

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA,)	
)	
Plaintiff/Respondent,)	Criminal Action No.
)	5:20-cr-0063-DCR-MAS
v.)	and
)	Civil Action No.
DOUGLAS WILLIAM VANCE,)	5:26-cv-0057-DCR-MAS
)	
Defendant/Movant.)	
)	

REPORT & RECOMMENDATION

This matter is before the undersigned on Petitioner Douglas William Vance’s (“Vance”) Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255. Vance asserts three categories for relief with several grounds listed under each category. [DE 290]. The United States responded contesting each category and ground [DE 290], and Vance replied [DE 291]. Considering the arguments of the parties as well as the record before it, the Court recommends Vance’s motion be denied for the reasons stated below.

I. RELEVANT FACTUAL BACKGROUND

In June 2020, a grand jury indicted Vance on several counts of wire fraud and money laundering. [DE 1]. The Sixth Circuit described the facts and background of the charges against Vance and his co-defendant, Molly McKinnon.

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.

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.

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.

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.

[DE 265, Page ID# 3186-87].

Vance appealed the judgment against him, but the Sixth Circuit affirmed. [DE 265]. Vance then filed this habeas petition. [DE 273].

II. ANALYSIS

Vance has asserted three broad categories of relief with more specific arguments under the umbrella of each category. First, Vance argues his trial counsel, Jeff Darling, was ineffective for his failure to challenge certain evidence during trial, failure to use other evidence, and failure to make certain objections at sentencing. Second, Vance advocates that there were certain due process violations at the trial level due to certain evidentiary misrepresentations. And third, Vance contends he has "new" evidence that establishes his innocence.

A. CATEGORY I: CLAIMS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

1. Standard for Ineffective Assistance of Counsel Claims

Under § 2255, a federal prisoner may obtain relief if his sentence violates the Constitution or federal law, the federal court lacked jurisdiction to impose such sentence, or the sentence exceeds the maximum authorized by law. 28 U.S.C. § 2255(a); *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003) ("In order to prevail upon a § 2255 motion, the movant must allege as a basis for relief: '(1) an error

of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.” (quoting *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001))). A constitutional basis for § 2255 relief requires “an error of constitutional magnitude which 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, 637–38 (1993)). Any non-constitutional error must constitute a “fundamental defect which inherently results in a complete miscarriage of justice,’ or, an error so egregious that it amounts to a violation of due process.” *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990). A § 2255 movant typically must prove any factual assertions by a preponderance of the evidence. *McQueen v. United States*, 58 F. App’x 73, 76 (6th Cir. 2003) (*per curiam*).

One class of alleged constitutional error is ineffective assistance of counsel in violation of the Sixth Amendment. The standard outlined in *Strickland v. Washington*, 466 U.S. 668 (1984), governs ineffective assistance of counsel claims. To prevail, a movant must prove (1) that defense counsel’s performance was deficient, and (2) that the demonstrated deficiency prejudiced the movant. *Id.* at 687. To establish deficient performance, a movant must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687–88. “Judicial scrutiny of counsel’s performance must be highly deferential” and the “court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. A prejudice showing requires a “reasonable

probability that, but for counsel’s errors, the judicial outcome would have been different.” *Id.* at 694–95. The Court “must consider the totality of the evidence” in assessing prejudice. *Id.* at 695. To satisfy the prejudice prong “[i]n a guilty plea context ‘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.’” *Campbell v. United States*, 686 F.3d 353, 357 (6th Cir. 2012) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). The movant must satisfy both prongs of the *Strickland* analysis, but courts need “not address both components of the deficient performance and prejudice inquiry ‘if the defendant makes an insufficient showing on one.’” *Id.* at 730; *Strickland*, 466 U.S. at 697.

2. November 14, 2018, Letter from McKinnon

In the final days of trial, McKinnon initially informed the Court and the parties that, contrary to prior indications, she did not wish to testify. At this point, Vance had already testified. Darling, Vance’s counsel, approached the Court seeking to reopen Vance’s testimony to introduce a letter McKinnon wrote to Vance on November 14, 2018. Darling described his purpose to the Court.

