UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

CRIMINAL ACTION NO. 5:20-CR-63-DCR-MAS
(Civil Action No. 5:26-CV-57)

UNITED STATES OF AMERICA **PLAINTIFF**

V. **UNITED STATES' RESPONSE TO 28 U.S.C. § 2255 MOTION**

DOUGLAS WILLIAM VANCE **DEFENDANT**

* * * * *

The Court should deny Douglas Vance's motion to vacate under 28 U.S.C. § 2255. [R. 273: Motion.]

The Sixth Circuit described the case background:

> Douglas Vance, a former coal miner, constructed a calciner, a machine that heats raw biomass or coal to produce biochar or calcinated coal. Such high-energy carbon products can then be sold to energy, industrial, or agricultural companies. From a small operation in Virginia, Vance hoped to expand to a site near Hazard, Kentucky. Enter Molly McKinnon. After meeting Vance in the spring of 2016, McKinnon began working with him, helping Vance with finances, while Vance focused on the business's operations. Vance and McKinnon generally referred to their business as Nex-Gen.
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> Vance and McKinnon found investors and lenders for Nex-Gen. One investor was Allan Deware. In August 2016, he agreed to provide a quarter million dollars in needed capital, creating a new corporate entity to oversee the operation. Around the same time, Vance and McKinnon convinced a charitable foundation called the Shumard Foundation to similarly invest in Nex-Gen. There were others that put money into Nex-Gen, as well, including Koch Industries and Vance's long-time friend, Joan Faybik.

> But not all was what it seemed with Nex-Gen. While the company's investors and lenders each operated on the understanding that they were the exclusive partners with Vance and McKinnon, the reality was that there were many fingers in the Nex-Gen pie. And Nex-Gen never seemed to ship large quantities of processed biomass or coal to any customers, despite continued assurances made to those with a financial stake in the company about pending sales. Indeed, many of the supposed sales and financial records that Nex-Gen's investors and lenders relied on to lend money to Nex-Gen were misleading at best. In truth, Nex-Gen was living hand to mouth. No income was coming into the company, bills were not being paid, and employee paychecks often bounced. The cash the company brought in from investors and lenders was sometimes distributed back in bits and pieces. But more often it was being misappropriated for personal use, and the company kept operating in a Ponzi-like fashion only because of the infusion of additional cash from unwary investors.
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> Eventually, the scheme became difficult to conceal. In the spring of 2017, Nex-Gen's office manager, April Francis, noticed sizeable outlays on Nex-Gen's bank statements. Alarmed, Francis turned to McKinnon, who became irate that Francis had examined the bank statement and knew the details of the company's finances. Suspecting that things were not on the up and up, Francis reached out to Deware, who she knew was one of the company's investors, and alerted him to Nex-Gen's financial woes. After reviewing financial documents sent by Francis, Deware realized he was not the only investor in Nex-Gen. He likewise recognized that McKinnon had fabricated documents to hide Nex-Gen's serious financial problems. Deware reached out to federal law enforcement, who, in turn, began investigating Vance and McKinnon in early 2018.
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> The ensuing investigation unearthed many similar improprieties associated with Vance and McKinnon's business. That led to a grand jury indicting Vance and McKinnon on charges of committing wire fraud, conspiring to commit wire fraud, and conspiring to launder money from August 2016 through December 2018. After a six-day trial in which Vance and McKinnon testified, the jury returned guilty verdicts across the board. The district court sentenced Vance to 174 months and McKinnon to 156 months of imprisonment, respectively.

United States v. Vance, Nos. 23-5766/5773, 2024 WL 4867049, at *1-2 (6th Cir. Nov. 22, 2024). The court of appeals affirmed. *Id.* at *15. Vance then filed a § 2255 motion

raising arguments related to ineffective assistance of counsel, due process, and actual innocence. [R. 273: Motion.] The motion is meritless.

Ineffective Assistance Claims

To prevail on an ineffectiveness claim, the Defendant bears the burden of showing that (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's ineffectiveness prejudiced his defense so as to deprive him of his right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A § 2255 petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel. If the Court determines that petitioner has failed to satisfy one prong, it need not consider the other. *Id*. at 697. A petitioner must prove his allegations by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006).

