

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-4071

David E. McMaster

Petitioner

v.

United States of America

Respondent

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:15-cv-00106-DLH)

JUDGMENT

Before GRUENDER, BOWMAN and BENTON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

June 02, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:15-cv-00106-DLH)

ORDER

The petition for rehearing by the panel is denied.

August 22, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

United States of America,	)	
	)	
Plaintiff,	)	ORDER DENYING DEFENDANT'S
	)	MOTION FOR HABEAS RELIEF
vs.	)	
	)	Case No. 1:12-cr-172
David E. McMaster,	)	
	)	
Defendant.	)	

David E. McMaster,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 1:15-cv-106
	)	
United States of America,	)	
	)	
Respondent.	)	

Before the Court is David E. McMaster's "Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255" filed on August 7, 2015. See Docket No. 82. The Government filed a response in opposition to the motion on November 20, 2015. See Docket No. 87. McMaster filed a reply on April 25, 2016. See Docket No. 96. For the reasons outlined below, the motion is denied.

I. BACKGROUND

The Defendant, David E. McMaster, was the vice president in charge of operations of American Mortgage Specialists, Inc. ("AMS"). AMS was an Arizona corporation headquartered in Mesa, Arizona. Co-defendant Scott N. Powers was the chief executive officer and president of AMS. Powers was McMaster's supervisor at AMS.

AMS was in the business of originating residential real estate mortgage loans to borrowers in Arizona and other states and then selling the loans to institutional investors, including J.P. Morgan Chase and Wells Fargo. AMS obtained funding for the loans by selling participation interests in the loans to financial institutions, including BNC National Bank ("BNC").

BNC was a national bank with headquarters in Bismarck, North Dakota, and offices in several states, including Arizona. BNC's deposits were insured by the Federal Deposit Insurance Corporation ("FDIC"). BNC was a member of the Federal Home Loan Bank of Des Moines, one of twelve regional banks established by Congress to support mortgage lending. In January 2009, BNC's holding company was the recipient of approximately \$20 million in federal funds from the federal Troubled Asset Relief Program ("TARP"). The holding company deposited approximately \$18 million of the TARP funds into BNC.

On or about October 30, 2006, BNC entered into a loan participation agreement with AMS to provide funding for loans originated by AMS. BNC was a 100% participant in the AMS loans, that is, BNC provided all of the funding on loans to the borrowers in which BNC participated. Under its initial agreement with BNC, the maximum principal amount outstanding on the aggregate of all loans at any time during the participation term was \$25 million, rising in later agreements to \$27.5 million. Under its agreements and understandings with AMS, BNC could require AMS to repurchase loans when the loans did not sell by the loan maturity date and if AMS did not get an extension. AMS also was required by its agreements and understandings with BNC to provide financial information to BNC, including periodic financial statements, and AMS was required to maintain certain minimum tangible net worth and to meet certain financial ratios. AMS was also required to disclose any change in the status of the loan collateral.

BNC provided funding for each loan via a wire of funds from a "funding" account at BNC in Bismarck. When loans were sold to investors, the funds were to be wired from the investors, often bundled together as one wire for several loans, to a "purchase" account held at BNC in North Dakota and AMS was to send a "pay down" email to BNC notifying it of the sales. The pay down emails provided the loan number, the borrower's name, and the amount of the funds wired for the loan purchase. BNC used the pay down information to calculate the loan participation principal, interest and fees owed to BNC, and to calculate additional amounts where a loan sale was insufficient to cover amounts due from AMS. Based in part on the AMS pay down emails which identified loans that had been sold to investors, BNC sent monthly reports to AMS listing what BNC understood were the outstanding loans held for sale.

By October 2007, AMS began to experience cash shortages. To cover its deficit, McMaster and Powers caused AMS to send false information to BNC in order to continue to obtain mortgage loan funding from BNC. Without this funding, AMS would have ceased operations. In particular, McMaster and Powers caused employees of AMS to delay notification to BNC that loans had sold, waiting at times months after the loans had been sold to investors, until funds from new loan sales had been received in sufficient amounts to make "lapping" payments that would appear to match the dollar amounts reported in the pay down emails for the earlier-sold loans. At times, it would take a greater number of newly sold loans to cover the dollar amounts shown in the fraudulent pay down emails for the earlier-sold loans. Meanwhile, AMS used funds received from the earlier-sold loans to pay for the operations of AMS and to provide benefits to McMaster and Powers, including hundreds of thousands of dollars in salary, bonuses, and payments for personal expenses.

