UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT RIVERNIDER	:	
v.	:	No. 3:14-cv-1000(RNC)
UNITED STATES	:	

RULING AND ORDER

This is a habeas case brought pursuant to 28 U.S.C. § 2255 by petitioner Robert Rivernider, who pleaded guilty to two counts of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and sixteen counts of wire fraud in violation of 18 U.S.C. § 1343. See United States v. Rivernider, 3:10-cr-222(RNC), ECF No. 366 (petition to enter plea of guilty). Rivernider was indicted along with his sister, Loretta Seneca, and business partner and friend, Robert Ponte. Two others – Tosha Wade and Shellie Kemp - were charged separately and pleaded guilty.

Rivernider, Seneca and Ponte went to trial. After two weeks of trial, Rivernider filed a petition to plead guilty to all the charges against him unaccompanied by a plea agreement with the government. See 3:10-cr-222, ECF No. 366-1. Seneca and Ponte also pleaded guilty. Extensive proceedings ensued with regard to Rivernider's motion for a downward departure

pursuant to U.S.S.G. § 5K2.13 based on diminished capacity, and the loss amount that should be used to calculate his guideline range under U.S.S.G. § 2B1.1.

Ultimately, Rivernider was sentenced to 144 months' imprisonment, followed by five years of supervised release, and ordered to pay restitution of more than $20 million. His convictions and sentence were affirmed on appeal. See United States v. Rivernider, 828 F.3d 91 (2d Cir. 2016). In 2020, he was granted compassionate release due to the Covid pandemic after serving approximately 77 months in custody, and began serving his 5-year term of supervised release.

During the pendency of this action, Rivernider has presented an extraordinary number of claims, more than fifty in all. Some claims have been withdrawn, and others denied or rendered moot by his release from custody, but numerous others remain to be addressed. Some challenge the validity of the guilty pleas on the basis of ineffective assistance of counsel. Others allege constitutional deprivations unrelated to the guilty pleas. And still others relate only to the sentence, specifically, the amount of the restitution obligation and the length of the term of supervised release.

For reasons discussed below, Rivernider's challenge to the validity of his guilty pleas is unavailing. Because the pleas are valid, his

other claims seeking to undo the convictions are barred. His challenge to the restitution obligation is not cognizable, and his challenge to the length of the supervised release term is without merit. Accordingly, the action is dismissed in its entirety with no certificate of appealability.

I.

The charges against Rivernider and his associates grew out of two related schemes to defraud. One of them, known as the "No More Bills" program ("NMB"), functioned like a Ponzi scheme. As detailed in his Admission of Offense Conduct, 3:10-cr-222, ECF No. 366-1, Rivernider received money from NMB clients on the understanding that he would repay them by paying their bills directly, at a rate of approximately 10 percent per month for several years, until the debts were paid in full. Rivernider made scheduled payments to NMB clients ostensibly using funds realized from successful investment activity when, in fact, those funds had been invested in the program by other NMB clients.

Rivernider participated in obtaining money from NMB clients knowing that clients of the program had been led to believe payments were being made from realized returns on successful investments when that was not true. In doing so, he specifically intended to deceive them in that he knew they would be placing their funds

at a risk of loss more substantial than the risk represented to them.

Rivernider continued to solicit new client money until the scheme collapsed. Between 2005 and 2007, the NMB program had eighty-four investors. Thirty-six of them were left with losses totaling more than $2 million. For some, the losses were life-altering.

The other scheme involved mortgage fraud tied to the housing bubble. Acting through an entity called Cut Above Ventures ("CAV"), Rivernider and Ponte recruited NMB clients and others to purchase condominiums in Florida and cabins in Tennessee as passive investments, with financing arranged by CAV through mortgage lenders, including Wells Fargo Bank, NA. Rivernider orchestrated the scheme from an office in Florida, where he worked closely with Seneca, who had a real estate background, and Wade, a real estate agent. Kemp, a mortgage consultant in Florida, was drawn into the conspiracy under the false impression that Rivernider was making millions in real estate. She helped him obtain financing from Wells Fargo, her employer.