To show deficient performance, a defendant "must prove that counsel's representation was not merely below average, but rather that it 'fell below an objective standard of reasonableness.'" *United States v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). Courts "employ a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id*. (quoting *Strickland*, 466 U.S. at 689).

To prove prejudice, a defendant "must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of [his trial] would have been different.'" *Dado*, 759 F.3d at 563 (alteration in original) (quoting *Strickland*, 466 U.S. at 694). "When determining prejudice, a court must consider the errors of

counsel in total, against the totality of the evidence in the case." *United States v. Munoz*, 605 F.3d 359, 377 (6th Cir. 2010). "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Dado*, 759 F.3d at 563 (quoting *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 [ultimate] judgment." *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 691). Proving ineffective assistance of counsel "is *never* an easy task." *Carter v. Parris*, 910 F.3d 835, 838 (6th Cir. 2018).

First, Vance argues that his counsel "failed to authenticate and admit the November 14, 2018 letter written by Molly McKinnon." [R. 273: Motion at 3376.] This claim fails because McKinnon's letter was not provided in reciprocal discovery and was inadmissible hearsay. [*See* R. 179: Court, TR (Trial Day 6) at 1779.]

On the reciprocal-discovery basis, Vance agreed that the letter was not provided. [R. 179: Colloquy, TR (Trial Day 6) at 1778 (agreeing that it was "fair summary" that letter "was never provided to the United States in reciprocal discovery").] "Failure to comply with the reciprocal discovery requirement under Rule 16 may result in . . . a prohibition on introducing the undisclosed evidence." *United States v. Hardy*, 586 F.3d 1040, 1043 (6th Cir. 2009). "The [Court] followed the clear guidelines for reciprocal discovery in Rule 16." *Id.* "A proper sanction for failure to disclose, under Rule 16, is exclusion of the evidence. Fed. R. Crim. P. 16(d)(2)(C). The [Court] did not err when it imposed this sanction under the Rule." *Id.* at 1044. On the hearsay basis, hearsay is "a

statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). McKinnon's letter was just that, as Vance does not contest. Such hearsay "is not admissible." Fed. R. Evid. 802. Thus, counsel did not deficiently perform by not admitting an inadmissible document. Further, there is no prejudice. The letter "does not come close to proving Vance actually innocent." *Vance*, 2024 WL 4867049, at *2. As the Sixth Circuit explained:

> Written well after the Nex-Gen FBI investigation began, McKinnon's letter asserts that Gary Chamblee, the chief investment officer of the Shumard Foundation, forced her to alter Nex-Gen's financial statements, and that Vance 'had no knowledge of what Chamblee had told her to do.' R. 262-1, PageID#2525–30. At bottom, the letter is a suspiciously timed, unsworn statement by McKinnon seeking to lay the groundwork for a duress defense contradicted by the record. [A] reasonable juror could very well find the letter less than compelling[.]

Id. at *3. For both a lack of deficient performance and a lack of prejudice, Vance's counsel was not ineffective regarding the letter.

Second, Vance alleges that his counsel "failed to introduce the December 19, 2018 FBI transcript corroborating the existence of the letter prior to indictment." [R. 273: Motion at 3376.] But there was no dispute that the letter existed. [*See* R. 177: Christopher Hubbuch, TR (Trial Day 4) at 1521-22.] (Vance, though, did not provide the letter to Special Agent Hubbuch. [R. 177: Christopher Hubbuch, TR (Trial Day 4) at 1522.] Neither did he disclose it in discovery. [R. 179: Colloquy, TR (Trial Day 6) at 1778.]) Further, given that the letter was inadmissible, further proof about the existence

of the letter would be all the more inconsequential. So counsel did not deficiently perform, and there is no prejudice.

Third, Vance faults his attorney for not objecting "to the false exculpatory statement instruction." [R. 273: Motion at 3376.] But the jury heard "testimony that after the crimes were supposed to have been committed, Defendant Vance provided false exculpatory statements to FBI Special Agent Christopher Hubbuch." [R. 131: Jury Instructions at 469; *see* R. 177: Christopher Hubbuch, TR (Trial Day 4) at 1489-1529; R. 178: Christopher Hubbuch, TR (Trial Day 5) at 1536-75.] So the instruction was proper, and counsel had nothing to object to. *See, e.g.*, *United States v. Hickman*, 766 F. App'x 240, 254 (6th Cir. 2019). Further, there is no prejudice. To the contrary, the instruction was either neutral in effect or helped Vance; it reminded the jury that "sometimes an innocent person my offer implausible explanations for some other reason" and that Vance had "no obligation to prove that he had an innocent reason for his conduct." [R. 131: Jury Instructions at 469.] And the jury would have convicted Vance, given the overwhelming evidence of his guilt, with or without this instruction.