Based on the Court’s ruling, it appears that Ms. McKinnon is no longer going to testify. I have exhibits that I was going to introduce through her. There is a letter written by her and signed by her that was given to Mr. Vance. The first time I realized that there was a possibility that she wasn’t going to testify was 9:20 this morning, which was why I did not introduce this at that time. I’m asking the Court for leave to reopen and to call Mr. Vance back to introduce this exhibit.

...

Our position is that our positions are adverse in this letter. She takes an awful lot, if not all, of the responsibility for everything that happened, particularly the bank statements. She admits in this letter that she had

access to Mr. Vance's email account and that she routinely sent emails under his name and actually opened them, as she put it on the end, so he wouldn't even know it had been sent.

[DE 179, Page ID# 1776-77]. McKinnon did not object to the request, but the United States did, arguing (1) Vance made the mistake not to introduce the letter during his testimony; (2) the letter was not provided as reciprocal discovery; and (3) the letter was impermissible hearsay. [DE 179, Page ID# 1777-78]. The Court denied Vance's request. [DE 179, Page ID# 1779]. "It would appear that this is the letter that Mr. Vance kept referring to in his interview with the FBI but would not disclose the contents of it. So he was clearly aware of it, of the existence of this letter whenever it was created. It was never provided to the United States in reciprocal discovery. . . . It's improper for several reasons that the United States has indicated." [DE 179, Page ID# 1778-79].

Vance now complains that Darling failed to "[e]stablish the authorship of the letter through McKinnon", "[i]ntroduce corroborating documentation", and "[u]tilize the FBI transcript to prove existence" of the letter. [DE 273-1, Page ID# 3387-88]. There appears to be no dispute from the United States that the letter was authored from McKinnon; thus, there was no need for Darling to establish authorship. And as the Court noted at the time, Darling had utilized the FBI transcript via Special Agent Hubbuch to establish the existence of the letter. The real problem is whether Darling could find any way to introduce the letter. The Court ruled against Darling's motion to reopen Vance's testimony. The letter was a statement made by McKinnon not "while testifying at the current trial or hearing" and offered by Vance "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). Darling cannot

be faulted for losing an argument he advanced. *See Hodge v. Haeberlin*, 579 F.3d 627, 644 (6th Cir. 2009) (“Counsel does not fall below [*Strickland*] standard by failing to prevail when arguing a debatable point to the court”).

However, when McKinnon ultimately testified in the case, Darling did not try to introduce the letter through her. At that point, the Court had ruled against admitting the letter both because it was hearsay (which would have been remedied by introducing it through McKinnon) and because it had not been provided as reciprocal discovery (which could not be remedied). Darling was not deficient for re-raising a motion he had just lost hours before when he had no additional arguments. *Dumas v. U.S.*, 2012 WL 8017841, at *4 (E.D. Mich. March 21, 2012) (“nor is counsel ineffective for failing to “reassert” arguments made and lost”).

Moreover, the Court is unconvinced that any failure, if it were, to introduce the letter through McKinnon was prejudicial. The Sixth Circuit explained the (lack of) import of the letter.

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.” 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. **Given that a reasonable juror could very well find the letter less than compelling, no miscarriage of justice excuses Vance’s forfeiture.**

[DE 265, Page ID# 3189 (emphasis added)]. Even if the Court were to find Darling’s performance deficient, the Court agrees that this letter, with its “suspicious” timing was unlikely to have changed the outcome. *Strickland, supra* at 694-95 (holding that a showing of prejudice requires a “reasonable probability that, but for counsel’s

errors, the judicial outcome would have been different.”). The Sixth Circuit has already held that a reasonable juror would not find the letter compelling. This Court will not disturb that conclusion.

3. December 19, 2018, FBI Interview

Vance next argues that Darling should have admitted the transcript of an FBI interview with Vance on December 19, 2018, to establish the existence and contents of the November 14th letter mentioned above. [DE 273-1, Page ID# 3388]. Yet, the record rejects Vance’s argument. During his interview with the FBI by SA Hubbuch, the November 14th letter was mentioned by Vance. However, as SA Hubbuch testified that Vance did not provide SA Hubbuch a copy of the letter. [DE 177, Page ID# 1521-22]. Thus, the admission of the FBI interview with Vance would not have established anything associated with the November 14th letter beyond Vance’s prior mention. Darling does not provide deficient performance for failing to admit evidence that would not in any way accomplished the goals cited by Vance. To the extent the November 14th letter was referenced during the interview, SA Hubbuch testified to that fact. There was nothing more for Darling to do. In the end, Vance’s arguments do not meet the *Strickland* standard because counsel cannot admit evidence that does not prove what Vance thinks it proves. *See United States v. Martin*, 45 Fed. App’x. 378, 381 (6th Cir. 2002) (discussing that one’s counsel cannot provide deficient performance by failing to raise wholly meritless claims) (citing *Strickland, supra* at 688).