The real estate scheme depended on deception of both buyers and lenders. As part of an "incentive program," Rivernider promised to pay the buyer's closing costs, taxes and mortgages for at least two years. The buyers were led to believe that Rivernider would be

able to make the mortgage payments using rental income from the properties. Rivernider knew there was a risk the rental income would be insufficient, in which case, he would be unable to make the payments as promised. In addition, buyers were frequently kept in the dark about kickbacks Rivernider took from sellers in the form of "marketing fees." Rivernider generated these fees by marking up the sale price agreed to by the seller to the highest price possible in light of friendly appraisals. Rivernider took fees of $7.7 million out of the real estate deals, which he used to keep both fraudulent schemes afloat.

Lenders were deceived by material misrepresentations concerning the true price of the properties, the income earned by the borrower, the source of cash provided by the borrower at closing and the borrower's other liabilities. Rivernider also directed Kemp and others to qualify borrowers for loans by falsely representing that the properties would be used as second homes in order to obtain a more favorable interest rate and loan-to-value ratio.

As a result of the mortgage fraud scheme, buyers of condominiums and cabins wound up owning properties they could not afford. Rivernider was unable to make the mortgage payments on 104 properties. Lenders were left with fraud-based losses of more than $21 million.

Rivernider's activities resulted in his indictment on one count of conspiracy to commit wire fraud based on the NMB scheme (count one), and seven counts of wire fraud related to that scheme, each based on a wiring involving funds invested by NMB clients (counts two through eight). In addition, he was charged with one count of conspiracy to commit wire fraud based on the CAV scheme (count nine) and nine counts of wire fraud related to that scheme, each based on a wiring involving the sale of a property with financing provided by Wells Fargo (counts ten through eighteen). As mentioned, he went to trial but pleaded guilty to every count.

II.

Rivernider's offenses exposed him to a guideline imprisonment range of 324 to 405 months. An evidentiary hearing was held on his request for a downward departure based on diminished capacity. The request relied on a neuropsychological evaluation conducted by Dr. Nellie Filippopoulos, a psychologist, who concluded that Rivernider had interrelated deficits in aspects of executive function and emotional intelligence that contributed to the conduct culminating in his arrest. See 3:10-cr-222, ECF No. 515. The government opposed the request and presented expert testimony that Rivernider's offense conduct reflected intact executive function. At the conclusion of the two-day hearing, I stated that, although the deficits identified by Filippopoulos might well

be relevant to Rivernider's sentencing, the executive dysfunction discussed in her report would not warrant a downward departure.

Rivernider reacted by immediately seeking to withdraw his guilty pleas, which had been in place for nine months. His appointed counsel, James W. Bergenn and Michael C. Chase, declined to file a motion to withdraw the pleas, so Rivernider filed a motion himself. The motion was permitted to be filed and argued by Rivernider. After it was denied on the merits, he was sentenced as set forth above.

In due course, Rivernider's co-conspirators were also sentenced following their guilty pleas. Ponte, whose guideline range was 168 to 210 months, was sentenced to 90 months' imprisonment, followed by five-years of supervised release, and ordered to pay restitution of more than $20 million at a rate of $300 per month. Seneca, who had the same guideline range as Ponte, was sentenced to 27 months' imprisonment and three years of supervised release, with a $5 million restitution obligation, payable in monthly installments of $300. Kemp, who had a guideline range of 51 to 63 months, received a downward departure pursuant to U.S.S.G. § 5K1.1, reflecting her substantial assistance to the government in prosecuting the case against Rivernider, Seneca and Ponte. She was sentenced to time-served, and supervised release for three years, with a restitution obligation of $50,000

payable at a rate of $200 per month. Wade, whose guideline range was 27 to 33 months, also received a substantial assistance departure. She was sentenced to time-served, and supervised release for three years.