Fourth, Vance thinks his lawyer failed to "[r]einforce" McKinnon's "testimony with documentary corroboration." [R. 273: Motion at 3389.] But he does not identify any documentary corroboration he wishes his attorney had used, and he does not specify what portion(s) of her testimony he wanted reinforced. To the extent Vance, yet again, thinks his attorney should have introduced her letter "to substantiate her statements," that claim fails for all the reasons stated herein. [*Id.*] And to the extent Vance complains that

his lawyer did not "[p]reserve objections to testimonial limitations," he does specify what objections his attorney should have preserved, and what testimonial limitations he means. [*Id.*] If he is referencing the limitation on McKinnon's testimony regarding a potential duress defense, those arguments are McKinnon's, not Vance's, to make, the issue was fully preserved for appeal, and the Sixth Circuit already upheld the limited testimonial restriction that did not prevent her from testifying to intent or purpose. *Vance*, 2024 WL 4867049, at *7-11. Vance proves no deficient performance or prejudice.

Fifth, Vance says his counsel "failed to properly use Mendie Hogan's testimony that [he] was not informed of the wires underlying Counts 2-4." [R. 273: Motion at 3376.] But his counsel is responsible for the very points on cross Vance cites. [*Id.* at 3389-90.] Counsel did not deficiently perform by bringing out the testimony that Vance now emphasizes. Regardless, none of the lines of questioning carries the weight Vance ascribes. Regarding formal votes, Hogan said that formal votes did not occur because Vance and McKinnon ("they," "the operators") requested the funds before they were advanced. [R. 176: Colloquy, TR (Trial Day 3) at 1144-45.] This, thus, supports Vance's knowledge of monetary transfers. Regarding funds "usually" being advanced based on "an email from Molly," [*id.* at 1145,] it was no secret that McKinnon "help[ed] Vance with finances, while Vance focused on the business's operations." *Vance*, 2024 WL 4867049, at *1. Although couched in generalities about what "usually" occurred, rather than what actually occurred on a given instance, this, if anything, would have further corroborated the general conspiratorial division of labor that trial established.

Regarding written notice, Hogan herself "was not involved in any notice," but Chamblee may have provided it. [R. 176: Colloquy, TR (Trial Day 3) at 1151.] So this was no sockdolager for Vance. And Hogan agreed that the transactions were "in the books" for Vance to inspect. [*Id.*] So neither did this help him. Further, none of this testimony related specifically to "the wires underlying Counts 2-4." [R. 273: Motion at 3376.]

If Vance is, yet again, generally attempting to claim ignorance, his head-in-the-sand arguments are counter to the evidence introduced at trial, the jury's verdict, and the Court's findings. [*See, e.g.*, R. 219: Court, TR (Evidentiary Hearing) at 2220 ("[Vance] did take the Sergeant Schultz approach during the trial of the case, and now, that he had a very limited view of what was happening, and to do that, you have to ignore a significant amount of evidence and testimony presented during the course of the trial."); *id.* (finding that Vance was "aware of and engaging in fraudulent activities" and "egregious conduct"); *id.* at 2208 (finding that Vance and McKinnon "did work together and were certainly aware of the activities of the other").] As the Sixth Circuit pithily summarized, "Vance's fingerprints are all over" this Ponzi-like scheme to defraud. *Vance*, 2024 WL 4867049, at *6. Further emphasizing these isolated parts of Hogan's testimony would not have swayed the jury to acquittal, particularly in light of their lack of centrality to the case and the otherwise overwhelming evidence of Vance' guilt, as summarized by the Court and the Sixth Circuit. There was no deficient performance or prejudice.