4. False Exculpatory Statement

Vance next attacks that “[b]ecause trial counsel failed to authenticate and corroborate the November 14th letter, the evidentiary foundation presented to the Court permitted issuance of a false exculpatory instruction.” [DE 273-1, Page ID# 3388]. Vance is referencing jury instruction No. 25 that provided “Defendant Vance provided false exculpatory statements to FBI Special Agent Christopher Hubbuch.” [DE 131, Page ID# 469].

The Court struggles to understand how Darling could have prevented such an instruction following SA Hubbuch’s testimony on direct exam. Darling could do nothing to prevent SA Hubbuch from providing such an opinion. Nor does Vance suggest how Darling was supposed to prevent Hubbuch from making such a statement irrespective of the November 14th letter. Hubbuch’s testimony about Vance’s exculpatory statements during the interview mandated the instruction, an instruction that is meant to temper the damage done by Vance. Like with the prior issue, Vance does not present a valid ineffective assistance of counsel claim when he is unable to explain what his counsel should have done differently.

5. Reinforce McKinnon’s Testimony

Per Vance, following McKinnon’s testimony, Darling should have introduced documentary evidence to reinforce her testimony. [DE 273-1, Page ID# 3389]. Other than the November 14th letter, however, Vance never explains what evidence Darling was to introduce to “reinforce” her testimony. To reach the *Strickland* analysis, however, Vance must present more than conclusory statements. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000) (holding that a “conclusory statement”

without more is “wholly insufficient to raise the issue of ineffective assistance of counsel”). Thus, because Vance has not provided any detail to support or explain his argument, the argument lacks merit. See *Johnson v. United States*, 457 Fed. App’x 462, 466-67 (6th Cir. 2012); *Short v. United States*, 504 F.3d 63, 65 (6th Cir. 1974) (affirming denial of a § 2255 motion because petitioner’s claims “were stated in the form of conclusions without any allegations of facts in support thereof, as well as being unsupported by proof or reference to such proof”).

6. Hogan Testimony

On the third day of trial, the United States called Mendie Hogan, an accountant and practical Chief Financial Officer for the Shumard Family Office in Georgia. [DE 176, Page ID# 1111]. The family was an investor with Vance and McKinnon. [DE 176, Page ID# 1112]. During cross-examination of Hogan, Darling elicited testimony suggesting that McKinnon, not Vance, had directed certain wire transfers that were the basis of the wire fraud counts against Vance. [DE 176, Page ID# 1144-52]. Vance contends that while Darling elicited this helpful testimony, he failed to “[c]onnect the testimony to the wire fraud elements.” [DE 273-1, Page ID# 3390].

By all accounts, Vance is alleging that Darling did an excellent job cross examining Hogan. However, Vance argues Darling should have leveraged that testimony more forcefully at closing. There are two problems with Vance’s argument.

First, Darling did emphasize this point during his closing.

Now, in order for them to keep money coming, they needed to see something in return. And if you remember, **there was testimony that Mendie Hogan**, who was the core member of the Shumard Group,

requested some bank statements. And there was testimony that these bank statements were fabricated to satisfy Ms. Hogan, who was the accountant for Shumard, so that they would continue to loan money.

Okay. That's wrong. I get it. Who fabricated those bank statements? **Did Doug Vance fabricate the bank statements? Nope. Did he send them to Mendie Hogan, no. Ms. McKinnon said she did the bank statements, she sent them to Mendie Hogan. Doug didn't know anything about it.**

[DE 179, Page ID# 1880 (emphasis added)]. Thus, the record reflects that Darling did exactly as Vance wanted him to do.

