APPENDIX

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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0138p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL SHANE MCCORMICK, SR.,

Petitioner—Appellant,

v. No. 22-5587

UNITED STATES OF AMERICA,

Respondent—Appellee.

Appeal from the United States District Court for the Eastern District of Kentucky at London.
Nos. 6:16-cr-00056-2; 6:19-cv-00198—Gregory F. Van Tatenhove, District Judge.

Argued: June 15, 2023

Decided and Filed: June 27, 2023

Before: GRIFFIN, KETHLEDGE, and THAPAR, Circuit Judges.

COUNSEL

ARGUED: Lawrence D. Rosenberg, JONES DAY, Washington, D.C., Anna Williams, WEST VIRGINIA UNIVERSITY, Morgantown, West Virginia, for Appellant. Lauren Tanner Bradley, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee. **ON BRIEF:** Lawrence D. Rosenberg, JONES DAY, Washington, D.C., for Appellant. Lauren Tanner Bradley, Charles P. Wisdom, Jr., UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee.

OPINION

THAPAR, Circuit Judge. Since his lawyer didn't file a notice of appeal, Michael McCormick moved to vacate his conviction. The district court denied the motion, and we affirm.

I.

McCormick pled guilty without a plea agreement to four offenses involving drugs or guns. For these crimes, the district court imposed a below-Guidelines sentence. McCormick didn't appeal.

Instead, ten months later, he moved to vacate his sentence under 28 U.S.C. § 2255. As relevant here, McCormick claimed that his trial counsel performed ineffectively by failing to file a notice of appeal. After holding an evidentiary hearing, a magistrate judge recommended denying the motion. The district court

agreed and adopted the report and recommendation. McCormick timely appealed.

II.

To succeed on an ineffective-assistance claim, a petitioner must show that counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We focus on the first requirement: deficiency. Our review of counsel's conduct is "highly deferential." *Id.* at 689. Put differently, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Here, that means McCormick must show: (1) counsel disregarded express instructions to file an appeal, or (2) counsel should have consulted McCormick about an appeal but didn't. *Roe v. Flores-Ortega*, 528 U.S. 470, 477–78 (2000). McCormick hasn't shown either.

First, the district court found that McCormick hadn't instructed counsel to file an appeal. We review that factual finding for clear error. *Neill v. United States*, 937 F.3d 671, 675 (6th Cir. 2019). In other words, we defer so long as the finding is "plausible on the record as a whole." *United States v. Estrada-Gonzalez*, 32 F.4th 607, 614 (6th Cir. 2022). And on this record, the finding is plausible. According to McCormick's own testimony, he told his counsel that he wanted to appeal under only two conditions: if he lost at trial, or if he "didn't feel like [he] was treated fairly" at sentencing. R. 456, Pg. ID 1650–51. So counsel told McCormick that if he felt he was being treated unfairly, he'd have to expressly tell counsel to file an appeal.

Neither of those conditions were met. Since McCormick pled guilty, there was no trial. Thus, the first condition wasn't met. And the district court found that the second condition wasn't met either. That factual finding wasn't clearly erroneous.

McCormick and his counsel disagree about what was said after sentencing. Counsel testified that McCormick expressed frustration with his sentence but never told him to file an appeal. McCormick says that he did, after telling his counsel, "You was no help." R. 456, Pg. ID 1653. Both stories couldn't be true, so after hearing the testimony and reviewing the record, the magistrate judge found counsel more credible. The district court agreed.

That choice wasn't clearly erroneous considering McCormick's admission that his memory had faded. To be sure, before McCormick pled guilty, he and counsel had contemplated the possibility of an appeal. But contemplating an appeal, without more, doesn't satisfy either of the conditions McCormick himself set out for when he wanted to appeal. Thus, there were "two permissible views of the evidence," so the district court's choice between them couldn't have been clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

McCormick raises two alternative arguments, one factual and one legal. The factual argument gets the same clear-error review described above, but we review the legal argument de novo. *Neill*, 937 F.3d at 675–76.

First, McCormick challenges the district court's factual finding that counsel consulted McCormick about an appeal. That finding was based on McCormick's

own testimony that counsel consulted him, which the district court credited. R. 456, Pg. ID 1652 ("Q. Did [counsel] ever come to you and talk with you and tell you what the risks, rewards were for appealing? A. Yes."); *see McCormick*, 2022 WL 2528240, at *7.

Now, McCormick argues the district court shouldn't have credited his testimony on this point since it discredited his testimony on other points. McCormick claims that, instead, the court should have credited counsel's testimony that he didn't consult with McCormick. But that argument fails for the same reason as his last factual argument: the district court had to decide between two plausible stories, so its choice couldn't have been clearly erroneous. *See Anderson*, 470 U.S. at 574. A district court can surely accept a party's own testimony about whether counsel consulted him, especially when that testimony is against his own interest. After all, a party generally won't make statements against his own interest unless he believes they're true. *Williamson v. United States*, 512 U.S. 594, 599 (1994). In any event, counsel testified that he and McCormick discussed an appeal on multiple occasions, further bolstering the district court's conclusion.

Next, McCormick's legal challenge. He claims that counsel was ineffective for consulting him before sentencing rather than after. In other words, McCormick claims that counsel was required to repeat his advice after sentencing. But the Constitution doesn't impose any such obligation. In fact, just the opposite.

The Supreme Court has interpreted the Sixth Amendment to guarantee criminal defendants the right to effective assistance of counsel at trial.

Strickland, 466 U.S. at 686. But that right doesn't prescribe rigid, technical rules. *Id.* at 688–89. That's because the Sixth Amendment doesn't set a trap for the unwary lawyer; rather, it "ensure[s] that criminal defendants receive a fair trial." *Id.* at 689.

Flores-Ortega follows that pattern. There, the Court once again rejected a rigid, technical rule in favor of a standard that ensures the defendant understands his appeal rights. *Flores-Ortega*, 528 U.S. at 477–81. The point is for counsel to help the defendant weigh the pros and cons of taking an appeal. In doing so, counsel must make a "reasonable effort to discover the defendant's wishes"—but only if the defendant hasn't gotten all the necessary information from another source. *Id.* at 478–80. For example, counsel need not consult his client about an appeal if the sentencing court's instructions were clear and informative. *Id.* at 479–80. And if the court's colloquy can relieve counsel of any obligation to consult, surely it's also relevant to whether counsel must repeat himself.

Here, the district court's model colloquy ensured that the defendant understood his rights. At the sentencing hearing, the district court provided McCormick written notice of his appeal rights. The court instructed McCormick to "talk to [his] lawyer about it" and then sign it when he was "comfortable." R. 325, Pg. ID 984. McCormick did so and assured the district court that he understood. After that colloquy and counsel's earlier consultation, McCormick knew everything he needed to decide whether to appeal. That's all the Sixth Amendment requires. *See Flores-Ortega*, 528 U.S. at 479–80. Thus, counsel's decision not to repeat himself was permissible under the Constitution.

Our caselaw supports this conclusion. Even without this kind of model colloquy, we have held that counsel need not repeat information that the defendant's already received. *See Johnson v. United States*, 364 F. App'x 972, 976 (6th Cir. 2010) ("[T]he fact that consultation occurred in the course of the case rather than after sentencing is not determinative."); *Shelton v. United States*, 378 F. App'x 536, 539 (6th Cir. 2010) (finding it sufficient under *Flores-Ortega* that "counsel met with petitioner on the day before sentencing"). The Seventh Circuit agrees. *Bednarski v. United States*, 481 F.3d 530, 536 (7th Cir. 2007).[1]

To be sure, we have also said, "trial counsel has a constitutional duty to consult with clients about filing an appeal *after the trial proceedings have concluded*."

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[1] In contrast, the Third Circuit has suggested that *Flores-Ortega* requires post-sentencing consultation. *United States v. Shedrick*, 493 F.3d 292, 301 (3d Cir. 2007); *see also United States v. Wright*, 180 F. App'x 348, 349 (3d Cir. 2006). Other circuits haven't weighed in as clearly. The First Circuit has held that pre-sentencing consultation was insufficient when counsel told the defendant merely that "his appeal waiver would prevent him from filing an appeal." *Rojas-Medina v. United States*, 924 F.3d 9, 18 (1st Cir. 2019). The Fifth Circuit has hypothesized that "the bulk of a constitutionally satisfactory consultation" may occur before sentencing but, to our knowledge, hasn't ever identified such a consultation. *United States v. Cong Van Pham*, 722 F.3d 320, 324 n.16 (5th Cir. 2013). The D.C. Circuit has held that counsel failed to consult when it was undisputed that counsel "advise[d the petitioner] in advance of the sentencing hearing that he would have the right to appeal" but didn't consult after sentencing. *United States v. Taylor*, 339 F.3d 973, 979 (D.C. Cir. 2003). The Fourth and Eleventh Circuits have specifically reserved the question. *Bostick v. Stevenson*, 589 F.3d 160, 166 (4th Cir. 2009); *Otero v. United States*, 499 F.3d 1267, 1270 & n.3 (11th Cir. 2007) (per curiam).

Smith v. State of Ohio Dep't of Rehab. & Corr., 463 F.3d 426, 434 (6th Cir. 2006) (emphasis added). But that statement doesn't bind us because it was dicta. First, it was made in passing and not critical to the claim in the case. *Smith* had nothing to do with the timing of consultation. Rather, the alleged error in *Smith* was counsel's failure to give his client a copy of the appeals court's decision in a timely manner. *Id.* at 432. Second, *Smith* denied habeas relief, so its discussion of counsel's deficiency didn't contribute to the judgment. *See id.* at 435–36. Thus, *Smith*'s isolated statement isn't binding. *See Wright v. Spaulding*, 939 F.3d 695, 701–02 (6th Cir. 2019).

In sum, the Constitution doesn't require counsel to repeat himself, especially when the district court conducts a model colloquy with the defendant about appeal rights. Here, counsel followed that commonsense rule and thus was not ineffective.[2]

III.

Finally, McCormick asks us to vacate his guilty plea because he didn't receive the benefit of his bargain (an appeal). But there was no bargain here. A bargain requires at least two parties to exchange promises or performance. *See United States v. Simmonds*, 62 F.4th 961, 967 (6th Cir. 2023) (noting that plea agreements are like contracts). McCormick may have expected an appeal, but the government didn't promise him that. So there isn't any bargain to enforce.

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[2] Because we don't disturb the district court's finding that counsel consulted McCormick about appealing, we need not reach McCormick's argument that it was unreasonable for counsel not to consult him.

McCormick doesn't cite any authority allowing us to vacate a plea in this situation. In fact, the cases he cites suggest we can't. For example, *Puckett v. United States*, 556 U.S. 129, 137 (2009), permits, but does not require, courts to vacate pleas when the government breaches its agreement. If a defendant isn't automatically entitled to vacatur when the government breaches a bargained-for plea agreement, it's not clear why McCormick would have a right to vacatur when no one promised him anything.

McCormick also claims he's entitled to plea vacatur because the government forfeited any argument against this remedy by responding to it in a footnote. It's true that the government responded to McCormick's claim in a footnote. But the government wasn't required to respond to the argument at all. *Kennedy v. City of Villa Hills*, 635 F.3d 210, 214 n.2 (6th Cir. 2011) ("[A]ppellees do not [forfeit] claims by failing to respond to appellants' arguments on appeal."). And even if the government had to respond, its footnote explained why McCormick's argument was meritless.

Thus, McCormick can't get out of his guilty plea.

* * *

We affirm.

APPENDIX B

No. 22-5587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL SHANE MCCORMICK, SR.,
Petitioner—Appellant,

v.

UNITED STATES OF AMERICA,
Respondent—Appellee.

FILED
Sep 26, 2023
DEBORAH S. HUNT, Clerk

O R D E R

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

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL SHANE McCORMICK, Sr. Defendant.	)	Case No. 6:16-cr-00056-GFVT-HAI-2 Related Civil No. 6:19-cv-00198-GFVT-HAI **MEMORANDUM OPINION & ORDER**

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

This matter is before the Court on the Recommended Disposition filed by United States Magistrate Judge Hanly A. Ingram. [R. 489.] The Defendant, Michael Shane McCormick, Sr., has filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [R. 316; R. 319.] Consistent with local practice, Judge Ingram reviewed the motion and ultimately recommends that the Court deny Mr. McCormick's § 2255 motion in its entirety. [R. 489 at 27.] For the reasons that follow, Mr. McCormick's objections will be **OVERRULED**, and his motion will be **DENIED** in its entirety.

I

Mr. McCormick consented to plead before Judge Ingram, and on June 9, 2017, Mr. McCormick entered an open guilty plea to conspiring to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance in violation of 21 U.S.C. § 846 (Count 1s); possession with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance in violation of 21 U.S.C. § 841(a)(1) (Count 3s); possession of a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A) (Count 4s); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Count 5s). [R. 155; R. 156.] Mr. McCormick received a three-level reduction for acceptance of responsibility, and during sentencing on October 9, 2018, the Court granted the Government's motion for an additional one-level downward departure, which reduced Mr. McCormick's offense level to 33. [R. 326 at 10.]

With a criminal history category of VI because of his career offender status[1] and an offense level of 33, Mr. McCormick's Guidelines Range became 235 to 293 months, with an additional 60 consecutive months because of the 18 U.S.C. § 924(c) offense. *Id.* at 10–11. Given Mr. McCormick's age, the Court granted a slight downward variance from the bottom of the Guidelines Range and sentenced Mr. McCormick to

[1] As provided in the PSR, "[t]he defendant is a career offender given his conviction in Counts 1 and 3; and he is also an armed career criminal given his conviction in Count 5. The guideline calculations have been computed as to career offender since the calculation provides for the highest offense level." [R. 491 at 10.]

216 months as to each of Counts 1s, 3s, and 5s, all to run concurrently, and 60 months as to Count 4s to run consecutively to Counts 1s, 3s, and 5s, for a total prison term of 276 months. [R. 300 at 2.]

Mr. McCormick signed the Advice of Right to Appeal form at sentencing, which notified him that any notice of appeal was due within fourteen days. [R. 299.] Neither Mr. McCormick nor his trial counsel, the Hon. H. Wayne Roberts, filed a notice of appeal. On August 16, 2019, approximately ten months after his sentencing, Mr. McCormick timely filed his § 2255 motion. [R. 316.]

II

A

In Mr. McCormick's § 2255 motion, which he filed on August 16, 2019,[2] he asserts that trial counsel was ineffective in the following three ways: (1) for failing to file a notice of appeal; (2) for failing to object to the Presentence Investigation Report; and (3) for failing to secure a favorable plea deal or communicate the existence of one. [R. 319 at 2–4.] Judge Ingram appointed the Hon. Bryan Sergent to represent Mr. McCormick for the purposes of an evidentiary hearing and briefing on the issue of whether Mr. McCormick's trial counsel failed to file a notice of appeal. [R. 454.]

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[2] Mr. McCormick failed to sign his first § 2255 motion under penalty of perjury. [R. 316.] Judge Ingram ordered Mr. McCormick to resubmit a signed version of his § 2255 motion, which he filed on September 12, 2019. [R. 319.] In all other respects, the second § 2255 motion is identical to Mr. McCormick's first § 2255 motion. As Judge Ingram notes, "[t]hough the filing at Docket Entry 319 serves as McCormick's official § 2255 motion, the filing at Docket Entry 316 tolled the statute of limitations." [R. 489 at 3–4 n.3.]

On February 23, 2022, Judge Ingram issued a Recommended Disposition in which he thoroughly considered each of Mr. McCormick's claims and determined that Mr. McCormick is not entitled to relief. [R. 489.] In his Recommended Disposition, Judge Ingram laid out the *Strickland* elements required to prevail on an ineffective assistance of counsel claim under § 2255[3] and then responded to each of Mr. McCormick's arguments. *Id.*

1

First, Mr. McCormick argues that on the day he was sentenced, "he specifically instructed his attorney, Wayne Roberts, to file Notice of Appeal" and that his attorney "said he would." [R. 319 at 2.] Mr. McCormick argues that after several months went by and he had not heard anything, "it became readily apparent that the attorney had failed to file Notice of Appeal on behalf of his client's instructions." *Id.* Following briefing from the parties, Judge Ingram ordered an evidentiary hearing as to whether "counsel failed to file a notice of appeal when allegedly instructed to do so." [R. 361 at 2.] In his Recommended Disposition, after carefully evaluating the hearing testimony and briefing, Judge Ingram found that Mr. McCormick had failed to meet his burden "of showing by a preponderance of the evidence that he expressly instructed his trial counsel to file an appeal." [R. 489 at 13.] Judge Ingram specifically found, as to the conflicting witness testimony of Mr. McCormick and Mr. Roberts, that Mr. Roberts's

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[3] To succeed on an ineffective assistance of counsel claim, a defendant must (1) "show that counsel's performance was deficient," and (2) "show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

"testimony is more credible because it is consistent with other matters in the record." *Id.*

Next, Judge Ingram determined that Mr. McCormick conceded that Mr. Roberts consulted with Mr. McCormick about an appeal before sentencing. *Id.* at 17. However, because Mr. Roberts "testified that he did not discuss what the strengths and weaknesses of the case and potential appeal were" with Mr. McCormick, Judge Ingram analyzed whether the failure was objectively unreasonable. *Id.* at 17–18. Ultimately, Judge Ingram concluded that even if Mr. Roberts failed to consult with Mr. McCormick regarding an appeal, Mr. McCormick "has not shown that a rational defendant would want to appeal or that he reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 20. Judge Ingram also determined that Mr. McCormick failed to demonstrate the *Strickland* prejudice prong and ultimately recommended that Ground One be denied. *Id.* at 22.

2

Next, Mr. McCormick argues that his trial counsel was ineffective for failing to object to the PSR "relating to double counting regarding criminal history and relating to the prior convictions used to enhance the petitioner's sentence." [R. 319 at 3.] Mr. McCormick argues that if his attorney had objected to the double counting of his prior criminal history, "he would have enjoyed the benefit of having been assessed a lower criminal history score which would have equated into a lower sentencing guideline and subsequently a lower imposed sentence." *Id.* Mr. McCormick also argues that his attorney should have attacked "the validity of prior state convictions(s)" because he should have been

given the opportunity to "collaterally attack the validity of prior state conviction(s) used to enhance [his] federal sentence." *Id.*

After reviewing the record, Judge Ingram determined that Mr. McCormick's argument "is comprised of conclusory allegations, which are insufficient to prove his grounds for relief." [R. 489 at 22.] Judge Ingram noted that Mr. McCormick failed to "identify which of his prior convictions were calculated in error." *Id.* Next, Judge Ingram pointed out that "not all instances of double counting are impermissible." *Id.* (quoting *United States v. Sanbria-Bueno*, 549 F. App'x 434, 441 (6th Cir. 2013)). For instance, "it is not impermissible to use a prior conviction to establish an offense level and a criminal history score." *Id.* at 23 (quoting *Sanbria-Bueno*, 549 App'x at 441). Although Mr. McCormick argues that he was prevented from gathering details related to his claims even though that was what "he needed his counsel for in the first place," Judge Ingram noted that Mr. McCormick confirmed at sentencing he had received a copy of his PSR, had read and reviewed it with counsel, and had all of his questions answered by counsel. *Id.*

Furthermore, Mr. McCormick failed to identify which of his prior convictions occurred without the benefit of counsel, and "a review of McCormick's PSR and the KYeCourt's website indicates that McCormick was represented by counsel for each of the convictions used in calculating his offense level and career criminal designation." *Id.* (citing [R. 491 at 24, 26–28]). Judge Ingram also stated that "[t]o the extent McCormick challenges a prior state conviction on any basis other than a denial of the right to counsel, this argument is barred." *Id.* at 24 (citing *Smith v. United*

States, WL 1719909, at *2 (E.D. Tenn. July 21, 2005)). Ultimately, Judge Ingram recommended that Ground Two be denied. *Id.*

3

Finally, Mr. McCormick argues that his counsel was ineffective for "failing to either secure a favorable plea deal or to communicate to the petitioner the existence of one." [R. 319 at 3.] Mr. McCormick states that "when counsel has advised his client to just plead guilty without the benefit of a plea agreement, this constitutes ineffective assistance of counsel." *Id.* In his reply memorandum, Mr. McCormick argues that he "should have been afforded a much more favorable deal than that contained in the proffered agreement" because of his "minor role in the conspiracy." [R. 347 at 3.]

Judge Ingram first noted that "[n]o constitutional right to a plea bargain exists." [R. 489 at 25 (citing *United States v. Sammons*, 918 F.2d 592, 601 (6th Cir. 1990)).] In the plea agreement context, Judge Ingram found that Mr. McCormick had to show that his trial counsel "failed to inform him of a plea proposal offered by the government." *Id.* at 25 (citing *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003)). During the rearraignment, Mr. McCormick's trial counsel and the Government both stated that only one plea offer was made by the Government, and Mr. McCormick "then confirmed that he discussed the plea offer with his trial counsel and turned it down." *Id.* at 26 (citing [R. 324 at 18–19]). Although Mr. McCormick argues that counsel never showed him "a 15[-]year plea agreement," Judge Ingram noted that the plea agreement Mr. McCormick is referencing appears to be the same

one Mr. McCormick received. That plea agreement noted the statutory minimums for Counts One and Four were ten years and five years, respectively. *Id.* at 27. However, the statutory maximum Mr. McCormick faced was life imprisonment on both counts. *Id.* The plea agreement did not specify an agreed sentence. *Id.* Ultimately, Judge Ingram recommended that Ground Three be denied. *Id.*

Finally, Judge Ingram determined that reasonable jurists would not debate the denial of Mr. McCormick's § 2255 motion or conclude that the issue warranted further review as to Grounds Two and Three but could as to Ground One. *Id.* at 27–28. Because of this, Judge Ingram recommended that a certificate of appealability be granted as to Ground One and denied as to Grounds Two and Three. *Id.* at 28.

