UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 1:21-cr-00120 (RCL)**
	)	
SCOTT KEVIN FAIRLAMB,	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this Opposition to defendant Scott Kevin Fairlamb's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. In his motion, defendant claims that his sentence should be vacated because his counsel allegedly provided ineffective assistance by failing to: (1) file a motion to dismiss Count Two of the Superseding Indictment, which charged defendant with Obstruction of an Official Proceeding in violation of 18 U.S.C. § 1512 (c)(2); (2) properly advise him of his potential sentence; (3) share specific discovery material with the defendant; and (4) file objections to the Presentence Investigation Report. These claims are meritless and require no hearing.

PROCEDURAL AND FACTUAL BACKGROUND

On April 7, 2021, a federal grand jury returned a superseding indictment charging the defendant with Civil Disorder in violation of 18 U.S.C. § 231(a)(3), Obstruction of an Official Proceeding in violation of 18 U.S.C. § 1512(c)(2), Assaulting, Resisting, or Impeding Certain Officers in violation of 18 U.S.C. § 111(a)(1), Entering or Remaining in any Restricted Building or Grounds with a Deadly or Dangerous Weapon in violation of 18 U.S.C. §§ 1752(a)(1) and (b)(1)(A), Disorderly and Disruptive Conduct in a Restricted Building or Grounds in violation of

18 U.S.C. § 1752(a)(2), Impeding Ingress and Egress in a Restricted Building or grounds in violation of 18 U.S.C. § 1752(a)(3), Engaging in Physical Violence in a Restricted Building or Grounds in violation of 18 U.S.C. § 1752(a)(4), Disorderly Conduct in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(D), Impeding Passage Through the Capitol Grounds and Buildings in violation of 40 U.S.C. § 5104(e)(2)(E), Act of Physical Violence in the Capitol Grounds or Buildings in violation of 40 U.S.C. § 5104(e)(2)(F), Parading Demonstrating, or Picketing in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G), and Stepping, Climbing, Removing, or Injuring Property on the Capitol Grounds in violation of 40 U.S.C. § 5104(d). (Dkt. 23).[1]

On August 6, 2021, pursuant to an agreement, the defendant pleaded guilty to Count Two, Obstruction of an Official Proceeding in violation of 18 U.S.C. § 1512(c)(2), and Count Three, Assaulting, Resisting, or Impeding Certain Officers in violation of 18 U.S.C. § 111(a)(1). In connection with the plea, the defendant and defense counsel signed a written plea agreement. (Dkt. 38-1). Before accepting the plea, the defendant was placed under oath and the Court conducted a colloquy with the defendant covering the applicable provisions of Rule 11 of the Federal Rules of Criminal Procedure. 8/6/2021 Tr. Specifically, the defendant was placed under oath and agreed that answers to the Court's questions were subject to penalty of perjury and making a false statement. 8/6/2021 Tr. at 2-3. The defendant said he had adequate time and opportunity to discuss the case with his attorney, Harley Breite, and he was satisfied with Mr. Breite's representation. Id. at 3. The defendant agreed that he and Mr. Breite discussed the United States Sentencing Commission Guidelines ("U.S.S.G." or the "Guidelines") and how they might apply. Id. at 6. When asked if "anyone threatened you or anyone else or forced you in any way to enter this plea

[1] "Dkt." refers to docket entries in the instant case. "Tr." refers to transcripts from Court proceedings.

of guilty," the defendant responded, "No, Your Honor. They have not." Id. at 7. Defense counsel reviewed the terms of the plea agreement, stating that the government would be seeking a sentence within the Guidelines range of 41 to 51 months, and the defense would submit a sentencing memorandum and argue for variance or departure from the guidelines range. Id. at 7-8. Defendant agreed that he understood counsel's summary, he had reviewed the plea agreement carefully with his attorney, and he understood and agreed to it. Id. at 8-9.

