United States v. Ross*, 619 F.

App'x 453, 456 (6th Cir. 2015). Next, he prepared for the hearing. Mr. Stephens studied the report, agreed with it, and, like counsel in *Ross*, had nothing to add or contradict the report. *Id.* Like Ross, Heard received adequate representation because standby counsel "adequately consider[ed the defendant]'s competency on his own," cooperated with the psychiatrist, analyzed the report, and prepared for the hearing. *Id.* Finally, as Mr. Stephens's hearing testimony established, his "decision not to contest the report was based on his agreement with it," rather than a bare belief that he simply had no obligation to make an independent assessment. *Id.* And, like the similar case of *Amir*, counsel here "agreed with the report" and made "his own independent assessment [that the defendant] was competent." *United States v. Amir*, 644 F. App'x 398, 400 (6th Cir. 2016). As with Amir, "neither the defendant, nor the court-appointed psychologist, nor the standby counsel doubt[ed] the defendant's competence[.]" *Id.* at 402. Thus, Heard's statutory and constitutional rights to representation at the proceeding were not violated.[4]

The facts developed at the evidentiary hearing also show that Mr. Stephens did not render ineffective assistance during the competency proceedings. Mr. Stephens was clearly well-prepared for the competency proceedings (to the extent that he could prepare without Heard's cooperation), and was unusually well-versed in competency matters. Heard has shown no deficient performance, and any prejudice he suffered while the competency determination was pending resulted solely from his refusal to speak with his attorney. Thus, to the extent that Heard challenges Mr. Stephens's performance in relation to competency proceedings prior to Mr. Stephens's appointment as standby counsel, his claim fails. If Heard is challenging Mr. Stephens's performance *as standby counsel*, such a claim is foreclosed by Heard's decision to

[4] Heard relies on *United States v. Meeks*, 987 F.2d 575 (9th Cir. 1993), as analogous and persuasive authority. D.E. 73-1 at 60. But *Meeks* concerned a finding that the defendant had impliedly waived his right to counsel through his conduct. *Meeks*, 987 F.2d at 578-79. Here, Heard explicitly waived his right to counsel; *Meeks* is distinguishable.

represent himself. A claim of ineffective assistance of standby counsel "necessarily fails" because a decision to exercise the right to self-representation waives the right to representation by counsel. *Wilson v. Parker*, 515 F.3d 682, 696 (6th Cir. 2008), *as amended on denial of reh'g and reh'g en banc* (Feb. 25, 2009). Grounds Two and Three should be denied.

V. Ground Four-A

Heard argues in Ground Four-A that his appellate counsel was ineffective for failing to argue that the evidence at trial was insufficient to convict on Count One, conspiracy to distribute five kilograms or more of a mixture or substance contianing cocaine. D.E. 273-1 at 63. He asserts the jury could not have properly found that a conspiracy existed or that the conspiracy involved five kilograms or more of a mixture or substance containing cocaine. *Id.* at 63, 66-67. The total amount of drugs seized was "well under 1 kilogram," he argues, and although codefendants testified as to other amounts, "their numbers varied greatly, and were not specific in nature." *Id.* at 63. He also argues that his relationship with his cocaine supplier was a buyer/seller or "consignment" arrangement, and that the evidence did not support a conspiracy. *Id.* at 66-67.

Claims of ineffective assistance of appellate counsel ("IAAC") are subject to the same standards that govern ineffective assistance of trial counsel ("IATC"), as described in *Strickland*. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Courts presume that appellate counsel provided reasonable professional assistance. *Hutton v. Mitchell*, 839 F.3d 486, 501 (6th Cir. 2016). Appellate counsel does not have to "raise every possible issue in order to render constitutionally effective assistance." *Id.* "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith*, 528 U.S. at 288. IAAC is "difficult" to demonstrate.

Id. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Thus, to demonstrate deficient performance, Heard must show that the issues he raises are "clearly stronger" than the ones his appellate counsel raised. *Hutton*, 839 F.3d at 501; *Bourne v. Curtin*, 666 F.3d 411, 414 (6th Cir. 2012); *Hoffner v. Bradshaw*, 622 F.3d 487, 505-06 (6th Cir. 2010).

The standard for constitutional insufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This Court cannot "reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Johnson v. Mitchell*, 585 F.3d 923, 931 (6th Cir. 2009).

In light of these standards, the operative question is whether the evidence at trial supporting the existence of the conspiracy and that it involved five kilograms of cocaine was so insufficient that such insufficiency was clearly stronger than the issues appellate counsel raised on appeal. The arguments raised on appeal concerned Heard's competency and his decision to represent himself at trial. *United States v. Heard*, 762 F.3d 538, 539 (6th Cir. 2014).