Second, to the extent that Vance argues that Darling should have stated this argument in a different manner or repeated the argument more forcefully in some fashion, the Court will decline to take up such criticisms. “Judicial scrutiny of counsel’s performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (internal citations and quotation marks omitted; alteration in original). Darling, in crafting his closing arguments, made decisions based upon his experience and understanding of the facts of the case how to frame arguments and present them to the jury. Simply because the jury did not agree with his arguments does not mean his performance is deficient.

7. Sentencing Enhancements

Vance's last argument under the category of ineffective assistance of counsel concerns sentencing enhancement applied to him. Per Vance, Darling should have objected to or defeated the application of these enhancements.¹

Initially, Vance cites several enhancements that his counsel failed to challenge. Namely, Vance lists the enhancement for (1) abuse of trust (USSG § 3B1.3); (2) sophisticated means (USSG § 2B1.1); (3) hardship (USSG § 2B1.1); and (4) the loss amount (USSG § 2B1.1). Setting aside the specific application of each enhancement, the flaw in Vance's argument is that each of these enhancements were heavily litigated. Not only were each challenged by Darling at the trial court level, but they were preserved and each litigated before the Sixth Circuit: (1) abuse of trust [DE 265, Page ID# 3196-97]; (2) sophisticated means [DE 265, Page ID# 3195-96]; (3) hardship [DE 265, Page ID# 3193-95]; and (4) the loss amount [DE 265, Page ID# 3192-93]. Vance is frustrated that both the trial court and the Sixth Circuit rejected his arguments, but that does not mean Darling provided deficient performance. As already noted above, "[c]ounsel does not fall below [*Strickland*] standard by failing to prevail when arguing a debatable point to the court." *Hodge v. Haeblerlin*, 579 F.3d 627, 644 (6th Cir. 2009).

The remaining enhancement for which Vance claims ineffective assistance from Darling is the enhancement for obstruction. Vance contends that "[t]he record

¹ In his petition, Vance challenged the application of the leadership enhancement. [DE 273-1, page ID# 3391]. However, in a subsequent filing, Vance acknowledged that he "did not receive a leadership enhancement." [DE 287, Page ID# 4096]. Thus, the Court does not address this argument.

lacks explicit findings distinguishing perjury from a good-faith denial of guilt. Counsel failed to demand those findings.” [DE 273-1, Page ID# 3392]. Vance is correct that the Court did not make any such findings because Vance did not object to the enhancement. [DE 220, Page ID# 2227-28]. However, the issue is whether such an objection would have any merit. As just mentioned, counsel is not deficient for failing to raise a losing argument. See *Goldman v. Anderson*, 625 F.2d 135 (6th Cir. 1980) (stating that a failure to object, when it is a tactical decision by counsel, without more, will not provide a basis for habeas relief).

A cursory review of the trial record establishes a clear basis for the application of the obstruction enhancement. The United States, during its closing, listed off all the lies Vance provided in his testimony.

Let's start, ladies and gentlemen, with his history of lying. He admitted to you that he lied under oath to the Tazewell County Circuit Court. He admitted under oath to that Court that he was guilty of a crime when he says he was not actually guilty of that crime. He lied to that Court under oath and now he wants you to believe him.

Ladies and gentlemen, he admitted he lied to you under oath here in this trial when he claimed that he was the sole owner of Nex-Gen, and then it was revealed to him that he was not, that he had given shares away to Ms. Faybik.

So ladies and gentlemen, he has already, in his very testimony in this case, lied to you.

He lied to Special Agent Hubbuch about the KRP money being from a loan. He lied to Allan Deware, he lied to the Shumards, he lied to Koch, he lied to KRP. And yet he asks you to believe him.

...

And we showed you documents where he signed an email in some other way other than “Best, Doug Vance.” I think Exhibit 129 was one of those documents, and 186 was as well.

And think about the word games he was playing with you all, where he said calcined coal in one sentence, and said he was selling 1,500 tons a month, but when he said that, in the very next sentence he meant some other unnamed product. Is that consistent with a truthful witness? Does that make any sense?

Ladies and gentlemen, I'm sure you'll remember that he wouldn't give a straight answer on whether owning 50 out of a hundred shares of a company meant owning half the company. I specifically remember him saying, "It depends on how you look at it." Is that the type of testimony a truthful witness gives?