Among other things, the plea agreement included the parties' agreement on the estimated offense level under the Guidelines. The agreement stated that the parties agreed that the total offense level for Count Two was a 25, based on a base offense level of 14 pursuant to U.S.S.G. § 2J1.2(a), eight points for injury/property damage to obstruct pursuant to U.S.S.G. § 2J1.2(b)(1)(B), and an additional three points for substantial interference pursuant to U.S.S.G. § 2J1.2(b)(2). (Dkt. 38-1 at 3). For Count Three, the parties agreed a total offense level of 20 would apply, based on a base offense level of 14 pursuant to U.S.S.G. § 2A2.2 and six points for the official victim pursuant to U.S.S.G. § 3A1.2. Id. The parties further agreed that assuming the defendant accepted responsibility, a three-level reduction would be appropriate pursuant to U.S.S.G. § 3E1.1. Accordingly, the total estimated offense level would be 22. Id. at 4.

The plea agreement stated that "[n]o agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein." (Dkt. 38-1). The defendant signed his acceptance of the terms of the agreement, agreeing that he was "pleading guilty because [he] was in fact guilty of the offense(s) identified" in the Plea Agreement. Id. at 11 (also stating that he was satisfied with his counsel, fully understood the Plea Agreement, and "reaffirm[ed] that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with [his] decision to plead guilty except

those set forth in [the] Agreement."). Defense counsel signed his acknowledgement with the Agreement, stating that he read every page of the agreement, he reviewed it with his client, the document "accurately and completely set forth the entire Agreement," and he concurred in his client's choice to plead guilty. Id.

The defendant orally confirmed at the plea hearing there were no promises outside of the plea agreement in the following exchange:

> The Court: Has anyone made any prediction or promise as to what sentence I will give you in this case?
> The Defendant: No, Your Honor.
> The Court: You understand I don't know myself right now.

Id. at 9. The Court discussed the sentencing process, explaining that he would consider the Presentence Investigation Report ("PSR") and listen to the defendant and counsel. Id. The Court also reviewed the Statement of Offense[2] with the defendant, who agreed he had signed it, reviewed

[2] In the Statement of Offense, among other things, the defendant acknowledged that he climbed the scaffolding erected on the West Terrace of the United States Capitol on January 6, 2021. (Dkt. 39 at 3). He joined a group of rioters who forcefully pushed through a line of police officers and metal barricades. Id. He obtained a collapsible police baton from the ground, and he recorded a video and posted it to Facebook bragging about his actions. Id. at 3-4. At approximately 2:15 p.m., the defendant entered the Capitol through the Senate Wing Door. Id. at 4. After exiting the Capitol building, he followed a line of Metropolitan Police Department Officers, screaming at them, "Are you an American? Act like a f**king one! . . . You guys have no idea what the f**k you're doing!" Id. He then inserted himself into the line of officers, cut off Officer Z.B. from the rest of the line, and shoved and then punched Officer Z.B. Id. In the Statement of Offense, the defendant admitted he was not acting in self defense. He also agreed that "[w] hen [he] unlawfully entered the Capitol building, armed with a police baton, he was aware that the Joint Session to certify the Electoral College results had commenced." Id. at 4. He agreed that he "unlawfully entered the building and assaulted Officer Z.B. with the purpose of influencing, affecting, and retaliating against the conduct of government by stopping or delaying the Congressional proceeding by intimidation or coercion." Id. He also agreed that "his belief that the Electoral College results were fraudulent is not a legal justification for unlawfully entering the Capitol building and using intimidating [sic] to influence, stop, or delay the Congressional proceeding." Id. at 4-5. The defendant signed the Statement of Offense, acknowledging that he read it and carefully reviewed it with his attorney, he was satisfied with his counsel's representation, and he fully understood and agreed to the document. Id. at 6 (also acknowledging that no threats were made to him, nor was he under the influence of anything that could impede his ability to understand it).

it "really carefully with [his] attorney," and it reflected "what really happened here." Id. The Court then summarized the colloquy and accepted the defendant's plea. Id. at 10.

In the October 6, 2021 draft PSR, probation calculated a total grouped offense level of 28. (Dkt. 46). This was based on a base offense level of 14 pursuant to U.S.S.G. § 2J1.2(a), eight points for physical injury to a person pursuant to U.S.S.G. § 2J1.2(b)(1)(B), three points for substantial interference with the administration of justice pursuant to U.S.S.G. § 2J1.2(b)(2), six points because the victim was a government officer or employee pursuant to U.S.S.G. § 3A1.2(b), and three points subtracted for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a) and (b). (Dkt. 46 at 11-12). On October 12, 2021, the government objected to the draft PSR computations. (Dkt. 56). The government respectfully requested that the offense level be calculated for each Count and objected to the application of the six-level victim adjustment pursuant to U.S.S.G. § 3A1.2(b) to the offense level for Count Two. (Dkt. 56) (also noting its agreement that U.S.S.G. § 2J1.2(b)(1)(B) applied because the offense involved threating to cause physical injury but that the victim in the case reported that he/she did not sustain injuries.). Defense counsel did not file objections to the PSR, but in his sentencing submission, agreed with the government's calculation of the Guidelines in accordance with the plea agreement and the government's PSR objections. (Dkt. 54).

