

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION NO. 09-665
 :
 ROBERT STURMAN : CIVIL ACTION NO. 13-3531
 :

SURRICK, J.

OCTOBER 14, 2014

MEMORANDUM

Presently before the Court is Petitioner Robert Sturman's Motion to Vacate/Set Aside/Correct Sentence under 28 U.S.C. § 2255 (ECF No. 84). For the following reasons, the Motion will be denied.

I. BACKGROUND

On October 13, 2009, a federal grand jury returned a fifteen-count Indictment charging Petitioner with one count of mail fraud, in violation of 18 U.S.C. § 1341; five counts of wire fraud, in violation of 18 U.S.C. § 1343; and nine counts of interstate transportation of stolen property ("ITSP"), in violation of 18 U.S.C. § 2314. (Indictment, ECF No. 18.) The Indictment alleged that from at least as early as November of 1997 through February 23, 2007, Petitioner defrauded approximately fifty people by a variety of fraudulent schemes. (*Id.* at 2.) Petitioner's principal scheme was a ticket investment fraud in which Petitioner told people that he had purchased large blocks of tickets to events at venues like the Wachovia Center that were sold out. (*Id.*) Petitioner would ask his victims to invest in the purchase of tickets, promising them a significant return on their investment. (*Id.*) Petitioner also defrauded people by soliciting them to invest in annuities, certificates of deposit, and other investment opportunities. (*Id.*) Petitioner's victims would give Petitioner money for these investments but rather than making

these investments on behalf of his clients, Petitioner would simply keep the money and use it for his own purposes. (*Id.* at 2, 3.)

Petitioner entered into a written plea agreement with the Government. (Plea Agreement, ECF No. 57.) Under the terms of the agreement, Petitioner entered a plea of guilty to all fifteen counts in the Indictment. (*Id.* at 1.) In the Plea Agreement, Petitioner stipulated that the fraud loss from his schemes was approximately \$4,258,994. (*Id.* at 6.) On July 1, 2010, Petitioner entered a plea of guilty pursuant to the Plea Agreement. At the guilty plea hearing, the Court conducted an extensive colloquy of Petitioner to ensure that he was entering the plea voluntarily and intelligently. (ECF No. 60.) On December 10, 2010, a sentencing hearing was held. (Min. Entry, ECF No. 70; Dec. 10, 2010 Hr'g Tr., ECF No. 78.) After considering all of the relevant circumstances, we imposed a sentence of 120 months incarceration followed by a three-year period of supervised release and restitution in the sum of \$4,258,994.00. (*Id.*) This sentence was above the Sentencing Guideline range of 78 to 97 months. (Dec. 10 Hr'g Tr. 82.) Petitioner was represented throughout the guilty plea and sentencing proceedings by trial counsel William J. Brennan, Esquire. (Pet'r's Mot. 10; ECF No. 84.)

Petitioner filed an appeal with the Third Circuit Court of Appeals. (ECF No. 72.) On July 6, 2012, the Third Circuit affirmed the judgment of sentence, finding that the sentence was both procedurally and substantively reasonable. *United States v. Sturman*, 484 F. App'x 686, 689 (3d Cir. 2012). On September 6, 2012, Petitioner filed a *writ of certiorari* in the Supreme Court. (Gov't's Resp. 14, ECF No. 91.) On October 9, 2012, the Supreme Court denied the writ. (*Id.*) Petitioner was represented on appeal by appellate counsel David Rudenstein, Esquire. (Pet'r's Mot. 11.)

On September 21, 2013, Petitioner filed the instant *pro se* Motion to Vacate/Set Aside/Correct Sentence under 28 U.S.C. § 2255. (*Id.*)¹ On August 30, 2013, the Government filed a Response. (Gov't's Resp.)² On December 30, 2013, Petitioner filed a Reply. (Pet'r's Reply, ECF No. 94.)

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate, set aside, or correct a sentence “upon the ground[s] that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). Relief under this provision is generally available “to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.” *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

While the court may in its discretion hold an evidentiary hearing on a Section 2255 petition, *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989), such a hearing need not be held if the “motion and the files and records conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992).

¹ We subject *pro se* pleadings to a liberal review. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A *pro se* complaint, “however inartfully pleaded,” is to be held to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *see also Higgs v. Att’y Gen. of the U.S.*, 655 F.3d 333, 339 (3d Cir. 2011).

² The Government’s 94 page response reviews in detail the charges against Petitioner and their factual basis as well as the claims that Petitioner is making here and the law related thereto.

III. DISCUSSION

Petitioner claims that both trial counsel and appellate counsel were ineffective. He makes the following arguments in support of his ineffective assistance of counsel claims: (1) trial counsel gave Petitioner erroneous legal advice that caused Petitioner to be prosecuted for conduct that was not prohibited by the criminal statute; (2) trial counsel induced Petitioner to plead guilty based on false promises and misrepresentation to Petitioner and the Court; (3) trial counsel failed to conduct a presentence investigation, causing Petitioner to be sentenced on materially false information; and (4) appellate counsel failed to raise all of the aforementioned claims on direct appeal. (Pet'r's Mot.) A review of the record in this case reveals that Petitioner's claims of ineffective assistance of counsel are frivolous.