Heard summarizes the relevant trial evidence in his memorandum. D.E. 273-1 at 66. He states that "the government star witness" was Victor Hernandez, who testified that Manuel Escalera sold him several multiple-kilogram quantities of cocaine to sell to Heard—as much as twelve kilograms at a time. *Id.* Heard also states that Special Agent Danielle Barto testified that Hernandez sold Heard over 40 kilograms of cocaine. *Id.* Heard argues that Hernandez's testimony was "very elaborate and questionable" and was "tailored to create a narrative more

favorable to the government." *Id.* Heard essentially asks the Court to reevaluate the credibility of these witnesses, but that is precisely what the Court cannot do when reviewing the sufficiency of the evidence. *United States v. Warman*, 578 F.3d 320, 332 (6th Cir. 2009). Similarly, his arguments that he was a buyer, not a co-conspirator, invite the Court to reweigh the evidence. *See id.*

Heard cannot establish that the evidence was insufficient without the Court impermissibly reweighing the evidence or reevaluating the credibility of witnesses. Because his insufficiency-of-the-evidence claim is plainly meritless, it cannot be "clearly stronger" than the issues appellate counsel raised on appeal. He cannot establish IAAC under *Hutton*, and Ground Four-A should be denied.

VI. Ground Four-B

Interwoven with Ground Four-A, Heard challenges the validity of the indictment. D.E. 273-1 at 64-65. Because this argument is nestled within Ground Four-A, which is an IAAC claim, Heard appears to argue that his appellate counsel was ineffective for failing to raise this issue on appeal. Heard also appears to argue in the midst of Ground Five that his trial counsel should have gotten the indictment dismissed.[5] D.E. 273-1 at 73.

To show prejudice on his IATC claim, Heard must show that any attack on the indictment for misconduct before the grand jury would have had merit. And, to prove his IAAC claim, Heard must show that this argument was "clearly stronger" than the arguments Heard's appellate counsel raised on appeal. *Hutton v. Mitchell*, 839 F.3d 486, 501 (6th Cir. 2016).

[5] Heard filed two *pro se* motions to dismiss the indictment. D.E. 40, 131. But these motions do not involve alleged misconduct before the grand jury. And neither of his attorneys moved to dismiss. During the pretrial conference on January 7, 2013, Heard orally moved again to dismiss the indictment. D.E. 228 at 39. But this motion also does not appear to be based on perjury or other prosecutorial misconduct before the grand jury.

According to Heard, Agent Barto of the IRS, who testified before the grand jury in conjunction with each of Heard's three indictments, "actively misled the grand jury or engaged in fundamentally unfair tactics in her presentation, [and] knowingly failed to inform the grand jury of other substantial evidence negating guilt." D.E. 273-1 at 73. Heard claims that Agent Barto's testimony "consisted of hearsay, conclusions and characterizations." *Id.* at 64. He also questions whether the grand jury knew it could subpoena witnesses. *Id.* Although he no longer possesses the transcripts,[6] Heard states that he "has seen the grand jury testimony with his own eyes" and recalls that "Agent Barto clearly told the grand jury that Heard is already indicted on Count 1." *Id.*; *see also id.* at 74. He argues that the grand jury lacked probable cause to indict. *Id.* at 64. But he also states he "does not know for certain if the government presented erroneous information to the grand jury." *Id.* Heard appears to argue that his trial and appellate counsel should have "contest[ed] and attack[ed] the IRS case agent's testimony because she presented testimony of hearsay and case summaries to the grand jury herself." *Id.* at 73.

Regarding his recollection that "Agent Barto clearly told the grand jury that Heard is already indicted on Count 1," Heard does not make clear whether this statement by Agent Barto was made in connection to the first, second, or third indictment. D.E. 273-1 at 64, 74. The indictment in Heard's case was superseded twice. D.E. 13, 57. Heard acknowledges that Agent Barto testified at each of those three grand jury proceedings, on June 2, July 3, and November 3, 2011. D.E. 273-1 at 64. Clearly, the statement that Heard was already indicted on Count One would be accurate and proper if it was made after the original indictment but before the first or second superseding indictments. And all three indictments contain, as the first count, a charge of conspiracy to distribute five kilograms or more of cocaine between September 2008 and May

[6] Heard has attempted to obtain the grand jury transcripts several times, but his requests have been denied for failure to demonstrate sufficient particularized need. D.E. 262, 268, 278.

2011, in violation of 21 U.S.C. § 846. D.E. 1, 13, 57. Because Heard never clearly alleges that Agent Barto made the statement prior to the original indictment, the Court has no basis to find that the statement was improper at all.

Additionally, it is common and not improper for law enforcement officers to testify before a grand jury without accompanying witnesses, and to relay hearsay information and their conclusions. *Costello v. United States*, 350 U.S. 359, 363 (1956); *United States v. Powell*, 823 F.2d 996, 1000 (6th Cir. 1987); *United States v. Markey*, 693 F.2d 594, 596 (6th Cir. 1982); *United States v. Short*, 671 F.2d 178, 181-82 (6th Cir. 1982). A grand jury meeting is not a criminal trial, and the rules of evidence do not apply. *Id.* "An indictment based on incompetent, inadequate or hearsay evidence will stand;" and "[t]he law in this circuit is that 'only on a showing of demonstrated and long-standing prosecutorial misconduct' will an indictment be dismissed." *United States v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983) (citations omitted).