B

Under Federal Rule of Civil Procedure 72(b)(2), a petitioner has fourteen days after service to register any objections to the Recommended Disposition or else waive his rights to appeal. In order to receive de novo review by this Court, any objection to the recommended disposition must be specific. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). A specific objection must "explain and cite specific portions of the report which [defendant] deem[s] problematic." *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) (internal quotations and citations omitted). A general objection that fails to identify specific factual or legal issues from the recommendation, however, is not permitted, since it duplicates the Magistrate's efforts and wastes judicial economy. *Howard v. Sec'y of Health & Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991).

After receiving Judge Ingram's Recommended Disposition, Mr. McCormick's counsel timely filed objections to Ground One, and Mr. McCormick timely filed objections to Ground Three. [R. 492; R. 495.] However, no objections were filed as to Ground Two, that Mr. McCormick's trial counsel was ineffective for failing to object to the PSR. Because no objections were filed against Ground Two, the Court need not review that portion of Judge Ingram's Recommended Disposition. *Garrison v. Equifax Info. Servs.,* LLC, 2012 WL 1278044, at *1 (E.D. Mich. Apr. 16, 2012) ("The Court is not obligated to review the portions of the report to which no objection was made.") (citing *Thomas v. Arn, 474* U.S. 140, 149–52 (1985)).[4] However, the objections to Grounds One and Three are sufficiently definite to trigger the Court's obligation to conduct a de novo review, and the Court will review those specific objections. *See* 28 U.S.C. § 636(b)(1)(C). The Court has satisfied its duty, reviewing the entire record, including the pleadings, the parties' arguments, relevant case

[4] Although not required to do so, the Court has reviewed Ground Two and agrees with Judge Ingram's thorough analysis. The Court finds that Ground Two is comprised of conclusory and unsubstantiated allegations. Mr. McCormick did not identify which prior convictions were calculated in error, did not explain how double counting was impermissible in his case, and failed to address the fact that he received a copy of his PSR at sentencing and reviewed it and had all his questions answered. As such, the Court will adopt Judge Ingram's recommendation as to Ground Two. The only related argument Mr. McCormick made in his objection was that his trial counsel failed to request that his jail credit from a prior state sentence also be counted as part of his federal sentence. [R. 492 at 2.] However, Mr. McCormick fails to proffer any reason why his state and federal sentences should have run concurrently or show that any jail credit should have been awarded. Therefore, this argument fails.

law and statutory authority, as well as applicable procedural rules.

1

Mr. McCormick raised three objections to Judge Ingram's Recommended Disposition pertaining to Ground One. First, Mr. McCormick argues that he did show by a preponderance of the evidence that he directed his trial attorney to appeal on the day he was sentenced. [R. 493 at 1.] Second, Mr. McCormick objected to Judge Ingram's finding that Mr. McCormick's trial attorney appropriately consulted with him regarding his ability to appeal. *Id.* Finally, Mr. McCormick objects to Judge Ingram's finding that he was not prejudiced by a lack of consultation regarding his appeal rights.

As discussed *supra*, a movant is required to demonstrate both that his counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687–88. Courts apply the three-part sequential test articulated in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), "[t]o determine whether counsel's failure to file a notice of appeal was objectively unreasonable." *Short v. United States*, 786 F. Supp. 2d 1348, 1350 (W.D. Mich. 2011). First, a court "must determine whether the defendant gave counsel express instructions regarding an appeal." *Flores-Ortega*, 528 U.S. at 477. The "failure to perfect a direct appeal, in derogation of a defendant's actual request, is a *per se* violation of the Sixth Amendment. *Campbell v. United States*, 686 F.3d 353, 358 (6th Cir. 2012) (quoting *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998)). A "[m]ovant must show by a

preponderance of the evidence that he expressly requested that Counsel file a notice of appeal, and Counsel failed to do so." *Short*, 786 F. Supp. 2d at 1351 (citing *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006)).

Second, if there is no express instruction to file a notice of appeal, a court must ask "whether counsel consulted with the defendant about an appeal." *Id.* (quoting *Johnson v. United States*, 364 F. App'x at 976, 975 (6th Cir. 2010)). Consultation means "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 478).

Third, if counsel fails to consult with the movant, a court must ask "whether the failure to consult was objectively unreasonable." *Id.* (quoting *Johnson*, 364 F. App'x at 976). A court may find objective unreasonableness if either (1) "a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal)," or (2) "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480).

a

Under the first objection to Ground One, Mr. McCormick specifically argues that (1) he consistently testified that he asked Mr. Roberts on the day he was sentenced that he wanted to appeal; (2) prior to sentencing, he had made it explicitly known to Mr. Roberts that if he "was upset or didn't like the sentence," then he would want to appeal; (3) he attempted to contact Mr. Roberts' office but could not reach him;

and (4) in a letter sent months after sentencing, he asked Mr. Roberts why he had not filed an appeal. *Id.* at 4.

A review of the hearing testimony demonstrates that Mr. McCormick and Mr. Roberts agree that Mr. McCormick was upset following sentencing. The parties also agree that Mr. Roberts recommended Mr. McCormick take an open plea to preserve his appellate rights. [R. 456 at 56.] However, the parties disagree about whether Mr. McCormick asked Mr. Roberts to file an appeal following sentencing. Mr. McCormick testified that after the sentence, he was "a little heated." [R. 456 at 13.] He further testified that when Mr. Roberts told him they could file an appeal, Mr. McCormick responded "[w]ell, you need to do that." *Id.* Mr. McCormick also testified that he tried to call and email Mr. Roberts but never heard from him. *Id.* Several months later, Mr. McCormick wrote Mr. Roberts a letter in which he stated, "I know you worked hard for me and did your best, why you didn't go on and file a[n] appeal for me I don't know." [R. 343–1 at 4.]

Conversely, Mr. Roberts testified that although Mr. McCormick was upset following the sentencing, Mr. McCormick never told Mr. Roberts "he definitely wanted to appeal." [R. 456 at 57.] Mr. Roberts testified that he has been practicing law for approximately thirty years and has always filed a notice of appeal, which is a simple one to one-and-a-half page document, on behalf of his clients who request them regardless of whether he agrees with the decision to appeal.[5] *Id.* at 46. Although Mr. Roberts testified that

[5] Mr. Roberts testified that in the twenty years he has been on

he was suffering from some health issues while representing Mr. McCormick, he states they did not affect his representation. *Id.* at 66–67, 79.

Ultimately, the question is whether Mr. McCormick can demonstrate by a preponderance of the evidence that he expressly asked Mr. Roberts to file an appeal after sentencing. The parties' testimony directly conflicts as to this point. However, the Court has reviewed the record and finds that Mr. McCormick has not satisfied his burden. As Judge Ingram noted, "[Mr.] McCormick's [testimony] directly relates to his own self-interest and has no corroborating support."[6] [R. 489 at 13.] Although Mr. McCormick argues that he asked his trial counsel to file an appeal immediately after sentencing, he could produce no witness to corroborate this request. Further eroding Mr. McCormick's argument, he testified that his memory of the relevant events was not complete, stating "I can't remember all of the facts." [R. 456 at 7.]

As for the issue of Mr. McCormick's prior statements regarding his desire to appeal, Mr. McCormick testified that he told Mr. Roberts that if he lost at trial,

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the CJA panel, he has received approximately ten to fifteen appointments to represent federal criminal defendants per year, and he has filed approximately two to three appeals to the Sixth Circuit annually. [R. 456 at 45–47.]

[6] While it is true as Mr. McCormick argues that "it would be bad for [Mr. Roberts's] substantial federal practice" to be found to have rendered ineffective assistance of counsel [R. 493 at 5], that fact alone does not render his testimony uncredible or suspect. Furthermore, the burden is on Mr. McCormick, not Mr. Roberts to demonstrate by a preponderance of the evidence that Mr. Roberts rendered ineffective assistance. *Short*, 786 F. Supp. 2d at 1351 (citing *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006)).

he would seek an appeal. [R. 456 at 7, 9–10.] This assertion later became moot when Mr. McCormick decided to plead guilty instead of going to trial. Mr. McCormick also testified that he told Mr. Roberts that he would want Mr. Roberts to appeal if things "turn[ed] out bad for sentencing and [he] didn't feel like [he] was treated fairly." *Id.* at 11. However, Mr. Roberts testified that he spoke with Mr. McCormick about the appeals process prior to sentencing, and Mr. Roberts told Mr. McCormick to inform him if he wanted to file an appeal. *Id.* at 82. Specifically, Mr. Roberts testified to the following:

> All the discussions about appellate rights and appealing came from me to him. He just listened. And I told him that if, you know, that if he—wanted to appeal a sentence that was unreasonable, then just let me know, and we would do that. Again, in this—in this case, the sentence was extremely reasonable.

Id. Mr. McCormick's prior statements and Mr. Roberts's testimony confirm that Mr. Roberts clearly informed Mr. McCormick that if he wanted to appeal, he simply needed to let Mr. Roberts know. However, Mr. McCormick has not demonstrated, despite his prior statements, that he did in fact explicitly ask Mr. Roberts to file an appeal on his behalf.

Mr. McCormick also argues that he tried to email and call Mr. Roberts following sentencing but his communication went unanswered. [R. 495 at 5.] However, Mr. McCormick conceded that records of his emails and phone calls should have remained accessible, but he could provide no email or phone records to corroborate his argument. As for the letter Mr. McCormick

wrote to Mr. Roberts six months after he was sentenced, the language "[w]hy you didn't go on and file a[n] appeal for me I don't know," cannot reasonably be construed as Mr. McCormick expressly telling Mr. Roberts to file an appeal. [R. 343–1 at 4.]

The facts as provided by Mr. McCormick stand in contrast to Mr. Roberts's sworn affidavit. Mr. Roberts stated that after the sentencing, he told Mr. McCormick to let him know if he wanted to "appeal any aspect of his sentence or conviction, but Mr. McCormick did not do so," only responding, "[t]hanks a lot, you were no help" and walking out. [R. 344–1 at 1.] "A petitioner's self-serving statements in an affidavit that are contradicted by a credible version of events in an affidavit from his trial counsel may be incredible as a matter of law." *United States v. Walls*, 2008 WL 927926, at *12 (E.D. Ky. Apr. 4, 2008); *see also Cummings v. United States*, 84 F. App'x 603, 604–05 (6th Cir. 2003) (holding that a district court may credit counsel's affidavit insofar as it indicates the client did not ask him to file an appeal).

b

Mr. McCormick next objected to Judge Ingram's finding that Mr. Roberts adequately consulted with him about an appeal. In his Recommended Disposition, Judge Ingram made two key findings. First, Judge Ingram found, according to Mr. McCormick's own testimony, that Mr. Roberts discussed the risks and rewards of appealing with him before sentencing. [R. 489 at 17.] Because Mr. McCormick admitted that Mr. Roberts discussed the risks and rewards of appealing with him, "then counsel cannot be found to have acted unreasonably unless he ignored his client's

express wishes." *Johnson*, 364 F. App'x at 975. Second, Judge Ingram found that even if Mr. Roberts failed to consult with Mr. McCormick about an appeal, Mr. McCormick failed to demonstrate that a rational defendant would want to appeal or that he reasonably demonstrated to counsel that he was interested in appealing. *Id.* at 20.

Mr. McCormick objects to these findings, arguing that "Mr. Roberts acknowledged that he had a duty to consult with his client to determine if he wanted to appeal" and failed to do so. [R. 495 at 8.] Furthermore, Mr. McCormick argues that although there was "no question that Mr. McCormick was interested in an appeal and took actions throughout this case to preserve his right to appeal," Mr. Roberts failed to contact him after the sentencing hearing. *Id.*

After review, the Court finds that Mr. Roberts adequately consulted with Mr. McCormick about an appeal. First, as Judge Ingram noted, Mr. McCormick testified that before sentencing, Mr. Roberts consulted with him about an appeal and the risks and rewards of appealing. [R. 489 at 17 (citing R. 456 at 12).] Furthermore, the fact that Mr. McCormick did not confer with Mr. McCormick after the sentencing is not dispositive. *See Johnson*, 364 F. App'x at 976 (finding that "[a]lthough the better practice is always to confer with the client after sentencing, regardless of the discussion that has preceded it," *Flores-Ortega* does not require counsel to do so).

However, if Mr. Roberts did not consult with Mr. McCormick regarding an appeal, and Mr. Roberts testified that he did not, then the Court must analyze whether the failure to consult was objectively

unreasonable by determining whether "(1) a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 975 (quoting *Flores-Ortega*, 528 U.S. at 480). The Court "must consider all the information counsel knew or should have known." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480). Factors for the Court to consider include "whether the conviction follows a trial or guilty plea both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to the judicial proceedings," and also "whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Flores-Ortega*, 528 U.S. at 480.

Here, Mr. McCormick pleaded guilty and sought to cooperate with the United States. These facts indicate a desire by Mr. McCormick to "seek[] an end to judicial proceedings." *Flores-Ortega*, 528 U.S. at 480. Furthermore, Mr. McCormick testified that Mr. Roberts told him an appeal would likely be frivolous, and as Judge Ingram noted, Mr. McCormick "has not presented any non-frivolous grounds for an appeal." [R. 489 at 18.]

In addition, as Judge Ingram found, Mr. Roberts's opinion as to the applicable Guidelines Range that he shared with Mr. McCormick was reasonably accurate, "so when [Mr.] McCormick received a sentence below the Range an appeal was not reasonably likely." *Id.* Mr. Roberts memorialized in a letter to Mr. McCormick on April 30, 2017, that Mr. McCormick's

Guidelines Range would likely be 322–387 months, and given his career offender designation he "could be looking at life." [R. 343–1 at 6.] The letter also clearly indicated that this was only his opinion and that Mr. McCormick could not know the actual Guidelines Range until after the PSR was completed. *Id.* Mr. McCormick's Guidelines Range ended up being 235 to 293 months, plus an additional 60 months to run consecutive because of the 18 U.S.C. § 924(c) offense. This Court varied downward slightly and sentenced Mr. McCormick to a total term of 276 months.

Furthermore, as Judge Ingram noted, Mr. Roberts testified that his numerous conversations with Mr. McCormick about his appeal rights were one-sided, with Mr. Roberts talking and Mr. McCormick merely listening, and Mr. Roberts also told Mr. McCormick to let him know "if he wanted to appeal a sentence that was unreasonable." [R. 556 at 82.] Ultimately, the record demonstrates that Mr. McCormick and his counsel discussed Mr. McCormick's appeal rights and how he could appeal an unreasonable sentence, counsel laid out the possible Guidelines Range before Mr. McCormick chose to plead guilty, and Mr. McCormick received a sentence below the Guidelines Range. Although counsel for Mr. McCormick objects that "[t]he appeal in this case had no downside for the defendant," that is not the standard. [R. 493 at 9.] Ultimately, Mr. McCormick has failed to show that a rational defendant would want to appeal or that he reasonably demonstrated to Mr. Roberts that he wanted to appeal, and Mr. McCormick's objections will be overruled.

c

Finally, the Court notes that Mr. McCormick was not prejudiced even if Mr. Roberts failed to consult with him about an appeal. Mr. McCormick admitted that he knew of his appeal rights, including that he had fourteen days from the entry of judgment to file a notice of appeal. [R. 456 at 9, 27–28.] As discussed *supra*, although Mr. McCormick testified that he tried to call and email Mr. Roberts, his testimony is not corroborated, and Mr. McCormick failed to specify whether those calls and emails even occurred within the fourteen-day notice of appeal timeframe. Furthermore, Mr. McCormick's letter to Mr. Roberts was not written until six months after sentencing, and Mr. McCormick did not file his § 2255 motion until approximately ten months after sentencing. [R. 316; R. 343-1 at 4–5.] The Sixth Circuit has found that such a lengthy delay in filing the motion to vacate weighs against a finding that Mr. McCormick would have timely appealed. *See Cross v. United States*, 73 F. App'x 864, 866 (6th Cir. 2003) (finding a nearly eight-month delay between sentencing and filing motion to vacate indicated "no interest in an appeal"); *see also Johnson*, 364 F. App'x at 977 (finding that knowledge of right to appeal and failure to contact counsel "until two to three months after sentencing" revealed "an improbability that Johnson would have timely appealed"). Furthermore, Mr. McCormick testified that he and Mr. Roberts discussed the risks and rewards of appealing before sentencing, and Mr. Roberts informed him that an appeal would likely be frivolous. [R. 456 at 12.] Therefore, given Mr. McCormick's delay in writing the letter and filing the motion, in addition to the knowledge that the appeal would be

frivolous, the Court "cannot say that there is a reasonable probability [Mr. McCormick] would have timely appealed." *Johnson*, 364 F. App'x at 977. Mr. McCormick's objection is overruled.

2

Next, Mr. McCormick objects to Judge Ingram's recommendation that Ground Three, trial counsel's failure to "either secure a favorable plea deal or to communicate to the petitioner the existence of one," [R. 319 at 3] should be denied. Mr. McCormick argues that Mr. Roberts "must have been confused" when he stated at sentencing that Mr. McCormick had only been offered one plea agreement because "evidently there was a second plea offer that was offered that he never showed me or that we had discussed." *Id.* Mr. McCormick argues that there was a "plea offer of 15 years," which he "would have signed," and the "one [he] turned down" for "[two] life sentences." *Id.* at 1–2.

As to the first argument, that Mr. McCormick's trial counsel failed to secure a favorable plea deal, no constitutional right to a plea offer exists. *United States v. Martin*, 516 F. App'x 433, 443 (6th Cir. 2013) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.") (quoting *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)). Therefore, this argument is without merit.

However, counsel is required to notify their client of a prosecutor's plea offer. *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003) (finding that if a defense attorney fails "to notify his client of a prosecutor's plea offer," this "constitutes ineffective assistance of counsel under the Sixth Amendment"). This is true

because an individual's "right to effective assistance extends to the plea-bargaining process." *Rodriguez-Penton*, 905 F.3d 481, 489 (6th Cir. 2018). Here, Mr. McCormick objects to Judge Ingram's finding that "no plea bargain was ever made other than the one McCormick rejected." [R. 489 at 26.] In his objection, Mr. McCormick reiterates that counsel never showed him a fifteen-year plea deal. [R. 492.]

However, the evidence indicates the United States only ever offered one plea agreement in this case, and that Mr. McCormick was not only aware of this plea agreement but rejected it. Mr. McCormick only produced one plea agreement, and during the rearraignment, both Mr. McCormick's trial counsel and the Government stated that only one plea offer was ever made to Mr. McCormick. [R. 319 at 18–19.] Trial counsel for Mr. McCormick discussed this plea offer with Mr. McCormick, and Mr. McCormick turned it down. *Id.* at 19. As for the confusion regarding the existence of one plea offer for fifteen years and one for two life sentences, it appears that Mr. McCormick may have simply misread the proposed plea agreement he received. The plea agreement provides that "[t]he statutory punishment for Count One is imprisonment for not less than 10 years and not more than life," and "for Court Four is not less than 5 years nor more than life imprisonment" to be served consecutive to Count One. [R. 343-2 at 3.] However, the fact the statutory minimums for Counts One and Four are ten and five years respectively does not mean that Mr. McCormick would have only received a fifteen-year sentence. In fact, the proposed plea agreement did not contain any agreement between the parties as to the sentence. Ultimately, the Court finds that Mr. McCormick was

made aware of, and indeed rejected, the only plea agreement in this case. Therefore, this objection will be overruled.

C

The final issue is whether a certificate of appealability should issue as to any of Mr. McCormick's claims. A certificate of appealability may issue where the movant has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). It is the reviewing court's role to indicate what specific issues satisfy the "substantial showing" requirement. 28 U.S.C. §2253(c)(3); *Bradley v. Birkett*, 156 F. App'x 771, 774 (6th Cir. 2005).

Although Judge Ingram determined that Mr. McCormick failed to show by a preponderance of the evidence that he instructed his counsel to file an appeal, he determined that a reasonable jurist could interpret the record and the testimony differently. [489 at 28.] Therefore, Judge Ingram determined that a Certificate of Appealability should only issue as to Ground One: whether Mr. McCormick instructed his counsel to file an appeal. *Id.* Mr. McCormick did not object to Judge Ingram's recommendation, and the Court having reviewed the record and filings agrees that the only issue for which a certificate of appealability should issue is the filing of an appeal. Reasonable jurists would not find the merits assessments of Grounds Two or Three to be wrong or debatable, and therefore no Certificate of Appealability will issue as

to those grounds. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

III

Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** as follows:

1. Judge Ingram's Recommended Disposition **[R. 489]** is **ADOPTED** as and for the Opinion of the Court;

2. Mr. McCormick's motion to vacate his sentence under § 2255 **[R. 316]** is **DENIED AS MOOT**;

3. Mr. McCormick's motion to vacate his sentence under § 2255 **[R. 319]** is **DENIED WITH PREJUDICE**;

4. A Certificate of Appealability is **GRANTED** as to Ground One and **DENIED** as to Grounds Two and Three;

5. **JUDGMENT** in favor of the United States shall be entered contemporaneously herewith; and

6. Mr. McCormick's collateral proceeding is **DISMISSED AND STRICKEN** from the Court's active docket.

This the 7th day of July, 2022.