Sixth, Vance thinks his attorney "failed to challenge leadership, loss amount, obstruction and hardship enhancements." [R. 273: Motion at 3376.] As he later says,

however, he "did not receive a leadership enhancement." [R. 287: Motion at 4096.] He challenges the abuse-of-trust and sophisticated-means enhancements instead. [*Id.*]

Subpart One: the loss amount. Vance is wrong that his attorney failed to challenge the loss amount. The loss amount was subject to extensive adversarial proceedings and appellate litigation. *See Vance*, 2024 WL 4867049, at *4-5. The Court and the Sixth Circuit disagreed with counsel's arguments, but that does not mean counsel was ineffective. Vance offers no specific argument regarding loss for the government to rebut, in light of the wide-ranging loss-amount litigation that has already occurred. [*See* R. 273: Motion at 3391.] (What "[a]sset valuation" or "[o]ffset credit" does Vance want considered? [*Id.*] What "[a]ccurate recalculation" does he want? [*Id.*] He declines to say.) In sum, counsel litigated the loss amount zealously and did not deficiently perform. Further, the loss amount was correctly calculated, and Vance proves no prejudice.

Subpart Two: the obstruction enhancement. This enhancement applied because Vance "testif[ied] falsely during the trial in the case." [R. 220: Court, TR (Sentencing) at 2227.] Because Vance did not object to the enhancement, the Court did not "make further specific findings about the nature of the false testimony presented during the case." [*Id.*] This is the entire basis of Vance's argument—that the "record lacks" these findings. [R. 273: Motion at 3392.]

At the outset, there is no deficient performance. It was well within the range of reasonable, strategic decision-making to forego an objection to this enhancement at sentencing and thereby avoid focusing the Court on Vance's numerous false statements in

his trial testimony. Given Vance's litany of testimonial lies that could have buttressed the enhancement, it was a reasonable, strategic decision to not object and thereby avoid the potential downsides of refocusing the Court's attention on Vance's falsehoods, an aggravating sentencing consideration.

There is also no prejudice; had Vance challenged the enhancement, the Court would have made the necessary findings. "Before applying the enhancement based on a defendant's trial testimony, a district court must satisfy two requirements." *United States v. Jackson*, 154 F.4th 422, 429 (6th Cir. 2025). "First, it must identify those particular portions of the defendant's testimony that it considers to be perjurious." *Id.* "And second, it must either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury." *Id.* "Those perjury predicates are threefold: The defendant must have given (1) false testimony that (2) was willful and (3) concerned a material matter." *Id.*

Vance's testimony was littered with falsity. As a few examples, he falsely said that Deware was "aware that [he] had a company with the Shumards" and that Deware "knew that part of the arrangement would be to pay off the Shumards on their share." [R. 178: Douglas Vance, TR (Trial Day 5) at 1646-47, 1726.] He falsely denied providing Koch falsified information. [*Id.* at 1668.] He falsely denied emailing Jaggers falsified information from his own account. [*Id.* at 1671-75.] He falsely denied "provid[ing] any falsified information to anybody involved in this business to support anything that your company has been doing." [*Id.* at 1675.] He falsely denied being guilty of a crime he

pleaded guilty to. [*Id.* at 1677-78.] He falsely denied signing an agreement. [*Id.* at 1688-89.] He falsely denied creating the Nucor spec sheet. [*Id.* at 1697-98.] He falsely refused to admit he sent the false spec sheet to Severson and falsely testified that he did not think he sent it. [*Id.* at 1701-03.] He falsely said that any falsified documents were "most certainly" sent "by somebody other than me." [*Id.* at 1703.] He falsely testified that he was the sole owner of Nex-Gen Industries. [*Id.* at 1729-33.] [*See generally* R. 179: James Chapman, TR (Trial Day 6) at 1868-71 (cataloguing Vance's lies).]

The Court would have found that Vance's numerous examples of false testimony were willful and material. There was "no misunderstanding" about Vance's "position[s]" expressed in this testimony. *Jackson*, 154 F.4th at 429. And the topics of Vance's falsities were "direct issue[s] in the case" about his fraudulent activities. *Id.* Thus, if counsel had objected, the Court would have made the necessary findings. Accordingly, Vance proves no prejudice from the lack of an objection, and there is no ineffectiveness.