A petitioner's claim of ineffective assistance of counsel has two components. *Strickland v. Washington*, 446 U.S. 668, 687 (1984). First, the petitioner must demonstrate that the representation he received was deficient. *Id.* Second, the petitioner must prove that the deficiency resulted in prejudice. *Id.* Deficiency is established by showing that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *United States v. Smack*, 347 F.3d 533, 537 (3d Cir. 2003) (quoting *Strickland*, 446 U.S. at 688). Prejudice, at the plea stage, "focuses upon whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). An ineffective assistance of counsel claim cannot succeed if it fails under either prong of *Strickland*. *Strickland*, 446 U.S. at 697.

A. Criminal Conduct Prohibited by Statute

1. Interstate Transportation of Stolen Property, ITSP – 18 U.S.C. § 2314

Petitioner asserts that trial counsel rendered ineffective assistance by advising him to plead guilty to nine counts of ITSP (Counts I, II, IV, VII, VIII, IX, X, XIV, XV). Petitioner argues the ITSP counts in the Indictment charged him with a scheme to defraud, but that the language of the statute does not include any reference to a scheme. (Pet’r’s Mot. 30.)³ Petitioner contends, therefore, that the Indictment failed to state a claim on those counts. (Pet’r’s Mot. 30.) Petitioner also argues that the ITSP counts were defective because they charged him with unlawfully transporting and causing the transport of “goods and merchandise” in the form of checks, bank checks, and money orders. (*Id.* at 31.) Petitioner argues that because checks qualify as securities, rather than goods and merchandise, the Indictment failed to allege specific facts to satisfy all elements of the crime. (*Id.*)

Petitioner cites *United States v. Capoccia*, 503 F.3d 103 (2d Cir. 2007), in support of his first argument. In *Capoccia*, the defendant was ordered to forfeit the contents of several bank accounts as the result of his conviction under the first paragraph of 18 U.S.C. § 2314. The indictment referred to the defendant’s scheme between 1997 and 2002 to steal money from his clients. *Id.* at 107. However, the charging portion of the indictment set forth a specific list of 31 instances, the earliest of which was dated May 24, 2000. *Id.* at 107, 111. The defendant objected to the forfeiture of any assets obtained prior to May 24, 2000, claiming that “they were not charged in the [i]ndictment and he had not been convicted of them.” *Id.* at 108. The

³ Section 2314 is comprised of five unnumbered paragraphs defining different violations of the statute. The first paragraph criminalizes the “transport[ation], transmi[ssion], or transfer[] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the

government countered that the pre-May 2000 assets were subject to forfeiture because they were included in the indictment's reference to defendant's scheme. *Id.* at 111. The Second Circuit rejected the government's argument and concluded that the indictment did "not charge any misconduct prior to May 2000 . . . either as part of an ongoing scheme or as discrete acts." *Id.* The Court explained that although the indictment "refer[red] to the existence of a scheme, it [did] not charge a scheme." *Id.* (emphasis in original). Instead, it listed specific transfers, all of which occurred after May 2000. *Id.* In addition, the Court noted that the first paragraph of Section 2314 "criminalizes *only* individual acts of transportation or transmission, not schemes or actions taken pursuant to schemes." *Id.* at 112 (emphasis in original).

As in *Capoccia*, the parties are in agreement that Petitioner was convicted of violating the first paragraph of Section 2314. However, Petitioner's reliance on *Capoccia* is misplaced. It is unnecessary to determine whether the first paragraph of 18 U.S.C. § 2314 criminalizes schemes, because Petitioner was charged with specific instances of criminal misconduct. The Indictment alleged that Petitioner cashed a number of checks knowing them to have been stolen, converted and taken by fraud. Each of the nine counts charged in the Indictment referenced the date of the transaction, the institution at which the transaction occurred, and, if applicable, the check number. (Indictment 8, 13, 16-17, 20, 22, 24, 32, 33.) This is sufficient to state a claim for ITSP. Trial counsel was not ineffective for advising Petitioner to plead guilty to the ITSP counts.