Rivernider and Ponte appealed. Rivernider argued that his pro se motion had been mishandled, the convictions lacked a factual basis, and the 144-month sentence was substantively unreasonable. As support for his argument that the convictions should be vacated, Rivernider repeated conclusory assertions from his pro se motion to withdraw his guilty pleas that the pleas had been coerced by his counsel. The Court of Appeals affirmed the judgment in a comprehensive opinion. United States v. Rivernider, 828 F.3d 91 (2d Cir. 2016).

In short, the Court of Appeals ruled that Rivernider's pro se motion to withdraw his guilty pleas was properly denied because there was a sufficient factual basis for the pleas and no basis for finding that Bergenn's refusal to file such a motion was tainted by an actual conflict of interest; the 144-month sentence easily fell within the range of reasonableness, inasmuch as it was substantially below the guideline range; and there was no reversible error in the restitution order.

III.

Rivernider seeks relief from his convictions and sentence on the ground that his guilty pleas

are invalid due to his counsel's alleged failure to provide the effective assistance guaranteed by the Sixth Amendment.

The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970); see also Boykin v. Alabama, 395 U.S. 238, 242 (1969). A plea constitutes an "intelligent" act if it is "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). A plea is "voluntary" unless it results from "actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally." Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988), citing Brady, 397 U.S. at 750.

When a defendant pleads guilty on the advice of counsel, he can challenge the validity of the plea based on ineffective assistance of counsel in the plea process or an earlier stage of the case if the pre-plea ineffectiveness prevented him from making an informed choice whether to plead guilty. See Hill v. Lockhart, 474 U.S. 52, 56-57 (1985); Tollett v. Henderson, 411 U.S. 258, 266-67 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970).

The two-part test of Strickland v. Washington, 466 U.S. 668, 687-688 (1984), for evaluating claims of ineffectiveness of counsel applies in this context. Hill, 474 U.S. at 58. To obtain relief, a defendant must "allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." McMann, 397 at 774. This depends "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771; see Tollett, 411 U.S. at 267 (defendant who pleads guilty upon advice of counsel must show that counsel's advice was not within the standards set forth in McMann). In addition, there must be "a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; see Lee v. United States, 137 S.Ct. 1958 (2017).

A.

In attacking the validity of his guilty pleas, Rivernider first claims that his counsel rendered ineffective assistance in the plea process. His primary claim is that Bergenn improperly coerced him into pleading guilty. Findings of fact with regard to this claim are set forth in a previous filing, which is incorporated here. See ECF No. 257.

There is no allegation that Bergenn pressured Rivernider to plead guilty prior to trial or at any time during the first two weeks of trial. Bergenn raised the issue at the conclusion of the second week of trial after Rivernider expressed empathy for victims of the NMB scheme in light of their trial testimony. Bergenn and Chase believed the trial was not going well and would almost certainly result in a guilty verdict on all counts in the indictment. Under the circumstances, viewed from the perspective of Rivernider's counsel, it was objectively reasonable for Bergenn to undertake to advise Rivernider about the desirability of changing his plea.

The determinative issue for Rivernider in deciding whether to plead guilty was the length of time he would be away from his two young children as a result of a conviction after a full trial or a mid-trial plea. Bergenn believed that if Rivernider pleaded guilty, the likely consequence would be a sentence significantly below the sentence he would receive after a full trial. Chase agreed. In forming this opinion, they relied on Dr. Filippopoulos's evaluation, which helped explain both Rivernider's criminal conduct and his previous inability to accept responsibility.

Bergenn and Chase provided Rivernider with honest advice concerning the reasons and factual basis for a guilty plea. Rivernider told them he was open to pleading guilty. The next day,

Bergenn and Rivernider met with Dr. Filippopoulos, who helped explain the significance of the results of the neuropsychological evaluation. Bergenn recommended that Rivernider change his plea in light of those results in order to best present himself for sentencing. Rivernider agreed that a change of plea was in his best interest and that of his children.