The defendant was sentenced on November 10, 2021. The Court began the sentencing hearing by addressing the PSR and objections to the PSR. 11/10/2021 Tr. at 3-4. The Court ruled in favor of the government and defense counsel's position on the Guidelines in the PSR and agreed to the Guidelines calculation in the plea agreement. Id. The Court then found that the total offense level would be 22, a criminal history category of I, and a resulting advisory guideline of 41 to 51 months. Id. at 4.

Both the government and defense counsel submitted written sentencing submissions and Officer Z.B. submitted a victim impact statement. The government "recommend[ed] that the Court sentence Fairlamb to 44 months' incarceration, which is within the advisory Guidelines' range of 41-51 months," describing the defendant's "swift, violent assault" of Officer Z.B., the powerful victim impact statement, the defendant's "history of getting angry and then violently punching people," and his history of violent rhetoric, as well as his early responsibility for his actions and expressions of remorse. 11/10/2021 Tr. at 2, 5-16. Defense counsel advocated for a sentence of 17 months incarceration, which he calculated "would essentially mean a time served sentence." 11/10/2021 Tr. at 17-33. He emphasized the defendant's personal history, professional work, acceptance of responsibility and remorse. The Court commented that "it [was] a sad case" because the assault was "out of character for what you would expect for his whole philosophy of living his life." 11/10/2021 Tr. at 21. The defendant addressed the Court and apologized to his family for his "complete irresponsible, reckless behavior" on January 6. 11/10/2021 Tr. at 33-36. The defendant said that he "truly regret[ted] [his] actions" and "have nothing but remorse." 11/10/2021 Tr. at 35.

In announcing the sentence, the Court explained that "it is such a serious crime that I cannot give a below guidelines sentence or vary or depart below the guidelines," despite the defendant's expressions of remorse and early acceptance of responsibility. 11/10/2021 Tr. at 36-38 (commenting that other similarly situated defendants would "get a lot more if they want to go to trial" but the Court would not go above the minimum under the guidelines because of the early plea). The Court noted the "powerful" victim impact statement and that "the offense itself . . . is so at the heart of our democracy that I cannot in good conscience justify going below the guidelines." 11/10/2021 Tr. at 38.

The Court sentenced the defendant at the low end of the agreed-upon guideline range to 41 months incarceration to be served concurrently as to Counts Two and Three, with credit for time served. (Dkt. 57) (announcing the judgment of the Court "pursuant to the Sentencing Reform Act of 1984, an in consideration of the provisions of 18 U.S.C. Section 3553, as well as the advisory sentencing guidelines."). The Court further sentenced the defendant to serve 36 months supervised release, to be served concurrently as to Counts Two and Three, and to pay $2,000 in restitution and a $200 special assessment. Id. The Court also granted the government's oral motion to dismiss the remaining counts. After sentencing, the defendant filed a notice of appeal, Dkt. 61, but then moved to withdraw the notice, Dkt. 63. The Court of Appeals treated the motion as one seeking voluntary dismissal and granted the motion. Dkt. 64. The order on mandate was issued on March 29, 2022. Id.

On September 13, 2022, defendant timely filed the instant motion within the applicable one-year limitations period. See 28 U.S.C. § 2255(f). (Dkt. 65).[3]

LEGAL STANDARD UNDER §2255

Under 28 U.S.C. § 2255, a defendant may move the sentencing court to vacate, set aside, or correct its sentence where 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). It is "well-settled" that "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982); see also United States v. Pollard, 959 F.2d 1011, 1020 (D.C. Cir. 1992)

[3] The motion was not accompanied by any supporting evidence, despite containing quotes in several places. See Dkt. 65 at 7 (alleging that "previous counsel omitted the filing of any objections 'because [if he did file objections] the prosecutors would not argue for a downward departure.'").