Gregory F. Van Tatenhove

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. MICHAEL SHANE McCORMICK, Sr., Defendant/Movant.	)	Criminal No. 6:15-cr-00056-GFVT-HAI-2 Related Civil No. 6:19-cv-00198-GFVT-HAI **JUDGMENT**

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

Consistent with the Order entered contemporaneously herewith, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, and the Court being otherwise sufficiently advised, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Judgment is **ENTERED** in favor of Respondent;

2. A Certificate of Appealability is **GRANTED** as to Ground One and **DENIED** as to Grounds Two and Three; and

3. All issues having been resolved, this case is **STRICKEN** from the active docket.

This the 7th day of July, 2022.

Gregory F. Van Tatenhove
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. MICHAEL SHANE McCORMICK, Sr., Defendant/Movant.	)	No. 6:16-CR-56-2-GFVT-HAI RECOMMENDED DISPOSITION

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

Federal prisoner Michael Shane McCormick, Sr., has filed a motion pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. D.E. 316, 319. McCormick attached a sworn declaration to his motion. D.E. 319–1. The government responded in opposition and included the affidavit of McCormick's trial-level counsel, Hon. H. Wayne Roberts, the only proposed plea agreement in the case, a 2017 letter from Roberts to McCormick, and a 2019 letter from McCormick to Roberts. D.E. 343. McCormick timely replied. D.E. 347. The record contains transcripts of McCormick's rearraignment (D.E.

324), sentencing (D.E. 325, 326), and evidentiary hearing (D.E. 456).

McCormick's motion raises three grounds for relief:

(1) Trial counsel was ineffective for failing to file a notice of appeal. D.E. 319 at 2.

(2) Trial counsel was ineffective for failing to object to the Presentence Investigation Report ("PSR"). *Id.* at 3.

(3) Trial counsel was ineffective for failing to secure a favorable plea deal or communicate the existence of one. *Id.* at 3–4.

Given the factual dispute as to whether McCormick instructed his trial attorney to appeal, after COVID-related delays, the Court conducted an evidentiary hearing on July 1, 2021. D.E. 454. The Court appointed Hon. Bryan Sergent to represent McCormick for the purposes of the evidentiary hearing and post-hearing briefing on Ground One. D.E. 361. McCormick and his trial counsel testified. D.E. 456. The hearing transcript was filed in the record. *Id.* McCormick, through counsel, filed a post-hearing memorandum on August 9, 2021. D.E. 458. This brief exclusively addresses Ground One. *Id.* That same day, McCormick filed a *pro se* memorandum stating that he received a copy of a plea deal with his trial counsel's affidavit that he had not previously seen. D.E. 459. The government filed its memorandum on August 23, 2021. D.E. 461.

As previously noted, Grounds Two and Three are so lacking in merit that no additional evidence is necessary. D.E. 361. As to these grounds, the Court recognizes that McCormick is proceeding *pro se*, without the assistance of an attorney. The Court construes *pro se*

motions more leniently than motions prepared by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Castro v. United States*, 540 U.S. 375, 381–83 (2003).

Under § 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*, 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).

I. Background

In June 2017, McCormick entered an open plea of guilty to conspiracy to distribute and possession with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, possession of a firearm during a drug trafficking offense, and felon in possession of a firearm. D.E. 156. By Judgment entered October 12, 2018, McCormick was sentenced to 216 months of imprisonment on each of the drug charges and felon-in-possession charge, to run concurrently, and 60 months of imprisonment on the possession of a firearm during a drug trafficking offense charge, to run consecutively, for a total term of imprisonment of 276 months. D.E. 300.

At sentencing, District Judge Van Tatenhove granted the government's motion for a one-level downward departure, making McCormick's offense level 33. D.E. 326 at 10. Thus, with a criminal history category of VI from his career offender status and an offense level of 33, McCormick's Guidelines Range became 235 to 293 months, with an additional consecutive 60 months stemming from the 18 U.S.C. § 924(c) offense.[1] *Id*. at 10–11; D.E. 325 at 31–32. Judge Van Tatenhove also found that McCormick's age warranted a slight downward variance from the bottom of this range to 216 months. D.E. 325 at 37, 39. On the date of sentencing, McCormick signed the Advice of Right to Appeal form, which notified him that any notice of appeal was due within 14 days. D.E. 299. Neither McCormick nor his trial counsel filed a notice of appeal. On August 8, 2019, per the prison mailbox rule,[2] McCormick timely filed his motion under § 2255.[3] D.E. 316.

II. Legal standards for IAC

Under § 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

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[1] McCormick was designated a career offender and armed career criminal under the Guidelines. D.E. 325 at 15, 16.

[2] Under the prison mailbox rule, a court filing is considered to be received by the Court the moment an inmate deposits it in the institution's legal mail system. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002) (citing *Houston v. Lack*, 487 U.S. 266 (1988)).

[3] McCormick's first filing was not signed under penalty of perjury. *See* D.E. 316. The Court ordered McCormick to resubmit a signed version of his § 2255 motion, which was filed on September 12, 2019. D.E. 319. Though the filing at Docket Entry 319 serves as McCormick's official § 2255 motion, the filing at Docket Entry 316 tolled the statute of limitations.

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*, 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).

An ineffective-assistance-of-counsel ("IAC") claim presents a mixed question of law and fact. *Mitchell v. Mason*, 325 F.3d 732, 738 (6th Cir. 2003). To successfully assert an IAC 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 made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. A defendant meets this burden by showing "that counsel's representation fell below an objective standard of reasonableness" as measured under "prevailing professional norms" and evaluated "considering all the circumstances." *Id.* at 688. However, a reviewing court may not second-guess trial counsel's strategic decisions. *Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002). Thus, "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." *Strickland*,

466 U.S. at 689 (internal quotations omitted). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

To prove prejudice under the second prong of *Strickland*, a 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. 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." *Id.* at 695.

> Strickland asks whether it is reasonably likely the result would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Harrington v. Richter, 562 U.S. 86, 111–12 (2011) (quotation marks and citations omitted).

To show prejudice in the sentencing context, a movant must establish that his "sentence was increased by the deficient performance of his attorney." *Spencer v. Booker*, 254 F. App'x 520, 525 (6th Cir. 2007) (citing *Glover v. United States*, 531 U.S. 198, 200 (2001)).

In the context of guilty pleas,"[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Thus, a defendant's "claims of ineffective assistance [that] do not attack the voluntary or intelligent nature of his plea by showing that counsel's advice was inadequate, but instead relate to earlier alleged constitutional deprivations" are waived. *United States v. Stiger*, 20 F. App'x 307, 308–09 (6th Cir. 2001). As such, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

The law is "clear that the failure to perfect a direct appeal, in derogation of a defendant's actual request, is a *per se* violation of the Sixth Amendment." *Campbell v. United States*, 686 F.3d 353, 358 (6th Cir. 2012) (quoting *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998). In such cases, prejudice is presumed, "regardless of whether the appeal would have been successful or not." *Ludwig*, 162 F.3d at 459.

The Sixth Circuit has summarized the appropriate analysis, as outlined by the Supreme Court in *Flores-Ortega*:

> First, we must determine whether the defendant gave counsel express instructions regarding an appeal. Second, if we find that the defendant did not provide express instructions, then we must determine whether counsel consulted with the defendant about an appeal. Finally, if there was no consultation, then we must decide whether the failure to consult was objectively unreasonable.

Johnson v. United States, 364 F. App'x 972, 975–76 (6th Cir. 2010) (discussing *Flores-Ortega*, 528 U.S. 470, 478–86 (2000)). As to the second step of the analysis, the Supreme Court has defined "consultation" as "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478.

If counsel fails to consult with his client, the Court must determine whether the failure to consult was unreasonable by determining whether "(1) a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Johnson*, 364 F. App'x at 975 (quoting *Flores-Ortega*, 528 U.S. at 480). In making this determination, the Court "must consider all the information counsel knew or should have known." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480). Factors for consideration include "whether the conviction follows a trial or guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to the judicial proceedings." *Flores-Ortega*, 528 U.S. at 480. The Court must also consider "whether the defendant

received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Id.*

To show prejudice, a defendant must prove that "there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484. "The question is whether [the defendant] 'would have' appealed, not whether 'his hypothetical appeal might have had merit.'" *Johnson*, 364 F. App'x at 977 (quoting *Flores-Ortega*, 528 U.S. at 486). The remedy for this type of *Strickland* violation is a delayed appeal. *Campbell*, 686 F.3d at 360.

Courts may approach the *Strickland* analysis in any order, and an insufficient showing on either prong ends the inquiry. *Strickland*, 466 U.S. at 697.

III. Hearing Testimony

At the evidentiary hearing, McCormick testified that, although he could not "remember all [of] the facts[,]" he believed the first meeting with his trial counsel involved discussing a proposed plea agreement that included two life sentences. D.E. 456 at 7. McCormick testified that he told Roberts he would "never sign nothing like that" and would rather go to trial. *Id.* McCormick also testified that he told Roberts if he lost at trial, he would want to appeal. *Id.* at 7, 9–10. McCormick stated that Roberts advised him not to accept the proposed plea deal and that he would keep his rights to appeal if he went to trial. *Id.* at 9–10.

According to McCormick, Roberts later indicated that his chances of success at trial were bleak and suggested that he enter an open plea. *Id.* McCormick

testified that he told Roberts he wanted Roberts to appeal "if things was to turn out bad for sentencing and [McCormick] didn't feel like [he] was treated fairly." *Id.* at 11. McCormick also stated that Roberts indicated he would not be sentenced to any more time in prison than his co-defendants. *Id.* Because his son received the highest imprisonment term, 188 months, McCormick stated that he was expecting to receive 180–190 months for his sentence. *Id.* McCormick testified that he told Roberts prior to sentencing that if his sentence did not "turn out like that, we'll appeal." *Id.* McCormick also admitted that Roberts counseled him on the risks and rewards of appealing. *Id.* at 12. Further, according to McCormick, Roberts stated that, although he thought doing so would be frivolous, he would file an appeal if that is what McCormick wanted. *Id.*

McCormick testified that, after his sentence was announced, he was "a little heated over it" and told Roberts, "Thanks, but you was no help." *Id.* at 13. According to McCormick, Roberts stated that they could file an appeal and McCormick responded by stating, "Well, you need to do that." *Id.* McCormick stated that, following sentencing, he did not remember receiving a copy of the Judgment from Roberts. *Id.* at 14. McCormick testified that he called Roberts multiple times and added him to CorrLinks, a prison e-mail system, but never received a response. *Id.* Then, several months later, McCormick sent a letter to Roberts asking why he did not file an appeal as discussed. *Id.* at 15.

During cross examination, McCormick was asked about having represented to the Court that he was never presented with a plea agreement. He stated, "I

think I meant to put 'an agreeable plea agreement." when asked why he stated, under oath, in his reply memorandum (D.E. 347) that he "never knew of the existence of a plea offer in the first place." D.E. 456 at 22; D.E. 347 at 3. McCormick also testified he understood that he had fourteen days from the entry of the Judgment to file an appeal. *Id.* 27–28. McCormick acknowledged he has a prior conviction for providing an officer a false name or address from 2002. *Id.* at 35.

Roberts testified that, during his thirty years of practice, he has always filed an appeal when directed to do so by his clients. *Id.* at 46–47. Further, Roberts stated that, in the event he does not agree that an appeal should be filed, he will still make the proper filing along with a motion to withdraw. *Id.* Roberts further testified that he wrote a letter to McCormick in April of 2017 memorializing several of their discussions regarding the case. D.E. 456 at 48–52. The letter includes Roberts's opinion that McCormick's Guidelines Range was potentially 322 to 387 months. D.E. 456 at 48–52; D.E. 343–1 at 6. The letter also states that Roberts would request potential changes to the previously proposed plea deal. D.E. 343–1 at 6–7; D.E. 456 at 53.

Roberts also testified that McCormick "misled" him as to the facts of the case. D.E. 456 at 54. Initially, McCormick told Roberts that he had no involvement in the drug conspiracy and that all of the involved firearms belonged to his co-defendants. *Id.* Because the proposed plea agreement included major discrepancies compared to McCormick's version of events, Roberts testified that he could not recommend that his client sign it. *Id.* at 54–55. Thus, Roberts recommended an open plea in order to preserve McCormick's appellate

rights. D.E. 343–3 at 1; D.E. 456 at 56. However, following his open plea, McCormick cooperated with the government and his version of the facts changed, aligning with the facts included in the plea deal. D.E. 456 at 55–56. McCormick admitted that several of the guns belonged to him and that he traveled to Tennessee to buy kilos of meth. *Id.*

According to Roberts, McCormick never told him that he "definitively wanted to appeal." *Id.* at 57. As to sentencing, Roberts testified that he assumed his client understood the information in the Advice of Right to Appeal form since McCormick read the document. *Id.* at 61. Roberts also testified that McCormick did not direct him to file an appeal on the date of sentencing. *Id.* According to Roberts, he believed that McCormick understood, based on their conversation, that he "received a break on his sentence." *Id.* at 62.

On cross examination, Roberts stated that he has had several medical issues arise, including while he represented McCormick. *Id.* at 66–67. However, Roberts later indicated the health issues did not impact his representation and that an appeal was "nothing . . . [he] couldn't do." *Id.* at 79. According to Roberts, he told McCormick that "if things [didn't] go to his satisfaction, then he [could] appeal it." *Id.* at 68. Roberts stated he recommended an open plea to his client for "several reasons," including the disparity between McCormick's version of events and what was alleged in the proposed plea agreement. D.E. 456 at 70. When pressed, he agreed that his affidavit (D.E. 343–3) and letter to McCormick (D.E. 343–1 at 6–7) only identify preservation of appellate rights as reasoning for the recommendation to reject the proposed agreement. D.E. 456 at 70. Roberts testified that McCormick

never communicated that "he wanted to appeal if he wasn't satisfied with the sentence[.]" *Id.* at 74.

Contrary to McCormick's testimony that Roberts did advise about the risks and rewards of appealing, Roberts stated there was no such consultation. *Id.* at 75. He explained that he believed there were no non-frivolous grounds for appeal because he "did not have the information in order to say that the government failed" in any way. *Id.* at 75–76. Roberts acknowledged he knew McCormick was not happy at sentencing but did not ask if he wanted to file an appeal. *Id.* at 77. Roberts testified that McCormick told him, "Thanks for nothin'." *Id.* Roberts stated that he sent a copy of the Judgment to McCormick, but did not otherwise contact his client after sentencing. *Id.* at 80–81. Roberts stated that, while he did not ask his client explicitly if he wanted to appeal, they did have several conversations prior to sentencing about his desires and Roberts told McCormick to let him know if he wanted to appeal an unreasonable sentence. *Id.* at 82. Roberts testified that these conversations were one-sided, McCormick just listened, and he never asked what his client thought an unreasonable sentence was. *Id.*

Roberts stated, while reviewing the Advice of Right to Appeal form at sentencing, he told McCormick that "Judge Van Tatenhove went down to the low end" as to the imposed sentence, that the sentence was reasonable, and that the document explained his rights to appeal. *Id.* at 83–86. However, Roberts then testified that he did not include this concept of a "good sentence" in his affidavit (D.E. 343–3) addressing the ineffective-assistance claim because he "might be wrong." D.E. 456 at 86. Roberts responded in the

negative to being asked, "Is it possible that [McCormick] told you to file an appeal and you didn't hear him because you were walking away?" *Id.* at 86–87. Roberts also reiterated that the context of his and McCormick's discussions regarding a potential appeal were "if the sentence was not within the guideline range or something like a life sentence or whatever, then he could appeal and he'd let me know that's what he want[ed]." *Id.* at 87.

In response to the Court's questioning, Roberts indicated he did not have any discussions with McCormick "about the sentences that were imposed upon the co-defendants in the case" or compare "what sentence [he] thought Mr. McCormick's sentence might be to any sentence that any co-conspirator received." *Id.* at 91.

IV. Ground One—IAC for Failure to File an Appeal

A. Express Instruction to File an Appeal

In considering McCormick's first ground for relief, the Court must determine whether he gave Roberts express instructions regarding an appeal. *Johnson v. United States*, 364 F. App'x 972, 975–76 (6th Cir. 2010). The testimony from both witnesses is consistent that, at bottom, McCormick was not happy at sentencing and he knew if he was not satisfied with the outcome of sentencing, then he could appeal. However, there is a discrepancy as to whether McCormick expressly told Roberts to appeal.

During the hearing, McCormick asserted that he told Roberts that, if he lost at trial, he would want to appeal. D.E. 456 at 7, 9–10. Of course, he later decided to plead guilty. McCormick also testified he told

Roberts that he wanted his counsel to appeal if things "turn[ed] out bad for sentencing and [McCormick] didn't feel like [he] was treated fairly." *Id.* at 11. McCormick stated that Roberts told him that he would not be sentenced to any more time in prison than his co-defendants. *Id.* Because his son received highest imprisonment term, 188 months, McCormick stated that he was expecting to receive 180–190 months for his sentence. *Id.* McCormick testified that he told Roberts prior to sentencing that if his sentence did not "turn out like that, we'll appeal." *Id.* McCormick also testified that, after his sentence was announced, he was "a little heated over it" and told Roberts, "Thanks, but you was no help." *Id.* at 13. According to McCormick, Roberts stated that they could file an appeal and McCormick responded by stating, "Well, you need to do that." *Id.*

Conversely, Roberts testified that McCormick did not direct him to file an appeal on the date of sentencing. *Id.* at 61. Prior to sentencing, Roberts testified that he told McCormick that "if things don't go to his satisfaction, then he can appeal it." *Id.* at 68. Roberts also acknowledged he knew McCormick was not happy at sentencing and did not ask if he wanted to file an appeal. *Id.* at 77. Roberts testified that McCormick told him, "Thanks for nothin'." *Id.* Roberts later clarified that McCormick "wasn't happy. It's a long sentence." *Id.* at 80. Roberts stated that, while he did not ask McCormick explicitly if he wanted to appeal, they did have several conversations prior to sentencing about his desires and Roberts told McCormick to inform him if he wanted to appeal an unreasonable sentence. *Id.* at 82. Roberts also reiterated that the context of his and McCormick's discussions regarding a

potential appeal were "if the sentence was not within the guideline range or something like a life sentence or whatever, then he could appeal and he'd let me know that's what he want[ed]." *Id.* at 87. Roberts also testified that he did not discuss with McCormick "the sentences that were imposed upon the co-defendants in the case" or compare what he "thought Mr. McCormick's sentence might be to any sentence that any co-conspirator received." *Id.* at 91.

The undersigned finds that McCormick has not met his burden of showing by a preponderance of the evidence that he expressly instructed his trial counsel to file an appeal. The only potential occurrence of an express instruction was directly after sentencing when McCormick claims he told Roberts to file an appeal. The testimony of the witnesses directly conflicts on this issue. The undersigned finds that Roberts's testimony is more credible because it is consistent with other matters in the record. On the other hand, where the two witnesses have inconsistencies in their testimony, McCormick's directly relates to his own self-interest and has no corroborating support. *See United States v. Walls*, No. 2:05-cr-92-WOB, 2008 WL 927926, at *12 (E.D. Ky. Apr. 4, 2008) ("A petitioner's self-serving statements in an affidavit that are contradicted by a credible version of events in an affidavit from his trial counsel may be incredible as a matter of law.") (citing *Gibson v. United States*, No. CV-06-5740, 2007 WL 210417, at *4 (E.D.N.Y. Jan. 25, 2007)).

McCormick relies heavily on the allegation that Roberts stated he would not receive a harsher sentence than his co-defendants in support of his claim that he instructed his trial counsel to appeal. This assertion is not credible because objective evidence in the

record undercuts it. Roberts testified that he did not discuss the sentences imposed upon the co-defendants or compare McCormick's potential sentence to theirs. D.E. 456 at 91, 96. Roberts's letter to McCormick describes his potential Guidelines Range as being 322–387 months, which includes the consecutive 60 months from the 924(c) offense. D.E. 343–3 at 1. The letter makes no mention of the codefendants' sentences. Roberts also testified that almost all of the co-defendants were cooperating with the government and were going to testify against McCormick. D.E. 456 at 92. It was not until after he pleaded guilty that McCormick decided to also cooperate with the government. *Id.* at 55.[4]

Further, Roberts testified he was concerned about McCormick's criminal history, potential sentencing enhancements, the gun offense, drug quantity, and career offender status. *Id.* at 91, 95–96. Because of this, Roberts believed McCormick would possibly "get a lot more" time than his co-defendants. *Id.* at 96. McCormick argues that Roberts's discussion of the co-defendants' sentences during his own sentencing supports his claim. D.E. 458 at 2–3. At sentencing, Roberts recommended "180 months on the drug charges" and "60 months on the gun charges[,]" to run consecutively, for a total term of imprisonment of 240 months. D.E. 325 at 24. Roberts did mention the sentences of the co-defendants during his recommendation to the

[4] It was also at this point that McCormick changed his version of the facts and revealed that he had been misleading Roberts regarding his involvement in the conspiracy. *Id.* at 54–56. McCormick does not refute that he misled his trial counsel, which is another factor weighing against his own credibility and bolstering Roberts's testimony.

Court, noting that Mr. Money received 144 months, and Mr. McCormick, Jr., received 188 months of imprisonment. *Id.* Roberts also noted that Mr. McCormick, Jr., was not a career offender but that Mr. Money did have that status. *Id.* Roberts stated that it was McCormick's criminal history that was "killing him." *Id.* at 27. While Roberts's recommendation on the drugs and 922(g) offenses was 180 months, which is similar to McCormick's son's sentence, his recommendation also included the consecutive 60 months for the 924(c) offense, for a total term of 240 months. D.E. 325 at 24. Roberts even stated during sentencing that McCormick's sentence was "going to be a lot more" in comparison to the sentences received by his co-defendants. *Id.* at 27. Roberts also testified at the evidentiary hearing that he was concerned about McCormick's criminal history, which is supported by his statements during sentencing. D.E. 456 at 91, 95–96. Thus, these significant distinctions between McCormick and his co-defendants, which are undisputed, undercut McCormick's claim that he expected to receive a similar sentence to theirs, communicated that expectation to Roberts, and instructed him to appeal when that did not happen.