Bergenn and Rivernider proceeded to work together drafting what became the Admission of Offense Conduct. Their collaboration on the draft continued the following day. When the draft was essentially complete, a copy was given to the government, which had been notified of Rivernider's decision to change his plea. Later that night, Rivernider sent Bergenn an email stating that he could not plead guilty.

At a meeting with Rivernider the next morning, Bergenn insisted on the soundness of his advice that a guilty plea was in Rivernider's best interest. Dr. Filippopoulos attended the meeting but did not actively participate. At the conclusion of the meeting, Rivernider again agreed with Bergenn's recommendation. He changed his plea later that day.

Rivernider contends that Bergenn forced him to plead guilty in order to escape the time-consuming demands of the trial. According to Rivernider's account, Bergenn used the results

of the neuropsychological evaluation to undermine his independent decisionmnaking. Then, at the morning meeting preceding the change of plea, Bergenn resorted to threats and intimidation to coerce him into pleading guilty. When he refused to capitulate, Bergenn refused to continue with the trial, leaving him with no option but to plead guilty.

Rivernider's account is unsupported by objective evidence. It also conflicts with his own statements, both in his petition to plead guilty and in response to my questions during the hearing on his petition, which, together with his demeanor, led me to find that his guilty pleas were voluntary. In addition, his account is contrary to the testimony of Bergenn and Dr. Filippopoulos at the evidentiary hearing in this case, which I credit. Dr. Filippopoulos testified that, although the meeting was somewhat antagonistic at the outset, at no time during the meeting did Bergenn engage in threats or intimidation or other improper conduct to coerce a guilty plea. Moreover, the record establishes that Rivernider's defense team was ready to continue with the trial if he elected to do so.

In addition to alleging blatantly improper conduct by Bergenn, Rivernider claims that Bergenn exerted undue influence on his decision to change his plea, which can violate the performance prong of Strickland. See Purdy v. United States, 208 F.3d 41, 45 (2d Cir. 2000).

"The performance issue is contextual; it asks whether defense counsel's actions were objectively reasonable considering all the circumstances." Id. at 44. Counsel must be careful to respect a client's right to decide for himself whether to plead guilty. However, a "blunt rendering of an honest but negative assessment of [the defendant's] chances at trial, combined with advice to enter the plea, [does not] constitute improper behavior or coercion that would suffice to invalidate a plea." United States v. Juncal, 245 F.3d 166, 172 (2d Cir. 2001), citing United States v. Moree, 220 F.3d 65, 72 (2d Cir. 2000)("That the attorney advised [the defendant] to take the [plea] offer and warned him that his failure to do so would lead to a thirty years sentence merely asserts that the lawyer gave professional advice as to what the consequences of his choice might be. The defendant's statement that he was 'scared' is understandable, but is not attributed to any misconduct of his attorney.").

"Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness." Purdy, 208 F.3d at 45. "Counsel rendering advice in this critical area may take into account, among other factors, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea (whether or

not accompanied by an agreement with the government), whether the defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision." Id.

Rivernider appears to be claiming that it was improper for Bergenn to arrange another meeting with him and Dr. Filippopoulos after he sent the email stating that he could not plead guilty. But the deficits shown by the neuropsychological evaluation required Bergenn to be vigilant in fulfilling his duty to advise Rivernider fully concerning the desirability of a change of plea. In the circumstances, it was proper for Bergenn to arrange another meeting with Rivernider and Dr. Filippopoulos.

It is undisputed that Bergenn strongly urged Rivernider to change his plea during the meeting. He did so because he thought Rivernider's best interests clearly required it. His judgment in that regard, assessed in light of the totality of the circumstances as they existed at the time, falls within the "wide range of reasonableness" described by the Second Circuit in Purdy.