(citing Frady). A judgment challenged on collateral attack carries with it a "presumption of regularity," "even when the question is waiver of constitutional rights." Daniels v. United States, 532 U.S. 374, 381 (2001) (internal quotation marks omitted). The defendant bears the burden of demonstrating that he is entitled to relief under § 2255. See, e.g., United States v. Bell, 65 F. Supp. 3d 229, 231 (D.D.C. 2014).

To succeed on an ineffective assistance claim, a defendant must prove: (1) that his counsel's performance was deficient, and (2) that his counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). More specifically, the defendant first must show that his attorney's errors were so "serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. To meet this standard, the defendant must show that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representations fell below an objective standard of reasonableness," or "prevailing professional norms." Id. at 688, 690; Nix v. Whiteside, 475 U.S. 157, 165 (1986). "'Surmounting [this] high bar is never an easy task.'" United States v. Brinson-Scott, 714 F.3d 616, 623 (D.C. Cir. 2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 371 (2010)). "As a general matter, the bar of objective reasonableness is set rather low." United States v. Hurt, 527 F.3d 1347, 1356 (D.C. Cir. 2008); see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). The Sixth Amendment does not require perfection. Hurt, 527 F.3d at 1357.

In evaluating counsel's performance, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances,

the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689, quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955); accord Darden v. Wainright, 477 U.S. 168, 186-187 (1986). The Supreme Court cautioned that "[e]ven the best criminal defense attorneys would not defend a particular client the same way." Strickland, 466 U.S. at 689 (citations omitted). There are ultimately "countless ways to provide effective assistance in any given case." United States v. Morrison, 98 F.3d 619, 623 (D.C. Cir. 1996) (citing Strickland, 466 U.S. at 689-90).

Second, even if counsel's representation was deficient, the defendant must affirmatively prove prejudice that is "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. 687, 693. To meet this standard, the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." United States v. Udo, 795 F.3d 24, 30 (D.C. Cir. 2015) (quoting Strickland, 466 U.S. at 694); see also Payne v. Stansberry, 760 F.3d 10, 13 (D.C. Cir. 2014); United States v. Cassell, 530 F.3d 1009, 1011 (D.C. Cir. 2008). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Rather, establishing a "reasonable probability" requires that "the likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011); see also Brinson-Scott, 714 F.3d at 624. To establish prejudice in the context of a conviction resulting from a guilty plea, a defendant must show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim." Strickland, 466 U.S. at 700 (emphasis added). Consequently, the reviewing court need not even "address both components of the inquiry if the

defendant makes an insufficient showing on one." Id. at 697. Thus, the reviewing court need not consider the issue of an attorney's performance if there is a finding that the defendant has not shown prejudice. "If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id.; see also Brinson-Scott, 714 F.3d at 623.

ARGUMENT

Defendant's motion fails to make the required showing of both constitutionally deficient performance and prejudice, and therefore is legally insufficient to warrant any relief. First, counsel neither performed deficiently nor caused the defendant prejudice by failing to argue that the 18 U.S.C. § 1512(c) charge should be dismissed. Next, the defendant's allegation that counsel misled him regarding his potential sentence is belied by the record, including defendant's sworn statements to the Court. Finally, counsel neither performed deficiently nor caused the defendant prejudice by failing to file formal objections to the Presentence Investigation Report. For each of these claims, the existing record is sufficient to show that the defendant is not entitled to relief.

A. Claim #1: Counsel's Performance Was Not Deficient in Failing to File a Motion to Dismiss 18 U.S.C. § 1512(c)(2) Charge

The defendant claims that he pleaded guilty to Count Two of the Superseding Indictment, which charged him with Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2), "even though a motion to dismiss this count would have had merit and would have changed the outcome of the case." (Dkt. 65 at 3-4). Specifically, he alleges that the conduct alleged in Count Two falls outside the scope of the statute because he "was not alleged to have taken any action with respect to a document, record or other object in order to corruptly obstruct, impede or influence an official proceeding." Id. This argument is unavailing.

Every reported court of appeals decision to have considered the scope of Section 1512(c)(2), and all but one of the district judges of this Court to have considered the issue in cases involving January 6, 2021, have concluded that Section 1512(c)(2) prohibits obstruction regardless of its connection to documentary or tangible evidence. See United States v. Williams, No. CR 21-0618 (ABJ), 2022 WL 2237301, at *1 (D.D.C. June 22, 2022).[4] "Plenty of ink has been spilled in this district denying motions that raise . . . arguments" challenging the statute. United States v. Bingert, 21-cr-91 (RCL), 2022 WL 1659163, at *2 (D.D.C. May 25, 2022).