Think about how, at the end of his testimony, he was left simply saying "You have to take my word for it." Ladies and gentlemen, the proof in this case has shown you that Doug Vance's word is not who you want to be taking.

Mr. Vance also said one thing in particular that was really revealing on the stand, one thing that stood out. When he was talking about money from investors and from lenders, he said "it's not theirs, it's mine." That was his attitude when it came to the money that came into his business endeavors in this case. That's an encapsulation of how he viewed that money that he lied to get.

Once he told his lies and had gotten that money, it didn't matter to him what the fund represented, whether it was an investment or a loan or anything else. What mattered to him was that the money was now his to do with as he pleased.

[DE 179, Page ID# 1868-71]. In its response to Vance's habeas petition, the United States lists even more falsehoods told by Vance during his testimony. [DE 290, Page ID# 4114-15]. Ultimately, the jury agreed with the United States when convicting Vance. Given the long list of falsities presented by the United States, it was reasonable for Darling to refrain from objecting to this enhancement. Even if Darling objected, the United States would have easily met its burden by pointing to the trial record. *United States v. Saunders*, 318 F.3d 1257, 1271 n.22 (11th Cir. 2003) ("A sentencing court's fact findings may be based on, among other things, the evidence

presented at trial.”). Darling cannot be faulted for failing to make an objection that had no merit.

B. DUE PROCESS ARGUMENTS

Vance’s next category of arguments is described as due process violations contending that his “conviction and sentence were obtained through materially misleading or incomplete information.” [DE 273, Page ID# 3377]. Vance provides three specific instances of false or misleading testimony. First, Vance contends that the “[s]entencing argument referenced hardship figures exceeding those reflected in the [Presentence Investigation Report or PSR]. This discrepancy materially affected the advisory range.” [DE 273, Page ID# 3377]. Second, Joan Faybik, an investor in Vance’s company, has provided a sworn declaration that is inconsistent with the victim narrative supplied by the United States. [DE 273, Page ID# 3377]. And third, repeating many of the arguments alleged in his ineffective assistance of counsel argument concerning the November 14th letter, etc., the conviction “rest[ed] on materially misleading inferences amplified by evidentiary omissions.” [DE 273, Page ID# 3377].

For his first argument, the record does not support or even explain the basis of Vance’s argument. A careful review of the PSR does not provide any “hardship figure.” The only hardship referenced in this case, as already mentioned above, was the enhancement applied by the Court at sentencing under the U.S.S.G. The PSR does not provide any guidance on that issue, and it certainly does not misrepresent or mislead in any fashion that could serve as the basis of a due process claim. Once more, where a defendant has not provided any detail to support or even comprehend

his claims, those claims should be dismissed. *See Johnson v. United States*, 457 Fed. App'x 462, 466-67 (6th Cir. 2012).

Turning to his second argument, Vance attacks the victim statement by Joan Faybik alleging that it does not match the “victim narrative” provided by the United States. For context, here is how the Sixth Circuit describe Faybik’s plight.

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. . . .

[DE 265, Page ID# 3194]. Like the last argument, the Court struggles to decipher precisely what Vance is arguing here. Faybik provided a victim statement to the Court prior to the sentencing phase. [DE 152]. Vance alleges not that she lied, but that her statement undercuts some parts of the Government’s position. Those same points, however, were addressed by the Court and the Sixth Circuit above. As the Sixth Circuit wrote, “[Vance] 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.**” [DE 265, Page ID# 3194 (emphasis added)]. To the extent that Vance is contending that there are parts of Faybik’s statement that run counter to the narrative of the United States and the findings of

the jury, that was not a secret. The issue was clearly at the forefront during the trial [DE 178, Page ID# 1730], during the sentencing [DE 220, Page ID# 2246], and at the Sixth Circuit as cited above. In short, Vance’s argument lacks any merit.

Lastly, Vance cites several evidentiary decisions (all of which are listed in II.A above) that created “a distorted evidentiary framework.” [DE 273, Page ID# 3377]. The Court has already addressed the ineffective assistance of counsel arguments. The Court is left guessing at what Vance is specifically arguing here beyond those claims. Consequently, without more, the Court should deny Vance’s claims on this final argument. *Short v. United States*, 504 F.3d 63, 65 (6th Cir. 1974) (affirming denial of a § 2255 motion because petitioner’s claims “were stated in the form of conclusions without any allegations of facts in support thereof, as well as being unsupported by proof or reference to such proof.”).