This conclusion is supported by the following factors: the lack of a realistic chance of avoiding conviction at trial; the likelihood of a material difference in the sentence of imprisonment if Rivernider continued to refuse to accept responsibility; Rivernider's

acknowledgement that he and his associates had knowingly deceived victims by means of material misrepresentations; and his above-average ability to comprehend and weigh the factors bearing on the decision whether to change his plea due to his background as a criminal investigator and training as a paralegal.

Rivernider claims that his guilty pleas must be vacated because Bergenn pressured him to plead guilty due to a conflict of interest. Ineffective assistance of counsel can occur when an attorney actively represents conflicting interests, in breach of the duty of loyalty, and the conflict adversely affects specific aspects of the attorney's performance. See Cuyler v. Sullivan 446 U.S. 335, 348-50 (1980).

There is no allegation or evidence that Rivernider's counsel actively represented another client whose interests conflicted with his. Rather, the claim is that Bergenn pressured Rivernider to plead guilty because the trial was interfering with his ability to represent other clients. It is undisputed that Bergenn met with another client the day after the change of plea. However, based on Bergenn's testimony, which I credit, he did not pressure Rivernider to plead guilty in order to free up his schedule. And his advice to Rivernider

regarding the desirability of a change of plea would have been the same in any event.[1]

Rivernider also seeks to invalidate his guilty pleas on the ground that his counsel misled him into believing that if he pleaded guilty, he would get a downward departure based on diminished capacity resulting in a sentence of imprisonment of not more than two or three years, which he would serve at a camp. He has stated emphatically that he never would have changed his plea if he thought he could be sentenced to a significantly longer term of incarceration.

To the extent Rivernider is claiming that his counsel promised him a sentence of not more than two or three years, the claim fails because it conflicts with his sworn statements at the change of plea proceeding, and is contrary to his counsel's hearing testimony and affidavits in this case, which I credit. To the extent the claim is that his counsel grossly misrepresented what the sentence exposure would be if he pleaded guilty, it fails for similar reasons.

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[1] Rivernider claims that Shipman & Goodwin LLP, the law firm where Bergenn and Chase practiced, had previously represented Webster Bank in connection with unrelated matters. There is no support for a finding that the firm's prior representation of Webster Bank had any effect on the advice Rivernider received from Bergenn and Chase with regard to his plea or any other aspect of their performance as his counsel.

In agreeing to change his plea, Rivernider stated that he understood the sentence could fall within the guideline range. There is no objective evidence that his counsel told him the sentence exposure would be capped at a level representing a small fraction of the guideline range, and his counsel have credibly stated that no such assurances were given.

Rivernider knew and understood that a term of imprisonment substantially longer than two or three years would be a likely consequence of pleading guilty. His assertion to the contrary is not believable. His counsel's sworn submissions, which I credit, show that he went to trial anticipating a sentence of imprisonment of up to twelve years. That expectation was formed as a result of his own deep involvement in preparing the case for trial. In advising him that a change of plea would be advantageous, Rivernider's counsel thought it would maximize his ability to get a sentence in "the single digits," in other words, a sentence of less than ten years, which was the goal. That advice, given in good faith, did not mislead Rivernider as to the likely consequences of a change of plea.

Rivernider's final challenge to the validity of his guilty pleas based on his counsel's alleged ineffectiveness during the plea process relates to the Admission of Offense Conduct discussed above. He claims that his counsel submitted the Admission at the change of

plea proceeding without his approval, after altering it without his knowledge. However, it is undisputed that Rivernider actively assisted Bergenn in drafting the document that was submitted in conjunction with his petition to change his plea. At the change of plea proceeding, he testified that he had an opportunity to review the final version in detail prior to signing it. In addition, the evidence shows that he affirmed the accuracy of the Admission months later in a conversation with his counsel and in a letter he signed at their request.

B.

Rivernider also claims that his guilty pleas must be invalidated because of his counsel's pre-plea ineffectiveness. He contends that his counsel failed to conduct an adequate investigation and provided incompetent representation at trial, thereby preventing him from making an informed choice to plead guilty. Rivernider has not alleged a pre-plea lapse by his counsel that affects the validity of his guilty pleas.