Petitioner's argument that the Indictment was defective because it charged him with unlawfully transporting and causing the transport of "goods and merchandise" in the form of

value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud. 18 U.S.C. § 2314.

checks, bank checks, and money orders is also unpersuasive. It is well settled that an “indictment must contain the essential elements of the offense charged” and “must be sufficiently precise to inform the defendant of the charges against which he or she must defend.” *United States v. Schramm*, 75 F.3d 156, 163 (3d Cir. 1996). “By sufficiently articulating the critical elements of the underlying offense, an indictment insures that the accused has been duly charged by the grand jury upon a proper finding of probable cause, and will be convicted only on the basis of facts found by that body.” *Id.* (quotation omitted). “[A]n indictment charging interstate transportation of fraudulently taken checks, Section 2314 requires: (1) knowledge that certain property has been stolen or obtained by fraud, and (2) transporting it, or causing it to be transported, in interstate commerce.” *United States v. Holland*, 831 F.2d 717, 721 (7th Cir. 1987) (citing *Pereira v. United States*, 347 U.S. 1, 9 (1954)). The Indictment in this case charged Petitioner with unlawfully transporting, or causing the transportation of checks, “knowing the same to have been stolen, converted and taken by fraud” and specifically identified the check numbers. (Indictment 7-8, 16-17, 20, 22, 24, 32, 33.) This was more than sufficient to place Petitioner on notice of the charges against which he had to defend. The fact that the Indictment used the language of the statute “goods and merchandise” does not make the Indictment defective. Trial counsel was not ineffective.

2. *Wire Fraud – 18 U.S.C. § 1343*

Petitioner next contends that trial counsel was “grossly negligent” for allowing Petitioner to plead guilty to the wire fraud counts (Counts V, VI, XI, XII, XIII) because the Government could not prove an element of that charge. (Pet’r’s Reply 21.) Specifically, Petitioner argues that the “wiring element” of 18 U.S.C. § 1343 was missing from the Indictment because Petitioner’s “scheme conduct charged in all wire fraud counts successfully ended, reaching

completion upon endorsing and cashing checks and receiving funds irrevocably.” (*Id.*)

Petitioner contends that “[t]he checks’ journeys thereafter were immaterial to petitioner as to the collection process.” (*Id.*)

To convict a defendant for wire fraud, “the evidence must establish beyond a reasonable doubt: (1) the defendant’s knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails or interstate wire communications in furtherance of the scheme.” *United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001).⁴ With regard to the third requirement, “‘the use of the wires need not be an essential element of the scheme,’ but rather, ‘it is sufficient for the use of the wires to be incident to an essential part of the scheme, or a step in the plot.’” *United States v. Keller*, 395 F. App’x 912, 915 (3d Cir. 2010) (quoting *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989)).

Petitioner relies upon *Kann v. United States*, 323 U.S. 88 (1944), in support of his argument that the wires alleged by the Government occurred only after Petitioner irrevocably received the funds. (Pet’r’s Mot. 31.) In *Kann*, three defendants caused three checks to be fraudulently cashed at a bank. *Id.* at 89-90. After they were cashed, the bank mailed the checks to the drawee banks for collection. *Id.* at 90-91. The government charged the three individual defendants with three individual schemes involving one check each, arguing that the mailing of the cashed checks to the drawee banks supplied the mailing element of the mail fraud charges. *Id.* The Supreme Court rejected the government’s argument, concluding that the defendants’ scheme had reached fruition when the checks were cashed and the defendants had irrevocably received the money. *Id.* at 94. The Court explained that because “[i]t was immaterial to [the

⁴ “The wire fraud statute . . . is identical to the mail fraud statute except it speaks of communications transmitted by wire.” *United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994).

defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank[,] [i]t [could not] be said that the mailings in question were for the purpose of executing the scheme.” *Id.* In reaching this decision, however, the Court left open the the possibility that “the mere clearing of a check . . . in some settings, would be enough” to satisfy the mailing requirement. *Kann*, 323 U.S. at 95.

The Government argues that *Kann* was limited by the Court’s later holding in *Schmuck v. United States*. The defendant in *Schmuck* was a used-car distributor who purchased cars, rolled back their odometers, and then sold the cars to retail dealers at artificially inflated prices. 489 U.S. at 707. Prior to reselling the cars, the retail dealers had to submit title applications to the department of transportation, and sales could not be completed until title was received. *Id.* The Court concluded that “[t]he submission of the title-application form supplied the mailing element of each of the alleged mail frauds.” *Id.* The Court explained that unlike in *Kann*, the defendant’s venture was not a “one-shot operation.” *Id.* at 711. Rather, the scheme was an “ongoing fraudulent venture” that depended upon the defendant’s “continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their . . . customers.” *Id.* at 711-12. “The mailing of the title-registration forms was an essential step in the successful passage of title to the retail purchasers” because “a failure of this passage of title would have jeopardized [the defendant’s] relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended.” *Id.* at 714. Therefore, the scheme “did not reach fruition until the retail dealers resold the cars and effected transfers of title.” *Id.* at 712.