Perhaps most importantly, any defect in an indictment generated by alleged perjured testimony was cured by the petit jury's verdict of guilt. *United States v. Combs*, 369 F.3d 925, 936 (6th Cir. 2004); *United States v. Cobleigh*, 75 F.3d 242, 251 (6th Cir. 1996). Grand jury errors caused by alleged prosecutorial misconduct "are *per se* harmless where the defendant is subsequently convicted by the petit jury." *United States v. Brown*, 332 F.3d 363, 375 (6th Cir. 2003). A trial verdict of guilt beyond a reasonable doubt remedies any defect in regard to a grand jury's finding of probable cause. *United States v. Mechanik*, 475 U.S. 66, 73 (1986). Furthermore, in cases like this, in which the alleged grand jury misconduct is not raised until after the verdict, the issue is forfeited by waiver. *Combs*, 369 F.3d at 936; Fed. R. Crim. P. 12(b)(3)(v).

Heard has not shown that the claim involving the validity of the indictment has merit or is clearly stronger than the claims appellate counsel raised on appeal. Ground 4-B fails.

VII. Ground Five

Ground Five argues that both trial counsel and appellate counsel were ineffective for their "failure to attack and suppress the evidence in all of the government's search and seizure warrants and affidavit[s]." D.E. 273-1 at 73. The government argues that Heard cannot complain about a failure to move to suppress evidence because he represented himself. D.E. 296. However, pretrial motions were due within eleven days of arraignment. D.E. 19 at 4. Heard was arraigned on the indictments on June 8, July 15, and November 4, 2011. D.E. 10, 18, 62. Heard was represented by counsel until May 1, 2012. D.E. 127. Thus, Heard was represented during the period when he was permitted to file pretrial motions.

A § 2255 movant can raise a Fourth Amendment claim indirectly as a claim of ineffective assistance of counsel. Although "free-standing Fourth Amendment claims cannot be raised in collateral proceedings under either § 2254 or 2255, the merits of a Fourth Amendment claim still must be assessed when a claim of ineffective assistance of counsel is founded on incompetent representation with respect to a Fourth Amendment issue." *Ray v. United States*, 721 F.3d 758, 762 (6th Cir. 2013) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986)).

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman, 477 U.S. at 375. As previously discussed, establishing ineffective assistance of appellate counsel requires a showing that the issue in question is clearly stronger than the issues

counsel raised on appeal. Thus, for both IATC and IAAC, Heard must convince the Court that his Fourth Amendment claim has merit.

Heard's substantive argument is that the affidavit supporting the search warrant "was based on the Grand Jury testimony of Special Agent Daniollo Barto." D.E. 273-1 at 74. He argues that "all of this information is a direct result of IRS agent Barto . . . stating to the grand jury that Heard is already indicted on Count 1." *Id.* Agent Barto testified before the first grand jury on June 2, 2011. D.E. 273-1 at 64. The warrant was executed on June 7, 2011. D.E. 229 at 20, 23, 87. Then the indictment was superseded twice. D.E. 13, 57.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." U.S. Const., amend. IV. Probable cause to issue a search warrant exists where "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The Court must "look only to the four corners of the affidavit" supporting the warrant to determine whether it was supported by probable cause. *United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010) (citing *United States v. Pinson*, 321 F.3d 558, 565 (6th Cir. 2003)). This Court, in reviewing a previously-issued warrant, must not engage in line-by-line scrutiny of the affidavit. *United States v. Woosley*, 361 F.3d 924, 926 (6th Cir. 2004) (citing *United States v. Greene*, 250 F.3d 471, 479 (6th Cir. 2001)). Rather, "[t]he affidavit should be reviewed in a commonsense . . . manner, and the court should consider whether the totality of the circumstances supports a finding of probable cause." *Id.* (citing *Greene*, 250 F.3d at 479). The warrant will be upheld unless the issuing judge lacked "'a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited.'" *Id.* (quoting *United States v. Davidson*, 936 F.2d

856, 859 (6th Cir. 1991)). The issuing judge's "determination of probable cause is afforded great deference, and that determination should be reversed only if the [judge] arbitrarily exercised his discretion." *Id.* (citing *Greene*, 250 F.3d at 479).