Rivernider's defense team conducted a reasonably adequate investigation in the circumstances. They reviewed Rivernider's extensive records, as well as tens of thousands of pages of documents produced by the government in discovery, including more than 90 FBI form 302s. When Rivernider raised concerns about the

truth of some of the information in the 302s, his counsel followed up as appropriate. In addition, defense investigators interviewed witnesses with regard to potential defenses.

The investigation conducted by Rivernider's counsel led them to conclude that the government would have little difficulty proving his guilt with regard to both fraudulent schemes. NMB clients interviewed by defense investigators said that before placing money with Rivernider, they had been falsely assured there was no risk of loss. And loan applications used in the CAV scheme were replete with material misrepresentations. Evidence taken from Rivernider's computer, including emails, bank statements, and spreadsheets, established his leadership role in both schemes.

Rivernider's main criticism of his counsel's performance prior to the change of plea is that they failed to adequately investigate Wells Fargo's risky lending practices. He points to a settlement that the Department of Justice reached with Wells Fargo in 2016, three years after his sentencing, stemming from representations made by Wells Fargo in connection with residential mortgage backed securities.

Rivernider's counsel undertook to defend him against the charges stemming from the CAV scheme by highlighting the conduct of residential mortgage lenders whose practices

contributed to the financial crisis, including Wells Fargo. Discovery provided by the government in response to a comprehensive request by Rivernider's counsel included information known to the prosecution team regarding the Wells Fargo civil litigation. Rivernider's counsel conducted their own independent research and investigation into Wells Fargo's potential culpability. Nothing they obtained in discovery or found on their own supported an inference that loan decisionmakers at Wells Fargo had knowledge of the fraudulent nature of the loans underlying the indictment. And even if those decisionmakers had been reckless or grossly negligent with regard to those specific loans, Rivernider could still be convicted.

Rivernider's claim that his counsel should have done more to investigate the conduct of Wells Fargo rings hollow in light of evidence in the record showing that he actively covered up his fraudulent scheme from Wells Fargo. After a fraud alert was issued at Wells Fargo with regard to certain loan files involving Kemp and CAV, Wells Fargo prohibited Kemp from working on deals with CAV. But Rivernider continued to use Kemp to get loans from Wells Fargo. In an email, Kemp warned Rivernider to "make sure Cut Above is nowhere on any papers . . . very, very important." He responded, "Cut Above will not appear anywhere, no problem." She replied, "Yeah, I am very careful about what I send

through Wells so stay in touch via [my personal email]." In an email to Ponte, Rivernider said he had two representatives at Wells Fargo who could do some of what Kemp had been doing. Rivernider confided to Ponte, "I will use both this time [so] as not to overwhelm one and red flag her with Wells for suddenly hav[ing] a lot of business in this market." Transactions facilitated by Kemp on behalf of Rivernider resulted in losses to Wells Fargo of $6.3 million, increasing her offense level under U.S.S.G. § 2B1.1 from 7 to 25. In accepting responsibility, she expressed shame and remorse for conspiring with Rivernider to defraud her employer.

"In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. The decision by Rivernider's counsel to recommend a change of plea without conducting further investigation was reasonable in the circumstances. "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further

investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 383 (2005).[2]

In a related vein, Rivernider claims that his guilty pleas are invalid because his counsel failed to obtain information in the government's possession relating to lender culpability. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), due process requires prosecutors to disclose impeachment evidence and exculpatory evidence on request. In United States v. Avellino, 136

[2] Rivernider's other criticisms of his counsel's investigation do not warrant extended comment. He argues that his counsel failed to adequately investigate his concerns about misrepresentations by grand jury witnesses, but his counsel considered the matter and reasonably concluded that the alleged misrepresentations did not provide a basis for dismissing the indictment. Similarly, he contends that his counsel failed to investigate the government's presentation of perjured testimony in the grand jury, but his counsel reasonably concluded that there was no basis for pursuing such an investigation. He contends that his counsel failed to investigate witnesses who could impeach Wade, but defense investigators did interview her husband (and tried unsuccessfully to interview her former boss, Danny Trutmann), and Rivernider's counsel were adequately prepared to cross-examine Wade.