“[A]lthough *Schmuck* did not overrule *Kann* . . . it emphasized that courts must consider the full scope of the scheme when determining the sufficiency of the mailing element.” *United*

States v. Lack, 129 F.3d 403, 407 (7th Cir. 1997) (quotation omitted). The paramount considerations are: (1) whether the scheme was an “ongoing fraudulent venture” or a “one-shot operation”; and (2) whether the defendant was “indifferent as to when the scheme was discovered or who bore the loss.” *United States v. Mills*, 199 F.3d 184, 189-90 (5th Cir. 1999). In *Mills*, the defendant caused fraudulent checks to be deposited into his bank account. *Id.* at 186. The bank then sent the checks to a federal reserve bank, which informed other federal reserve banks of the transactions via interstate wire. *Id.* at 187. The defendant argued that the interstate wire transmissions were not “incident to an essential part of the scheme because the embezzlement had already been completed when he deposited the . . . check[s] into his account . . .” *Id.* at 188. The Fifth Circuit rejected this argument and explained that unlike *Kann*, the checks were deposited “near the temporal midpoint” of the defendant’s ongoing scheme. *Id.* at 190. Moreover, the court concluded that the defendant was not indifferent as to when the scheme was discovered or who bore the loss because its success “depended upon continued harmonious relations among” the defendant, the banks, and the victim. *Id.* at 190.

Finally, courts have relied upon the Uniform Commercial Code in distinguishing *Kann*. In *United States v. Franks*, 309 F.3d 977 (7th Cir. 2002), the defendant deposited checks that she fraudulently obtained from her employer into her personal bank account. *Id.* at 977. The bank then forwarded the checks for collection using interstate couriers. *Id.* The defendant argued that her mail fraud conviction should be overturned because the “use of interstate transportation did not facilitate the deceit of her employer; it just adjusted the accounts among the potential victims” *Id.* The Seventh Circuit rejected this argument, noting that the Uniform Commercial Code “makes it easy for a customer’s bank to reverse the credit if the instrument cannot be collected.” *Id.* at 978. The Court explained that even if the defendant drew off the embezzled funds

immediately, “her own funds remained and could have been debited to cover the loss, had the checks not been sent out of state and paid in due course.” *Id.* Moreover, the Court explained that “[i]f the early checks had not been sent interstate and cleared, the later checks would not have been credited to [the defendant’s] account, and her scheme would have been foiled.” *Id.* Therefore, “the interstate transportation facilitated the repetition of acts that were vital to making the scheme profitable.” *Id.*

In the Third Circuit, the case of *United States v. Keller*, No. 07-51, 2008 WL 2120022, at *1 (E.D. Pa. May 19, 2008), *aff’d*, 395 F. App’x 912 (3d Cir. 2010), is instructive. The defendant in *Keller* was an attorney who embezzled approximately \$225,000 by writing checks on his client’s Interest on Lawyer Trust Account (“IOLTA Account”). *Id.* The check clearing process required communication over interstate wires and the checks were not irrevocably debited to the defendant’s account until they had cleared. *Id.* at *2. Unlike in *Kann*, where the government charged three individual schemes involving one check per defendant, in *Keller* the government alleged an ongoing two-year scheme in which the defendant cashed numerous checks. *Id.* at *3. Thus, the defendant’s scheme did not terminate upon the cashing of a single check. *Id.* Furthermore, to maintain the ongoing scheme, the “defendant had to convince the victim that the money was still in his IOLTA Account so that the victim did not demand the money back.” *Id.* The scheme also “depended on [the defendant’s] continued relationship with the bank that cashed his checks because if the early checks had not been sent interstate and cleared, the later checks would not have been credited to defendant’s account, and his scheme would have been foiled.” *Id.* at *4 (quotation omitted). Given these facts, the Third Circuit concluded that the defendant’s “ability to continue cashing checks against his IOLTA Account,

while perhaps not the most important aspect of the scheme, was nonetheless a necessary part of its success.” *Id.* at 3.

In this case, the Indictment alleged that Petitioner presented numerous fraudulent checks to the same check cashing institution on various dates spanning the course of more than one year. (Indictment 14-15, 25-30.) After the checks were cashed, the check cashing institution sent electronic images of the checks to a bank, which then submitted the data to a federal reserve bank. (*Id.* at 15, 26, 28-30.) Petitioner’s fraudulent venture was not a “one-shot” operation as in *Kann*. Here, as in *Schmuck*, *Mills*, and *Keller*, the success of Petitioner’s ongoing scheme was dependent upon his continued harmonious relationship with his clients. As in *Keller*, where the defendant had to convince his client that the money was still in his IOLTA account, the viability of Petitioner’s scheme depended upon his clients’ belief that their money was being properly invested. Clearly, Petitioner’s ability to continue cashing his client’s checks was necessary to the success of his scheme. We cannot say that trial counsel acted unreasonably by advising Petitioner to plead guilty to the wire fraud charges under the circumstances.

B. False Promises and Misrepresentations

In his second claim of ineffective assistance of counsel, Petitioner alleges that trial counsel induced Petitioner to plead guilty based on false promises and misrepresentations. (Pet’r’s Mot. 33.) Petitioner asserts that his ticket business was a “factual and actual business” and that “he purchased millions of dollars of tickets to sporting and entertainment events contradicting a key essential element alleged in the indictment.” (*Id.*) Petitioner alleges that nevertheless, due to trial counsel’s refusal to prepare for trial, he had no choice but to plead guilty. (*Id.*) In addition, Petitioner asserts that trial counsel induced his guilty plea by telling him that “he would file a motion for a downward departure based on sentencing guidelines

5k2.10 and 5k2.12 using coercion and duress as mitigating factors rather than as a defense.”