The Court has obtained the affidavit by Agent Barto. Early in the affidavit, Agent Barto states, "I am aware that on June 2, 2011, a sealed indictment was returned against [Heard, which] included drug-trafficking and money-laundering charges."[7] So Heard is correct that the affidavit is, at least in part, "based on" Agent Barto's grand jury testimony. D.E. 273-1 at 74. At trial, a prosecutor told the Court that Agent Barto was the only witness who testified before the grand jury that issued the indictments. D.E. 232 at 100. But there is nothing unusual, untoward, or even unexpected about Agent Barto informing the Court in her search-warrant affidavit that Heard had already been indicted. Heard provides no coherent theory as to how the affidavit failed to establish probable cause to support the search. He states that the information in the affidavit was "extremely stale and unreliable," but does not explain how or why this is so. D.E. 273-1 at 73. The Court is left with no basis upon which to find ineffective assistance of trial or appellate counsel in respect to the validity of the search warrant. Ground Five therefore fails.[8]

VIII. Conclusion

Based on the foregoing, the undersigned **RECOMMENDS** that Heard's 28 U.S.C. § 2255 motion (D.E. 273) be **DENIED.**

IT IS ORDERED THAT the application for a sealed warrant and supporting affidavit in case number 5:11-MJ-5060-REW **BE FILED** in the record in this case. The Court notes that Judge Wier unsealed these materials by order dated October 4, 2011.

[7] To ensure a complete and accurate record, the Court orders below that this affidavit be filed in the record of this case.

[8] Pages 75 and 76 of Heard's memo contain a string of case citations and summaries without any context as to whether or how Heard believes they might apply to his case. D.E. 273-1 at 75-76. The Court does not interpret these citations as raising claims besides those already discussed.

The undersigned further **RECOMMENDS** that no Certificate of Appealability issue. Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See also* Rule 11 of the Rules Governing Section 2255 proceedings. This standard is met if the defendant can show "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.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). The Court has considered the issuance of a Certificate of Appealability as to each of Heard's claims. No reasonable jurist would find the assessments on the merits above to be wrong or debatable; thus, no Certificate of Appealability should issue. As to Ground Three, the undersigned believes that reasonable jurists could not disagree as to Mr. Stephens's handling of the competency issues in light of *Ross*, *Martin*, and *Amir*. Mr. Stephens's testimony is undisputed, and the facts closely align with those of *Ross* (on remand) and *Amir*. Mr. Stephens plainly did all that he could to reasonably investigate Heard's competency. He was left with no basis whatsoever to challenge the examiner's conclusion that Heard was competent, and strategically chose not to assert any challenge. The uncontested facts establish that meaningful adversarial testing took place.

When a claim (such as Ground One here) is dismissed on procedural grounds, a Certificate may only issue if the movant can show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, Ground One is clearly foreclosed by the fact that the Court of Appeals unambiguously held that Heard made a voluntary, knowing, and

intelligent waiver of the right to counsel. *United States v. Heard*, 762 F.3d 538, 543 (6th Cir. 2014). That this ground is procedurally barred is not debatable.

The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Recommended Disposition, issued under subsection (B) of the statute. *See also* Rules Governing Section 2255 Proceedings, Rule 8(b). Within fourteen days after being served with a copy of this decision, any party may serve and file specific written objections to any or all findings or recommendations for determination, *de novo*, by the District Court. Failure to make a timely objection consistent with the statute and rule may, and normally will, result in waiver of further appeal to or review by the District Court and Court of Appeals. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981).

This the 20th day of September, 2017.

Signed By:
Hanly A. Ingram
United States Magistrate Judge

APPENDIX

F

Nos. 17-6103/6504

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MARQUIS DERON HEARD,)
)
Petitioner.)

ORDER

Before: NORRIS, ROGERS, and STRANCH, Circuit Judges.

In No. 17-6103, Marquis Deron Heard petitions for a writ of mandamus, generally seeking to compel a ruling on his motion to vacate and specifically seeking to compel the magistrate judge to issue a report and recommendation on that motion. After the magistrate judge recommended denying Heard's motion to vacate, Heard filed a second mandamus petition, No. 17-6504, asking us to compel the magistrate judge to conduct a "full and fair record review" of his claims or, alternatively, set aside the magistrate judge's Report and Recommendation. He moves to proceed *in forma pauperis* in both actions.

The remedy of mandamus is a drastic one to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978). "[D]istrict courts ordinarily enjoy broad discretion in matters of pretrial management, scheduling, and docket control." *Kimble v. Hoso*, 439 F.3d 331, 336 (6th Cir. 2006); *see also In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996). Nonetheless, we look "unfavorably upon lengthy, unjustified, and inexplicable delays on the part of district courts in deciding cases." *Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 782 (6th Cir. 2007) (collecting cases). While we will not "condone lengthy and unnecessary delays in the review" of motions to vacate, we grant district courts some latitude in timely reviewing such petitions. *In re Cox*, No. 90-8520, 1990 WL 85337, at *1 (6th Cir. June 22, 1990) (Table).

The district court and the magistrate judge have been actively involved in adjudicating Heard's motion to vacate. They have taken numerous steps to ensure full review of his claims, ordering both an evidentiary hearing and a supplemental response from the government. Heard's request that the magistrate judge issue a Report and Recommendation is now moot. And the district court has not unduly delayed ruling on Heard's motion to vacate, given that it has only been ripe for review for four months (since his objections to the magistrate judge's Report and Recommendation were received). Thus, Heard has not shown a clear and indisputable right to the relief sought in No. 17-6103.