McCormick also states that Roberts's discussion of the criminal histories of the co-defendants during sentencing is "the reason [he] was so upset because he believed he was getting a sentence closer to the other codefendants." D.E. 458 at 3. This is a far cry from being explicitly told by his trial counsel that he would not receive a sentence higher than his co-defendants. Indeed, Roberts's own sentencing recommendation was much higher than the referenced co-defendants' sentences due to the consecutive 60 months stemming

from the 924(c) conviction. McCormick's statutory minimum was 240 months, which Judge Van Tatenhove explained at sentencing he could not "pierce." *Id.* at 6–7. This alone makes McCormick's assertion that his counsel stated he would not receive more than 188 months of imprisonment, the most a co-defendant was sentenced to, not credible. Further, the letter Roberts sent to McCormick included the estimated Guidelines Range, which also stated McCormick may face life imprisonment if the career offender designation applied. D.E. 343-1 at 6–7. This letter is devoid of any notion that McCormick would receive a similar sentence to those of his co-defendants. Because the context of the case undercuts McCormick's claimed motivation to appeal, his testimony that, because of that motivation he instructed Roberts to appeal, is not credible.

As to the letter McCormick wrote to Roberts, this does not indicate that he explicitly told his counsel to file an appeal. Rather, the letter states, "Why you didn't go on and file a[n] appeal for me I don't know." D.E. 343-1 at 4. McCormick testified at the evidentiary hearing that the letter implies Roberts knew his client asked him to file an appeal. D.E. 456 at 41. However, such a vague statement does not indicate McCormick expressly told Roberts to file an appeal. In comparison, Roberts testified that he has always filed a notice of appeal when directed to do so by his clients. Both witnesses testified that McCormick was upset after the sentencing hearing and told Roberts "Thanks for nothing" or words to that effect. *Id.* at 13, 77.

It is true that Roberts's testimony and affidavit have some discrepancies between them, such as whether Roberts explicitly told McCormick he received a

reasonable sentence (*id.* at 84–86) and the reasons for recommending an open plea (*id.* at 70). However, the portions of Roberts's testimony central to McCormick's claims are supported by evidence in the record. On the other hand, the context as to why McCormick claims he instructed Roberts to appeal is inconsistent with the record. The record supports Roberts's version that no express instruction was given.

After reviewing the testimony from the evidentiary hearing, exhibits, and record as a whole, the undersigned finds that, because his testimony was not credible, McCormick has not met his burden to show that he expressly instructed his trial counsel to file an appeal.

B. Consultation Regarding an Appeal

Next, the Court must determine whether Roberts consulted with McCormick about an appeal. The Supreme Court has defined "consultation" as "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). According to McCormick's own testimony, Roberts did consult with him:

> Q. Did you—did he ever come to you and talk with you and tell you what the risks, rewards were for appealing?
>
> A. Yes.
>
> Q. When did he do that?
>
> A. Maybe before sentencing.
>
> Q. And what did you and he discuss when you—when he told you what he thought?

> A. He said—he still said that my appeal would probably be frivolous, but if he wanted—I wanted to appeal, he would.

D.E. 456 at 12. Thus, McCormick concedes this point through his own testimony, and, because he carries the burden in proving his grounds for relief, denial of Ground One on this independent basis is appropriate. *See Johnson*, 364 F. App'x at 975 (stating "If counsel has consulted with his client, then counsel cannot be found to have acted unreasonably unless he ignored his client's express wishes.").

However, Roberts testified that he did not discuss what the strengths and weaknesses of the case and potential appeal were with McCormick:

> Q. Prior to sentencing at any time in this case did you tell him what the strengths or the weaknesses of an argument were, what the strengths and weaknesses of his appeal were, or what the risks and benefits of an appeal were at any point in time?
> A. No. Because again, I did not have the information in order to say that the government failed to do this, failed to do that. And then again, after we had the sit-down downstairs, it came to light that the government was accurate in everything that they proposed.

Id. at 76. In any event, even if Roberts is correct that he did not consult with McCormick about an appeal, this does not end the inquiry. Instead, when counsel fails to consult with his client, the Court must analyze whether the failure was objectively unreasonable by determining whether "(1) a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) this particular

defendant reasonably demonstrated to counsel that he was interested in appealing." *Johnson,* 364 F. App'x at 975 (quoting *Flores-Ortega*, 528 U.S. at 480). In making this determination, the Court "must consider all the information counsel knew or should have known." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480). Factors for consideration include "whether the conviction follows a trial or guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to the judicial proceedings." *Flores-Ortega*, 528 U.S. at 480. The Court must also consider "whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Id.*

First, McCormick pleaded guilty, which, together with his eventual cooperation with the government, indicates he desired an end to the judicial proceedings. However, McCormick entered an open plea to preserve his appellate rights. McCormick testified that Roberts told him an appeal would likely be frivolous. D.E. 456 at 12. Further, McCormick has not presented any non-frivolous grounds for an appeal. While his § 2255 motion makes an ineffective assistance of counsel claim for failure to object to the PSR, as the Court will later discuss, this claim is without merit and does not amount to a non-frivolous ground to appeal. Thus, there is little room for a finding that a rational defendant would have wanted to appeal.

Further, the record shows Roberts's previous opinion on the applicable Guidelines Range was reasonably accurate, so when McCormick received a sentence below that Range an appeal was not reasonably likely.

As indicated in his letter, Roberts predicted McCormick's Guidelines Range would be 322–387 months, including the consecutive 60 months from the 924(c) offense. D.E. 343–1 at 6. Roberts also indicated that the career offender designation meant there was a "possibility that [McCormick] could be looking at life." *Id.* Roberts made clear that this was only his opinion and that he would not know the actual Guidelines Range until the PSR was completed. *Id.*

At sentencing, Judge Van Tatenhove granted the government's motions to reduce McCormick's offense level reducing it from 37 to 33, with a criminal history category of VI. D.E. 326 at 10; D.E. 325 at 11–12. This made McCormick's Guidelines Range 235 to 293 months with "the five-year consecutive on top of that" from the 924(c) charge. D.E. 326 at 10–11. However, McCormick's statutory minimum was 180 months based on the 18 U.S.C 922(g) charge. *Id.* at 5–6. This plus the mandatory consecutive 60 months from the 924(c) charge made his statutory minimum 240 months, which Judge Van Tatenhove explained he could not "pierce." *Id.* at 6–7. Judge Van Tatenhove confirmed McCormick understood this and that Roberts had previously explained the statutory minimum to him. D.E. 325 at 31–32. Judge Van Tatenhove later stated he would vary below the Guidelines Range after considering McCormick's age and the goals of 18 U.S.C. § 3553, resulting in a sentence of 216 months on the drug and 922(g) charges, to be served concurrently, and 60 months on the 924(c) charge, to be served consecutively, for a total imprisonment term of 276 months. D.E. 325 at 37–39.

Further, Roberts testified that all of his conversations with McCormick regarding his appellate rights

were one-sided and that he told McCormick to let him know "if he wanted to appeal a sentence that was unreasonable." D.E. 456 at 82. Roberts stated that the discussions regarding an appeal did not include that "if [McCormick] was dissatisfied, he'd wanted to appeal, or he would appeal." *Id.* at 87. Instead, Roberts clarified, "the component was, . . . if the sentence was not within the guideline range or something like a life sentence or whatever, then he could appeal and he'd let me know that's what he want[ed]." *Id.* Roberts stated, "[McCormick] wasn't happy. It's a long sentence[,]" indicating that he believed McCormick's unhappiness stemmed from the general length of the sentence. *Id.* at 80. This is supported by Roberts stating, "Again, . . . in this case, the sentence was extremely reasonable." *Id.* at 82. Indeed, McCormick received multiple breaks via downward departures and variances, and he has not demonstrated how his sentence was unreasonable.

Thus, taking into account what trial counsel knew and should have known at the time, the undersigned finds that McCormick has not shown that a rational defendant would want to appeal or that he reasonably demonstrated to counsel that he was interested in appealing. The record supports McCormick, at bottom, knew he could appeal if his sentence was unreasonable. His counsel provided a reasonably estimated applicable Guidelines Range. D.E. 343–1 at 6–7. This estimated range was fairly accurate, and, even if overstated, Judge Van Tatenhove made him aware of the actual applicable range and granted multiple downward variances. While McCormick reserved his right to appeal through an open plea and was unhappy after his sentence was announced, this is not sufficient to

show that a rational defendant would have wanted to appeal or that he reasonably demonstrated to his counsel that he was interested in appealing when weighed against other facts of the case. The potential sentence McCormick could have received given the applicable statutory range, Guidelines Range, and his criminal history, as opposed to the multiple downward departures applied and sentence he actually received, indicate a rational defendant would not want to appeal the sentence. Further, McCormick has not shown that he reasonably demonstrated to Roberts that he wanted to appeal given these facts. McCormick's sentence was reasonable, within the Guidelines Range, and a result of multiple breaks being granted by Judge Van Tatenhove. The evidence supports that he was unhappy with his sentence generally, but without more, McCormick has not shown that he demonstrated to Roberts he wanted to appeal.

C. Prejudice

Even if the undersigned found that Roberts failed to consult with his client about an appeal and that this failure was objectively unreasonable, McCormick's claim still fails because he has not shown that, but for counsel's failure, he would have timely appealed. McCormick admitted he was aware of his appellate rights, including that he had fourteen days from the entry of the Judgment to file a notice of appeal. D.E. 456 at 9, 27–28. McCormick testified that he attempted to call and e-mail Roberts but "never could get an answer" and did not leave any phone messages because "it just rang" with no answer. *Id.* at 14, 32. McCormick did not testify as to how many days, weeks, or months after sentencing these attempted calls and e-mails took place. *See id.* at 14–15, 32–33.

The vague timeline does not support a finding that McCormick took any steps to timely appeal.

The only evidence in the record to support that McCormick attempted to contact Roberts regarding his appeal is the letter he wrote six months after his sentencing. D.E. 343–1 at 4–5. McCormick then filed his § 2255 motion nearly four months after he wrote the letter to Roberts, which was ten months after his sentencing. D.E. 316. The Sixth Circuit has weighed such a delay in favor of finding that a defendant would not have timely appealed. *Cross v. United States*, 73 Fed. Appx. 864, 865 (6th Cir. 2003) ("[The defendant] waited nearly eight months after sentencing before asserting in his motion to vacate that he told counsel to file a notice of appeal. During that time, [the defendant] did not seek to file a belated appeal."); *Johnson*, 364 F. App'x at 977 (noting that the defendant waiting almost a full year after sentencing to file his § 2255 motion indicates he was unlikely to have timely appealed). The Sixth Circuit has also found that a defendant's knowledge of an appeal having little success is another factor indicating he would not have timely appealed. *Johnson*, 364 F. App'x at 977. Indeed, McCormick admitted that Roberts told him any appeal would be frivolous. D.E. 456 at 12.

Thus, the undersigned finds that, even if his trial counsel unreasonably failed to consult with him, McCormick has not shown that he would have timely appealed, and recommends that Ground One be denied.

V. Ground Two—IAC for Failure to Object to the Presentence Investigation Report

McCormick next claims that his counsel was ineffective for failing to object to the PSR, despite his instructions to do so. D.E. 319 at 3. To show prejudice in the sentencing context, a movant must establish that his "sentence was increased by the deficient performance of his attorney." *Spencer v. Booker*, 254 F. App'x 520, 525 (6th Cir. 2007) (citing *Glover v. United States*, 531 U.S. 198, 200 (2001)). "Yet, merely conclusory allegations of ineffective assistance . . . are insufficient to state a constitutional claim." *Wogenstahl v. Mitchell*, 668 F.3d 307, 335 (6th Cir. 2012); *see also Cross v. Stovall*, 238 F. App'x 32, 39–40 (6th Cir. 2007) (holding the defendant's IAC claim was "doomed by the fact that she [made] nothing more than conclusory assertions about actual prejudice"); *Hodge v. Haeberlin*, 579 F.3d 627, 640 (6th Cir. 2009) (citing *Strickland*, 466 U.S. at 693) ("The defendant must affirmatively prove prejudice.").

Ground Two of McCormick's § 2255 motion is comprised of conclusory allegations, which are insufficient to prove his grounds for relief. McCormick claims that, if his trial counsel had objected to "double counting regarding his prior criminal history," he would have received a lower criminal history score, which would have resulted in a lower sentence. D.E. 319 at 3. However, McCormick fails to identify which of his prior convictions were calculated in error. Further, "not all instances of double counting are impermissible." *United States v. Sanbria-Bueno*, 549 F. App'x 434, 441 (6th Cir. 2013) (quoting *United States v. Wheeler*, 330 F.3d 407, 413 (6th Cir. 2003)). For example, the Sixth Circuit has held "it is not impermissible

to use a prior conviction to establish an offense level and a criminal history score." *Id.* (citing *United States v. Crace*, 207 F.3d 833, 838 (6th Cir. 2000)).

In his reply memorandum, McCormick indicates that he was precluded from gathering the details related to his claims because this was what "he needed his counsel for in the first place." D.E. 347 at 1. However, McCormick confirmed at his sentencing that he received a copy of the PSR, read it, reviewed it with his trial counsel, and had all of his questions answered by his counsel. D.E. 325 at 3. McCormick bears the burden of proving his allegations by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (per curiam). Because McCormick has failed to explain the basis for his claim, such as which prior convictions he requested his trial counsel to challenge, how they were double counted, why any double counting was in error or any resulting prejudice, this portion of his claim should be denied.

McCormick also states that he "specifically asked his attorney to challenge the prior convictions used to enhance his sentence due to the fact that at least one of those convictions resulted without the benefit of the Sixth Amendment's guarantee to the right of effective counsel." D.E. 319 at 3. McCormick fails to identify which of his prior convictions resulted without the benefit of counsel. However, a review of both the PSR and the KYeCourts website indicates that McCormick was represented by counsel for each of the convictions used in calculating his offense level and career criminal designation. PSR at 24, 26–28. Roberts's affidavit indicates that the prior conviction McCormick took issue with "was approximately 6 years old, and the statute of limitations, in affiant's opinion, had ran." D.E.

344–1 at 2. In his reply memorandum, McCormick argues that this statement indicates that Roberts "was making guesses." D.E. 347 at 2. McCormick fails to provide any evidence that Roberts's assessment of the issue was incorrect and, again, does not identify which conviction he is challenging.

To the extent McCormick challenges a prior state conviction on any basis other than a denial of the right to counsel, this argument is barred. *Smith v. United States*, 1:05-CV-177, 2005 WL 1719909, at *2 (E.D. Tenn. July 21, 2005) (holding a defendant "can only collaterally attack those state convictions on the basis that he was denied his right to counsel") (citing *United States v. Custis*, 511 U.S. 485, 496 (1994) (holding the right to collaterally attack a prior criminal conviction in a subsequent proceeding for enhancement purposes is limited to the actual denial of counsel)); *see also Daniels v. United States*, 532 U.S. 374, 375 (2001) (extending *Custis* to § 2255 context).

To the extent McCormick argues that a prior state conviction occurred as a result of an actual denial of counsel that enhanced his current sentence, he fails to identify the particular conviction or further expound upon his claim. While McCormick also indicates that he was prevented from challenging the prior convictions due to "external factors," he bears the burden of proving the validity of his claims by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (per curiam). As noted, the PSR indicates that McCormick was represented by counsel for each of the prior convictions used to enhance his sentence. PSR at 24, 26–28.

McCormick has not provided a sufficient factual basis or legal argument as to the claims involved in Ground Two, when it is his burden to do so. Thus, the undersigned recommends that Ground Two be denied.

VI. Ground Three—IAC for Failure to Secure or Inform McCormick of a Plea Deal

McCormick clams his trial counsel was ineffective by "failing to either secure a favorable plea deal or to communicate . . . the existence of one." D.E. 319 at 3. Without any supporting authority, McCormick states "when counsel has advised his client to just plead guilty without the benefit of a plea agreement, this constitutes ineffective assistance of counsel." *Id.* In his reply memorandum, McCormick states that he "should have been afforded a much more favorable deal than that contained in the proffered agreement" due to his "minor role in the conspiracy." D.E. 347 at 3. McCormick then seems to assert that his trial counsel could have obtained a plea agreement that "would agree not to advocate for the usage of the prior convictions for the career offender status." *Id.* at 4. McCormick bases his argument on the assertion that "the government is always open to negotiate." *Id.*

No constitutional right to a plea bargain exists, and thus, McCormick had no right or ability to compel the government to offer a plea agreement. *United States v. Sammons*, 918 F.2d 592, 601 (6th Cir. 1990) (quoting *Weatherford v. Bursey*, 429 U.S. 545 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."). Thus, to succeed on an ineffective assistance of counsel claim, McCormick must show that his trial counsel failed to inform him of a plea proposal offered by the

government. *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003) ("A defense attorney's failure to notify his client of a prosecutor's plea offer constitutes ineffective assistance of counsel under the Sixth Amendment . . .").

Further, McCormick must also show that a plea offer was actually made by the government to succeed on his ineffective assistance of counsel claim. *Gregory v. United States,* 2:05-CR-64(1), 2013 WL 5350621, at *10 (E.D. Tenn. Sept. 23, 2013) ("Prejudice, in the context of a plea negotiations, has resulted only where there exists a reasonable probability that petitioner and the court would have accepted the guilty plea, i.e., the one which the government ***actually offered***.") (emphasis added) (citing *Lafler v. Cooper*, 566 U.S. 156, 174 (2012)); *see also United States v. Williams*, CR 7:14-015-DCR, 2017 WL 345873, at *2 (E.D. Ky. Jan. 24, 2017) (finding no ineffective assistance of counsel for failing to obtain a binding plea deal where defendant failed to show the United States ever offered such an agreement).

During McCormick's rearraignment, Roberts and the government stated only one plea offer was made by the government. D.E. 324 at 18–19. McCormick then confirmed that he discussed the plea offer with his trial counsel and turned it down. *Id.* at 19. McCormick has provided no evidence of the existence of any plea proposal other than the one he reviewed with his attorney and subsequently rejected.

McCormick also filed a *pro se* post-hearing brief in which he states that his counsel never showed him "a 15[-]year plea agreement." D.E. 459. He indicates the plea deal was sent to him with his counsel's affidavit

in response to the § 2255 motion and that he had never seen the document before. It appears McCormick has mistaken the proposed plea deal he was offered and rejected in this case for a different one. Roberts's affidavit and the proposed plea agreement were both attached to the government's response to the § 2255 motion, which certifies a copy was mailed to McCormick. D.E. 343 at 13.

As confirmed by the parties during the rearraignment, no plea bargain was ever made other than the one McCormick rejected. D.E. 324 at 8–19. That proposed plea agreement indicates that, in exchange for McCormick's guilty plea to Counts One and Four of the Indictment, the government would dismiss any additional counts. D.E. 343–2 at 1. Count One of the Indictment charged McCormick with conspiring to intentionally distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine. D.E. 1 at 1–2. Count Four of the Indictment charged McCormick with knowingly possessing a firearm in furtherance of drug trafficking offenses. *Id.* at 3. McCormick was also named in Counts Three and Five of the Indictment. *Id.* at 2–4. This corresponds with the description of the plea agreement in McCormick's post-hearing brief: "a 15[-]year plea agreement. Dismiss two charges on indictment for a plea of guilty on the other two [counts] of conspiracy and a 924(c)(1)(A)." D.E. 459.

Although McCormick's brief indicates the proposed plea deal included that he would plead guilty to two counts of conspiracy, this appears to be a typing error as the Indictment only includes one conspiracy charge against him. *See* D.E. 1. Also, it appears McCormick misread the proposed plea agreement to mean that he

would only receive a sentence of fifteen years of imprisonment in exchange for his plea. D.E. 459. This is inaccurate. The proposed plea deal indicates the statutory minimums for Counts One and Four, ten years and five years, respectively. D.E. 343–2 at 2. The proposed plea bargain also indicates that the statutory maximum McCormick faced on both counts was life imprisonment. D.E. 343–2 at 2. However, it does not contain any agreement as to the sentence.

McCormick has failed to show that the government ever offered a plea bargain other than the one he reviewed with his trial counsel and subsequently rejected. Therefore, Ground Three is plainly without merit and the undersigned recommends that it be denied.

VII. Conclusion

For these reasons, the undersigned **RECOMMENDS** that McCormick's § 2255 motion be **DENIED.**

The undersigned further **RECOMMENDS** that a Certificate of Appealability issue only with respect to Ground One. 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

believers its findings above are correct. However, the layered analysis under *Flores-Ortega* and *Johnson* could be applied by a reasonable jurist to find that Roberts did not consult with McCormick concerning an appeal and that either a rational defendant would have wanted to appeal or McCormick demonstrated he was interested in doing so, and that he would have timely appealed. However, no reasonable jurist would find the assessments on the merits above as to Grounds Two or Three to be wrong or debatable; thus, no Certificate of Appealability should issue as to those Grounds.

Finally, the parties are notified that any objection to, or argument against, denial of this motion must be asserted properly and in response to this Report and Recommendation. The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Report and Recommendation, 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 Judge. 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 Judge and Court of Appeals. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019).

This the 23rd day of February, 2022.

Signed By:
Hanly A. Ingram
United States Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA,

Plaintiff,

VS.