Subpart Three: the hardship enhancement. Vance is wrong that his attorney failed to challenge this enhancement. The hardship enhancement was subject to intensive adversarial proceedings and appellate litigation. *See Vance*, 2024 WL 4867049, at *5. The Court and the Sixth Circuit disagreed with counsel's arguments, but that does not mean counsel was ineffective. Vance asserts that Faybik invested voluntarily and did not consider herself defrauded. [R. 273: Motion at 3391.] Neither of those things, which were known at the time of sentencing, impacts the enhancement. *See Vance*, 2024 WL 4867049, at *5. [*See, e.g.*, R. 152: Notice of Filing at 590-98; *see also* R. 151:

Sentencing Memorandum at 582-83 (explaining why enhancement applies); R. 219: Court, TR (Evidentiary Hearing) at 2212-13 (same).] Counsel litigated this enhancement zealously and did not deficiently perform. The enhancement properly applied, and Vance proves no prejudice.

Subpart Four: the abuse-of-trust enhancement. Vance is, again, wrong that his attorney failed to challenge this enhancement. The abuse-of-trust enhancement was, again, subject to adversarial proceedings and appellate litigation. *See Vance*, 2024 WL 4867049, at *6-7. The Court and the Sixth Circuit disagreed with counsel's arguments, but that does not mean counsel was ineffective. As the evidence showed, Vance was no "mere 1% owner with no management authority." [R. 287: Motion at 4097.] He was Nex-Gen's CEO. "The quintessential example of such a position is an executive of an organization . . . which was Vance's role with Nex-Gen." *Vance*, 2024 WL 4867049, at *6. [*See also* R. 151: Sentencing Memorandum at 583-85 (explaining why enhancement applies); R. 219: Court, TR (Evidentiary Hearing) at 2219-21 (same).] Counsel litigated this enhancement zealously and did not deficiently perform. The enhancement properly applied, and Vance proves no prejudice.

Subpart Five: the sophisticated-means enhancement. Vance is, yet again, wrong that his attorney failed to challenge this enhancement. The sophisticated-means enhancement was, yet again, subject to adversarial proceedings and appellate litigation. *See Vance*, 2024 WL 4867049, at *5-6. The Court and the Sixth Circuit disagreed with counsel's arguments, but that does not mean counsel was ineffective. As to Vance's

argument that his "limited ownership interest and lack of operational control" mean the enhancement should not apply, [R. 287: Motion at 4098,] the government can only repeat the Sixth Circuit's analysis: "Vance's fingerprints are all over the concededly sophisticated means of the conspiracy. He signed the agreements creating the fraudulent corporate entities that purported to provide exclusive rights in Nex-Gen to both Deware and the Shumard Foundation. And trial testimony detailed Vance's role in providing phony financial records that gave the false impression that Nex-Gen was financially healthy." *Vance*, 2024 WL 4867049, at *6. If Vance seeks to blame McKinnon for their scheme's sophistication, that argument fails for the reasons the Sixth Circuit gave. *Id.* [*See also* R. 151: Sentencing Memorandum at 586-89 (explaining why enhancement applies); R. 219: Court, TR (Evidentiary Hearing) at 2213-14 (same).] Counsel litigated this enhancement zealously and did not deficiently perform. The enhancement properly applied, and Vance proves no prejudice.

Due Process Claims

"The Due Process Clause generally guarantees the fundamental elements of fairness in a criminal trial." *United States v. Singleton*, Nos. 5:13-CR-8-KKC-REW, 5:17-CV-24-KKC-REW, 2018 WL 5075982, at *13 (E.D. Ky. Mar. 20, 2018).

At the outset, the Court should dismiss these arguments as procedurally defaulted. "[D]ue process challenge[s]" must "first be raised . . . on direct appeal." *Peveler v. United States*, 269 F.3d 693, 698 (6th Cir. 2001). "Otherwise, the claim is procedurally defaulted." *Id.* "A procedurally defaulted claim, absent a showing of cause and

prejudice or actual innocence, cannot give rise to relief under § 2255." *Id.* Vance makes no attempt to show cause for failing to raise these issues on appeal, and, as discussed in this response, no showing of prejudice or actual innocence. Accordingly, the claims are procedurally defaulted and should be dismissed. The Court should end its analysis there. But if the Court nevertheless evaluates the claims, they fail.