Mandamus relief is not available when petitioners have "'adequate alternative means to obtain the relief they seek.'" *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078 (6th Cir. 1996) (quoting *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 308-09 (1989)). It is also not "intended to substitute for appeal after a final judgment." *In re Life Investors Ins. Co. of Am.*, 589 F.3d 319, 323 (6th Cir. 2009). Heard filed objections to the magistrate judge's Report and Recommendation, challenging the completeness of review, and he may appeal an adverse judgment. Because Heard has an adequate alternative remedy, he has not shown a clear and indisputable right to the relief sought in No. 17-6504.

The mandamus petitions are **DENIED** and the motions to proceed *in forma pauperis* are **DENIED AS MOOT**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

CRIMINAL ACTION NO. 11-73-KKC

UNITED STATES OF AMERICA, PLAINTIFF,

v. **OPINION AND ORDER**

MARQUIS DERON HEARD, DEFENDANT.

* * * * * * * * * * *

This matter is before the Court on the defendant Marquis Deron Heard's motion (DE 273) to vacate his sentence under 28 U.S.C. § 2255. The Court referred the matter to a magistrate judge who conducted a hearing and filed a report (DE 335) in which he recommends that the Court deny the motion. Heard has filed objections (DE 338) to the recommendation. The Court has "ma[d]e a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b). For the following reasons, the Court will overrule Heard's objections.

As the magistrate judge explained, Heard was convicted of various counts relating to the distribution of cocaine, money laundering, and being a felon in possession of a firearm. He represented himself at trial and was convicted and ultimately sentenced to a prison term of 360 months.

Heard's first objection to the magistrate judge's recommendation deals with the magistrate judge's determination that Heard has not shown that his trial and appellate counsel were ineffective for failing to move to dismiss his indictment based on prosecutorial misconduct before the grand jury. Heard argues in his § 2255 motion that IRS Special Agent Danielle Barto "clearly told the grand jury that Heard is already indicted on Count 1."(DE 273-1 Mem. at 64.) Count 1 charged Heard with conspiring to distribute five

kilograms or more of cocaine. The magistrate judge found that Heard had not made clear when precisely Agent Barto allegedly made this statement. The original indictment in this matter was superseded twice. The magistrate judge determined that Agent Barto's statement would have been appropriate if made after the original indictment but before the first or second superseding indictments. In his objections, Heard states that he alleges that Agent Barto made the statement to the grand jury before it issued the original indictment.

For purposes of this opinion, the Court will assume this is correct. The statement still would not warrant vacating Heard's conviction. For Heard to establish that his trial counsel was ineffective for failing to move to dismiss the indictment based on Agent Barto's statement, he must establish "that his counsel's performance was deficient under an objective standard of reasonable performance, and that there is a reasonable probability that his counsel's errors prejudiced the outcome of the proceedings against him." *Jacobs v. Mohr*, 265 F.3d 407, 418 (6th Cir. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). This means he must show that, had his trial counsel moved to dismiss the indictment based on Agent Barto's statement, there is a "reasonable probability" that the Court would have granted it. *United States v. Carter*, 355 F.3d 920, 924 (6th Cir. 2004)

As to the objective reasonableness of Heard's counsel's failure to move to dismiss the indictment on the basis of Barto's statement, the Court notes that Heard chose to represent himself in this matter. While he had court-appointed counsel until May 1, 2012 – who remained standby counsel during the trial – Heard was not willing to work with counsel or even communicate with counsel on any issue other than the Court's jurisdiction. (DE 331, Tr.) Heard himself told the Court he was not willing to speak with his court-appointed counsel on any other issue. (DE 240, Tr. at 6.) It is difficult to find counsel unreasonable for failing to make particular motions on a defendant's behalf when the defendant refused to cooperate with his counsel.

More importantly, it was not objectively unreasonable for Heard's counsel to fail to move to dismiss the indictment based on Agent Barto's alleged statement because there was no reasonable probability the Court would have granted such a motion. For the same reason, Heard cannot show he was prejudiced by his trial counsel's failure to move to dismiss the indictment on the basis of Barto's alleged statement. *See* Carter, 355 F.3d at 924 ("Failing to make a motion. . . that had no chance of success fails both [*Strickland*] prongs. First, counsel cannot be said to be deficient for failing to take frivolous action, particularly since a frivolous effort takes attention away from non-frivolous issues. Second, it is evident that failing to make a motion with no chance of success could not possibly prejudice the outcome.")

Because a court must respect the independence of the prosecutor and the grand jury, dismissals of indictments for prosecutorial misconduct are rare. *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *United States v. Kilpatrick*, 821 F.2d 1456, 1465 (10th Cir. 1987). Grand jury indictments are presumed valid and a court must "exercise extreme caution in dismissing an indictment for alleged grand jury misconduct." *United States v. Overmyer*, 899 F.2d 457, 465 (6th Cir. 1990). "Dismissal of the indictment based on the prosecutor's misconduct before the grand jury is warranted only where the misconduct 'undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it.'" *United States v. Griffith*, 756 F.2d 1244, 1250 (6th Cir. 1985) (quoting *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391 (9th Cir. 1983)). Heard does not explain how Agent Barto's statement affected the grand jury's ability to evaluate the evidence regarding his involvement in a conspiracy to distribute cocaine. The fact that the trial jury ultimately convicted him of this count indicates that the grand jury's decision to indict him on the charge was reasonable.