MICHAEL SHANE McCORMICK, SR.,

Defendant.

Docket No. 6:16–CR–56–2
At London, Kentucky
Thursday, July 1, 2021 1:02 p.m.

– – –

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE U.S. MAGISTRATE JUDGE HANLY A. INGRAM

– – –

APPEARANCES:

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Official Court Reporter
313 John C. Watts Federal Building

330 West Broadway, Suite 327
Frankfort, Kentucky 40601

Proceedings recorded by mechanical stenography, transcript produced by computer.

[Proceedings commenced at 1:02 p.m. in open court]

THE COURT: Everybody be seated and remain seated throughout the hearing, please.

Madam Clerk, would you call the case, please. COURTROOM DEPUTY: Yes, Your Honor. It's London Criminal 16–CR–56–2, United States of America versus Michael Shane McCormick, Sr.

THE COURT: Okay. Thank you. I see Mr. Trimble for the government. Good afternoon to you.

MR. TRIMBLE: Good afternoon, Your Honor.

And I'll note that H. — Mr. H. Wayne Roberts is also present and in the courtroom in the gallery.

THE COURT: Yes, I see him in the gallery. Thank you.

I recognize Mr. Sergent for the petitioner. Good afternoon to you.

MR. SERGENT: Good afternoon, Your Honor.

THE COURT: Thank you.

MR. SERGENT: And this is Mr. McCormick beside me.

THE COURT: Okay. Yes, good afternoon to you, sir.

THE DEFENDANT: Good afternoon to you, sir.

THE COURT: Thank you.

All right. The guidelines in this division indicate that if you're fully vaccinated, meaning it's been more than two full weeks since a full course of treatment for a COVID vaccine, you're not required to wear a mask. You can if you want to.

If you're not fully vaccinated, you're strongly encouraged to wear a mask until you're vaccinated and to become vaccinated.

Mr. McCormick, I see you're wearing a mask.

THE DEFENDANT: Yes, sir.

THE COURT: Does it cause you any problem to wear that?

THE DEFENDANT: No, it doesn't.

THE COURT: Okay. Have you been vaccinated, sir?

THE DEFENDANT: No.

THE COURT: Okay. Well, we'll discuss issues concerning that here in just a moment, if we need to.

The matter's set for an evidentiary hearing on a claim raised by Mr. McCormick in a Section 2255 motion, specifically claimed instruction to his former counsel that a direct appeal be filed following a conviction upon a guilty plea and a resultant sentencing, of course.

Let me first see if you've had enough time to consult with Mr. McCormick.

Mr. Sergent, of course, you were appointed as required whenever there's an evidentiary hearing on a 2255.

We ordered Mr. McCormick to be brought into the district. Tell me if you've been able to consult with him and if you're ready for the hearing.

MR. SERGENT: Judge, I have consulted with him both in person and by Zoom. We'd also consulted earlier by telephone. We are prepared today to move forward.

THE COURT: Okay. Now, it's your client's burden on this lone—well, on all the issues in the motion, but particularly on the one issue that's resulted in this phase, correct?

MR. SERGENT: That is accurate, Your Honor.

THE COURT: Okay. So what do you anticipate in terms of your evidentiary presentation?

MR. SERGENT: Your Honor, I anticipate calling Mr. McCormick.

THE COURT: Okay. Mr. Trimble, you ready for the hearing as well?

MR. TRIMBLE: I am, Your Honor.

THE COURT: Okay. Are there any further preliminary issues I need to take up before we begin the proof? Mr. Sergent?

MR. SERGENT: Judge, we would just ask for separation of witnesses.

THE COURT: Any objection, Mr. Trimble?

MR. TRIMBLE: No objection, Judge.

THE COURT: Okay. Mr. Roberts is leaving the courtroom. Thank you. We'll just let you know when you're called.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: You're welcome.

Okay. So let's go ahead and call your first witness, Mr. Sergent.

MR. SERGENT: Your Honor, I'll call Mr. McCormick, Sr.

THE COURT: Okay. Are you able to stand and walk into the witness stand for us, sir?

THE DEFENDANT: Sure.

THE COURT: Okay. Come right around here. Stop as you get over in that open space, and direct your attention to the clerk to be sworn in by the clerk. Stop right there. There you go.

COURTROOM DEPUTY: Please raise your right hand.

[THE DEFENDANT MICHAEL SHANE McCORMICK, SR. WAS SWORN]

COURTROOM DEPUTY: Thank you, sir.

THE COURT: All right. Have a seat there for me, please.

Okay. I'm going to ask that he testify without a mask on. Does anyone have any concern about that? Mr. Sergent?

MR. SERGENT: None, Your Honor, at all.

THE COURT: Mr. Trimble?

MR. TRIMBLE: No, Your Honor.

THE COURT: Okay. State your full name, please.

THE DEFENDANT: Michael Shane McCormick, Sr.

THE COURT: Okay. Go ahead, Mr. Sergent.

Defense Evidence

DIRECT EXAMINATION

BY: MR. SERGENT:

Q. Mr. McCormick, where are you currently housed?

A. Beckley, West Virginia.

Q. And you filed a motion alleging ineffective assistance of counsel; is that correct?

A. Yes sir, I did.

Q. I want to talk to you a little bit about the representation. Who represented you at the trial?

A. Mr. Roberts, Wayne Roberts.

Q. And can you just describe briefly how your interaction was with him for the first time; when did you meet him and where were you at?

A. I met him at the Laurel County jail. Seemed like—seemed like he was pretty decent when I met him. Seemed like a good lawyer.

Q. Okay. And can you just tell me what did you discuss with him at that point in time.

A. We discussed—I'm thinking that the first time that he first come seen me, he had a plea agreement for the state—or for the government maybe. It's been a while; it's been, like, over two years since. I can't remember all the facts. But when he did come see me, he had the plea agreement for the two life sentences, and I told him I would never—I would never sign nothing like that, that I would rather go to jury trial. And if I was to lose at jury trial, I would want to appeal.

Q. Okay. Let me kind of back you up. I'm assuming—did you—do you remember getting a copy of the indictment and having a—

A. Yeah, yeah, yeah. I had a motion—I had the motion of discovery and everything.

Q. No, no, no, the indictment.

A. Yeah. No, I know.

Q. Do you remember that document that you got?

A. Yes.

Q. Okay. And so that would have been the first point in time that you're dealing with Wayne Roberts?

A. Yeah.

Q. Okay. And then when you were housed in the detention center, did you go over your discovery with Mr. Roberts?

A. Yeah. Yes, sir.

Q. Okay. And during that period of time, did he give you advice about how to proceed or what he thought the discovery meant or things of that nature?

A. He did.

Q. Okay. And did you explain or discuss with Mr. Roberts your concerns?

A. I did.

Q. And what were some of the concerns that you had that you discussed with Mr. Roberts?

A. Mainly, I was worried about my record and the charges I had, of course.

Q. And you and he discussed that at length?

A. Yes.

Q. Now, can you tell me at any point in time during the period of time that you were discussing things, did you talk with him about your right to appeal?

A. Yes, sir, I did.

Q. Okay. Do you remember what he told you about your rights to appeal?

A. He told me as long as I—I didn't take a plea bargain, that I would have a right to appeal as long as I went to a jury trial. And I had a—after final sentencing, I'd have 10 to 14 days to file it.

Q. All right. Now, I want to talk to you first about the plea bargain. You told us a little bit about that, but do you remember meeting with or going over and discussing a plea agreement with Mr. Roberts?

A. Yes.

Q. Did you and he specifically discuss anything with regards to your appeal rights?

A. Yes.

Q. Do you remember what you and he discussed about those appeal rights?

A. He—he—he said that he didn't think I should accept the plea bargain, and I said yeah, there's no way I would accept that. I said, I'd like to—I'll just go to a jury trial, I guess, and try my luck there. And he said, Well, if you do go to a jury trial, he says, at least you'll be able to keep your appeal. I said, Yes, I said, if things turn out bad at a jury trial, I would like to appeal.

Q. And at what point in time did you and he start talking about some type of resolution of this case without a jury trial; do you remember that?

A. Probably maybe the second or third time we met.

Q. Okay. And what exactly was his advice regarding that?

A. He said that I didn't have no—no grounds to stand on in a jury trial, that he thought that I should plead.

Q. And did he have a plea bargain for you to sign, or how did he tell you that you ought to plead?

A. No, he said that I should plea in open court, and that way, I'd be able to keep my appeal.

Q. So you were contemplating—both you and he at that time were contemplating a plea that would allow you to keep all of your appellate rights?

A. Yes, sir.

Q. Okay. Did you ever notify him or tell him or make him aware that you wished to appeal during the presentencing phase of this case?

A. Yes.

Q. Okay. Can you describe what you told him or what you discussed.

A. I told him if things was to turn out bad for sentencing and I didn't feel like I was treated fairly, that I wanted him to appeal.

Q. And in that circumstance—let's talk about that. Did you quantify what bad was? Did you have any opinion as to the amount of time that you should get?

A. Well, he—he pretty much told me that my—that I wouldn't get no more time than the other people in my conspiracy. Well, my son got the most; he got 188 months, and I was thinking 180 months, 190

months, you know. And I said, If it don't turn out like that, we'll appeal.

Q. So did you make him aware that you felt like if you got more time than the other co-conspirators, you felt like that wasn't a resolution that you were okay with?

A. Definitely.

Q. And he was aware of that prior to the sentencing?

A. Yes, sir.

Q. Did you—did he ever come to you and talk with you and tell you what the risks, rewards were for appealing?

A. Yes.

Q. When did he do that?

A. Maybe before sentencing.

Q. And what did you and he discuss when you—when he told you what he thought?

A. He said—he still said that my appeal would probably be frivolous, but if he wanted—I wanted to appeal, he would.

Q. Okay. And did you tell him anything at that point in time or did you talk to him about that what your choices were?

A. Yeah. Like I said just a minute ago, if things didn't turn out like I thought they should, I would like to appeal.

Q. And so let's fast-forward to your sentencing hearing. That hearing was October 9, 2018; does that sound right?

A. Yes.

Q. Okay. And can you describe to me kind of what happened on your sentencing day from your perspective.

A. Well, we come in here and the judge sentenced me to 276 months. I pled guilty, like he suggested I do, and he sentenced me to 276 months. And I'll have to say that I was a little heated over it.

Q. You were upset?

A. I was, yes, I was a little heated over it.

And after the sentencing was done, I looked at Mr. Roberts and told him, I said, You was no help. Thanks, but you was no help. He said, Well, I'm sorry. I done my best. He said, We can file for appeal. And I said, Well, you need to do that.

Q. So on the date of the hearing, you make him aware that you wanted him to file the appeal?

A. Yes.

Q. Now, you said you were heated?

A. Yes.

Q. Do you think—or did you sense that Mr. Roberts knew that you were heated?

A. Oh, yeah, he knowed I was mad.

Q. Did he stay around and discuss anything with you?

A. No.

Q. After your sentencing hearing, did he send you a letter or contact you in any way?

A. Not at all.

Q. Did you get a copy of your judgment from Mr. Roberts?

A. Not that I remember.

Q. Do you remember—did you try to contact him?

A. I did. I tried to call him from the jail numerous times, and never could get an answer.

Q. Did you leave messages? Did you get an answering machine?

A. There was no—it just rang, no answer.

Q. And had you ever spoken with an assistant for him, or was it always him who would respond to you?

A. I had before I was sentenced, yes, but afterwards, no.

Q. And did you actually write him a letter at some point in time after the sentencing?

A. I did.

Q. Was that before or after you—was that before you left Laurel County or after you left Laurel County?

A. After I left Laurel County.

Q. What made you—

A. Well, I—I hadn't heard nothing about the appeal, and it had been a few months, and, well, I guess he was working—I thought he was working on it, you know, and I never did hear nothing. And I said, Well—and I was talking to a legal aide there, and he said, Did your lawyer file an appeal for you? And I said, Yeah, he was supposed to. He said, Well, you know you only had ten days to do that. I said, Yeah. I said, I guess he's working on it. But he—evidently he wasn't. So I wrote him a letter and asked him about

it, told him why didn't he file an appeal like we discussed.

Q. And what did—did he respond to you?

A. No response.

Q. Have you ever received a response or any communication from Mr. Roberts—

A. No.

Q. —since you were . . .

A. I even put him on my CorrLinks email, put his email in my CorrLinks email and never could talk to him. He accepted it. He accepted the email request, but he never would talk to me.

MR. SERGENT: That's all I have at this time, Your Honor.

THE COURT: Okay. Mr. Trimble.

CROSS-EXAMINATION

BY: MR. TRIMBLE:

Q. Good afternoon, Mr. McCormick.

A. Hello, Mr. Trimble.

Q. All right. I want to follow up on some of the questions that Mr. Sergent asked you. If you don't understand something I'm asking you, just let me know and I'll try to ask the question better, okay?

A. Okay.

Q. Did—there was some discussion about a plea agreement when Mr. Sergent was asking you questions; do you remember that?

A. Yes.

Q. And I just want to make sure I understand your testimony today. Is it your testimony that you received a plea agreement offer in this case?

A. I did for two-and-a-half—two—two life sentences and eight years supervised release.

Q. And did—Mr. Roberts gave you that when he came to meet you and he put your—

A. He did.

Q. —he put the plea agreement in your hands?

A. Yes.

Q. All right. Do you ever remember representing to this Court that he never gave you a plea agreement?

A. Sir?

Q. Did you ever tell this Court in any of your pleadings—

A. No.

Q. You never said that?

A. No.

MR. TRIMBLE: Your Honor, I'd like to provide the witness with what I'll mark as Government Exhibit 6.

THE COURT: Okay. Has the—has Mr. Sergent seen it?

MR. TRIMBLE: He did, Your Honor. It's in the record, Docket Entry 347.

THE COURT: Okay, sure. Is there any objection, Mr. Sergent?

MR. SERGENT: (Nod negatively).

THE COURT: Okay. That can be provided.

Mr. Trimble, how would you like to—will you just walk it right up and provide it through that opening to the witness, okay?

MR. TRIMBLE: And I have a hard copy for the Court as well.

THE COURT: Okay. Great. You can hand that up.

MR. TRIMBLE: And I have a copy for Mr. Sergent.

THE COURT: You can distribute those, and hand the Court's copy to Sheila for me, please.

Q. All right. Do you recognize that document, Mr. McCormick?

THE COURT: Sheila, you can hang onto that. I have a copy.

A. No, not really, not right off the bat. It's been a while since I've seen these documents. I've been locked down in Beckley for over a year, and no access to anything.

Q. So, you know, I mean, it's from January of '20, so you may not remember.

A. I really don't.

Q. Now, if you'd go to the page 4 of 4. You see there in the middle where it says, "Respectfully submitted, Michael Shane McCormick, Sr." Is that your signature, Mr. McCormick?

A. Yes.

Q. And you see right below that first signature there's a heading, "Penalty of Perjury" —

A. Yes.

Q. —and it says—

A. Yep.

Q. —correct me if I read it wrong, it says, "I, Michael Shane McCormick, Sr., hereby declare under penalty of perjury that the above foregoing reply to response of the United States—

A. Yes.

Q. —in opposition to Mr. McCormick's motion to vacate's true and correct to the best of my knowledge and belief?"

A. Yes.

Q. Do you see that?

A. Yes.

Q. And I don't—I mean, I've had interaction with you, but you can read and write, correct?

A. Yeah. This is the motion that I filed, right—

MR. TRIMBLE: Okay.

A. —yeah.

Q. So you remember that now?

A. Yeah.

Q. And it looks like down here on the certificate of service, you sent it to me and it was filed in the Court?

A. Yes.

Q. Okay. I'd like you to go to page 3 of 4 of that document. And on the bottom it says, "3 of 4."

A. Yeah.

Q. And there's a sentence there that begins, "The fact of the matter." It's right at the very bottom, just, you know, there's two lines up from the bottom, and

then over there kind of to the right there's a sentence that begins, "The fact of the matter." Do you see that?

A. I do not. Three of 4, right?

MR. TRIMBLE: I'm sorry?

A. Page 3 of 4, yes?

MR. TRIMBLE: Three of 4.

THE COURT: At the very bottom.

MR. TRIMBLE: If you'd just go to the very bottom and go up kind of two lines. Do you see that, "The fact of the matter?"

A. I do not see it.

MR. TRIMBLE: Your Honor, can I come point it out for him, sir?

THE COURT: You can.

Sir, three lines up from the bottom. It's on the right side.

A. Yeah, I found it.

Q. I'm going to read that into the record.

A. Okay.

Q. And you just correct me if I say anything wrong, okay?

A. Yeah.

Q. "The fact of the matter is that Mr. McCormick never knew of the existence of a plea offer in the first place."

A. Yes, I see that.

Q. Did I state that correctly?

A. Yes.

MR. TRIMBLE: Your Honor, I would like to at this time tender to the witness what I'll mark as Government Exhibit 7.

THE COURT: Okay.

MR. TRIMBLE: It's in the record as well, 327.

THE COURT: Okay. That can be provided.

MR. TRIMBLE: And I'd move for the admission of Government Exhibit 6 as well, to the extent it needs to be because it's in the record.

THE COURT: Is there any objection to that, Mr. Sergent?

MR. SERGENT: No, Judge.

THE COURT: Okay. So that's an exhibit to the hearing then.

And what docket number did you say your next Exhibit is?

MR. TRIMBLE: 327.

THE COURT: Thank you.

A. I think I meant to put "an agreeable plea agreement."

THE COURT: There's a little opening there on the front if you'd rather use that. It's up to you, either way, whatever's easiest.

MR. TRIMBLE: Oh, okay. I apologize.

THE COURT: Yeah. It's a little hard to see and I—at this point, I'm keeping these up until I decide . . .

A. I'm not a very good typist, so I probably missed it on my—while I was retyping it after I'd wrote it.

Q. Okay. I've handed to you what I've marked as Government's Exhibit 7. Do you recognize this document? Take your time to look at it.

A. Yes.

Q. And what is this, Mr. McCormick?

A. It's where I had to write back and file—put the perjury—is that—that's the one, ain't it?

Q. It looks like it's a Motion to Amend Petitioner's 2255 Petition.

A. Yes.

Q. And did you file that?

A. Yes.

Q. Can you go with me to the—I think it's the part of this document that's headed, "Declaration of Michael Shane McCormick, Sr."

A. I gotcha'.

Q. Do you see that?

A. Yes, sir.

Q. Is that your signature there at the bottom of that page?

A. Yes, sir, it is. Yes, sir, it is.

Q. Okay. Now, I want to go to number 6, number 6 on this document.

A. Yes.

Q. And I'd like to read that into the record, and you correct me if I've said anything incorrect.

"Mr. Roberts instructed me that I needed to just plead guilty in open court without the benefit of a plea agreement. I asked him why he could not—he couldn't get me—" excuse me, I read it wrong.

"I asked him why couldn't he get me a plea deal. He would not answer me. I felt like he was being untruthful to me, and that he just would not tell me about a plea deal that had been offered, for whatever reason." Did I read that correctly?

A. Yes, sir.

Q. All right. And then I'd like to jump down to number 8. And I'm going to read that into the record, and you correct me if I say it incorrectly.

"The other defendants in my case were all afforded a plea agreement". Is—did I read that correctly?

A. Yes.

Q. And did you write that in your declaration of Michael Shane McCormick, Sr.?

A. Yes.

MR. TRIMBLE: All right. Your Honor, I would move the admission of Government Exhibit 7, to the extent it's necessary since it's already in the record.

THE COURT: Objection, Mr. Sergent?

MR. SERGENT: No objection.

THE COURT: Okay. That will be designated as a hearing to the evidentiary—excuse me—an exhibit to the evidentiary hearing.

MR. TRIMBLE: Your Honor, I'd like to tender another exhibit to the witness, an exhibit that I've premarked as Government's Exhibit 3. It is Court Docket Entry 299.

THE COURT: Okay. That can be tendered.

Q. Mr. McCormick, do you recognize this document?

A. Yes.

Q. You do?

A. Yes.

Q. What is it?

A. It's forma pauperis.

Q. I'm sorry?

A. To have the lawyer appointed to me.

Q. And is that your signature there at the bottom of that document?

A. Yes, sir.

Q. And do you remember when you got this document?

A. No.

MR. TRIMBLE: Take your time now. Read it if you need to.

THE COURT: Hang on just a second.

Mr. McCorm—hang on. Hang on.

Mr. McCormick, you need to wait until Mr. Trimble's finished his question—

THE WITNESS: Okay.

THE COURT: —before you provide your answer, okay?

THE WITNESS: Okay.

MR. TRIMBLE: I'm sorry about that. Sometimes it takes me a little while to formulate my own questions in my mind, so if I'm dragging on you and catching you up, I'm sorry.

Q. So my question was, did—do you remember when you—take all the time you need to read the

document. Do you remember when you received this document and signed it?

A. When I got it back from the Court.

Q. What do you mean by that?

A. When I got it back from where I filed—where I filed it.

Q. Okay. So you think you filed this document?

A. This is a forma pauperis that I had to put in to get a lawyer, right? I can't see it, man, and I don't have my glasses.

THE COURT: Do you have reading glasses with you today?

A. I do not. I forgot them, Your Honor.

THE COURT: Okay.

MR. TRIMBLE: I'm not trying to trick you. I can read it to you, if that would be helpful.