F.3d 249 (2d Cir. 1998), the Second Circuit stated that the government's obligation to disclose Brady material "is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty." Id. at 255. Since then, however, the Supreme Court has held that, because Brady relates to the fairness of a trial, the government need not disclose impeachment evidence before a defendant pleads guilty. United States v. Ruiz, 536 U.S. 622, 629 (2002).

Whether Ruiz supercedes Avellino with regard to exculpatory evidence is unclear. See Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010)(state court's rejection of Brady claim based on prosecution's pre-guilty plea failure to disclose use of hypnosis to induce complainants to recall instances of sexual abuse did not constitute unreasonable application of Supreme Court precedent). Assuming for present purposes that it does not, Rivernider's allegations are insufficient to support a viable claim that his counsel were ineffective in failing to obtain material exculpatory information from the government.

Evidence is material for purposes of Brady if there is a reasonable probability that disclosure of the material would have changed the outcome of the proceeding. See United States v. Bagley, 473 U.S. 667, 682 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the

outcome." Id (quoting Strickland, 466 U.S. at 694). Rivernider has not identified such evidence and it is implausible that such evidence actually existed given the extensive nature of his multifaceted fraud.

IV.

Rivernider further claims that his counsel rendered ineffective assistance as follows: they failed to inform him that a motion for a bill of particulars had been denied; they failed to move to dismiss the indictment based on prosecutorial delay; they failed to object during voir dire to a prospective juror's comment, which tainted the jury pool; they failed to object to certain questions at trial; they failed to pursue a trial subpoena of a witness; they failed to challenge the government's argument at trial that he made misrepresentations to certain NMB clients and lenders regarding the true risk of investments and loans; and they failed to properly cross-examine some witnesses.

These alleged deficiencies do not provide a basis for relief because they do not detract from the voluntary and intelligent character of the guilty pleas. A valid guilty plea generally bars a defendant from raising claims about deprivations of constitutional rights prior to the plea. Tollett, 411 U.S. at 267. When a conviction based on a valid guilty plea has become final, only claims affecting the court's power to enter the conviction may be raised on

collateral attack. See United States v. Broce, 488 U.S. 563, 569 (1989). None of the claims just listed falls within the scope of this exception.

V.

Rivernider claims that his convictions must be vacated because of wrongdoing by the government. He alleges that the government violated his due process rights under Brady, engaged in electronic surveillance without a warrant, tampered with witnesses, surreptitiously read and listened to privileged communications between him and his counsel, and presented perjurious testimony in the grand jury and at trial. With the possible exception of the Brady claim, all these claims are foreclosed by the guilty pleas. See United States v. Montilla, 870 F.2d 549, 553 (9th Cir. 1989, opinion amended, 907 F.2d 115 (9th Cir. 1990)(claim that indictment should be dismissed based on outrageous government conduct in violation of due process barred by guilty plea because indictment on its face alleged offenses within the government's power to prosecute). Even assuming the Brady claim is not barred, it does not provide a basis for relief. As discussed above, the government had no duty to disclose impeachment evidence before the guilty pleas were entered, and Rivernider's allegations that the government withheld material exculpatory evidence do not support a plausible claim.

VI.

Rivernider also seeks relief on the basis of ineffectiveness on the part of his appellate counsel. To prevail on this claim, he must prove both that his counsel's failure to raise an issue was objectively unreasonable and that there is a reasonable probability the outcome of the appeal would have been different if the issue had been raised. See Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994). Ineffectiveness may be shown if appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." Id.