When BNC inquired as to why specific loans-usually the oldest loans-had not sold, McMaster and Powers would provide and cause to be provided to BNC false and misleading explanations to divert further scrutiny and then would cause pay down emails to be sent requesting pay downs on those loans, giving the impression that those loans had just sold.

The pay down emails were drafted by McMaster, who sent them to an AMS employee or an employee of an AMS affiliate and directed the employee to send them to BNC in Bismarck. At times, generally when he was on vacation or otherwise unavailable to monitor the incoming investor wires from new loan sales, McMaster sent an employee a list of "priority" pay downs, describing the order in which to pay down those loans in specific amounts based on the dollar amount of funds received from new sales and the balance in the purchase account. At times during and as part of the conspiracy, McMaster also falsely inflated the dollar amount of the loan sales reported in the pay down emails, which created the appearance of greater gains on the sales of loans, including instances where there was actually a loss on the sale. The false pay down emails also included requests for BNC to pay down hundreds of thousands of dollars of loans made to Powers and McMaster, funded by BNC. McMaster kept Powers fully apprised of the true status of the loans and actions taken to carry out the fraud.

McMaster and Powers also provided other materially false and misleading information to BNC about AMS' operations and financial condition. For example, McMaster and Powers caused an AMS employee to send financial statements to BNC which overstated AMS' cash-on-hand in order to reach the minimum requirements in its financial covenants with BNC, and which further created the appearance that AMS had liquid assets of over \$1 million when, in fact, cash actually available to AMS was significantly below that amount. The financial statements also disguised and "buried"

under marketing and advertising expenses, \$55,000 per month in payments that AMS was making under installment agreements with the IRS regarding a delinquency in unpaid payroll taxes. From his discussions with BNC, McMaster knew that one of the material facts in BNC's decision in agreeing to the loan funding arrangement was that AMS had resolved its payroll tax delinquency.

As the fraud continued and as BNC continued to fund loans, the loss to BNC continued to grow. In addition, McMaster and Powers used BNC funds to make hundreds of thousands of dollars in loans to themselves and used diverted funds to pay off the loans. By on or about April 20, 2010, only a handful of loans actually remained to be sold, totaling less than \$1 million, rather than the approximately \$27 million of loans for which BNC had advanced funds to AMS and had not been repaid. AMS closed in April 2010. The resulting loss to BNC caused by the fraud was approximately \$26 million. These losses exceeded the \$20 million that BNC received from TARP. BNC was unable to make its required TARP dividend payments to the United States Department of Treasury between February 2010 and December 2011.

On September 28, 2012, McMaster and Powers were charged in an Information with one count of conspiracy to commit bank fraud and wire fraud affecting a financial institution in violation of 18 U.S.C. § 1349. See Docket No. 1. On October 19, 2012, McMaster pled guilty to the offense charged pursuant to a written plea agreement. See Docket Nos. 14 and 16. McMaster signed a waiver of indictment prior to his plea of guilty. See Docket No. 12. On June 28, 2013, the Court sentenced McMaster to 188 months imprisonment and ordered restitution in the amount of \$28,564,470.46. See Docket No. 55. The restitution obligation is joint and several with co-defendant Powers who also pled guilty and was sentenced to 96 months imprisonment. McMaster appealed claiming the Court had misapplied the Sentencing Guidelines. The Eighth Circuit Court of Appeals

dismissed the appeal on May 9, 2014, citing the appeal waiver contained in the plea agreement and finding McMaster knowingly and voluntarily signed the plea agreement. United States v. McMaster, 564 Fed. App'x 875 (8th Cir. 2014) (per curiam).

McMaster filed the motion to vacate under 28 U.S.C. 2255 now before the Court on August 7, 2015. See Docket No. 82. In his motion, McMaster raises three claims of ineffective assistance of counsel with seventeen subparts. His fourth claim asserts court error with eleven subparts.

II. STANDARD OF REVIEW

“28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his ‘sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the maximum authorized by law.’” King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a “fundamental defect” resulting in a “complete miscarriage of justice.” Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion is not a substitute for a direct appeal, and is not the proper way to complain about simple trial errors. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994). A 28 U.S.C. § 2255 movant “must clear a significantly higher hurdle than would exist on direct appeal.” United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is “intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.” Davis, 417 U.S. at 343.