First, Vance says the sentencing "hardship figures" exceeded "those reflected in the PSR." [R. 273: Motion at 3377.] The government does not know what Vance means. The PSR does not contain something called a "hardship figure." The PSR and the Court applied a hardship enhancement, based on the trial and sentencing evidence, as affirmed by the Sixth Circuit. And the PSR and Court applied an enhancement for a loss between $1.5—3.5 million, again based on the trial and sentencing evidence, and, again, as affirmed by the Sixth Circuit. The government does not know what else to respond to regarding this argument. Vance proves no due process violation.

Second, Vance thinks Faybik's declaration "contradicts the Government's victim narrative." [R. 273: Motion at 3377.] The government does not know what Vance means by a "victim narrative," but nothing in the declaration moves the needle on proper application of the hardship enhancement. As the Sixth Circuit wrote,

> The district court concluded that Joan Faybik's losses amounted to a substantial financial hardship. And no wonder. A hairdresser and close friend of Vance's, Faybik was an early investor in Nex-Gen who, like others, thought that she was the only other investor (besides Vance) in the company. Faybik provided Vance with whatever money he needed for Nex-Gen, including lending out cash, providing Vance with her personal credit card, and even wiring money from her retirement investment accounts. All told, the FBI investigator estimated that Faybik lent Vance

> roughly half a million dollars. This resulted in Faybik racking up considerable credit card debt and eating into her retirement savings. On this record, we see no error in the district court concluding that Faybik suffered more than a minimal or trivial loss.
>
> Vance pushes back. He begins by noting that Faybik, in a statement to the district court, claimed that she was not harmed by Vance. But whether Faybik suffered substantial financial hardship is judged by the connection between the offense and the extent of the harm that results, not by whether she subjectively views herself as harmed. Vance offers another argument, highlighting that FBI agents could trace only $42,500 coming from Faybik to Vance on her bank records alone. But the government offered evidence that Faybik invested much more. The FBI agent investigating Faybik's losses testified that the $42,500 mark was wildly inaccurate. Faybik herself admitted to the FBI that she provided well more than that amount to Vance. As did her son. So at best, we are left reviewing the district court's choice between two different plausible interpretations of the facts, which is not clear error.

Vance, 2024 WL 4867049, at *5 (cleaned up).

In essence, Faybik's position—that she was not harmed by Vance, that she does not consider herself to be defrauded or to be a victim, etc.—was fully before the Court at sentencing and before the court of appeals. Although "Ms. Joan" has stuck up for her "friend for a long time" and her "partner until [he] dies" yet another time, her newest declaration does not change the enhancement's application. [R. 178: Douglas Vance, TR (Trial Day 5) at 1730 (describing closeness of his relationship with Faybik).] The Court has previously seen through the Vance-Faybik relationship and found that Vance "continued in his efforts to provide false information to others to . . . limit his liability" and "certainly did take advantage of her." [R. 220: Court, TR (Sentencing) at 2251.] At bottom, Vance proves no due process violation via a declaration signed years after his

sentencing containing information repetitive in purpose to information known at trial, at sentencing, and on appeal.

Third, Vance argues that a series of factors he claimed as ineffective assistance together "produced a distorted evidentiary framework." [R. 273: Motion at 3377.] But, per the above analysis, Vance identified no error in his ineffective-assistance arguments, so the underpinning of this argument falls away. Further, the government is not clear what Vance means by an "evidentiary framework," but the Rules of Evidence properly applied in his trial. Vance may disagree with those Rules, but they produced a legally sound evidentiary framework for the trial.

Actual Innocence Claims

A "free-standing claim of actual innocence is not cognizable under § 2255 and is subject to dismissal." *United States v. Lee*, Nos. 5:22-026-DCR, 5:25-380-DCR, 2026 WL 183609, at *2 (E.D. Ky. Jan. 20, 2026) (citing cases). Nevertheless, to "establish actual innocence, a movant must persuade the district court that, in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* (citing cases).

At the outset, the Court should dismiss these arguments because, as the Court has previously held, "free-standing claim[s] of actual innocence [are] not cognizable under § 2255 and [are] subject to dismissal." *Lee*, 2026 WL 183609, at *2. The Court should end its analysis there. But if the Court nevertheless evaluates the claims, they fail. The documents Vance cites, whether considered individually or collectively, "do[] not come

close to proving [him] actually innocent." *Vance*, 2024 WL 4867049, at *2. "[T]he actual-innocence remedy is reserved for only the most extraordinary case." *Hubbard v. Rewerts*, 98 F.4th 736, 747 (6th Cir. 2024). This is not such a case.