Citing Judge Nichols' decision in United States v. Miller, 1:21-cr-00119 (CJN), 2022 WL 823070 (D.D.C. Mar. 7, 2022), defendant argues in the instant motion that that the charged actions were insufficient to constitute a violation of the statute because the word "otherwise" is limiting and the defendant "was not alleged to have taken any action with respect to a document, record or other object in order to corruptly obstruct, impede or influence an official proceeding." (Dkt. 65 at 3-4). However, defense counsel's failure to file a motion to dismiss the charge was not deficient

[4] Citing United States v. Sandlin, 21-cr-88 (DLF), 2021 WL 5865006, at *3–5, *10–13 (D.D.C. Dec. 10, 2021) (denying motion to dismiss charge under 18 U.S.C. § 1512(c)(2)); United States v. Caldwell, 21-cr-28 (APM), 2021 WL 6062718, at *4–11 (D.D.C. Dec. 20, 2021) (same); United States v. Mostofsky, 21-cr-138 (JEB), 2021 WL 6049891, at *8–13 (D.D.C. Dec. 21, 2021) (same); United States v. Montgomery, 21-cr-46 (RDM), 2021 WL 6134591, at *4–10, *18–23 (D.D.C. Dec. 28, 2021) (same); United States v. Nordean, 21-cr-175 (TJK), 2021 WL 6134595, at *4–12, *14–19 (D.D.C. Dec. 28, 2021) (same); Order, United States v. Reffitt, 21-cr-32 (DLF) (D.D.C. Dec. 29, 2021) (same); United States v. McHugh, 21-cr-453 (JDB), 2022 WL 296304, at *3, *22 (D.D.C. Feb. 1, 2022) (same); United States v. Grider, 21-cr-22 (CKK), 2022 WL 392307, at *3–8 (D.D.C. Feb. 9, 2022) (same); United States v. Bozell, 21-cr-216 (JDB), 2022 WL 474144, at *1–7 (D.D.C. Feb. 16, 2022) (same); United States v. Robertson, 21-cr-34 (CRC), 2022 WL 969546, at *3–6 (D.D.C. Feb. 25, 2022) (same); United States v. Andries, 21-cr-93 (RC), 2022 WL 768684, at *3–17 (D.D.C. Mar. 14, 2022) (same); United States v. Puma, 21-cr-454 (PLF), 2022 WL 823079, at *4–19 (D.D.C. Mar. 19, 2022) (same); United States v. McHugh, 21-cr-453 (JDB), 2022 WL 1302880, at *2–12 (D.D.C. May 2, 2022) ("McHugh II") (same); United States v. Bingert, 21-cr-91 (RCL), 2022 WL 1659163, at *3–11, *12–15 (D.D.C. May 25, 2022) (same); United States v. Fitzsimons, 21-cr-158 (RC), 2022 WL 1698063, at *3–13 (D.D.C. May 26, 2022) (same); United States v. Williams, No. CR 21-0618 (ABJ), 2022 WL 2237301, at *8-18 (D.D.C. June 22, 2022) (same).

because Judge Nichols had not issued his decision in Miller until seven months after Fairlamb entered his guilty plea and four months after his sentencing. A court evaluating whether counsel was effective must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland at 690. Accordingly, Fairlamb's counsel should not be second-guessed for seeking a favorable plea agreement rather than pursuing dismissal under a theory, which, while Fairlamb's case was pending, had not been adopted by a single judge in this district.

Indeed, this Court ultimately rejected the reasoning in Miller as have the other judges in this district who have considered it. In Bingert, this Court concluded that Miller's "narrow interpretation strains the statute [Section 1512(c)(2)] beyond its ordinary meaning." Bingert, 2022 WL 1659163, at *7 (further "address[ing] defendants' additional arguments and why they are unpersuasive").