III. LEGAL DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL

McMaster broadly asserts three claims of ineffective assistance of counsel. The first claim relates to trial preparation and investigation; the second claim relates to the plea agreement; and the third claim relates to sentencing. Each claim has numerous subparts, although some of the subparts contain little explanation or support. As will be shown, McMaster freely and voluntarily pled guilty with the advice of competent counsel whom McMaster had retained.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. To be eligible for habeas relief based on ineffective assistance of counsel, a defendant must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, a defendant must establish that defense counsel's representation was constitutionally deficient, which requires a showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Id. at 687-88. In considering whether this showing has been accomplished, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. If the underlying claim (i.e., the alleged deficient performance) would have been rejected, counsel's performance is not deficient. Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996). Courts seek to "eliminate the distorting effects of hindsight" by examining defense counsel's performance from counsel's perspective at the time of the alleged error. Id.

Second, it must be demonstrated that defense counsel's performance prejudiced the defense. Strickland, 466 U.S. at 687. In other words, under this second prong, it must be proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings

would have been different." *Id.* at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 534 (2003). In a guilty plea context, a defendant must establish a reasonable probability that he would not have pled guilty and would have exercised his right to a trial but for counsel's ineffectiveness. Hill v. Lockart, 474 U.S. 52, 59 (1985). Merely showing a conceivable effect is not enough. *Id.* An increased prison term may constitute prejudice under the *Strickland* standard. Glover v. United States, 531 U.S. 198, 203 (2001).

There is a strong presumption that defense counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996). A court reviewing defense counsel's performance must make every effort to eliminate hindsight and second-guessing. Strickland, 466 U.S. at 689; Schumacher v. Hopkins, 83 F.3d 1034, 1036-37 (8th Cir. 1996). Under the *Strickland* standard, strategic decisions that are made after a thorough investigation of both the law and facts regarding plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690.

Where a defendant raises multiple claims of ineffective assistance, each claim of ineffective assistance must be examined independently rather than collectively. Hall v. Luebbers, 296 F.3d 685, 692-93 (8th Cir. 2002); Griffin v. Delo, 33 F.3d 895, 903-04 (8th Cir. 1994). Cumulative error will not justify habeas relief. United States v. Brown, 528 F.3d 1030, 1034 (8th Cir. 2008); Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990).

1. TRIAL PREPARATION AND INVESTIGATION

McMaster claims his defense counsel failed to test the Government's case, conduct an investigation, obtain discovery, ask for an evidentiary hearing, recuse the judge, ask for a change of venue, present mitigating evidence, object to the Presentence Investigation Report, and object to his co-defendant's sentencing memorandum. These arguments are either clearly contradicted by the record, unsupported, or have no legal basis to support them. Insofar as McMaster has attempted to support his contentions through his "declaration," the Court finds McMaster's "declaration" to be self-serving, unpersuasive, and contrary to the acknowledgments he made in open court at the change of plea and sentencing hearings. See Docket No. 97. The underlying facts of the fraudulent scheme in which McMaster fully participated are well-established and thoroughly set forth in the plea agreement and the Presentence Investigation Report. See Docket Nos. 14, ¶ 6, 38, ¶¶ 4-16.

McMaster's contentions that defense counsel failed to test the Government's case, conduct an investigation, obtain discovery, and ask for an evidentiary hearing are not supported by the record. In a claim that defense counsel was ineffective for failing to adequately investigate, a defendant must show what favorable information counsel would have discovered in a more thorough investigation, and how the favorable information would have affected the outcome of the proceeding. Kilgore v. Bowersox, 124 F.3d 985, 994 (8th Cir. 1997); Otey v. Grammar, 859 F.2d 575, 578 (8th Cir. 1988); United States v. Barth, 488 F. Supp. 2d 874, 882-83 (D.N.D. 2007). McMaster makes no such showing and the Court finds his contention unpersuasive. There is no explanation as to what sort of evidentiary hearing was necessary or what evidence would have been received at this hearing, and the Court rejects the idea that one was necessary.