First, Vance identifies a "sworn authentication of the November 14, 2018 letter." [R. 273: Motion at 3379.] But the government does not see any "sworn authentication" of the letter. Vance filed the letter at R. 274-1, at 3408-13. There is no sworn authentication included as part of the letter. (There is a notary acknowledgment, but this is not what the government understands a "sworn authentication" to be, and it is not clear that the notary acknowledgement applies to the letter.) Regardless, even if the letter qualifies as "new" evidence, *see Hubbard*, 98 F.4th at 743, Vance does not show that, if the letter were considered, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *See Vance*, 2024 WL 4867049, at *2-3 (so holding). In light of all the evidence of guilt, as the Sixth Circuit already held, Vance "fails to show that every reasonable juror would accept" the letter's narrative. *Houston v. Tanner*, 160 F.4th 683, 694 (6th Cir. 2025). Further, based on all the evidence presented, the letter is not "reliable." *Hubbard*, 98 F.4th at 747.

Second, Vance points to a "sworn declaration of Joan Faybik." [R. 273: Motion at 3379.] As above, even if this declaration qualifies as new evidence, Vance does not show that, if it were considered, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. It would have been reasonable for a juror, like the Court, to have seen through the too-cozy relationship between Vance and Faybik and to

have perceived Vance's efforts to "take advantage of her." [R. 220: Court, TR (Sentencing) at 2251.] A "reasonable juror," after all, "may freely choose between conflicting testimony." *Houston*, 160 F.4th at 694. And even if the information were credited, it would have added yet more evidence to prove this Ponzi-like scheme, where, by its nature, a small number of investors may come away duped and happy. All told, information from one victim, deceived many times over by Vance, would not have changed every reasonable juror's verdict in light of the other overwhelming and varied evidence presented at trial, and Vance "fails to show that every reasonable juror would accept []his theory." *Id.* Further, based on all the evidence presented about the crimes and about Faybik, this declaration is not "reliable." *Hubbard*, 98 F.4th at 747.

Third, Vance cites a "December 19, 2018 FBI transcript." [R. 273: Motion at 3379.] The reason Vance wants to introduce the transcript is to verify McKinnon's letter existed. But there was no dispute that the letter existed. [*See* R. 177: Christopher Hubbuch, TR (Trial Day 4) at 1521-22.] Further, much of the conversation was played to the jury, and the conversation was discussed extensively in testimony. So the transcript would have, in essence, changed nothing about the trial. Thus, even if the transcript were considered, Vance does not show that no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Fourth, Vance identifies "McKinnon's allocution and sworn confirmation." [R. 273: Motion at 3379.] For the same reasons described above, the government does not see any "sworn confirmation" of McKinnon's sentencing allocution. (Vance does not say

if "sworn authentication" and "sworn confirmation" mean the same thing.) Further, McKinnon's sentencing allocution is not evidence at all; it is her own skewed, post-trial analysis of the trial evidence, not evidence itself. *See, e.g.*, *Strack v. State*, 186 N.E.3d 99, 102 (Ind. 2022). But even if the sentencing allocation were considered, Vance does not show that no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Her allocution was not reliable. *Hubbard*, 98 F.4th at 747. And Vance does not identify anything specific that McKinnon's views would have changed about the case for the government to respond to. It would have been reasonable for a juror to see through her efforts at sentencing to justify her and Vance's fraud, just as the jury saw through her and Vance's trial testimony attempting to do the same. Vance "fails to show that every reasonable juror would accept" McKinnon's narrative. *Houston*, 160 F.4th at 694; *see Vance*, 2024 WL 4867049, at *2-3 (so holding, regarding her letter). Further, "actual innocence means factual innocence," *Bousley v. United States*, 523 U.S. 614, 623 (1998), and McKinnon's sentencing allocution, made years after her fraud was complete, and which "merely attack[ed] the [government]'s case," does not change the underlying facts. *Hubbard*, 98 F.4th at 747.

Conclusion

The Court should deny Vance's § 2255 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 16, 2026, I electronically filed this response through the ECF system, and I mailed this response to:

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