(*Id.*) Moreover, Petitioner maintains that trial counsel persuaded him to plead guilty by telling him that he would contest the number of victims at sentencing. (*Id.* at 34.) Finally, Petitioner contends that prior to his change of plea hearing, trial counsel “advised petitioner to affirm that he read the entire plea agreement and memorandum when in fact petitioner was never provided with a copy to read, review, or keep.” (*Id.*) The Government responds that Petitioner’s “claims are belied by the record.” (Gov’t’s Resp. 37.) The Government is correct.

“A habeas Petitioner challenging the voluntary nature of his . . . guilty plea faces a heavy burden.” *Zilich v. Reid*, 36 F.3d 317, 320 (3d Cir. 1994). This is because the guilty plea colloquy “is designed to uncover hidden promises or representations as to the consequences of a guilty plea.” *Id.* at 320. Thus, “[a] petitioner challenging the voluntary nature of a facially valid guilty plea based on unfulfilled promises or representations by counsel must advance specific and credible allegations detailing the nature and circumstances of such promises or representations.” *Id.* at 320-21 (citing *Lesko v. Lehman*, 925 F.2d 1527, 1537 (3d Cir. 1991)). Moreover, a defendant who has pled guilty must do more than simply assert his innocence; he must also “give sufficient reasons to explain why contradictory positions were taken before the district court” *United States v. Jones*, 336 F.3d 245, 253 (3d Cir. 2003); *see also United States v. Davis*, 48 F. App’x 809, 811 (2d Cir. 2002) (“Although since his guilty plea [the defendant] has consistently protested his innocence of the charges, a claim of innocence is not a basis for withdrawing a guilty plea unless supported by evidence.”).

1. Plea Colloquy

Petitioner’s current assertions are directly contradicted by his sworn testimony at the guilty plea hearing. At the beginning of the hearing, we asked Petitioner about an e-mail that he

had sent the Court claiming that trial counsel had only met with him three times, was unfamiliar with his case, and had failed to prosecute his claim to his satisfaction. (July 1, 2010 Hr'g Tr. 5-6, ECF No. 60.) We sent a copy of that e-mail to trial counsel. After receiving that e-mail, trial counsel met with Petitioner, discussed his case, and Petitioner informed trial counsel of his desire to change his plea to guilty. (*Id.* at 8.) Petitioner also informed the court that it was his “unwavering desire” to plead guilty. (*Id.* at 9.) When the Court inquired as to whether Petitioner was satisfied to go forward with the plea with trial counsel representing him, Petitioner responded “[a]bsolutley.” (*Id.* at 10.)

The Court then conducted an extensive colloquy of Petitioner. We inquired as to whether Petitioner’s plea was the result of any threats or promises, and Petitioner responded in the negative. (*Id.* at 9, 20, 22, 32.) We explained that Petitioner had an absolute right to go to trial and that a guilty verdict would require the unanimous vote of twelve jurors. (*Id.* at 17-18.) We set forth the elements of the crimes that Petitioner had been charged with, as well as what the Government would have to establish to prove Petitioner’s guilt. (*Id.* at 10-16.) We asked Petitioner whether he had reviewed the Government’s plea agreement and plea memorandum with trial counsel. (*Id.* at 22-23.) Petitioner confirmed that he had read each and every paragraph of the two documents and that he discussed any questions that he had with trial counsel. (*Id.*)

When we asked Petitioner whether he had any questions about the plea memorandum, he expressed a desire to inform the Court that the ticket aspect of his business “was a factual and actual business of which over \$3 million of tickets were purchased” (*Id.* at 26.) The Government did not dispute the fact that Petitioner had purchased tickets. (*Id.* at 37; Plea Mem. 10, ECF No. 58.) However, the Government explained that because the amount of money

Petitioner spent on tickets was substantially less than the amount that he received, the net loss to Petitioner's victims was three million dollars. (July 1 Hr'g Tr. 37; Plea Mem. 10.) The Government also clarified that while the actual ticket purchases occurred early in the scheme, most of the charged counts occurred later in the scheme. (July 1 Hr'g Tr. 38.) Petitioner's rights were fully explained to him and he answered the Court that his plea was not the result of threats or promises. After hearing the Government's review of the evidence, and having read the plea memorandum, Petitioner advised the court of his desire to admit the operative facts and to plead guilty. (*Id.* at 49-50.) One need only read the transcript of the guilty plea hearing to conclude that Petitioner's guilty plea was knowingly, voluntarily, and intelligently entered and was based on admitted facts that were more than sufficient.