The record reveals that McMaster's retained defense counsel vigorously tested the Government's case and obtained discovery. Prior to the plea agreement, the Government made

McMaster and his counsel aware that at least two of McMaster's co-conspirators were cooperating with the Government and would describe McMaster's major role in the conspiracy. McMaster and his counsel were made aware of the substantial documentary evidence corroborating the testimony of the cooperators, including emails in which McMaster instructed AMS employees to send to BNC the materially false and misleading pay down emails. At the change of plea hearing, the Court inquired regarding discovery made available to McMaster as follows:

The Court: Do you feel that you've had sufficient time to review the discovery and the evidence that the United States has turned over and would present against you if this case went to trial.

The Defendant: Yes, sir, I have.

See Docket No. 64, p. 12.

Later in the change of plea hearing, Master affirmed that he made the decision to plead guilty after reviewing the discovery and consulting with his attorney. See Docket No. 64, p. 19.

McMaster also contends defense counsel failed to recuse the judge and ask for a change of venue. The charges in this case alleged that McMaster committed the conspiracy offense "in the District of North Dakota and elsewhere." See Docket No. 1. The victim of the fraudulent scheme, BNC Bank, has its headquarters in Bismarck, North Dakota. The emails and other communications which supported the fraudulent scheme were made between Arizona, where McMaster and AMS were located, and BNC Bank in Bismarck. Hence, the crime was committed in the District of North Dakota against a victim based in the District of North Dakota. It is well-settled that a trial court has broad discretion in determining whether a defendant should be granted a change of venue. See Walker v. Bishop, 408 F.2d 1378, 1369 (8th Cir. 1969). The Government's choice of forum is ordinarily respected. See United States v. McManus, 535 F.2d 460, 463 (8th Cir. 1976). Venue is

decided by Rule 18 of the Federal Rules of Criminal Procedure, which states in relevant part “the government must prosecute an offense in a district where the offense was committed.” Fed. R. Crim. P. 18. Thus, venue for the offense was perfectly proper and appropriate in the District of North Dakota.

McMaster was charged with and pled guilty to conspiracy to commit bank fraud and wire fraud affecting a financial institution in violation of 18 U.S.C. §§ 1349 and 982(b)(1) and 21 U.S.C. § 853(p). In *United States v. Hull*, the Eighth Circuit Court of Appeals held that venue is proper “in any district in which any action in furtherance of the conspiracy was committed by any of the conspirators even though some of them were never physically present there.” 419 F.3d 762, 768 (8th Cir. 2005) (emphasis added). See also 18 U.S.C. § 3237(a) (“any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.”). Given the strong opposition of the Government and the victim to any venue other than the District of North Dakota, there is no reasonable probability that Court would have granted a motion for change of the venue had one been requested.

McMaster also alleges that “had counsel filed to recuse the Judge he would have protected his client from the harsh sentence imposed by the Court.” See Docket No. 82, p. 17. Disqualification is only required if a reasonable person, knowing the circumstances, would question the judge’s impartiality, even though no actual bias or prejudice has been shown. United States v. Tucker, 78 F.3d 1313, 1324 (8th Cir. 1996). McMaster’s allegation that BNC Bank and the Court and/or its employees must have a business relationship because the federal courthouse in Bismarck is located

a few blocks from BNC Bank is pure speculation and a grossly inadequate basis on which to seek, much less to obtain, the recusal of a presiding judge.

McMaster further contends defense counsel failed to present mitigating evidence, object to the Presentence Investigation Report, and object to his co-defendant's sentencing memorandum. Defense counsel submitted a great deal of mitigating evidence including sentencing memorandum, a statement from McMaster himself, and more than 100 letters of support. See Docket Nos. 26, 26-1, and 26-2. In addition, defense counsel presented mitigating evidence during the sentencing hearing. See Docket No. 65, pp. 59-70. Defense counsel made two specific objections to Sentencing Guideline enhancements. See Docket No. 38, p. 19-20. The Sentencing Guideline objections were contemplated by the plea agreement, discussed at length in the sentencing memorandum and Presentence Investigation Report, and the subject of a great deal of debate at the sentencing hearing. See Docket Nos. 14, p. 8, 38, pp. 19-20, 26, pp. 9, 23-26, and 65, pp. 6-42. McMaster's suggestion otherwise is wholly inaccurate. As for co-defendant Powers' sentencing memorandum, it had no impact on the sentence McMaster received.