Rivernider complains that he was deprived of effective assistance on appeal because his counsel: failed to argue that the government presented false evidence at trial, failed to argue that mental coercion was used to coerce his plea, failed to argue that his plea was invalid because he did not possess an understanding of the law in relation to the facts, failed to argue that his trial counsel's defective advice to plead guilty rendered the pleas involuntary, and failed to pursue arguments raised in his pro se submissions. All these claims are effectively precluded by my findings that the guilty pleas are valid.[3]

[3] In addition to claiming that his appellate counsel omitted clearly meritorious arguments while making weaker ones, Rivernider claims that

Finally, Rivernider claims that his counsel rendered ineffective assistance by failing to perfect the record on appeal. Though the basis for this claim is unclear, Rivernider has complained that the record does not include two items: a transcript of a colloquy concerning scheduling that occurred at the end of a trial day after the court reporter had been excused; and a security camera videotape of the interior of the courtroom on the day of the change of plea before the change of plea proceeding took place. He has argued that these items, if they existed, would help him prove that his guilty pleas are invalid. His appellate counsel was not ineffective in proceeding with the appeal despite these alleged defects in the record, neither of which calls into question the validity of his pleas.

VII.

Turning to Rivernider's challenge to his sentence, he acknowledges that his release from custody moots any claims predicated on the length of his sentence of imprisonment. But he continues to seek relief from his five-year term of supervised release and his obligation to pay restitution. He is not entitled to either form of relief under § 2255.

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his counsel falsely stated that he had admitted matters in the Admission of Offense Conduct. This claim is also foreclosed by the guilty pleas.

A.

Rivernider's challenge to the restitution part of his sentence is not cognizable here. The Second Circuit has held that an obligation to pay restitution generally does not restrict liberty to the degree that it satisfies the custody requirement of § 2255. See United States v. Rutigliano, 887 F.3d 98, 107 (2d Cir. 2018). In Rutigliano, each of the four defendants was sentenced to pay restitution in excess of $20 million in accordance with installment payment schedules that had yet to be fixed by the district court. The Second Circuit held that the defendants' obligations to pay restitution in installments did not create a sufficiently severe restraint on their liberty to equate to custodial punishment. Id.

Like the defendants in Rutigliano, Rivernider has been sentenced to pay restitution in excess of $20 million in accordance with an installment payment schedule. The only difference between the cases is that here the schedule has been set: Rivernider is required to pay $500 a month while on supervised release. If he were to comply with this schedule, he would pay a total of $30,000 while on supervision. Under Rutigliano, this obligation falls far short of the severe restraint on liberty required to satisfy the custody requirement of the statute.

B.

With regard to the five-year term of supervised release, Rivernider's convictions exposed him to a mandatory minimum term of two years and a maximum of five. He claims that the "extended" nature of the term he received must be reduced based on his counsel's ineffectiveness at sentencing. However, his sentencing-related arguments do not provide a basis for reducing the term of supervised release.

Rivernider argues that his counsel rendered ineffective assistance at sentencing because they failed to adequately develop the record with regard to lenders' knowledge of material misrepresentations in loan applications and other documents. If their losses had been excluded from consideration, he argues, the guideline imprisonment range would have been reduced to 135 to 168 months. In addition, downstream purchasers of the loans would be considered their victims not his, so the sentencing enhancement for more than 50 victims would not apply.

These arguments do not pertain to the length of the supervised release term. Rivernider was sentenced to supervised release for five years, three years more than the mandatory minimum, because of his aggravated role in the fraudulent schemes, his refusal to accept responsibility for his actions and his obligation to pay restitution. In addition, a five-year period would enable him to access any

needed treatment, at a cost he could afford, throughout the full five-year period. Even if the loss calculation had been reduced and the sentencing enhancement for more than 50 victims had been rejected, the same five-year term of supervised release would have been imposed subject to the same conditions.

VIII.

Accordingly, the petition is hereby dismissed. No certificate of appealability will be issued.

So ordered this 19th day of September 2022.

/s/ RNC
Robert N. Chatigny
United States District Judge