2. *Failure to Investigate*

Petitioner cites to trial counsel's refusal to subpoena receipt records from arenas, sports teams, and ticket brokers as evidence of his refusal to prepare for trial. (Pet'r's Mot. 33-34.) Specifically, Petitioner contends that trial counsel "already had \$2 million of paid receipts in his possession . . . and refused to procure another 1-2 million dollars of paid receipts to substantiate petitioner's claim clearly disproving the government's allegations by evidencing [Petitioner's] conduct in making appropriate investments." (*Id.* at 33.) As explained above, the Government never contested the fact that Petitioner purchased tickets—"even lots of tickets." (Gov't's Resp. 56.) To the extent that Petitioner now argues that all of the money that he received went towards ticket purchases, his argument is directly contradicted by his admissions at the guilty plea hearing. Petitioner's reply brief concedes that his ticket business "went awry and ilegal [sic] activities took place" (Pet'r's Reply 12.) As an example, at sentencing Petitioner admitted to soliciting \$50,000 from a husband and wife in the form of two \$25,000 checks and he further

admitted that instead of purchasing tickets with these funds he converted them to cash for his personal use. (Dec. 10 Hr'g Tr. 19, 20; Indictment 6-7) Petitioner admitted the facts giving rise to all of these charges while under oath. (Indictment 6-8.) Given these admissions, no one could reasonably conclude that trial counsel was ineffective for choosing to not subpoena the receipt records.

3. *Coercion and Duress*

Petitioner next asserts that his plea was induced by trial counsel's unfulfilled promise to "file a motion for a downward departure based on sentencing guidelines 5k2.10 and 5k2.12 using coercion and duress as a mitigating factors rather than a defense." (Pet'r's Mot. 33.) Petitioner's Motion does not elaborate upon these claims. However, in his reply brief, Petitioner references two occasions on which he was forced to steal money from clients because of threats that were made to him and his family. (Pet'r's Reply 34-35.)

Section 5k2.10 of the U.S.S.G. provides that "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." U.S.S.G. § 5k2.10. Section 5k2.12 provides that "[i]f the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward." U.S.S.G. § 5k2.12. Trial counsel was not ineffective for failing to file a motion for downward departure under Section 5k2.10. Petitioner does not allege that any of the victims named in the indictment contributed to the offense behavior.

Trial counsel was not ineffective for deciding not to file a motion under 5k2.12. At sentencing, trial counsel acknowledged the threats that Petitioner and his family received. (Dec. 10 Hr'g Tr. 38.) Trial counsel stated that although the threats were nothing to make light of, he

determined that the psychological report prepared by William Russell, Ph.D. (“Dr. Russell”), was more instructive of Petitioner’s motivation. (*Id.*) Moreover, it was reasonable for trial counsel to conclude that, by filing any such motions, he would have weakened Petitioner’s chances of receiving a downward adjustment for acceptance of responsibility. In fact, both the probation officer and the Government were already of the opinion that, given Petitioner’s post plea conduct, he should not be given credit for acceptance of responsibility. (*Id.* at 5-6.)

Moreover, trial counsel was not ineffective for failing to file a motion for downward departure under Section 5k2.12 since Petitioner already brought his allegations of physical violence and intimidation to this Court’s attention on two separate occasions. (Feb. 19, 2010 Hr’g Tr. 18, 20-22, ECF No. 46; Dec. 10 Hr’g Tr. 26, 74-77.) Given our familiarity with Petitioner’s allegations, there is no reason that we “could not, *sua sponte*, have granted a downward departure based upon coercion or duress if [we] deemed such a departure appropriate.” *United States v. Harris*, 104 F.3d 1465, 1477 (5th Cir. 1997); *see Sukhu v. United States*, Civ. No. 11-0061, 2011 WL 5839001, at *4 (D. Md. Nov. 18, 2011) (rejecting the petitioner’s claim for ineffective assistance of counsel for failure to request a downward departure under Section 5k2.12 where the court was aware of the threats to the petitioner’s family). In fact, notwithstanding our familiarity with Petitioner’s allegations, we determined that a sentence above the sentencing guideline range was appropriate. Petitioner suffered no prejudice as a result of trial counsel’s decision.

4. *Number of Victims*

Petitioner also contends that trial counsel induced his guilty plea by promising to file an objection to the Government’s alleged number of victims. (Pet’r’s Mot. 34; Pet’r’s Reply 1.) Petitioner asserts trial counsel never met with him prior to sentencing, “never discuss[ed] the

victim list he promised to respond to and never fil[ed] the promised objection to the court.” (Pet’r’s Mot. 34.) The Government counters that Petitioner “misstates the record as to trial counsel’s statements . . . which can hardly be characterized as a ‘promise’ which ‘duped’ [Petitioner] into an involuntary plea.” (Gov’t’s Resp. 62.) We agree with the Government.

At the guilty plea hearing, trial counsel informed the Court that:

In negotiating the proposed plea agreement with the Government, the Government and I agreed on certain things, we disagreed on others, and in some things we agreed to disagree on.

For instance, 50 or more victims, [the Government] and I have agreed to make our best efforts to meet prior to sentencing so when we get here to receive the sentence we are in some type of agreement on that issue, and we think we can do that. But I’ve explained that to [Petitioner] and if we can’t then I’ll file an objection and Your Honor will make that determination.