Accordingly, because counsel does not render ineffective assistance "'by declining to pursue a losing argument,'" the defendant has not carried his burden to show deficient performance on behalf of his counsel. See Johnson v. Wilson, 960 F.3d 648, 656 (D.C. Cir. 2020) (quoting United States v. Watson, 717 F.3d 196, 198 (D.C. Cir. 2013). Contrary to his claim that "a motion to dismiss [Count Two] would have had merit," if counsel had filed a motion to dismiss on Count Two, it would have been denied.

Moreover, even if the Miller court's view was adopted,[5] the defendant's claim fails because he has not met his burden of demonstrating a substantial likelihood of a different ultimate result. The defendant's argument fails to address that pursuant to the plea agreement, the government

[5] On December 12, 2022, the Court of Appeals held oral arguments in United States v. Fisher, 22-3038, a consolidated appeal challenging Judge Nichols' interpretation of Section 1512 as stated in Miller.

dismissed multiple counts in the Superseding Indictment, including Civil Disorder in violation of 18 U.S.C. § 231(a)(3) charged in Count One.

For these reasons, under either prong, the record "conclusively show[s] that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Accordingly, no evidentiary hearing is needed on this claim.

B. Claim #2: The Record Refutes Allegations that Counsel Misled Defendant as to His Sentence

The defendant claims that his counsel misled him regarding his sentence and that his plea "was induced by promises from his previous counsel that he would receive a sentence no longer than 12 months." (Dkt. 65 at 4-6).[6] This unsupported and incredible claim fails. Even if Fairlamb's contention that counsel misled him were unrefuted (which it is not), this argument does not provide grounds for vacating his plea and his sentence. An attorney's incorrect assurances that a defendant will receive more lenient treatment is not a reason to set aside a conviction. United States v. Griffin, 816 F.2d 1, 6 (D.C. Cir. 1987) (insufficient for defendant to allege he was misled by counsel; to warrant relief, defendant must demonstrate he received advice from counsel that judge was party to an agreement or that plea agreement was binding on the judge) (quoting United States v. Simpson, 436 F.2d 162, 164 (D.C. Cir. 1970)). Here, Fairlamb makes the legally inadequate claim that his prior counsel misled him about the outcome of his sentence; he does not

[6] The instant motion is unclear because the following sentence states that counsel allegedly told defendant that "he would be home 'this time next year.'" (Dkt. 65 at 5). Based on that language, the government presumes defendant is alleging that defense counsel predicted that defendant would return home in approximately a year, taking into account credit for the time defendant served prior to sentencing, potential placement into residential reentry centers or home confinement, earning of time credits, and other calculations done by the Bureau of Prisons. At the sentencing hearing, defense counsel asked for a sentence of 17 months, which he calculated "would essentially mean a time served sentence." 8/6/2021 Tr. at 33.

claim this Court was bound by or a party to such an agreement, and thereby fails to provide grounds for the relief he demands.

Moreover, the defendant's allegations in the instant motion contradict his prior sworn statements made to the Court during the plea hearing. See 8/6/2021 Tr. For example, the defendant swore that no one "made any prediction or promise as to what sentence" the Court would impose. 8/6/2021 Tr. at 9 (acknowledging also that he understood the Court did not know at the time of the plea and would determine the sentence after reviewing the presentence report and hearing from government counsel, defense counsel, and the defendant). He also swore that the facts set forth in the statement of offense "really happened" and he was in fact guilty. Id. at 9-10. Fairlamb's statements, made under oath during his plea colloquy, are presumed to be true. Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity"); United States v. Farley, 72 F.3d 158, 164-65 (D.C. Cir. 1995) (quoting Blackledge); United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994) (strong presumption that statements made during guilty plea colloquy are true).

The written plea agreement also contradicts defendant's allegations in the instant motion. The plea agreement included the following provision:

> No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by your client, defense counsel, and an Assistant United States Attorney for the District of Columbia.

(Dkt. 38-1 at 10). Defendant signed the agreement, "reaffirm(ing) that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with his decision to plead guilty except as set forth in this Agreement." (Dkt. 38-1 at 11) (acknowledging, among other things, that he was satisfied with counsel and "pleading guilty because [he was] in fact guilty of the offense(s) identified in this Agreement."). Defense counsel also signed the plea

agreement, and his acknowledgment stated that it "accurately and completely set forth the entire Agreement." Id.