A. Let me see—let me get close to it here. I might be able to . . .

Q. If it will help you out, I'll let you know that it's labeled, "Court's Advice of Right to Appeal."

A. Yes. Yes, this is the 14-day—yeah, I'm sorry, yeah, this is the 14-day limit I have for filing an appeal.

Q. Do you remember when you got this document?

A. I think it was right after sentencing.

Q. So, like, right at the end of your sentencing hearing?

A. I'm thinking so.

Q. And that's your signature on the bottom of it?

A. Yes, sir.

Q. Are you able to tell that?

A. Yes, sir.

Q. Okay. And I'll just note, and you may not be able to read it, so you or your lawyer can correct me if I'm wrong here, but the last sentence of paragraph 2, I'm going to read it into the record, and you correct me if I'm wrong or something different you don't remember.

"This notice of appeal must be filed within 14 days from the date of the entry of this judgment." Is that correct?

A. Yes, sir.

Q. And that's what you testified to with Mr. Sergent, correct?

A. Yes.

Q. That was your understanding?

A. Yes.

MR. TRIMBLE: Okay. Your Honor, I would move for the admission, to the extent necessary, of Government Exhibit 8.

MR. SERGENT: No objection.

THE COURT: Okay. That'll be admitted.

MR. TRIMBLE: Your Honor, I would like to at this time tender to the witness what I have marked as Government Exhibit 4.

THE COURT: And what is it?

MR. TRIMBLE: It's a letter dated April 22, 2019. It was an attachment to the affidavit of Mr. Roberts.

THE COURT: Yeah, that can be provided to the witness.

A. Yeah, this is my letter.

Q. All right. Did I describe it correctly, a letter from you to Mr. Roberts on April 22, 2019?

A. Yes, sir.

Q. Okay. And I just want to read the first—I just want to read the first couple of sentences and ask you what you meant.

A. Okay.

Q. "Dear Wayne. First, I want to apologize for the way that I acted at sentencing. I was just really shocked that I got so much time."

A. Yes.

Q. What did you mean by that?

A. Well, he pretty much told me that he didn't think that I would get that much time. He didn't think I would get any more than my co-defendants, and it just shocked me that I got that much time.

Q. And is that—I think you and Mr. Sergent talked about the fact that you were heated?

A. I was a little heated, yes.

Q. Is that what you're talking about here?

A. Uh-huh (affirmatively).

Q. Okay. Now, then you say, "I know you worked hard for me and did your best."

A. I said that, yes.

Q. And what did you mean by that?

A. I meant that he was—he tried, but he just—he didn't do everything that he was supposed to do.

Q. What did you mean when you said he worked hard for you?

A. I—

Q. Do you believe that?

A. I went on to say there that I wondered why he didn't file the appeal for me.

Q. Do you believe that Mr. Roberts worked hard for you like you said in your letter?

A. I mean, he—no, no.

Q. So you—you said in your letter, "I know you worked hard for me," you didn't mean that?

A. I mean, I didn't mean that he didn't go on and file my appeal; he didn't finish his job.

Q. So that's—that's—you don't—that's not true, right?

A. Yeah.

Q. Is that right?

A. (Nod affirmatively).

MR. TRIMBLE: I'll just note that he shook his head affirmatively, for the record.

A. He just didn't finish his job is what I was trying to get at.

Q. All right. Now, then you asked—and again, you can correct me if I misrepresent anything here. "Why didn't you go on and file an appeal for me, I don't know. That was the only reason I pled in open court like I did, was to keep my right to appeal. You knew this." Did I read that correctly?

A. You did.

Q. Now, you may be able to find, or you may not without your reading glasses, but you never say

expressly in this letter that you told him to file a notice of appeal; is that right?

A. Not in this letter, no.

Q. Okay. So that's not in there? You just say that, "I wanted to keep my appeal rights and you knew that?"

A. I said that—that he knew he was supposed to appeal because I talked to him and told him he was supposed to appeal.

Q. You say, "The only reason I pled in open court like I did was to keep my right to appeal?"

A. Right.

Q. But you didn't say anything in here, I told you to file a notice of appeal?

A. Doesn't you do this? Doesn't that entitle to what I'm trying to get across to him?

Q. So no, you didn't say that expressly, right, that's the question I'm asking you?

A. No.

Q. Now, this was written, I think you'll agree with me, April 22, 2019, correct?

A. Yes, sir.

Q. Now that's six months after your sentencing?

A. Yes, sir.

Q. In the 14 days after your judgment came down—

A. Yeah.

Q. —did you write Mr. Roberts any letters?

A. No.

Q. Now, you said that you made phone call calls to Mr. Roberts?

A. Yes.

Q. Do you have any records of those?

A. No.

Q. You said you sent emails to Mr. Roberts?

A. I did.

Q. Do you have any records of those?

A. They're probably on my CorrLinks in Beckley.

Q. But they're not here today?

THE COURT: What's the word you're using here? Are you saying CorrLinks?

THE DEFENDANT: CorrLinks, C–O–R–R Links.

THE COURT: Okay. Go ahead. Sorry to interrupt.

MR. TRIMBLE: It's okay, Your Honor.

Your Honor, to the—I don't remember what this exhibit number was, Your Honor, I don't have it written on mine.

COURTROOM DEPUTY: 4.

MR. TRIMBLE: Your Honor, I move the admission of Government Exhibit 4.

THE COURT: Okay. That'll be admitted.

Q. You are a felon; is that correct, Mr. McCormick?

A. I am, sir.

Q. Do you know how many felony convictions that you have?

A. Not right off the top of my head, no, sir.

Q. Is it one or multiple felony convictions?

A. Probably multiple, yes.

Q. All right. And this isn't designed to be a trick question. I've got the docket sheet if you want to look at, so I'm not trying to do a surprise here, but back in 2002, in case number 02–M–1216, you were found guilty of giving an officer a false name or address; is that correct?

A. I don't remember it.

Q. Would it refresh your memory if you could see either your—the docket sheet of that case or . . .

A. What month was it? What month was it?

Q. It was in 2002.

A. What was the month?

MR. TRIMBLE: Well, I can—I'll show you your docket sheet. I'll just mark it as Government Exhibit 8.

A. I mean, if it's on the docket, I'm sure I did, I guess, you know. I don't remember doing it, though. 2002? That's been 19 years ago, Mr. Trimble.

Q. I understand that's a long time ago. That's why I brought the sheet. I didn't want to—

A. Yeah.

Q. Now, your section—and this isn't on the Court's copy—there's a highlighted—there's a highlighted section. Can you—do you see that?

A. Yes, I see it, seventh month.

MR. SERGENT: Judge, I'm going to object. This isn't a felony, so impeaching him of a misdemeanor?

A. Yeah, that's a misdemeanor.

MR. TRIMBLE: It's a crime of deception, Your Honor, and the Rules of Evidence don't apply.

THE COURT: I'll overrule the objection. The matter of felony convictions, those were covered separately, and the Rules of Evidence, they don't apply. So go ahead with the question—well, or the answer—restate your question.

THE WITNESS: Have I been found guilty on this charge?

MR. TRIMBLE: That's my question to you.

A. Does it say "guilty?"

Q. Did you have—were you found guilty?

A. I don't think I was.

Q. So it looks like giving an officer a false name or address, if you look at July 5, 2002, that's charge 10, and there's a guilty indicated by that?

A. That same charge?

Q. Charge 10, giving an officer a false name or address.

A. I think.

Q. And then if you don't remember, I've also got your presentencing report where there's indication you were found guilty of that offense in paragraph 78.

A. I guess so then, sir.

Q. So you agree with me then that you've been found guilty in your past of giving an officer a false name?

A. Yes, sir.

MR. TRIMBLE: All right. Your Honor, to the extent necessary, I will move Government Exhibit 8—

THE COURT: Yeah, that'll be admitted.

MR. TRIMBLE: —and admit it into the record.

Q. What do you think will happen if you win your motion, your—I call it a 2255, your lawyer called it ineffective assistance of counsel—what do you think happens if you win?

A. Well, I'd like to be vacated and go back to resentencing is what I'd like to do. And if not that, get my appeal like I lost.

Q. And are you—are you hoping that if you got to go back to the sentencing, you're hoping that you get a lower sentence?

A. Yes.

Q. Is that fair to say?

A. Yes.

Q. And you want to serve less time in jail; is that fair?

A. Of course.

MR. TRIMBLE: All right. Your Honor, I don't have any further questions for Mr. McCormick.

THE COURT: Okay. Mr. Sergent?

MR. TRIMBLE: And if Mr. Sergent wants them, I can leave them up there, but otherwise, I can collect the exhibits.

MR. SERGENT: I was going to say, if it's okay if we just leave them for my redirect.

MR. TRIMBLE: That's fine. I'll leave them up there. But to the extent I haven't done it, I'll move them into evidence and I'll collect them after the—after his testimony.

THE COURT: I don't think there's anything's not that has not been admitted, and Sheila's nodding. And so go ahead, Mr. Sergent.

REDIRECT EXAMINATION

BY: MR. SERGENT:

Q. You were shown an exhibit, I've got 7, it's a motion to amend petitioner's 2255 petition. Can you look at that real quick with me. There's—on the second page it says "Declaration of Michael Shane McCormick, Sr." Do you see that?

A. Yes.

Q. Okay. Now, you were asked specifically about number 6. All I want to know is what were you trying to convey in that paragraph?

A. Hold on a minute. I've got the wrong—on what page is it, Bryan?

MR. SERGENT: It's—if you'll—the front—you got front and back, Shane, and then you've got this page. It's your—it's what I would call your affidavit, you declared your declaration.

THE WITNESS: This one? No.

MR. SERGENT: If I can go help?

THE COURT: Yeah, why don't you help, Mr. Sergent.

MR. SERGENT: Here, Michael.

THE DEFENDANT: This?

MR. SERGENT: No, not even close, Buddy. This one.

A. This one. Okay. Yeah. That's the one I was in. I thought that was right.

Okay. Yes. Thank you.

Q. Now, paragraph 6, I'm going to read it since you're having some trouble seeing, if that's okay with the Court.

A. I can see it. It's just blurry a little bit.

Q. It's okay. "Mr. Roberts instructed me that I needed to just plead guilty in open court without the benefit of a plea agreement. I asked him why he couldn't give me a plea deal, he would not answer me. I felt like he was being untruthful to me and that he just would not tell me about the plea deal that had been offered, for whatever reason." What were you trying to convey?

A. I guess I was trying to convey that it wasn't acceptable, you know, an acceptable plea of guilty.

Q. Now you've testified—

A. He definitely come with the plea deal for the two life sentences, and I had no—I think what I done was I think I must have mistyped or had wrote down wrong or something, I don't know.

Q. What's your educational background, Mr. McCormick?

A. Seventh grade.

Q. So you read and write, but you're not college-educated or you're not high school-educated?

A. Oh, no, no, no.

Q. So when you write these, you're doing it with some help from a legal aide person in the prison?

A. Yes.

Q. And some of these documents that you were asked about that you wrote, that was you trying to

convey your thought about how you felt about the plea agreement you were shown?

A. I was.

Q. Can you explain to the Court, have you ever meant to maintain, to the extent you did, that Mr. Roberts hadn't brought you a plea agreement at all?

A. I didn't mean to say that, no. I didn't mean—if I did imply that, it wasn't—that wasn't what I was implying. I was trying to imply that it wasn't an acceptable plea agreement that he brought me.

Q. And when you talked about you thought there were other plea agreements, is that just your feeling and nothing—

A. About my other co-defendants?

MR. SERGENT: Yes.

A. Well, I know they all got plea agreements; they all took plea agreements. They're all my family members.

Q. Did you and Mr. Roberts ever talk about trying to get a better plea agreement than the one he showed you?

A. I asked him if he could, yes.

Q. And did he tell you that he tried?

A. Yes, he said he would try.

Q. And is that what you're—I guess, is that what you're upset about or what you're trying to convey, is that you're upset that he didn't get a better plea deal?

A. Yes.

Q. All right. I want to talk with you about Exhibit Number 4, and that's your—what you identified as your letter to Mr. Roberts.

A. Okay.

Q. And then I think it's Number 4.

A. Yeah, I got it.

Q. Okay. Now, you were asked about your letter, and you asked him in this letter, "Why didn't you go on and file an appeal for me?"

A. Yes.

Q. What did you mean by that?

A. Well, it was implied that he knowed I asked him to file the appeal. I was implying why didn't he do it.

Q. And I'm assuming that at that point in time, where were you housed at when you wrote this letter?

A. I was in Beckley, Beckley, West Virginia.

Q. During the 14 days after your—your sentencing was October 9?

A. Yes.

Q. Your judgment was entered October 12. Any—at any point in time after October 9, for 14, 17 days, however many days, did you receive any contact, any mail, or any documents from Mr. Roberts to your recollection?

A. No.

THE COURT: Okay. I'm just going to remind you again to wait to give your answers until the question is finished.

THE DEFENDANT: Okay. Thank you, and I'm sorry, Your Honor.

THE COURT: That's okay. Go ahead, Mr. Sergent.

Wait a second, the previous answer—will you re—can you restate that answer for me.

A. No, he did not—he did not send me anything.

MR. SERGENT: Okay.

THE COURT: Okay. Go ahead, Mr. Sergent.

Q. And is it fair to say that Mr. Roberts was aware that you were unsatisfied with the sentence given to you by the Court?

A. Yeah, he knowed I—he knowed I wasn't satisfied.

Q. And during your period of time of being represented by Mr. Roberts, you had spoken at length about appeals, appeal rights, and what it meant to keep those appeal rights, correct?

A. Yes.

Q. And after sentencing, did he speak with you regarding any advantages, disadvantages about appeals or appeal?

A. At sentencing?

Q. After sentencing?

A. The only thing he said after sentencing is, "I tried. I could appeal." And I said, "Well, you need to do that." That's the only conversation we ever had. Out the door we went.

Q. And that was the last time that you spoke with Mr. Roberts?

A. Yes, sir.

Q. Except by letter, I want to be clear?

A. Yes.

MR. SERGENT: That's all I have, Judge.

THE COURT: Okay. Any recross, Mr. Trimble?

MR. TRIMBLE: No, Your Honor.

THE COURT: Okay. You can step down, Mr. McCormick. Watch your step going down those steps, please.

Now, the exhibits, do you intend to use those with the next witness?

MR. TRIMBLE: Two of them I do, Your Honor. THE COURT: Let's just leave them there, Mr. McCormick. That's fine. He's not taken any with him. Yes.

And when you sit down, if you can get your mask back on for us, Mr. McCormick.

Is there further proof on behalf of the petitioner, Mr. Sergent?

MR. SERGENT: No, Your Honor.

THE COURT: Okay. Mr. Trimble, call your witness, sir.

MR. TRIMBLE: Thank you, Your Honor. The United States calls Mr. H. Wayne Roberts.

THE COURT: Okay. We'll get Mr. Roberts in the courtroom, please.

[THE WITNESS HAROLD WAYNE ROBERTS WAS SWORN]

COURTROOM DEPUTY: Thank you, sir.

THE COURT: State your full name, please.

THE WITNESS: Harold Wayne Roberts.

THE COURT: Ok–ay. Spell the middle name for me, please.

THE WITNESS: W–A–Y–N–E.

THE COURT: Okay, no H.

The chair doesn't move. The microphone will slide closer to you, if that makes you more comfortable as you're testifying.

THE WITNESS: That's fine.

THE COURT: Okay. Go ahead, Mr. Trimble.

Government's Evidence

DIRECT EXAMINATION

BY: MR. TRIMBLE:

Q. Good morning—good afternoon, Mr. Roberts.

A. Good afternoon, Mr. Trimble.

Q. Sir, how are you currently employed?

A. I'm a solo practitioner.

Q. Are you an attorney?

A. Yes.

Q. How long have you been an attorney?

A. Approximately 30 years.

Q. Are you on the CJA panel of criminal defense attorneys?

A. Yes. I was appointed approximately 30–20 years ago. To my knowledge, I was the first African-American to serve on the panel in the Eastern District of Kentucky until a couple of years ago, and then Rawl Kazee and Mr. Gary Harris is also on the panel, and they call me regularly for advice.

Q. So in that 20 years that you've been on the CJA panel, have you regularly received appointments by the Court to represent federal criminal defendants?

A. I receive, in my estimate, 10 to 15 per year. Currently, I have ten federal cases, all but one are appointed.

Q. All right. During the time that you have been on the CJA panel, has there ever been a finding by the Court that you have rendered ineffective assistance of counsel under 2255?

A. Never. And there has not been a finding on the state level of an 1142.

Q. Have you ever been found by a court to have failed to file a notice of appeal, despite a client asking you to do so?

A. Never.

Q. Have there been occasions of your 20 years of practice on the CJA panel where a defendant has asked you to file a notice of appeal, and then you did—you filed the notice of appeal in the record?

A. There has never been a case where a client called me and said, "File a notice of appeal," and I did not do so. I'll always follow my client's direction far as filing notices of appeal, whether I agree with him or not. And then if I don't agree with them, then what I do is I subsequently file the motion to—to withdraw, and file the appropriate brief.

Q. So you have filed notices of appeal for your client before when they've asked you to?

A. Dozens. I have—I get—right now I have two cases before the Sixth Circuit—before the end of the year I'll have a third—so I average filing briefs before the Sixth Circuit two to three times a year for the last 20 years.

Q. So I'm not talking—I won't want to—I don't want to confuse you here, I'm not talking about a brief. How long does it take you to put together a notice of appeal, just the notice, and to file it in the record?

A. Oh, it's easy. I mean, it's a template, so all I do is change the style and the date in the judgment and file them.

MR. TRIMBLE: All right.

A. I mean, it's not a complicated matter. It's just maybe one page, a page-and-a-half.

Q. You were you appointed to represent Michael Shane McCormick, Sr. in case number 6:16–CR–56 on or about June 10, 2017; is that correct?

A. I'm not sure of the date, but I was appointed to represent Mr. McCormick.

Q. Okay. Now, during the course of your representations with Mr. McCormick, Sr., were there different ways in which you communicated with him or talked to him about this case?

A. Yes, by letter and by phone, and I went to see Mr. McCormick at least a dozen times.

MR. TRIMBLE: All right. Your Honor, I would like to tender to Mr. Roberts what I've premarked as Government Exhibit 1.

THE COURT: Okay. That's not among the stack that's up there, correct?

MR. TRIMBLE: No, Your Honor.

THE COURT: Okay. And it is . . .

MR. TRIMBLE: It's part—it was attached to the affidavit. It's an April 30, 2017 letter.

THE COURT: Okay. That can be tendered.

MR. TRIMBLE: And I've provided a copy to Mr. Sergent.

THE COURT: Okay.

Q. Mr. Roberts, what is this?

A. This is a letter that I sent to Mr. McCormick basically outlining my opinion as to his guideline range, because, you know, when you represent criminal defendants, they all want to know what they're looking at, and as you know, we're not really permitted to say, Well, you're looking at this and this or that. But, you know, Michael was always insistent asking. So I drafted this—this summary to basically set out in my opinion, you know, what his guideline range would be.

Q. Okay. Let's start at the top with your letterhead. Was this your correct address and telephone number during the time period that you represented Mr. McCormick?

A. This telephone number, 225–0062, that was the number of John Anggelis and Tim Philpot back in the '80s, when I finished law school. I was their law—their paralegal for seven years until I went to law school and graduated, and then they made me a partner.

And then in 2000, we started office sharing, and they gave me this number, so I've had this number for over 30 years.

Q. And it's—and the address is correct as well?

A. The address is correct. That's my home address. I practice out of my home. I've been doing that since 2010. Before that, I was in the world trade center for ten years. And then before that, I was on Market Street for ten years.

Q. All right. Now, I want to—I'll read the first sentence of this letter. I'm not going to go through sentence by sentence, but there are a couple of questions that I want to ask you. But the first sentence of the letter says, "The purpose of this letter is to memorialize our several discussions with respect to your case." Is that accurate? Had you had several discussions with Mr. McCormick, Sr. about his case?

A. Oh, several. Michael's—when I—when I first meet my client and I start representing them, I give them my business card with, you know, my contact information, and also tell them that, you know, don't let me walk off a cliff. We are chained together, and if you let me walk off the cliff, then guess who's going with me. Just tell me whatever—whatever, you know, you know about your case, and I'm not going to judge you. I don't care. Just tell me. And I told Mr. McCormick that, and then I also, you know, I had the—I think the bond papers, and I told him, I said, Your criminal history's horrible, and, you know, and you got several counts that could carry up to life, so—and you could be a career offender, and the guns, you know, would also enhance. And probation and parole, they may find some other matters to—to hit you with and enhance.

So—but, you know, just to make sure that he knew the seriousness of—and what he was looking at, I summarized this—this document.

Q. And you tell me if I'm misrepresenting anything on here, but you told Mr.—you predicted to Mr. McCormick and told him it wasn't exact, but that essentially on the drug counts, he was looking at a potential guideline range of 262 to 327 months. And that after the gun count ran consecutively, you estimated

that he'd be looking at 322 to 387 months. That ended up being—and again, you say in there, "This is just my opinion; it's not exactly," but that ended up being the actual guideline range that was set forth in the presentence report, correct?

A. Correct. You know, I don't know whether Mr. McCormick really realized this, but Judge Van Tatenhove really gave him a heck of a break because he was a career offender; that's 188 months, which has to run consecutively to the 60 months gun, which has to run consecutively to the drug offenses, the 262 to 327, and Judge Van Tatenhove gave him 276. So he really just—just hit him with what was in the guideline range for the drugs, and he didn't do the other, which, you know, of course, I'm not going to say anything, you know, that would just hurt Mr. McCormick.

Q. And isn't it the case, Mr. Roberts, that as far as the drug counts are concerned, Mr. McCormick, Sr. received the sentence of about four years below the bottom of the drug guidelines; is that correct?