C. ACTUAL INNOCENCE

Vance’s third and final category of habeas grounds is that new evidence establishes he is innocent of the charged crimes. When the claim is of actual innocence free-standing apart from overcoming some procedural hurdle, the Supreme Court has cast heavy doubt on such a request in a non-capital case. *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (“Claims of actual innocence . . . have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying . . . criminal proceeding”). Consequently, the Sixth Circuit “has ‘repeatedly indicated that [free-standing innocence] claims are not cognizable on habeas.’” *Smith v. Nagy*, 962 F.3d 192, 206 (6th Cir. 2020) (quoting *Cress v. Palmer*, 484 F.3d 844, 854 (6th Cir. 2007)).

Even if the Sixth Circuit reversed course, the Court is guided by the Sixth Circuit’s analysis in rejecting Vance’s free-standing innocence claim on the merits in *Stojetz v. Ishee*, 892 F.3d 175 (6th Cir. 2018). There, after acknowledging its own refusal to recognize a free-standing innocence claim, the Sixth Circuit created a framework if such a theoretical claim were permitted.

[T]he Supreme Court has yet to answer whether freestanding innocence claims are cognizable in habeas corpus. *House[v. Bell]*, 547 U.S. [547,] at 554–55, 126 S.Ct. 2064 [2006].

Despite such uncertainty, the Court has provided two guideposts that allow us to dispose of Stojetz’s first subclaim. In *Herrera*, the Court mused that, were freestanding innocence claims cognizable in federal court, “the threshold showing for such an assumed right would necessarily be extraordinarily high.” 506 U.S. at 417, 113 S.Ct. 853. Then, in *House*, the Court elaborated on this point, stating that the showing required for such a hypothetical claim would be greater than that required for a gateway-innocence claim. 547 U.S. at 555, 126 S.Ct. 2064. Logic therefore dictates that if Stojetz cannot meet the standard for a gateway-innocence claim—*viz.*, establishing that “it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt[,]” *Schlup*, 513 U.S. at 327, 115 S.Ct. 851—he cannot meet the burden implied in *Herrera*.

Ishee, 892 F.3d at 208.

Mirroring the analysis by the Sixth Circuit in *Ishee* and even assuming everything in Vance’s petition is true, Vance cannot meet the extraordinarily high burden.

To support his claim of innocence, Vance cites (1) the November 14th letter, (2) the sworn declaration of Faybik, (3) the December 19th FBI transcript of Vance’s interview, and (4) McKinnon’s allocution and sworn confirmation. [DE 273, Page ID# 3379]. Taking those one at a time, the Court starts with the November 14th letter, a topic already addressed. Initially, as the United States highlights in its response, the

November 14th letter is neither “sworn” nor “authenticated” as Vance suggests in his petition. [DE 273, Page ID# 3379]. More importantly, the November 14th letter changes little as the Sixth Circuit has already opined.

But even assuming the forfeited arguments for excluding the [November 14th] letter were beyond reasonable dispute or were otherwise a serious affront to the legal system, the letter itself does not come close to proving Vance “actually innocent.” Proving as much requires a showing that “no reasonable juror would have convicted him in light of the new evidence.”

... 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. Given that a reasonable juror could very well find the letter less than compelling, no miscarriage of justice excuses Vance’s forfeiture.

[DE 265, Page ID# 3188-89 (internal citations omitted)]. The Court will not disagree.

Vance next points to Faybik’s declaration to suggest his innocence. As already discussed, the Faybik declaration was part of the trial record and appellate record; the Court fails to see how this is “new” evidence. Even setting aside that concern, the Faybik declaration does little to undercut the proof of fraud committed by Vance on several investors, not just Faybik. While Faybik was certainly a tragic victim, she was but one victim to Vance’s actions. Faybik’s declaration, if considered new evidence, does not compel the Court to find that, considering all the evidence, that no reasonable juror would have convicted him. *See Philips v. United States*, 734 F.3d 573, 582 (6th Cir. 2013).