Accordingly, the Court cannot find that, had his trial counsel moved to dismiss the indictment based upon Agent Barto's alleged statement that Heard had already been indicted on Count 1, there is a reasonable probability the Court would have dismissed it. Because the Court cannot find that Heard's trial counsel was ineffective for failing to move to dismiss the indictment based on Agent Barto's statement, the Court cannot find that Heard's appellate counsel was ineffective for failing to make this argument on appeal.

Heard's second objection deals with the affidavit filed in support of the search warrant authorizing the search of his residence. Heard argues in his § 2255 motion that his trial counsel was ineffective for failing to move to suppress the evidence obtained pursuant to the search warrant. He argues that the affidavit supporting the search warrant was based on Agent Barto's grand jury testimony. The magistrate judge agreed that the affidavit was based in part on Agent Barto's grand jury testimony. Nevertheless, the magistrate judge determined that Heard provided "no coherent theory" as to how the affidavit failed to establish probable cause for the search. The magistrate judge also ordered that the affidavit be filed in the record. (DE 336, Application for a Search Warrant.)

In his objections, Heard asserts that the affidavit filed in the record is not authentic. He argues that it differs in some way from the copy provided to him during his jury trial. There is no merit to this argument. The affidavit filed in the record has been maintained in the Court's possession. The Court agrees with the magistrate judge that Heard has presented no meritorious argument that the affidavit does not establish probable cause. Accordingly, the Court cannot find that Heard's trial counsel was ineffective for failing to move to suppress evidence on the basis that the affidavit was insufficient. Nor can the Court find that appellate counsel was ineffective for failing to make this argument.

Heard's third objection deals with the magistrate judge's rejection of Heard's argument that he received ineffective assistance of counsel during proceedings to determine

his competency. The Court is uncertain as to precisely what objection Heard makes to this determination. He points out that his counsel at the competency proceeding, Andrew Stephens, testified that he had no strategy for contesting the competency evaluation at the hearing. However, Stephens further explained that he reviewed Heard's competency evaluation, had no evidence to contradict the competency finding, and Heard refused to cooperate with him. (DE 331, Tr. at 25.) It was for this reason that he was unable to develop any strategy to object to the finding.

The Court agrees with the magistrate judge's determination that Stephens conducted an adequate investigation into Heard's competency, discussed his client's competency with the mental examiner, thoroughly read and analyzed the competency evaluation prior to the competency proceeding, and chose not to contest competency based on his own strategic decision that the evaluation was correct, not on his belief that he had no obligation to.

Finally, Heard objects to the magistrate judge's determination that Heard is procedurally barred from arguing in this motion that Judge Coffman erred in determining that Heard was competent to represent himself at trial. The Court agrees with the magistrate judge's determination that Heard has already litigated this claim on direct appeal. Thus, this claim cannot be reasserted in a § 2255 motion absent exceptional circumstances, which do not exist here.

For all these reasons, the Court hereby ORDERS as follows:

1) the magistrate judge's Recommended Disposition & Order (DE 335) is ADOPTED as the Court's opinion;
2) Defendant Heard's objections (DE 338) are OVERRULED;
3) Defendant Heard's motion to vacate, set aside, or correct his sentence (DE 273) is DENIED; and

4) the Court will not issue a Certificate of Appealability, Heard having failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2);.

Dated February 5, 2018.

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

APPENDIX

H

AO 93 (Rev. 12/09) Search and Seizure Warrant

UNITED STATES DISTRICT COURT

for the

Eastern District of Kentucky

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	)	Case No. 5:11-MJ-5060-REW
Real property known as 3461 Milam Lane, Lexington, KY , which is a residence rented/occupied by Marquis Deron Heard	)	

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the Eastern District of Kentucky

(identify the person or describe the property to be searched and give its location):
Real property known as 3461 Milam Lane, Lexington, Kentucky, which is the residence rented/occupied by Marquis Deron Heard

The person or property to be searched, described above, is believed to conceal *(identify the person or describe the property to be seized)*:
See attachment.

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property. I have also reviewed and in part base probable cause on the indictment in 11-cr-73.

YOU ARE COMMANDED to execute this warrant on or before JUNE 19, 2011 *(not to exceed 14 days)*

☑ in the daytime 6:00 a.m. to 10 p.m. ☐ at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge Robert E. Wier *(name)*.

☐ I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)* ☐ for _____ days *(not to exceed 30)*.

☐ until, the facts justifying, the later specific date of _____.

Date and time issued: JUNE 5, 2011 @ 8:09 p.m.