A. Yes, that is correct. But in my opinion, and I emphasize "my opinion", he received—the 262 to the 327 was just for the drug quantity, the 1.5 kilograms to the five kilograms. It did not have anything to do with the career offender that he got hit with, or the gun. The career offender has to run consecutively to the gun. The career offender and the gun has to run consecutively to any drugs. That's my opinion.

So—so yeah, he was—he got a break, even a four-year break is good on the minimum, but I think Judge Van Tatenhove went below the 262 and hit him with 216, I believe.

Q. All right. And you indicated that you did discuss with Mr. McCormick that he could be a career offender?

A. Yes.

Q. Okay. I want to look at the third paragraph of the letter, and I'll just read it and you tell me if I'm misstating anything.

"The prosecution has filed a motion and entered a superseding indictment, which will in all likelihood, require a new trial date.

Michael, you need to make a decision as to whether you're going to plead to the charges or proceed to trial. It is my intent to talk to the prosecutor on Tuesday, May 2, 2017, to see if they'd be willing to change some of the language contained in the plea agreement. If they refuse, then I would recommend possibly entering into an open plea, as opposed to giving up your appellate rights."

All right. Did I read that correctly?

A. Yes, you did.

Q. Now, at the time of the writing of this letter, you had received from the United States through me a plea offer, correct?

A. That's correct.

Q. And did you convey that plea offer to Mr. McCormick, Sr.?

A. We discussed that plea agreement at least three or four times. I gave him a copy, as I do all of my—my clients. I never fail to give them a copy of the plea agreement and an indictment.

The problem and the issue was, is that with Mr. Michael McCormick, he misled me. He said with his statement of facts was that when he was paroled in May, he went to live with his son and Robin, his girlfriend, and—and that he kind of suspected what they were doing, but he didn't have any involvement. He said that in about November, he had a relapse, and—and that's where he—that's when he—they found the drugs when they came in the house, and that the shotgun and the guns in his house belonged to his son and to Robin. The shotgun was found right there at the sofa where he was at, so I'm like, you know, you had access to it. You could—you knew it was there. So he had knowledge, access, the constructive possession, if nothing else.

So—and I told him that nobody's going to believe that Robin had all these rifles and these guns. And I could not recommend—I would not recommend to my client to sign a plea agreement that is so different from his version of the facts. He said the guns weren't his, and your plea agreement talked about the guns. He said that 50 grams, that's it; that's all he knows about. In the plea agreement he had to plead to 1.5 to five grams. And I'm like, Well, until we find out anything, my recommendation would be just to enter an open plea because in reality, it had been my experience in federal court that it's probation and parole that really controls things. I mean, the sentencing guidelines is going to be the sentencing guidelines as they see it. The alleged facts are going to be the alleged facts as they see it.

So if the facts are different, and these facts, the drug quantity, the gun, when he allegedly entered the conspiracy, is a big difference from entering the

conspiracy in May, and then in November, a week, that would affect the drug quantity.

So given all these unknowns, I'm—and again, given the night and day difference in the alleged facts of the plea agreement and his facts, I could not recommend that. So that's why I suggested the open plea.

And then as you know, after we did the open plea, he then decided to cooperate with the government. I tried to get him to do that before that you submitted your plea, and he would not do it. He was very adamant that he wasn't going to talk on anyone.

And then in this building downstairs, he admitted that the guns were his, all of 'em, several. He was sellin' 'em. He admitted going to Tennessee, buying kilos of meth. He admitted to—to—well, he went down there with his son, and then he went to Robin, and then Robin was sending money to—to the supplier down there, and he was sellin' drugs, you know, ounces here in, you know, in this area.

So everything that was in your plea agreement that was contrary to what he was initially saying turned out to be true.

Q. So his story changed to you?

A. Story changed, yes.

Q. Now, you say in your letter here that—that if they refuse, "they" being the government, to change some of the language contained in the plea agreement, "Then I would recommend possibly agreeing to an open plea, as opposed to giving up your appellate rights."

A. Right.

Q. What did you mean by that?

A. Well, in the plea agreement, and there was certain language that you—you waive, you know, your conviction, you waive this, you waive, you know, any sentence. And I wasn't worried about the sentence in the respect to the guideline range because, you know, he was looking at life on three different counts. So the Sixth Circuit, in my opinion, would interpret that, well, you know, whatever sentence he had would have been in the guideline range statutorily. So that's what I meant. You know, just, you know, whatever, whatever comes down the pike because I didn't know what was going to be coming down the pike, you know, so . . .

Q. Did—did you all—during this portion when you're talking about potentially keeping his appellate rights, did Mr. McCormick definitively tell you at that stage that he definitely wanted to appeal his sentence?

A. He never did, Mr. Trimble, tell me that he definitely wanted to appeal. What we talked about was this, you know, given the huge inconsistencies in the stories and the alleged facts, that, you know, if something was so bogus and so crazy, you know, then—then you can appeal it, you know, appeal anything, the conviction, the plea, whatever, you know, and that's the whole purpose really of open pleas.

I mean, that's the only reason why you do open pleas. And I've done several. You know, when you have a complex case, you know, do open plea because the probation and parole, whatever the guidelines are going to be, the guidelines are going to be.

If you have a simple case, which I have of several illegal re-entries, you know, I even recommend an open plea on those, too, you know, so . . .

MR. TRIMBLE: Your Honor, to the extent I haven't done it already, I'd move the admission of Government Exhibit 1.

THE COURT: That'll be admitted.

MR. TRIMBLE: And I'd like to request the ability to tender to the witness what I have preliminarily marked as Government Exhibit 2.

THE COURT: Just describe it for me, if you would.

MR. TRIMBLE: And that's the draft plea agreement provided by the government to Mr. Roberts.

THE COURT: Sure. That can be provided.

Q. All right. Do you see that?

A. Yes, I do.

Q. And we've been talking about a plea offer that the United States, through me, made Mr. McCormick through you. Is this the plea offer that was made by the United States to Mr. McCormick in this case?

A. It is.

Q. Is this the only plea offer that was made by the United States to Mr. McCormick, Sr.?

A. It was.

MR. TRIMBLE: Your Honor, I would move for the admission of Government Exhibit 2.

THE COURT: Okay. That will be admitted.

Q. All right. Mr. McCormick pled guilty to the offenses that he was charged with in this case—

A. Uh-huh (affirmatively).

Q. —on about June 9, 2017; is that correct?

A. That's correct.

Q. And that was an open plea?

A. That's correct.

Q. Now, you represented Mr. McCormick at his sentencing hearing; is that correct?

A. That's correct.

Q. And that was in October of—that was in October of 2018; is that right?

A. I don't know the exact date, but, you know, that sounds correct.

Q. Okay. And the—I think you mentioned it before, but the Court sentenced Mr. McCormick to 216 months imprisonment on the drug counts with 60 months consecutive on the gun count, for 270 months; is that right?

A. That's correct.

Q. Now, following the imposition of the sentence, did the Court provide Mr. McCormick a notice of his rights to appeal?

A. They did, and I signed it and Mr. McCormick signed it, and I—you know, I tell all my defendants that this is just standard. I've seen hundreds of 'em, so just—just explained what you have to do when you want to appeal because you're going to appeal.

Q. Somewhere up in that stack of papers is what's been marked and admitted as Government's Exhibit 3. It's the Court's advice of rights to appeal.

A. Uh-huh (affirmatively).

Q. Can you find—do you see that?

A. Yes.

Q. And did—do you recognize that?

A. Please?

Q. Did you find Exhibit 3?

A. Yes, uh-huh (affirmatively).

Q. And do you recognize that document?

A. Yes.

Q. And is that your signature down at the bottom?

A. Yes.

Q. Is that Mr. McCormick, Sr.'s. signature at the bottom?

A. It is.

Q. It looks like on this document the sentencing was October 19, 2019?

A. Correct.

Q. And did you discuss this with Mr. McCormick after the sentencing?

A. Yeah. He read it, and I leaned over him when he was reading it.

Q. And I believe you said a minute ago that in all your cases you discussed this and tell them what they need to do if they want to appeal?

A. Yeah.

Q. Did—and do you believe Mr. McCormick, Sr. was aware of that information?

A. He read it, so I assumed it.

Q. Did Mr. McCormick direct you to file an appeal on his behalf on the date of the sentencing?

A. No, he did not.

Q. Do you remember anything that Mr. McCormick, Sr. said to you at—at the end of the sentencing hearing?

A. No. He did not direct me to file an appeal. All the discussions we had about his case, his sentencing and whatever is that if, you know, he had an issue if somebody was absurd or crazy or whatever, he could file an appeal. He could file an appeal. I never said I would do it just spontaneously. I can't. I don't think that the Sixth Circuit permits that.

Q. What that means is you were not going to just do it without him telling you to do it?

A. He's got to tell me to do it.

Q. And he did not do that, correct?

A. No. And an attorney not filing a notice of appeal when a client tells me is ineffective assistance of counsel, but he's got to tell me to do it.

Q. In the—in the 14 days following the judgment in this case, did Mr. McCormick ever direct you to file a notice of appeal for him?

A. No. I—I received a letter from—from Mr. McCormick about six, seven months thereafter saying, "I wish you had went ahead and filed the notice of appeal," but that was six, seven months down the road. I was—I really was under the belief that he realized after our conversation that he got a break on his sentence. Judge Van Tatenhove could not do anything with the career offender statute, nothing. He had to impose that. You weren't coming off of anything much, you know. Judge Van Tatenhove cannot have done anything with the 60 months. He had to impose it consecutively. That's 248 months. He received 276.

Q. Now, if you could, somewhere in that stack of documents there is Exhibit 4, Government Exhibit 4.

A. Yes.

Q. Is that the letter that you're talking about that Mr. McCormick sent you?

A. Yep.

Q. About six months after sentencing?

A. That's correct.

Q. All right. And then finally, Mr. Roberts, I'd like to tender to you what I've marked preliminarily as Government Exhibit 5. That's at Docket Entry 344–1 that's attached to—it's a notice of filing of a notarized affidavit of Mr. Roberts.

THE COURT: He's already got that one?

MR. TRIMBLE: No, that needs to be tendered.

THE COURT: That can be provided.

MR. TRIMBLE: You've already got it, right?

MR. SERGENT: Yeah.

MR. TRIMBLE: Okay.

Q. Do you recognize that document, Mr. Roberts?

A. Yes.

Q. And is that the affidavit that you drafted in response to Mr. McCormick's 2255 petition?

A. Yes.

Q. As you sit here today under oath, do you stand by everything that you said in that affidavit to the best of your knowledge?

A. Absolutely.

MR. TRIMBLE: Your Honor, I would move for the admission of Government Exhibit 5 into the record.

THE COURT: That'll be—that will be admitted.

MR. TRIMBLE: And subject to redirect, I don't have any further questions for Mr. Roberts.

THE COURT: Okay. Mr. Sergent, are you ready for your cross?

MR. SERGENT: Yes, Judge.

CROSS-EXAMINATION

BY: MR. SERGENT:

Q. Would you agree, Mr. Roberts, that this was a serious case with a serious penalty; is that accurate?

A. Absolutely, Mr. Sergent.

Q. And I was just going to ask you, you said earlier that you met with him, you know, many times. How many times did you meet and discuss the case with Mr. McCormick?

A. I can't recall, but it was—it was a lot, Mr. Sergent. It was, I'd say, a dozen.

Q. And you met with him in person; is that correct?

A. That's correct.

Q. Okay. Now, I wrote down the question: "Do you have any staff, or is all contact directly to you?" In other words, if your clients call, do they have to call and talk with you, or is there someone that you direct them to contact and will get a message to you?

A. Mr. Sergent, my office is open 24/7.

Q. That's not the question I asked you.

A. Well, no, they call me—

MR. SERGENT: Okay.

A. —and I get the message because it's my home. That's my office when I was representing Mr. McCormick. And so he could call me at 4:00 in the morning, I would have got the message.

Q. Now, is it fair to say the vast majority of your practice is comprised of federal and appellate—federal appellate work?

A. No, not really. I do lot of state stuff.

Q. How would you break down the percentage?

A. I would say federal is about—now is about 40 percent, and then the state is criminal, it's about 25 percent.

Family—I got a law partner now; she used to work for me as a paralegal for 17 years, she just finished law school, I made her partner. So I've increased my family practice to give to her. So that's about 15 percent. And then the rest is employment and probate.

Q. So the largest portion of your practice is federal and appellate and district court work, correct?

A. Yeah, federal keeps me pretty busy, yeah.

Q. And you would agree that it would not have been a good thing to have been found ineffective for your federal practice?

A. It wouldn't be a good thing. But, Mr. Sergent, you know, I will—in two months I'll be 68 years old, and I have, in the last five years, battled possibly going blind. I've had three surgeries on each of my eyes. I have to have shots in my eyes every four to six weeks. I'm a severe diabetic. I was told about two months ago, because I got an injury to my leg, that if they can't do something, then I will lose my foot. And about five months ago, I just finished 33 treatments of chemo

because of cancer. So there's bigger concerns here than just being ineffective counsel, to me.

Q. So in the last five years, you've had a lot going on personally; is that accurate?

A. That's correct.

Q. Now, you gave legal advice to Shane; is that correct?

A. That's correct.

Q. And he relied upon your advice; is that correct?

A. Not really, because when I—when I told him not to let me walk off a cliff and he misled me, then, you know, that is a critical piece of advice that I need in order to be an effective attorney.

Q. He entered into an open plea; is that correct?

A. That's correct.

Q. And that's what you advised him to consider; is that correct?

A. Given the huge disparity in the facts that he stated and the facts that Mr. Trimble stated, and I could not advise him to accept a plea where he says the facts are not correct, and Mr. Trimble wasn't willing to change 'em.

Q. Isn't it correct that he entered a plea partially upon your advice?

A. It was upon my recommendation.

Q. Correct.

A. Correct.

Q. And you and he spoke on numerous occasions about his appeal rights, correct?

A. I told him maybe two or three times that if things don't go to his satisfaction, then he can appeal it. And again, if you look at the plea agreement, it talked about drug quantities, which he said wasn't true. Later it came out to be true. And he talked about guns that he said he didn't possess, which later he did possess, you know, then you can't admit to stuff like that.

Q. And if I—I'm looking at your affidavit. You had testified earlier that that was accurate correct and true?

A. Uh-huh (affirmatively).

Q. And in that, in paragraph 4, would you take a look at that. Is that paragraph true?

A. That is true, and—

Q. So you gave him advice to enter a plea of guilty in open court so that he could preserve his appeal rights, correct?

A. All of 'em, yes, correct.

Q. So you knew that he was interested in preserving and keeping his appeal rights, correct?

A. No.

Q. He wasn't interested in keeping his appeal rights?

A. That was my recommendation to him, to—to—and that's the only reason, Mr. Sergent, you do an open plea, is to preserve your appellate rights in all of 'em. That's the only benefit. And in his case when he's looking at three possible life sentencing—sentences, then it really made no sense for him to accept Mr. Trimble's plea agreement, which requires him to give up his appellate rights.

Now, there is language in the plea agreement that basically says that if the sentence is beyond the recommended guideline range, then he can—you know, then he can appeal if he signed that waiver. The problem here was, is that I could not say what the recommended guideline range was going to be in his case. It could have been life.

Q. I'm going to ask the question again. He was interested in his appellate rights enough to refuse a plea agreement and enter into an open plea, correct?

A. Again, I recommended that he do not accept the plea agreement for several reasons, and not only because of the appellate waivers. That was a partial reason, but not the sole reason. He cannot plea to something that he's saying is not true.

Q. Mr. Roberts, did you draft this affidavit after reviewing the allegations contained in the 2255 motion filed by Mr. McCormick?

A. I don't recall reviewing the 2255 affidavit.

Q. And—

A. I just—I just dictated this from what I remember occurred during my representation.

Q. And if you would look at that affidavit. Would you agree that the only reason you put into this affidavit telling us what happened was that he was not required to waive his appellate rights?

A. In this affidavit, that is true.

Q. So in other words, when I showed up for this hearing today, I had—this is what I knew that you had provided and told us what happened, correct?

A. As far as I know, yes.

Q. And I think you gave us a letter, and you gave us a letter you wrote and a letter he wrote, correct?

A. Correct.

Q. And in that letter that you wrote, you would agree that you specifically told him that the reason that he needed to consider an open plea was so that he could preserve his appellate rights, correct?

A. That's correct.

Q. And then you would agree that he wrote you a letter afterwards when he was in Beckley asking you why you didn't file a notice of appeal, correct?

A. 'Cause he didn't tell me to.

Q. I asked you a question.

A. Correct—yes, that's correct.

Q. Thank you. And now let's ask it this way, Mr. Roberts. Did you file a sentencing memorandum?

A. I don't recall.

Q. If the—if the record reflects that you didn't, would you have any reason to disagree with me?

A. That I didn't? No, I don't.

Q. And you did have discussions with plea agreements with Mr. Trimble, correct?

A. Correct.

Q. And the plea agreement that has been introduced here today, I want to make sure I understand. You said that that plea agreement, Mr. McCormick was facing multiple life sentences; is that correct?

A. Potential, yes.

Q. Potential life sentences?

A. Yes.

Q. And these were under the career guideline offender designation, the drug quantity and the—

A. And if you look at—if you look at paragraph 4—

MR. SERGENT: Yes.

A. —of the plea agreement?

MR. SERGENT: Yes.

A. Okay. It says, "The statutory punishment for Count 1 is imprisonment for not less than ten years and not more than life."

MR. SERGENT: Yes.

A. "A fine of not more than $8 million, and a term of supervised release of eight years. The defendant is eligible for the above-referred enhanced sentence based on a prior qualifying felony drug conviction.

The statutory punishment for Count 4 is not less than five years, no more than life imprisonment, to be served consecutively to any term of imprisonment imposed by any other offense, not more than a $250,000 fine," and et cetera, et cetera, et cetera.

Q. Do those charges group?

A. Please?

Q. Do the charges group?

A. No.

Q. Okay. So each one of those are separate sentences, correct?

A. Correct.

Q. All right. And you discussed that with your client, correct?

A. Correct.

Q. And you spoke with him at that point in time about all the paragraphs that were included in that document, correct?

A. We went over every single paragraph, correct.

Q. So during that period of time you spoke with him about his appeal rights, correct, paragraph 8?

A. I told—like I said, Mr. Sergent—I told Mr. McCormick on two or three occasions that if he had issue with something, he could appeal it.

Q. And he told you that he would—he wanted to appeal?

A. No, he did not.

Q. Did he tell you he wanted to appeal if he wasn't satisfied with the sentence?

A. No, he did not.

Q. You said earlier that he could appeal if something was off or it was—I can't remember the exact language that you used, but it was something that just wasn't okay with him, correct?

A. I told him that if he felt—if he felt that it was something that was unreasonable, whatever, he could appeal it.

Q. And it's your obligation as an attorney, if you're told to file an appeal, to file the appeal?

A. Absolutely.

Q. Is that the only time you have an obligation to do anything with regards to appeals, to your knowledge?

A. That's the only time I would file a notice of appeal for my client telling me to do so.

Q. You discussed that you do not think there were any grounds to appeal; that's your opinion, correct?

A. That's absolutely my opinion. If he would have told me to file a notice of appeal, I would have done it, Michael.

Q. In paragraph—

A. —but—but what I would always have done was file a motion to withdraw.

Q. Again, in paragraph number 5 of your affidavit, you say that you do not think there were any grounds for appeal, correct?

A. That's correct.

Q. And when did you discuss that with your client? When did you tell him you didn't think there were grounds for appeal?

A. He didn't ask me.

Q. That's not my question, sir. I asked you specifically when did you discuss with him—

A. I did not.

Q. You did not discuss anything with regards to the appeal or anything of that nature or any grounds; is that right?

A. That's correct, because—

MR. SERGENT: Okay.

A. —let me clarify it—because he did not call me and tell me to file a notice of appeal. If he did, I would say, Michael, I'm going to file a notice of appeal, but I'm also going to file a motion to withdraw.

I did not go to Michael and say, Well, you know, I think you need to appeal it, because I thought the sentence was reasonable, very reasonable.

Q. Mr. Roberts, at any point when you represented him, did you discuss your feelings that there were no grounds to appeal?

A. At sentencing, no.

Q. Prior to sentencing at any time in this case did you tell him what the strengths or the weaknesses of an argument were, what the strengths and weaknesses of his appeal were, or what the risks and benefits of an appeal were at any point in time?

A. No. Because again, I did not have the information in order to say that the government failed to do this, failed to do that.

And then again, after we had the sit-down downstairs, it came to light that the government was accurate in everything that they proposed.

Q. Mr. Roberts—

A. He admitted it.

Q. —in your testimony here today, if the only reason or the main reason to enter an open plea is to preserve all your appellate rights, why did you fail to file a notice of appeal?

A. Again, I just don't spontaneously file a notice of appeal without grounds and without my clients directing me to do so. That did not occur in this case, Mr. Sergent.

Q. Mr. Roberts, did you ask him if he wanted to file an appeal?

A. No.

Q. Was Mr. McCormick happy at the sentencing hearing?

A. No, he wasn't.

Q. Was he what I would describe heated or upset? Was he upset?

A. He said, "Thanks for nothin'."

Q. And is it fair to say that you could tell from that statement and his attitude that he was not happy with this sentence?

A. He was not happy with the sentence.

Q. So did you stay and speak with him about an appeal at that point in time?

A. No.

Q. So you basically just left, and didn't discuss an appeal with him at any point in time after the sentencing?

A. I thought he would call me like he normally do and we would discuss it, but I did tell him, "You can appeal." He never did call.

Q. And so basically he told you that—he let you know he wasn't happy, and at that point in time did you apologize because you were sorry that he got that sentence? Do you remember?