Vance also points to the transcript of his FBI interview on December 19, 2018. [DE 273, Page ID# 3379]. Per Vance, introduction of the interview would establish the authenticity of the November 14th letter. However, as already noted above, the interview was discussed during the trial testimony, and SA Hubbuch testified that

during the interview Vance cited the letter without providing it to the FBI. [DE 177, Page ID# 1521-22]. The interview fails to alter, in any way, the outcome of the jury verdict in this case.

Finally, Vance posits that “McKinnon’s allocution and sworn confirmation” establish his innocence. [DE 273, Page ID# 3379]. By this, the Court presumes that Vance is arguing that McKinnon’s allocution to the Court proves his innocence. Two problems. First, McKinnon’s allocution is not evidence and is not testimony subject to cross-examination. Second, Vance does not highlight for the Court what part of McKinnon’s allocution, if any, establishes his innocence. The Court is again left guessing at what Vance means and scouring the record on Vance’s behalf. Without much more, Vance “fails to show that every reasonable juror would accept” McKinnon’s narrative. *Houston v. Tanner*, 160 F.4th 683, 694 (6th Cir. 2025).

D. MOTION FOR HEARING

In addition to his habeas petition, Vance has filed a motion asking for an evidentiary hearing and asking that he be allowed to appear by video at the hearing. [DE 292].

Rule 8 of the Rules Governing Section 2255 Proceedings requires the Court to “review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule to determine whether an evidentiary hearing is warranted.” The Court must hold an evidentiary hearing on any “§ 2255 motion in which a factual dispute arises.” *Howard v. United States*, 485 F. App’x 125, 128 (6th Cir. 2012) (quoting *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007)). However, where the “record conclusively shows that the petitioner is entitled to no

relief[.]” *id.*, no hearing is required. *Accord Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (emphasizing that “no hearing is required if the petitioner’s allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact”) (internal quotation marks omitted).

Considering the record and arguments presented above, the Court cannot discern any dispute of fact that exists. At no point during its analysis does the Court weigh into or counter the factual allegations provided by Vance. Thus, Vance’s request for an evidentiary hearing will be denied.

III. CERTIFICATE OF APPEALABILITY

A certificate of appealability (“COA”) shall issue only if a defendant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (addressing issuance of a certificate of appealability in the context of a habeas petition filed under 28 U.S.C. § 2254, which legal reasoning applies with equal force to motions to vacate brought pursuant to 28 U.S.C. § 2255). In cases where a district court has rejected a petitioner’s constitutional claims on the merits, “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.*

As explained above, Vance asserts three categories of claims. First, Vance argues his trial counsel was ineffective for his failure to challenge or admit certain evidence during trial. As detailed above, Vance fails to provide any detail how his

counsel should meet his requested goals, Vance ignores the trial record, and/or Vance fails to explain his argument to the Court. Second, Vance advocates that there were certain due process violations at the trial level due to certain evidentiary misrepresentations. A careful review of the trial transcript demonstrates that there were no evidentiary misrepresentations; the jury simply rejected Vance's preferred narrative. And third, Vance contends he has "new" evidence that establishes his innocence. However, the evidence is far from new and does not alter the jury's verdict. Reasonable jurists could not debate these conclusions.

Accordingly, it is **RECOMMENDED** that a certificate of appealability be **DENIED** upon the District Court's entry of its final order in this matter.

IV. CONCLUSION

For the reasons stated herein, the Court **RECOMMENDS**:

- 1) The District Court **DENY**, with prejudice, Vance's Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255 [DE 273];
- 2) The District Court **DENY** a certificate of appealability as to all issues, should movant request a COA; and
- 3) The Court will **DENY** Vance's request for an evidentiary hearing [DE 292].

The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Recommended Disposition, issued under subsection (B) of the statute. See also Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 8(b). Within fourteen days (14) after being served with a copy of this decision, any party may serve and file specific written objections to any or all

findings or recommendations for determination, de novo, by the District Court. Failure to make a timely objection consistent with the statute and rule may, and usually does, result in waiver of further appeal to or review by the District Court and Court of Appeals. See *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981); *Thomas v. Arn*, 106 S. Ct. 466 (1985).

Entered this the 18th day of May, 2026.



Matthew A. Stinnett
MATTHEW A. STINNETT
UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF KENTUCKY