(July 1 Hr’g Tr. 24.) Trial counsel did not make an unconditional promise to challenge the Government’s number of victims. Rather, he informed Petitioner that he would file an objection if he could not come to an agreement with the Government. Prior to sentencing, the Government informed trial counsel that it counted 57 victims and supported its finding with a list of victims. (Gov’t’s Resp. 63.) The Presentence Report (“PSR”), which was adopted by this Court, also determined that Petitioner’s offense involved more than 50 victims. (*Id.*; Dec. 10 Hr’g Tr. 79.) We cannot say that trial counsel rendered deficient performance by deciding not to object to the Government’s calculation. Moreover, as the Government points out, Petitioner does not explain his own calculation of the number of victims, and has not demonstrated that the Government’s calculation was erroneous. We reject this ineffective assistance of counsel claim.

C. Presentence Investigation

Petitioner contends that trial counsel was ineffective for not attending the pre-sentence interview between Petitioner and the parole officer, and that trial counsel never responded to the

parole officer during the pre-sentence investigation. (Pet’r’s Mot. 36.) Petitioner also alleges that trial counsel never provided him with the Government’s sentencing memorandum and victim letters. (*Id.*) Petitioner alleges that as a result, the PSR “was replete with serious factual inaccuracies highly prejudicial to the petitioner.” (*Id.*) Petitioner further alleges that trial counsel did not meet with him until one hour before sentencing, and that this Court violated Federal Rule of Criminal Procedure 32 by failing to inquire as to whether trial counsel had reviewed the PSR with Petitioner. (*Id.*) Petitioner argues that because of these failures, he did not have an opportunity to review the PSR and object to the misstatements of material fact contained therein. (*Id.*)

Federal Rule of Criminal Procedure 32(i)(1)(A) requires that before imposing sentence, a district court “must verify that the defendant and the defendant’s attorney have read and discussed the presentence report and any addendum to the report[.]” Fed. R. Crim. P. 32(i)(1)(A).⁵ The Third Circuit has not interpreted this rule “as creating an absolute requirement that the court personally ask the defendant if he has had the opportunity to read the report and discuss it with counsel.” *Stevens*, 223 F.3d at 241 (quotation omitted). Rather, the Court “allow[s] for a more functional fulfillment of the rule, requiring only that the district court somehow determine that the defendant has had this opportunity.” *Id.* (quotation omitted); *see Rolon v. United States*, Civ. No. 03-3902, Crim. No. 01-583, 2006 WL 2417275, at *7 (D.N.J. Aug. 21, 2006) (finding that defense counsel’s letter brief expressing his intent to argue for a downward departure at sentencing was “evidence of discussion between [p]etitioner and

⁵ This requirement previously appeared as Rule 32(c)(3)(A), which provided that a district court must “verify that the defendant and defendant’s counsel have read and discussed the presentence report.” *United States v. Stevens*, 223 F.3d 239, 241 (3d Cir. 2000) (quoting Fed. R. Crim. P. 32(c)(3)(A)).

counsel”). A review of the record in this case reveals that Petitioner was fully aware of the contents of the PSR. Moreover, when a court’s failure to comply with this rule is raised for the first time on direct appeal, the Third Circuit requires a showing of prejudice. *United States v. Cedeno*, No. 05-216, 2008 WL 4415600, at *5 (M.D. Pa. Sept. 25, 2008) (citing *Stevens*, 223 F.3d at 246). A showing of prejudice is also required when a failure to comply is raised in a motion under Section 2255. *Id.*; *Santiago v. United States*, Civ. No. 09-1334, Crim. No. 08-478, 2009 WL 2391284, at *13 (D.N.J. Jul. 30, 2009) (“The actual prejudice prong requires that petitioner demonstrate that the [c]ourt’s alleged violation of Rule 32 resulted in [p]etitioner experiencing an actual and substantial disadvantage.”) (quotation omitted). It is obvious that there is no violation and no prejudice here.

We reject Petitioner’s assertion that trial counsel was ineffective for failing to attend the meetings between Petitioner and the probation officer. *United States v. Mitchell*, Civ. No. 09-26, Crim. No. 11-411, 2014 WL 1871916, at *10 (N.D. Fla. Apr. 8, 2014) (rejecting Petitioner’s Section 2255 claim for ineffective assistance of counsel because there is no constitutional right to counsel during a presentence interview by a probation officer and because there is nothing in the text of Rule 32(c)(2) that requires counsel to attend a routine presentence interview).⁶ Similarly, we reject Petitioner’s contention that trial counsel was ineffective for failing to provide him with a copy of the Government’s sentencing memorandum and victim impact letters. *Melendez v. United States*, Civ. No. 11-6632, Crim. No. 05-44-7, 2013 WL 4774134, at *5 (E.D. Pa. Sept. 6,

⁶ Federal Rule of Criminal Procedure 32(c)(2) provides that “[t]he probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant’s attorney notice and a reasonable opportunity to attend the interview.” Fed. R. Crim. P. 32(c)(2).