2. THE PLEA BARGAIN/PLEA AGREEMENT

McMaster contends his attorney was ineffective in relation to the plea agreement in that he gave erroneous advice to McMaster as to the sentence he would receive, allowed him to waive his appeal rights, did not advise him of the possibility of a binding plea agreement, and advised him to plead guilty to conduct that was not attributable to him. These contentions are unpersuasive. In addition, these contentions are contradicted and largely negated by McMaster's plea of guilty which the Court finds to be knowing and voluntary. See McMaster, 564 Fed. App'x at 876 ("the record

reflects that McMaster knowingly and voluntarily assented to the plea agreement and waiver” of the right of appeal).

The contention that McMaster pled guilty to conduct that was not attributable to him is wholly contradicted by the record. The Government had a very strong case which was supported by the cooperation received by co-conspirators Scott Powers and Laretta Horton, who also pled guilty and agreed to testify against McMaster. The plea agreement contained a detailed factual statement as well. See Docket No. 14, ¶ 6. A binding plea agreement was not possible given the disagreement of the parties as to whether certain Sentencing Guideline enhancements applied and as reflected in the plea agreement. See Docket No. 14, ¶ 14.

The contention that defense counsel erred by advising McMaster to sign a plea agreement which contained a waiver of appeal rights fails as well. Such waivers are very common. Nearly every federal plea agreement contains such a waiver. The Court specifically advised McMaster that if he was sentenced within the Sentencing Guideline range he could not appeal. See Docket No. 64, p. 26. At the change of plea hearing, McMaster advised the Court that he had read the plea agreement “many times” and reviewed it in detail with his counsel before he signed it. See Docket No. 64, p. 25. The plea agreement contained an unambiguous waiver of McMaster’s right to appeal his conviction and sentence. Paragraph 22 of the plea agreement provides in part:

By signing this agreement, defendant voluntarily waives defendant’s rights to appeal the Court’s judgment against defendant; and, absent a claim of ineffective assistance of counsel, defendant waives all rights to contest the Judgment in any post-conviction proceeding, including one pursuant to Title 28, United States Code, Section 2255. Defendant reserves only the right to appeal from a sentence that is greater than the upper limit of the Court-determined Sentencing Guidelines range.

See Docket No. 14, p. 13 (emphasis added). Paragraph 22 further provides:

Defendant and defendant's attorney acknowledge they have fully reviewed and fully discussed the record in this case and all issues that may be raised on appeal. They have fully discussed defendant's right of appeal and the consequences of waiver. Defendant has decided to waive any right of appeal, except as may be provided herein.

Further, the plea agreement states, "Defendant understands and agrees this case will be over once defendant has been sentenced by the Court. . . . The United States will rely upon defendant's waiver . . . as a basis for dismissal of the appeal." See Docket No. 14, p. 13.

The Court thoroughly questioned McMaster about the appeal waiver and ensured that he understood it:

The Court: Well, every defendant also has a right to plead guilty, and when you make that decision, then you give up your right to a jury trial. But you also, as a result of a provision in the Plea Agreement that I'll talk to you about, agree to give up or waive your right to appeal the conviction on your record and the sentence that I order you to serve as long as I order a sentence that falls within the sentencing guidelines that are found to apply to you. Do you understand that?

The Defendant: Yes, sir, I do.

See Docket No. 64, p. 19.

Later in the change of plea hearing, the Court again asked McMaster whether he understood the appeal waiver, and McMaster responded, "Yes, sir, I do." See Docket No. 64, p. 26. The Court made clear, "If we get to the sentencing hearing and I choose to sentence you anywhere within the sentencing guideline range that is found to apply to you, in this paragraph [22] you have agreed not to appeal that, not to challenge it in any way. Do you understand that?" See Docket No. 64, p. 26 (emphasis added). Again, McMaster replied, "Yes, sir, I do." See Docket No. 64, p. 26. The Court explained further: "Waiver of appeal provisions are really designed to put some closure to this case after you, as a defendant, have been sentenced, and hopefully are designed to eliminate any appeals." See Docket No. 64, p. 27. The record is clear that McMaster was fully informed of his right to appeal

and that he knowingly and voluntarily chose to plead guilty and limit his appeal rights as part of his plea agreement.

McMaster has failed to demonstrate either deficient performance by his attorney or prejudice in relation to the decision to sign the plea agreement and plead guilty. Thus, his claims relating to the plea agreement and the decision to plead guilty fail.