Judge's signature

City and state: Lexington, Kentucky — Robert E. Wier - United States Magistrate Judge

Printed name and title

APPENDIX I

PRETRIAL 54 at 18-22

#2

Now, what I will look at tonight, to make sure, is that if there is any other issue regarding irregularity of the grand jury proceeding that this Court is required to address, I'll take a look at the law on that tonight, and we'll take that up first thing in the morning.

PRETRIAL at 1-6

#1

MR. HEARD: Because it's going to be an appeal issue. The foreperson never signed this, so I want to be able to have — to make an oral motion to challenge the grand jury, based on the fact that you said that actually once the witness has testified. But I don't believe a grand jury was ever drawn, your Honor, and I want to legally challenge it prior to trial.

TRIAL 1A-48 at 7-21

#3

You're being charged and tried today for those items listed in Indictment No. 73, which is a superseding indictment filed on November 3rd, 2011. Nothing more, nothing less.

The June indictment is not before this Court. It is not before this jury. More importantly, any arguments about the legality of an indictment should be made to this Court, this Judge, and you have made those. They are not appropriate — these are not appropriate matters for the jury's consideration.

The jury is impaneled solely for the purpose of determining whether the government can factually prove the charges contained in Indictment 11-73, which is the superseding indictment on November 3rd, 2011.

So I'm going to direct that you not talk to the jury or question any witnesses about the June 2nd indictment, because it is not before this Court.

(Tr. 4-4 at 19-25).

#4

So I'm going to abide by my prior ruling and will ask that you do the same, and that we just not talk about that first indictment. It really doesn't have any bearing on your guilt or innocence in the November 2011 indictment.

So if you'll please abide by my ruling and just stay away from that subject.

MR. HEARD: That's fine.

TRIAL 3-101 at 9-17

MR. HEARD: I was reading over it. I actually got a chance to skim over it because there's been so much going on, only so much time to read it.

#5

I never really — it indicated in the packet that I was to receive that she testified to Count No. 3 on the original plea, but I never really seen anything about Count 1, which is why I was taken aback. And I don't know who was to testify about that. And if there was, was there anyone that has testified on the stand in my trial?

(Tr. 3-103 at 3-18):

MR. HEARD: I want to know as far as who testified in Count 1 of my indictment. Because in the package, like I said, the information on the grand jury packet that I was given by Special Agent Barto, I never received anything indicating that she testified to Count 1 of the indictment.

#6

This is the count that has the strong footing, the foundation for the indictment, all three of them, and so we have to figure these things out.

And I want to know -- I want -- I want that to be added as one of my grounds for my exculpatory motion, because I want to know who testified to that on June the 2nd. Now, the other dates it doesn't matter, because that doesn't -- then I'm not sure if they have to even come back in; maybe they do, maybe they don't. But on that particular date I want to be able to get everything started from the foundation, from the footing of this case.

(Tr. 3-199 & 3-200 at 25-16)

MR. HEARD: Also one more thing, your Honor. Okay, now,

#7

in the grand jury matter that I have for Ms. Barto, which I was recently given, it references Mr. Hernandez in Count 3 of the original pleading, which I know we're not supposed to talk about. But it references Mr. Hernandez in the money-laundering count. Which is absolutely fine, okay?

In Count 2, it references the sale that I supposedly made to Mr. Lewis on February 28, 2011.

And even as an unindicted coconspirator, I cannot say who was referenced at the grand jury matter of Count 1 to be able to attack it. And so that still places me in a situation where I am unable to defend myself properly, you know, to a ghost. Because I can attack and say, okay, in Count 3, Mr. Hernandez was, you know, the bulk of who you said was an unindicted coconspirator, which is absolutely fair. But in Count 1, I still do not know who is an unindicted coconspirator as far as the grand jury proceedings go.

TRIAL 3-113 at 5-7, 18, 19

THE COURT: Okay. All right. Let me first talk about proof of the conspiracy. We have two conspiracies; the conspiracies to distribute crack cocaine and cocaine, and the money-laundering conspiracy.

And to tell you the one I'm the most concerned about, Mr. Thompson, and I'd like to hear from you about, is the money-laundering conspiracy. If you will remind me of any evidence in support of the money-laundering conspiracy.

MR. THOMPSON: Would you like --

THE COURT: And please respond to each one.

#8

MR. THOMPSON: Would you like me to address it first, your Honor, in Count 6?

THE COURT: You need not address it in any particular order, but it's the one that's been troubling me.

MR. THOMPSON: Well, actually, if I may go in reverse, I think one leads into the other one.

THE COURT: Okay, you may.

MR. THOMPSON: And I think the evidence is largely duplicitous; I think sort of the same evidence applies, we belive, to both.

TRIAL 3-123 at 13, 14

MR. THOMPSON: If I may, I will go ahead with Count 6, because I think it sort of follows off of Count 1.