2013) (“Rule 32 does not specifically require providing in hard copy the sentencing memoranda or otherwise giving the defendant the Government’s memorandum.”).

Furthermore, despite Petitioner’s assertions to the contrary, the record reflects that Petitioner was given an ample opportunity to review the PSR. The PSR was mailed/delivered directly to both Petitioner and trial counsel well before the sentencing hearing. (Sept. 22, 2010 Probation Letter (on file with Court).) Trial counsel responded to the PSR by filing a sentencing memorandum in which he challenged the PSR’s conclusion that Petitioner should not receive an adjustment for acceptance of responsibility. (Pet’r’s Sentencing Mem. (on file with Court).) Ultimately, the Court agreed with trial counsel and granted Petitioner a three-point reduction for acceptance of responsibility. (Dec. 10 Hr’g Tr. 81.) Petitioner now raises “at least 33 issues contained within the [PSR]” that he was never given an opportunity to respond to. (Pet’r’s Mot. 36, 39-40.) As the Government notes, the paragraphs of the PSR to which Petitioner objects mainly concern the offense conduct, whether Petitioner accepted responsibility, the circumstances of a prior arrest, his gambling history, his earnings, and the PSR’s conclusion that no downward departures were warranted. (Gov’t’s Resp. 91.) Petitioner does not explain the grounds upon which these objections are based. Presumably, the objections are based upon the Petitioner’s argument that he really did purchase tickets and that his criminal conduct resulted from coercion and duress. Even if trial counsel was deficient for failing to object on these grounds, we provided Petitioner with ample opportunity to address his concerns during his two-hour sentencing hearing. Petitioner said nothing in this regard. Petitioner cannot establish that he was prejudiced by the alleged deficiencies of trial counsel or this Court.

Finally, Petitioner objects to the psychological report prepared by Dr. Russell. (ECF No. 68.) Petitioner contends that trial counsel and Dr. Russell conspired to create an image of

Petitioner as a compulsive gambler and that this addiction caused his conduct. (Pet'r's Mot. 37.) Petitioner asserts that there is no support for this contention in the record. (*Id.* at 37-38.) We disagree. During the sentencing hearing, Petitioner admitted that he attended Gambler's Anonymous for a 13-year period beginning in 1980. (Dec. 10 Hr'g Tr. 65.) Petitioner's son repeatedly referred to Petitioner as a compulsive gambler and informed the Court that the victims in this case were the victims of his father's addiction. (*Id.* at 59, 61.) Petitioner's assertion that trial counsel and Dr. Russell conspired against him is patently ridiculous. Petitioner's claim of ineffective assistance of trial counsel for having him evaluated is rejected.

D. Appellate Counsel

Finally, Petitioner contends that he received ineffective assistance from appellate counsel.⁷ (Pet'r's Mot. 43.) Petitioner argues that he attempted to contact appellate counsel on multiple occasions to inform him of valid appeal issues and that appellate counsel was unresponsive. (*Id.*) The appellate issues identified by Petitioner are the same issues that Petitioner presents in the instant Motion. We have determined that Petitioner's arguments are meritless. Appellate counsel was not ineffective for failing to raise them on appeal.

IV. CERTIFICATE OF APPELABILITY

The Third Circuit's Local Appellate Rules instruct:

At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue. If the district judge issues a certificate, the judge must state the specific issue or issues that satisfy the criteria of 28 U.S.C. § 2253. If an order denying a petition under § 2254 or § 2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate references the opinion or report.

⁷ We note that Petitioner waived his right to appeal and his right to collateral review when he entered his guilty plea. Thus, the issues that he could raise on appeal were limited. *See United States v. Khattak*, 273 F.3d 557 (3d Cir. 2001).

Third Circuit L.A.R. 22.2. Under 28 U.S.C. § 2253, a defendant seeking a certificate of appealability 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). Defendant has raised no viable claims. No reasonable jurist could disagree with this assessment. Therefore, a certificate of appealability will not issue.

V. CONCLUSION

For the foregoing reasons, Petitioner’s Motion will be denied, and a certificate of appealability will not issue.

An appropriate Order follows.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'R. Surrick', is written over a horizontal line.

R. BARCLAY SURRICK, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION NO. 09-665
 :
 : CIVIL ACTION NO. 13-3531
 ROBERT STURMAN :

SURRICK, J.

OCTOBER 14, 2014

ORDER

AND NOW, this 14th day of October, 2014, upon consideration of Petitioner's Motion to Vacate/Set Aside/Correct Sentence under 28 U.S.C. § 2255 (ECF No. 84), and all papers submitted in support thereof and in opposition thereto, it is **ORDERED** as follows:

1. Petitioner's Motion To Vacate/Set Aside/Correct Sentence under 28 U.S.C. § 2255 is **DENIED**; and
2. No Certificate of Appealability shall issue.

IT IS SO ORDERED.

BY THE COURT:



R. BARCLAY SURRICK, J.