3. SENTENCING

McMaster contends his attorney was ineffective during the sentencing stage by failing to contest several sentencing enhancements, failing to object to statements made by the prosecutor, and failing to object to statements made by the Court. The record reveals defense counsel vigorously contested the sentencing enhancement. The statements made by the prosecutor and judge, which McMaster erroneously refers to as “testimony,” were entirely proper in the context of a sentencing hearing. The prosecutor’s statements were argument and entirely permissible. The Court’s statements were its rulings, albeit ones McMaster may have disagreed with.

In the plea agreement, McMaster agreed to plead guilty to the conspiracy charge in the information. The parties jointly agreed to the application of certain Sentencing Guideline enhancements. Specifically, the parties agreed to a base offense level of 7 (U.S.S.G. § 2B1.1(a)(1)), an upward adjustment of 22 levels for a loss exceeding \$20 million but less than \$50 million (U.S.S.G. § 2B1.1(b)(1)(L)), and an upward adjustment of 2 levels for an offense involving sophisticated means (U.S.S.G. § 2B1.1(b)(10)(c)). See Docket No. 14, p. 8. The parties did not reach an agreement as to whether an upward adjustment of four levels under U.S.S.G. § 2B1.1(b)(15)(B)(i) for an offense which substantially jeopardized the safety and soundness of a financial institution

applied. In addition, the parties disagreed whether an enhancement of four levels under U.S.S.G. § 3B1.1 for McMaster's role in the offense as an organizer and leader of the criminal activity was warranted. See Docket No. 14, p. 8.

The Presentence Investigation Report recommended that the base offense level of seven be increased by four different enhancements: twenty-two levels for amount of loss; two levels because the offense involved sophisticated means; four levels for substantially jeopardizing the safety and soundness of a financial institution; and four levels for McMaster's role in the offense. See Docket No. 38, p. 9. McMaster objected to the four-level enhancement for jeopardizing the safety and soundness of the victim bank and the four-level enhancement for being an organizer and leader of a criminal activity. See Docket No. 38, pp. 19-20.

McMaster's counsel also submitted a sentencing memorandum in which counsel asserted that the four-level enhancement for jeopardizing the safety and soundness of a financial institution was inapplicable. See Docket No. 26, pp. 23-25. McMaster's counsel also argued that a four-level enhancement for McMaster's role in the offense overstated his conduct and that any adjustment should not exceed two levels. See Docket No. 26, p. 26. Defense counsel urged the Court to impose a below-Guidelines sentence of between 42 and 72 months. See Docket No. 26, pp. 1, 9-16. Defense counsel also presented these arguments orally at the sentencing hearing. See Docket No. 65, pp. 6-42. While the Court ultimately rejected these arguments, the record clearly reflects that defense counsel ably contested the Guideline calculation and there is simply no merit to McMaster's assertion otherwise.

McMaster also contends defense counsel should have called his chiropractor to testify about the effect of concussions on his decision-making abilities. The Court notes that Dr. Porman

submitted a letter in support of McMaster which addressed this issue. See Docket No. 26-2, pp. 33-43. The decision of what witnesses to call is a matter of strategy. Strickland, 466 U.S. at 690. As the Court was made aware of this mitigating information, the Court finds counsel was not deficient and there was clearly no prejudice.

Like his other arguments, McMaster's claims of ineffective assistance at the sentencing stage are contradicted by the record.

B. COURT ERRORS

McMaster's contends in his motion that the Court made eleven errors, mostly at sentencing, which entitle him to Section 2255 relief. A remedy under 28 U.S.C. § 2255 is only provided in instances where the trial court lacked jurisdiction, constitutional errors were committed, or errors of law resulted in a fundamental defect in the proceedings in which the motion is filed. United States v. Addonizio, 442 U.S. 178, 185-186 (1979). McMaster's contentions are largely unsupported and none withstand even minimal scrutiny. His claims of court error, therefore, are subject to dismissal as being conclusory and lacking the sufficiency necessary to state a claim for relief. Hollis v. United States, 796 F.2d 1043, 1046 (8th Cir. 1986) ("vague and conclusory allegations are not sufficient to state a ground for relief under 28 U.S.C. § 2255"); Smith v. United States, 677 F.2d 39, 41 (8th Cir.1982) (conclusory allegations, unsupported by any specifics, are subject to dismissal); Smith v. United States, 618 F.2d 507, 510 (8th Cir.1980) (wholly conclusory claims will not suffice to command an evidentiary hearing).