Nevertheless, the instant motion alleges that the defendant's "responses to the Court's Rule 11 inquiries . . . proceeded not from the consciousness of his guilt but from his previous counsel's advice to answer the Court's questions affirmatively, regardless of the truth, so that he would receive a lighter sentence." (Dkt. 65 at 5). Not only does this unsubstantiated allegation stand in stark contrast to the defendant's signed plea agreement and his sworn statements to the Court at the plea hearing, but it also contradicts the defendant's acknowledgment of his guilt at the sentencing hearing and his statements in an interview with the FBI conducted prior to sentencing. At the sentencing hearing, when given an opportunity to make a statement of the Court, he stated he "truly regret[ted]" his actions on January 6 and "ha[d] nothing but remorse." 8/6/2021 Tr. at 35. Similarly, he expressed remorse during an interview with the FBI after his plea and before he was sentenced. During the interview, "he expressed what appeared to be sincere remorse during his debrief and he apologized through the prosecutors to the victim in this case." 8/6/2021 Tr. at 13. In announcing the sentence, the Court concluded the defendant's "expression of remorse . . . is sincere." Id. at 36. Accordingly, the claim in the instant motion is conclusively refuted by the defendant's own statements during and after the plea hearing.

Defendant's other arguments on this issue are also factually rebutted by the record and do not demonstrate that his counsel's performance was deficient. Defendant claims that he was "incentivized" to plea so that he would be transferred away from the Correctional Treatment Facility in Washington, D.C., but he remained there for 82 days. (Dkt. 65 at 5). The defendant ignores that his counsel requested the defendant be "expeditiously removed from the D.C. Jail," and the Court agreed and said it would complete the sentencing paperwork as soon as possible "so

that [the defendant] can be moved promptly." 8/6/2021 Tr. at 45. Defendant similarly alleges that his counsel did not share discovery with him, and he had not seen footage "which depicted [him] rendering assistance to four Capitol police officers." (Dkt. 65 at 6). The record indicates that defense counsel made efforts to send defendant discovery materials. See 6/23/2021 Tr. at 8-15 (discussing discovery at status conference prior to plea). Defendant was also aware of the plethora of government evidence in the case because much of it was included in the government's Memorandum in Support of Pre-Trial Detention. See Dkt. 18 at 5 ("His crimes are documented through a series of videos provided to the FBI by various concerned citizens, body worn camera from the Metropolitan Police Department, and surveillance footage from inside the Capitol."). As for the defendant's claim in the instant motion that he had not seen videos regarding him rendering aid, the government explained at sentencing that "the defendant has reported that he was offering [the officers] water and offering to render them aid . . . . [and] the evidence largely corroborates the defendant's report of what happened." 8/6/2021 Tr. at 9. The record shows that defense counsel argued that the defendant's assistance to law enforcement supported a lower sentence. See Dkt. 54 at 5-6; 8/6/2021 Tr. at 26 (defense counsel noting that the Court was "well aware" of the defendant assisting officers). The Court credited the defendant's report and carefully considered it in determining the sentence. 8/6/2021 Tr. at 37 (commenting that the offense conduct "was out of character with what you had done earlier in that day"). Consequently, the record indicates that counsel worked to provide the defendant with discovery and used the prior interaction with the officers in his sentencing advocacy.

The defendant also fails to demonstrate prejudice. The defendant has not even alleged that, absent supposedly deficient performance from his attorney, he would have chosen to go to trial. See Hill, 474 U.S. at 59. Because the defendant has not even addressed this requirement, let alone

offered evidence of any desire for a trial, he fails to meet his burden of demonstrating prejudice under the standard stated in Hill. See also United States v. Talley, 674 F.Supp.2d 221, 227 (defendant did not demonstrate prejudice from "conclusory and unsubstantiated" allegations that defendant would not have entered into plea agreement). Similarly, no "reasonable probability" exists that, if he had gone to trial, "the result of the proceeding would have been different." See Strickland, 466 U.S. at 694. The Court plainly said so at the sentencing hearing. See 8/6/2021 Tr. at 36 ("[H]ad you gone to trial I don't think there's any jury that could have acquitted you or would have acquitted you."); see also 8/6/2021 Tr. at 37 ("[Y]ou couldn't have beat this if you went to trial on the evidence I saw."). Defendant's "bare allegations are insufficient to establish prejudice or to warrant an evidentiary hearing" and should be denied. Talley at 227.