#9

TR. 3-124 at 17-23):

(TR. 3-124 at 17-23):

And in this case, and that's where I go back to the facts, the same sort of scenario that I just spoke about on Count 1 -- this flow of drugs, kilograms of cocaine going from Mr. Escalera to Victor Hernandez, to Mr. Heard, and then that money going back the other direction; Mr. Heard taking cash, U.S. currency in bulk, giving it back to Mr. Hernandez, who then sent it back to Mr. Escalera.

#10

(TR. 3-125 at 21, 22):

So the 1956, to be clear, is a promotion charge, your Honor, related to Count 1.

#11

TRIAL 3-128 at 7-25

Now, here we have had direct testimony by Mr. Hernandez and also, to some extent, Mr. Lewis. But Mr. Hernandez testified about the existence of the conspiracy. He identified the membership. He stated its objective and specifically testified about its overt acts, including the quantities of cocaine that was moved.

He named Mr. Escalera and himself and Mr. Heard as having a business agreement. He gave specific testimony about cutting the cocaine, repackaging it, exchanging drugs and money with Mr. Heard; describing in detail the amounts of drugs and money, because his own income was to some extent based on the quantities that he processed, for lack of a better term.

#12

So based on that evidence, whether or not I believe it or whether or not the jury's going to believe it, the Court finds that the United States has presented sufficient evidence for this issue to go to the jury. Considering the evidence in the light most favorable to the government, they could convict -- a reasonable jury could convict.

So I'm going to let that count, Count 1, the conspiracy

(Tr. 3-127 at 9-12):

#13

THE COURT: Count 6 doesn't deal with -- we'll talk about the house and things later. But what they are saying is that this property that went between you and Mr. Escalera, the testimony of Mr. Hernandez establishes that conspiracy.

TRIAL 3-198 at 12-18

MR. THOMPSON: Yes, your Honor. The person we will allege conspired with Mr. Heard to distribute cocaine is, among others, Mr. Escalera, Mr. Hernandez, and Mr. Lewis as far as the names that were specifically mentioned. Of course, inference could be drawn that there were more persons, but those persons have been addressed specifically within the province of the trial.

#14

(Tr. 3-199 at 13-24):

MR. THOMPSON: The one brief issue I will address that Mr. Heard raised, I will certainly agree as a matter of law that any action that Mr. Lewis took following his agreement to cooperate with the United States cannot and has not been considered to be a part of the conspiracy, because at that point he is a government cooperator. It's not something he's doing of his own free will.

#15

So to the extent that Mr. Lewis and Mr. Heard had an agreement dating back in time, that would have had to have been preceding approximately November of 2010. Anything after that, once he was contacted by law enforcement, I agree none of those following activities have contributed to the conspiracy.

TRIAL IA 20 at 20-25

things -- all of these things led agents to seek and to obtain a federal search warrant for the person and property of Mr. Heard early last summer.

#16

On the morning of June 7th, 2011, officers and agents executed a search warrant at the home of Mr. Heard in Merrick Place apartments in Lexington, Kentucky. They also

TRIAL 3-87 at 15-20

Q. Detective Qualls, you testified previously about a search warrant that was executed at Milam. Do you recall that testimony?

#17

A. Yes, I do.

Q. Were you present for that search warrant?

A. I was.

TRIAL 8-155 at 1-13

Q. And for approximately how long did you continue the ruse?

A. **I think we tried for maybe 10 or 15 minutes.**

Q. When he did not exit the residence, what happened next?

#18

A. **We decided to make a forcible entry. We approached the front door, knocked and announced, breached the front door open and cleared the house.**

Q. And were you one of the persons who breached the door on that date?

A. **I wasn't the one holding the ram, but I was one of the first into the house, yes.**

Q. And did you assist in the actual search of the home?

A. Yes.

TRIAL 3-69 at 11-16

A. **Every agency has different procedures; but yes, I am familiar with mine.**

#19

Q. Okay. And you are familiar, and so you have been to trial, and you know how the whole -- pretty much how the system works as a detective of the United States government. Correct?

A. Yes.

TRIAL 3-71 84 7-10

BY MR. HEARD:

Q. Well, anyway, If you had evidence that came from, let's say, a faulty search warrant, what would happen to the evidence in trial?

A. I've never had a faulty search warrant.

Q. Well, what would you guess would happen?

#80

TRIAL 3-107 84 8-85

So the first issue that he is asking me to raise is based in part on what he perceived to be an irregularity, in that the first indictment, albeit not the one he's being tried on, was issued and then referred to in the affidavit obtaining the search warrant, which actually occurred on June 5, 2011, by Judge Wier.

Then the search is executed on the various and sundry locations on June 7th. And based in great measure on the fruits of that search, subsequent to the indictment, the first superseding and then the second superseding came about.

And while your Honor I think understood that clearly before the lunch break and I think even ruled that there's nothing impermissible about that procedure, Mr. Heard has asked me to ask for purposes of this record to quash superseding indictment No. 1 and superseding indictment No. 2, that with which he was tried, because of the process that got us from the original indictment, through the search, to today.

THE COURT: All right. I understand better now.

#81