In addition, McMaster's claims of court error are procedurally barred. If a claim could have been raised on direct appeal but was not, it is procedurally defaulted and cannot be raised in a Section

2255 motion unless the “defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent.” Becht v. United States, 403 F.3d 541, 545 (8th Cir.2005) (quoting Bousley v. United States, 523 U.S. 614, 622 (1998) (internal quotations and citations omitted)); see also Massaro v. United States, 538 U.S. 500, 504, (2003). McMaster’s claims of court error could have been raised on direct appeal, but were not. McMaster has not asserted cause and prejudice for his failure to raise these trial court error claims on direct appeal, nor does he make a meaningful assertion of actual innocence. Further, McMaster waived his right to file a Section 2255 motion in his plea agreement, save for claims of ineffective assistance of counsel. See Docket No. 14, p. 13. Section 2255 waivers are generally enforceable but such waivers are not absolute. See DeRoo v. United States, 223 F.3d 919, 923-24 (8th Cir. 2000) (ineffective assistance in the negotiation of and entry into a plea agreement cannot be waived). Despite the conclusory and unsupported nature of the claims, the procedural default, and the Section 2255 waiver, the Court will briefly address his claims.

In considering McMaster’s claims it is important to remember that despite McMaster’s egregious behavior in perpetrating a fraud which cost the victim bank over \$28 million dollars, the Court sentenced him at the low end of the 188-235 month advisory Sentencing Guideline range. McMaster contends the Court sentenced him under the assumption he would be able to successfully appeal his sentence. The Court held no such assumption. The Court fully understood and carefully explained to McMaster at the change of plea hearing the meaning of the appeal waiver contained in the plea agreement. See Docket No. 64, pp. 19, 26.

The Court’s comments about BOP policy and where McMaster may serve his sentence were just that, comments. The Court did not base its sentence on those factors. Nor did the Court base the sentence on community pressure. If it had done so, the sentence would have been much longer. The

Court was well aware McMaster was charged with conspiracy to commit bank fraud and wire fraud affecting a financial institution and not embezzlement. Any reference to embezzlement was made because the two crimes have the same base offense level under the Sentencing Guidelines (U.S.S.G. § 2B1.1) and McMaster clearly benefitted financially from his fraudulent scheme.

McMaster's contention that the Court misapplied the Sentencing Guidelines is not cognizable in a Section 2255 motion. The Eighth Circuit has held that "ordinary questions of guideline interpretation falling short of the 'miscarriage of justice' standard do not present a proper § 2255 claim." Auman v. United States, 67 F.3d 157, 161 (8th Cir.1995). The Court fully explained its rationale relating to the disputed Sentencing Guideline enhancements at the sentencing hearing and McMaster does not explain how the Court erred. The Court remains convinced the application of the two disputed Sentencing Guideline enhancements was proper.

Any disparity in the sentences McMaster and Powers received related to their respective roles in the fraudulent scheme and thus was proper under the Sentencing Guidelines. The Court's use of a preponderance standard in relation to sentencing and determinations as to whether certain Sentencing Guideline enhancements apply was also proper. United States v. Cole, 537 F..3d 923, 929 (8th Cir. 2008) (finding a preponderance of evidence standard of proof applies to judicial fact finding at sentencing, a standard that satisfies both the Fifth Amendment's guarantee to due process and the Sixth Amendment right to trial by jury).

McMaster's last claim is that the Court was improperly involved in plea negotiations. The claim is wholly unsupported and entirely false. The Court was not involved in plea negotiations in any way. The comments by the Court at the change of plea hearing regarding 80% of defendants

receiving a sentence within the applicable advisory Sentencing Guideline range were made long after the plea agreement had been negotiated, signed, and filed.

The Court finds as a matter of law that McMaster's claims of Court error are without merit. Thus, the grant of Section 2255 relief is unwarranted.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons set forth above, the Court **DENIES** McMaster's motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Docket No. 82). The Court also issues the following **ORDER**:

- 1) The Court certifies that an appeal from the denial of this motion may not be taken in forma pauperis because such a appeal would be frivolous and cannot be taken in good faith. Coppedge v. United States, 369 U.S. 438, 444-45 (1962).
- 2) Based upon the entire record before the Court, dismissal of the motion is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will not be issued by this Court. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). If the defendant desires further review of his motion he may request the issuance of a certificate of appealability by a circuit judge with the Eighth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated this 31st day of August, 2016.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court