C. Claim #3: Counsel Was Not Ineffective for Failing to Object to the Presentence Investigation Report

Finally, the defendant alleges that counsel was ineffective for failing to object to the PSR. (Dkt. 65 at 6-7). Although the motion is vague, it appears that defendant's primary contentions are that the Guideline calculation incorrectly included a Victim Related Adjustment and the PSR did not state that the Guidelines are advisory. Id.

Contrary to defendant's allegation, the record shows that counsel for the government objected to the Guidelines calculation in the PSR and defense counsel argued for the calculation detailed in the plea agreement. Compare Dkt. 56 (government PSR objections) and Dkt. 54 at 2-3 (defendant's sentencing submission advocating for a total offense level of 22 and explaining that the plea agreement "permits the Defense to argue for a downward variance based upon the factors set forth in 18 U.S.C. Section 3553(a)") with Dkt. 38 at 3 (plea agreement detailing agreed calculation resulting in a total offense level of 22). The defendant also cannot demonstrate prejudice because the Court ruled the adjustment did not apply. In determining the applicable

Guidelines range, the Court, stating that it "disagree[d] with the probation calculations that are in the report, and . . . agree[d] with the counsels' recommendation," did not include the adjustment and calculated a total offense level of 22. 11/10/2021 Tr. at 3-4 ("Because this is an official proceeding that was obstructed here, . . . you do not enhance it for the personal conduct that's included in the assault charge.").

Defendant also has not demonstrated that counsel's performance was deficient or that he was prejudiced due to language in the PSR stating that "the Court must select a sentence from within the guideline range unless the case presents atypical factors." (Dkt. 65 at 7). The PSR language quoted by the defendant appears to be a typo, and the record conclusively demonstrates it was not considered by the parties or the Court. As stated in the plea agreement, "the parties agree[d] that either party may seek a variance and suggest that the Court consider a sentence outside the applicable Guidelines range, based upon the factors to be considered in imposing a sentence pursuant to 18 U.S.C. § 3553(a)." (Dkt. 38 at 5). The transcripts of both the plea hearing and sentencing hearing clearly indicate that the Court properly considered the Guidelines to be advisory and not binding on the Court when determining the sentence. See, e.g. 11/10/2021 Tr. at 4 (stating that after calculating the Guidelines the Court would consider "arguments of counsel in their allocution of the Court's balancing of the factors under [18 U.S.C. §] 3553(a)"); 11/10/2021 Tr. at 38 (pronouncing the judgment of the Court "in consideration of the provisions of 18 U.S.C. Section 3553, as well as the advisory sentencing guidelines"); 8/6/2021 Tr. at 7 (defendant agreeing with the Court that "after [it] determine[s] what guidelines applies in this case, [the Court] ha[s] authority in some circumstances to impose a sentence that is more severe or less severe than the sentence called for by the guidelines.").

Because defendant has utterly failed to establish any deficient performance or prejudice with respect to his claims regarding his attorney failing to file objections to the PSR, this claim should be rejected.

D. No Evidentiary Hearing Is Required

Defendant's instant motion warrants neither an evidentiary hearing nor any relief and should be summarily denied. "Evidentiary hearings on § 2255 petitions are the exception, not the norm, and there is a heavy burden on the petitioner to demonstrate that [a] . . . hearing is warranted. An evidentiary hearing is not necessary when a § 2255 petition (1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case." Moreno-Morales v. United States, 334 F.3d 140, 145 (1st Cir. 2003); see also Pollard, 959 F.2d at 1030-31 (only where the § 2255 motion raises "detailed and specific factual allegations whose resolution requires information outside of the record or the judge's personal knowledge or recollection must a hearing be held"); United States v. Sayan, 968 F.2d 55, 66 (D.C. Cir. 1992) (no need for hearing in § 2255 proceeding in part because the same judge presided over the original proceedings).

CONCLUSION

For the reasons stated herein, the existing record is sufficient to show that the defendant is not entitled to relief under 28 U.S.C. § 2255. Accordingly, this Court should deny his petition without a hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 13th day of December 2022 I caused a copy of the foregoing to be served via the Electronic Case Filing system upon any counsel of record and by mail upon defendant Scott Kevin Fairlamb, Register Number 26840-509, FCI Butner Medium II, Federal Correctional Institution, P.O. Box 1500, Butner, NC 27509.

/s/ Sarah W. Rocha
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