A. No, I did not apologize, and I wasn't sorry that he got that sentence. That was the only sentence—Judge Van Tatenhove went to the bottom end of the guideline range. He—you know, he got 14 months over the minimum. And again, in my opinion, I think that that was not proper because I think the 262 should have been on top of the 248.

Q. And the 248 comes from what?

A. Comes from being a career offender—

MR. SERGENT: Okay.

A. —and—and—and the gun.

Q. Okay. So you feel like there should have been a sentence for the career offender that would run consecutive with the 262 of the drug weight to run consecutive with the 60 months?

A. Correct.

Q. That's the way you think the judge should have done it?

A. Not should have done it, could have done it.

Q. Or could have done it. And in that circumstance, is that what you told Michael?

A. No.

Q. You didn't tell him anything like that or tell him that he should have appealed because of this great deal that he got?

A. It is not my—and I've never done this. I've never told a client to appeal or shouldn't appeal a case. That's totally up to my client, no matter what I may believe as to the merits of his appeal 'cause I always have an option to file a motion to withdraw. But I will not support a frivolous appeal or a frivolous—

Q. Did you tell him he could appeal on the date of sentencing?

A. No, I don't remember—I don't remember, no.

Q. Now, were you having health issues during that period of time?

A. No, nothing that I couldn't—you know, couldn't do. I mean . . .

Q. And did he tell you to go ahead and do that, the appeal?

A. No, he did not.

Q. And is it fair to say that since there was tension and he was upset, that you wanted to—to give him some time to cool off?

A. No, not really, because again, he knew that all he had to do was call me and I'll file the notice of appeal. But like I told him, the basis for going forward would be if the sentence was unreasonable—and we discussed this—I told him, you know, that this is what the judge has to do. And that's why I was so adamant about him sitting down with Mr. Trimble to get some reduction in the sentence, which he wasn't going to do. But he finally did it. But we didn't get much, six months, or something like that.

Q. You've testified that an open plea was to preserve all appellate rights without getting credit for—while getting credit for acceptance, correct?

A. Correct.

Q. You knew that your client was dissatisfied by his sentence, correct?

A. He wasn't happy. It's a long sentence.

Q. You took no effort, or made no effort to consult with your client after the sentencing; is that correct?

A. That's correct.

Q. You did not write a letter to him attaching a copy of his judgment so that he would know when his 14 days started; is that correct?

A. He knew when his 14 days was. I sent him a copy of the judgment.

Q. When did you send it to him?

A. I don't recall.

Q. Do you have a letter?

A. No.

Q. Did you attach a letter to your filing?

A. No.

Q. So you don't have anything that shows when you would have sent him the judgment; is that correct?

A. To my knowledge, no.

Q. And the judgment wasn't entered on the date of the sentencing, was it?

A. No.

Q. And you didn't call the jail and talk to him about his feelings regarding an appeal, correct?

A. That is correct. And to be honest with you, Mr. Sergent, I've never done that in my practice.

Q. And did you send him a letter that told him that you weren't sure if he wanted to appeal and he had 14 days, he either needed to contact you immediately or contact the clerk; did you send him a letter like that?

A. I've never done that.

Q. You do go to CJA training, and I've seen you at those seminars; is that accurate?

A. That's correct.

Q. And they talked at those seminars about the need to make sure we know what the client's desires are, correct?

A. That's correct.

Q. But in this case, you took no action to know what the desire of the defendant was, correct?

A. We had several discussions prior as to his desire. He never really—Mr. McCormick really never said that he was going to appeal anything, Mr. Sergent. All the discussions, all the discussions about appellate rights and appealing came from me to him. He just listened. And I told him that if, you know, that if he—if he wanted to appeal a sentence that was unreasonable, then just let me know, and we would do that. Again, in this—in this case, the sentence was extremely reasonable.

Q. When did you ask him what he considered to be an unreasonable sentence?

A. I did not.

Q. Can you tell me today what he considered to be an unreasonable sentence?

A. I did not. At—

Q. Are you—are you aware of an obligation to determine what your client's desire is?

A. At the—yes, but at the—at the sentencing, you know, we—I told him that Judge Van Tatenhove came way down and he was in the guidelines, and he just went over 14 months, that that's reasonable.

Q. You just told us that you had not spoken with him after the sentencing, that you didn't remember anything during the sentencing, you didn't remember him telling you that he wanted to appeal.

A. I didn't say that. I didn't ask him whether he wanted to appeal. I didn't ask him what he wanted to appeal, but I thought the sentence was reasonable.

Q. I'm not asking what you thought. I'm saying, did you communicate that to your client on the date of sentencing?

A. Other than—nothing other than Judge Van Tatenhove sentencing at the low end of the guidelines, and he just went over 14 months, or something like that.

Q. When did you say that to him?

A. There in court down there.

Q. Down where?

A. In the courtroom.

Q. Okay. So in the courtroom, was that—when—what time frame was that? Was that before Mr. McCormick told you that, "Thanks for nothing," or was it after?

A. When he said, "Thanks for nothing," he was standing up leaving the Court, and that was surprising to me.

Q. And so when did you tell him that Judge Van Tatenhove varied under and gave him this great deal?

A. When the judge announced the sentence.

Q. So being kind of familiar with how Judge Van Tatenhove's sentencings go, you were talking while he was reading the special conditions?

A. No.

Q. So when it—the—when that ends, he gives the document to him that you've seen earlier to consent—or the appellate rights document, correct?

A. Correct. And when we—when I leaned over and stuff and he was reading it and I said, "Judge Van

Tatenhove went down to the low end," I says, "That's pretty good." And that's it.

Q. Okay. So you never told him anything but you were happy with the sentence; he wasn't, accurate?

A. That's accurate.

Q. Okay. And doesn't Judge Van Tatenhove tell you to read and advise him about what those, you know, appellate forms have in them and what the significance is?

A. I told—I told—

Q. You just now told me he read it?

A. I told McCormick that that document I've seen hundreds of times, and basically it just lays out his rights and if he wants to appeal. That's it.

Q. When did you tell him that?

A. When we was going over the document, Mr. Sergent.

Q. But you told me a little bit earlier that basically you sat there and told him that you thought Judge Van Tatenhove gave him a good deal while he was reading. You never said you explained anything, talked to him, told him, or anything of that nature?

A. It doesn't take—you know, when he was—the judge said, "Read the document, you all discuss it, and then you sign it." And then I took—and I was leaning over because I get a copy, he gets a copy, and I told him, I said, "You know, the sentence I think, was reasonable. This document just explains your right to appeal." I've seen it several times, and that's it. I didn't have to read that to Mr. McCormick. He can read. He understands. He read it.

Q. Is anything that you just testified to in the affidavit that you provided to the government to explain what happened and what your position was and is?

A. My position, Mr. Sergent, simply is that—

Q. That's not the question, sir. I asked you was that, what you just testified to, in this document that was tendered?

A. Explain the question so I understand.

Q. Did you put in this document that you spoke with him, told him you thought he—that Judge Van Tatenhove gave him a good sentence, and that he could read and he could appeal?

A. No, I didn't put that in there. And the reason why is that I might be wrong. But the whole issue here is to me is did Mr. McCormick tell me to file a notice of appeal or directed me at any time to file a notice of appeal or said, "I just want you to file a notice of appeal spontaneously, no matter what happened," and he didn't do that.

Q. Is it possible that he told you to file an appeal and you didn't hear him because you were walking away?

A. No.

Q. And you did not have—and to go—to make sure we understand, you understand you have a duty to consult with your client about an appeal?

A. Yes.

Q. And you would agree with me that after sentencing, you made no contact or any attempt to consult with your client?

A. That's correct.

Q. And you also admit that your client was upset with the sentencing, correct?

A. He wasn't happy, that's correct.

Q. And you also have testified here today that the appellate discussions that you had at the very least had a component that said if he was dissatisfied, he'd wanted to appeal, or he would appeal?

A. No.

MR. SERGENT: Okay.

A. The—the component was, is that if the sentence was not within the guideline range or something like a life sentence or whatever, then he could appeal and he'd let me know that's what he want.

But again, I never—and I will start after this hearing—but I have never, ever consulted a client whether they should file a notice of appeal because the judges tell them that they can file a notice of appeal. They can inform—they could ask the court clerk or they can—they say you can call Mr. Roberts. I'm pretty sure that he will file a notice of appeal.

Mr. McCormick did not do that. So I never follow up and ask someone whether you want me to file a notice of appeal on your behalf; I've never done that, Mr. Sergent.

Q. You've wrote a letter that's been previously identified as an exhibit. You say, "I recommend possibly entering into an open plea, as opposed to giving up your appellate rights," correct?

A. Correct.

Q. So by that letter, you're acknowledging that Mr. McCormick was interested and did know that he had appellate rights and wanted to exercise 'em?

A. Mr. McCormick did not let me know that he was interested in filing an appeal at any time. That conversation, Mr. Sergent, was a one-sided conversation. It was me telling him that given his criminal history, that's given the difference in facts because he—his statement of the facts to me was misleading and wasn't true, given the possibility of what he could get hit with, then I saw no advantage in waiving the appeal because again, probation and parole, they—they drive the sentencing.

MR. SERGENT: Could I have just a moment, Judge, to talk to my client? I may be done.

THE COURT: Yes.

[COUNSEL AND DEFENDANT CONFERRING]

Q. Mr. Roberts, if you would do me a favor and take your affidavit and look at the top of—I think it's page 2, paragraph 7. Do you see that?

A. Uh-huh (affirmatively).

Q. Now, you—you wrote in there, or you quoted from, I guess, the letter, Why did you go on and file an appeal for me?

A. Uh-huh (affirmatively).

Q. That's not an accurate quote; is that right?

A. This came from his letter. Let's see.

Q. Well, and I'm going to read the position—or it's a full sentence, it looks like. It says, "I was just really shocked that I got so much time. I know you worked hard for me and did your best. Why you didn't go on and file an appeal for me, I don't know." That's the quote, isn't it?

A. Yes.

Q. Okay. Now, did you respond to that letter?

A. No.

Q. Did you—you didn't send him a letter saying you never told me to appeal, Michael?

A. No. I don't believe so.

Q. You didn't call him or email him or anything of that nature?

A. No.

MR. SERGENT: Nothing further, Judge.

THE COURT: Okay. Mr. Trimble, redirect?

Hang on one second. Do you need a break, Sandy?

COURT REPORTER: I think I'm fine. Thank you.

THE COURT: Okay.

MR. TRIMBLE: Your Honor, I just want to—

The only thing I want to check on before I release the witness, I think it may be possible that me or Mr. Sergent or both may rely at some point on the sentencing transcript or rearraignment transcript and the presentence report. I think those are fairly in the record.

THE COURT: They are.

MR. TRIMBLE: And so I—I didn't move it in through the witness. I can if the Court prefers.

THE COURT: No, that's fine.

MR. TRIMBLE: So other than that, Your Honor, I have no further questions.

THE COURT: Mr. Roberts, did you have any discussion that you can recall with Mr. McCormick about the sentences that were imposed upon the co-defendants in the case?

THE WITNESS: No.

THE COURT: Do you recall ever comparing what you thought Mr. McCormick's sentence might be to any sentence that any co-conspirator received?

THE WITNESS: No, not really, Your Honor. My concern was the gun and possible enhancements, and the fact that he was a career offender, which—and the drug quantities.

THE COURT: Okay.

THE WITNESS: Because—because of his record, which was possible, and the other defendants, their criminal histories, I believe, wasn't as bad as Mr. McCormick's.

THE COURT: Do you recall if those other defendants were sentenced before or after Mr. McCormick?

THE WITNESS: I don't recall.

THE COURT: Okay. Do counsel have follow-up questions to mine, Mr. Sergent?

MR. SERGENT: I do actually, if it's okay.

THE COURT: If it's limited to what I ask, yeah, go ahead.

MR. SERGENT: Yeah.

RECROSS-EXAMINATION

BY: MR. SERGENT:

Q. Did you ever discuss with Mr. McCormick what the other sentences of the defendants were actually?

A. No. I do remember discussing with Mr. McCormick that the other defendants—I think all but one was cooperating with the government, and they were talking, and—and that they were going to testify

against Mr. McCormick and that, you know, they were going to get a 4K, and that he needed to just realize that if they're talking against him, that he should go ahead and talk because that would help him at sentencing, which eventually he did.

Q. It's fair to say that Mr. Money, who was also a co-defendant, was also a career offender, correct?

A. I don't recall at this time.

Q. And I think in the sentencing arguments that you made, you referenced that Mr. McCormick, Jr. got 148 months. Does that sound right to you?

A. That sounds right.

Q. And is it fair to say that during the sentencing, the U.S. Attorney stated that the—Mr. McCormick, Jr., Ms. Johnson or Nelson, I'm not really—I don't remember his last name. Do you remember her name?

MR. TRIMBLE: Your Honor, can we jump on the headsets here?

THE COURT: Yes. All right.

COURTROOM DEPUTY: This will be bench conference?

THE COURT: All right. Let's go on with the bench conference and maybe take a break.

COURTROOM DEPUTY: The court reporter can't hear.

[INDISCERNIBLE BENCH CONFERENCE]

[IN OPEN COURT]

MR. SERGENT: I don't have very many questions.

THE COURT: What does that mean?

MR. SERGENT: It means that you had asked him specifically about if he ever discussed with Mr. McCormick the co-defendants and their sentences versus his sentence.

THE COURT: All right. Let's take a ten minute break, and I'll allow—and you do need to limit the additional questions to the subject matters that I've covered on the few that I asked.

MR. TRIMBLE: And, Your Honor, maybe if we're going to do a pop quiz on the sentencing transcript, which is, of course, in the record, I would request Mr. Roberts be able to have access to that, if he's going to be asked specific detailed questions about what happened in the sentencing.

MR. SERGENT: He's not.

THE COURT: Well, we'll see what the questions are. That's a fair point.

Okay. We'll, take a ten-minute recess. We'll be in—we'll be in recess.

[RECESS – 2:51 – 3:05 p.m.]

[IN OPEN COURT]

THE COURT: All right. We're back on the record. Mr. Roberts is still on the witness stand.

Go ahead, Mr. Sergent.

Q. Mr. Roberts, Michael Shane McCormick, Sr. was the last of the conspirators to be sentenced; is that accurate?

A. I can't say for sure, Mr. Sergent.

Q. And he got 88 months more than anyone else in the conspiracy, correct?

A. I don't know what the other co-defendants received.

Q. Okay. And as I understand it, how many—do you remember how many people were indicted in this conspiracy?

A. Mr. Money, and to my knowledge, his criminal history wasn't nowhere near Mr. McCormick, Sr.

Ms. Robin Lawson, I believe last name, and her criminal history wasn't—wasn't as bad.

Mr. McCormick, Jr. had a pretty extensive criminal history. I think he did receive a career offender status, but I don't think he—I don't think he had a gun, but in his case, he started cooperating from almost day one and continued to talk.

Q. So there were four in the indictment?

THE COURT: Mr. Sergent, my questions were triggered by your client's testimony, and this is not a memory test for Mr. Roberts about the other co-defendants and the sentences they might have gotten. If you have questions that go to the topic that your client addressed in his direct and that I followed up on, you can ask those questions. But it shouldn't be a memory test about the number of other conspirators or what sentences they got or when they were sentenced. That's not at all what I was getting at with my questions.

Q. Did you talk to Mr. McCormick, Sr. and encour—or give him the idea that he was not going to get any more time than anybody else in the conspiracy?

A. No, not at all.

Q. Did you ever discuss that in relation to the fact that he wasn't involved for as long as the other conspirators?

A. He led me to believe that he was only involved in the conspiracy for about a week, which was incorrect. But we didn't talk about him getting less than the co-defendants given his—his record. I was concerned that he possibly would get a lot more.

Q. Okay. And that's your recollection of what you talked about?

A. That's what I know we talked about.

MR. SERGENT: Okay. That's all, Judge.

THE COURT: Mr. Trimble?

MR. TRIMBLE: No, Your Honor.

THE COURT: Okay. Mr. Roberts, you can step down.

Would you gather all of those papers that are there and pass them to Mr. Trimble, please.

THE WITNESS: Uh-huh (affirmatively).

THE COURT: Okay. Thank you. Thank you for appearing this afternoon.

THE WITNESS: No problem, Your Honor. Thank you.

THE COURT: All right. Mr. Trimble, is there further proof from the government?

MR. TRIMBLE: No, Your Honor.

THE COURT: Is there rebuttal proof from the petitioner, Mr. Sergent?

MR. SERGENT: No, Your Honor.

THE COURT: Okay. How do counsel prefer to proceed at this point? It's your client's burden, Mr. Sergent.

MR. SERGENT: Judge, I think I'd like to brief and get the copy of the transcript to rely specifically on certain testimony, frankly. I'm prepared to argue it today, if that's the Court's preference, but I would like to have the transcript to reflect directly on.

THE COURT: Okay. No, there's no hurry from the Court's perspective.

How long do you want after the transcript's prepared, Mr. Sergent?

MR. SERGENT: I have a two-week trial starting July 19th, so I anticipate filing the form tomorrow to get the transcript.

THE COURT: Okay.

MR. SERGENT: So I'll do that as quickly as I can. So if I could have—if I could have 35 days, Judge, that would get me past the trial and able to file a brief.

THE COURT: All right, sure. Let's say your brief is due on August 9.

Two weeks after that enough time for you to get a responsive brief together, Mr. Trimble?

MR. TRIMBLE: Yes, Your Honor.

THE COURT: You sure, the 23rd?

MR. TRIMBLE: Yes, Your Honor.

THE COURT: Okay. So it's a post-hearing brief from the defense on or before August 9, brief from the government on or before August 23rd, and then it will stand submitted.

Madam Court Reporter, is there anything significant on your schedule that you know of that would postpone the preparation of the transcript?

COURT REPORTER: No, Your Honor.

THE COURT: All right. So if timing issues arise, you can seek relief as necessary, but that's the briefing schedule I'll impose at this point.

Okay. So, Mr. McCormick, we're going to have further written submissions. Your appointment continues through those submissions, Mr. Sergent. You weren't appointed to represent Mr. McCormick on the other two claims in his motion. So what—what always gets a little tricky is your appointment status following the issuance of an R&R because you handle certain issues in the case, but not others.

What I'll do is extend Mr. Sergent's appointment through the proceedings in this district. Any concern about that, Mr. Sergent?

MR. SERGENT: I want to make sure that I understand, Judge, because it's one of those things that makes me a little nervous, and I—because I've actually talked to our—one of our panel reps about this issue.

I read the Court's order, understand that I was appointed for the limited purpose of this hearing as far as this issue.

THE COURT: That's right.

MR. SERGENT: When the Court rules on the R&R, I am assuming that you will be ruling on the other issues that you've brought up that I've not.

THE COURT: I've already said those would be very frivolous.

MR. SERGENT: Yes. So I wanted to make sure that when my appointment continues, it's everybody, including my client, understands that it will be with regards to this issue.

THE COURT: That's fine. You don't owe him any duties with respect to those other claims.

Mr. McCormick, Mr. Sergent is only your lawyer on this claim that you say you asked Mr. Roberts to file an appeal for you and that he didn't and you should be given a new appeal as a result of that. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So what that means is when the Court, either me or Judge Van Tatenhove makes a ruling, if we address other issues, your other claims, you're—you have to assert your rights on those. Do you understand that? Mr. Sergent's not your lawyer on those; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And the reason that gets messy is you could—theoretically, you could have two sets of objections filed. But no, Mr. Sergent doesn't owe you any duties with respect to those other claims.

THE DEFENDANT: Yes, sir, Your Honor. I understand.

THE COURT: Okay. Is that fair enough, Mr. Sergent?

MR. SERGENT: It is, Judge. Thank you.

THE COURT: Do you think that makes sense, Mr. Trimble? I don't know how else to handle it.

MR. TRIMBLE: I understand, Your Honor.

THE COURT: All right. And if they're proceeding before the district judge and you need clarification on your representation, you can raise them at that time, but I'll just extend the appointment through the proceedings in this district, Mr. Sergent. Okay?

MR. SERGENT: Yes.

THE COURT: Okay. Anything further, Mr. Trimble?

MR. TRIMBLE: No, Your Honor. The only thing is, I've organized the exhibits and I'll tender them to the clerk following the hearing.

COURTROOM DEPUTY: I've got them.

THE COURT: You have the courtesy copies, I think, Sheila?

MR. TRIMBLE: The courtesy copies, some of them are front and back—

THE COURT: Yeah.

MR. TRIMBLE: —and these are—the ones that I gave the witnesses are just all front. I think that's how the clerk prefers them.

THE COURT: Yes.

MR. TRIMBLE: So I can tender these copies to the clerk.

COURTROOM DEPUTY: We'll trade.

THE COURT: Okay. That's fine. You all can sort—and the ones that the witnesses used had the—

MR. TRIMBLE: That's these.

THE COURT: Do they have any call-outs or anything like that, highlighting or anything like that on them?

MR. TRIMBLE: The one of them has a highlighter.

THE COURT: I thought so. Okay. I've seen the version that the witnesses were using, so provide those to the deputy clerk.

Anything further, Mr. Trimble?

MR. TRIMBLE: No, Your Honor. Thank you.

THE COURT: Anything further, Mr. Sergent?

MR. SERGENT: No, sir.

THE COURT: Okay. We'll be adjourned. Thank you all.

[END OF PROCEEDINGS – 3:15 p.m.]

* * * * *

I, SANDRA L. WILDER, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sandra L. Wilder RMR, CRR
Official Court Reporter

Date of Certification:
July 19, 2021

INDEX

EXHIBITS

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APPENDIX G

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.