FILED
United States Court of Appeals
Tenth Circuit

October 29, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOEL S. ELLIOTT,

Defendant - Appellant.

No. 18-8046
(D.C. Nos. 1:18-CV-00012-SWS and 1:15-CR-00042-SWS-1)
(D. Wyo.)

ORDER DENYING A CERTFICATE OF APPEALABILITY

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Defendant Joel Elliott seeks a certificate of appealability (COA) to appeal the dismissal by the United States District Court for the District of Wyoming of his motion for relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal denial of a § 2255 motion). We deny a COA and dismiss the appeal.

I. BACKGROUND

On June 4, 2014, an arsonist planted an incendiary device in the Sheridan County Attorney's Office that set fire to the building. Defendant Joel Elliott was suspected but not charged with the arson. Months later, Defendant and the public defender representing him on state charges of forgery, stalking, and burglary met with the assistant United States attorney (AUSA) and law-enforcement officers investigating the arson. Defendant claimed that a fellow inmate, Joseph Wilhelm, had confessed to Defendant and another

inmate, Robert Weber, that he had committed the arson. Defendant provided a proffer to be evaluated by the federal government for a possible leniency recommendation regarding his state charges. But after an investigation of Mr. Wilhelm, it became clear that Defendant was attempting to frame him. The AUSA informed Defendant's public defender (1) that the government would not provide a favorable recommendation on Defendant's state charges, and (2) that the arson investigation was active and would be treated as entirely separate from Defendant's state charges.

In January 2015 state investigators learned from counsel for Weber that Defendant was making incriminating statements about the arson and that Weber was willing to surreptitiously record his conversations with Defendant. State investigators met with Weber, placed a wire on him, cautioned him not to speak with Defendant about his state charges or any conversations Defendant had with his state counsel, and sent Weber back to the jail pod he shared with Defendant. On January 14 and 15, Weber recorded conversations in which Defendant disclosed incriminating information about the fire. Two months later, Defendant was charged in federal court with five offenses related to the arson.

Defendant filed a pretrial motion to suppress the statements he made to Weber on the ground that his Fifth Amendment right to counsel had been violated. Relying on *United States v. Cook*, 599 F.3d 1208 (10th Cir. 2010), the district court denied Defendant's motion, and he was ultimately convicted. He unsuccessfully appealed his conviction, claiming, among other things, that the government committed ethical violations under the Wyoming Rules of Professional Conduct in arranging for the

recorded conversations. *See United States v. Elliott*, 684 F. App'x 685 (10th Cir. 2017). In contesting the appeal, the government submitted an email exchange between the AUSA assigned to Defendant's case and an advisor in the Department of Justice's Professional Responsibility Advisory Office (PRAO) concerning compliance with the Wyoming Rules.

On January 17, 2018, Defendant filed a § 2255 motion claiming that (1) his counsel was constitutionally ineffective in failing to contest the recorded conversations on Sixth Amendment grounds, and (2) the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding the email exchange between the AUSA and the PRAO. The district court denied the § 2255 motion on both grounds and declined to grant a COA.

II. DISCUSSION

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Otherwise stated, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." 529 U.S. at 484.

No reasonable jurist could debate the district court's denial of Defendant's § 2255 motion. To prevail on an ineffective-assistance claim, Defendant must demonstrate both

that his counsel's performance was deficient and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defendant was not prejudiced by counsel's failure to raise a Sixth Amendment claim. The Sixth Amendment right to counsel attaches "only to charged offenses" and to those uncharged offenses that "would be considered the same [as the charged offense] under the *Blockburger v. United States*, 284 U.S. 299 (1932) test." *United States v. Mullins*, 613 F.3d 1273, 1286 (10th Cir. 2010) (brackets and internal quotation marks omitted). At the time Weber recorded the incriminating conversations, Defendant had not been charged with arson or any related offense. His Sixth Amendment rights therefore had not yet attached.

Defendant also contests the district court's denial of his *Brady* claim. The government violates *Brady* if it suppresses "evidence favorable to an accused" that is "material either to guilt or to punishment." *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 822 (10th Cir. 1995) (internal quotation marks omitted). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Defendant cannot make the necessary materiality showing here, as the email exchange has no bearing on the merit of the arson charges against him. Nor do the email communications suggest any violation of Defendant's constitutional rights that could have resulted in suppression of evidence against him. There is thus no reasonable probability that disclosure of the email communications would have altered the result of Defendant's trial.

Defendant also raises Fifth and Sixth Amendment claims regarding his recorded conversations that were not presented to the district court, but we can easily dispose of them on the merits. As discussed above, Defendant's Sixth Amendment rights had not attached at the time he spoke to Weber and thus were not violated. *See Mullins*, 613 F.3d at 1286. Nor were Defendant's Fifth Amendment rights violated, as *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny apply "only in the context of custodial interrogation." *Cook*, 599 F.3d at 1214. Where, as here, the defendant is unaware that he is speaking with a government agent, the questioning "lack[s] the police domination inherent in custodial interrogation," so *Miranda* does not apply. *Id.* at 1215.

III. CONCLUSION

We **DENY** a COA and **DISMISS** the appeal. We **GRANT** Defendant's motion to proceed *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge

FILED
United States Court of Appeal
Tenth Circuit

January 14, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOEL S. ELLIOTT,

Defendant - Appellant.

No. 18-8046

ORDER

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JOEL S. ELLIOTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:18-CV-0012-SWS
(Criminal Case No. 1:15-CR-042-SWS)

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255

This matter comes before the Court on Petitioner/Defendant's *Motion Under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence* (ECF No. 1) (CR Case ECF No. 204).[1] On October 8, 2015, a jury found Defendant guilty on four counts charged by indictment: arson of a building owned by an organization receiving federal funds by means of fire and explosives, in violation of 18 U.S.C. § 844(f)(1) and (f)(2); use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and (B)(ii); possession of an unregistered firearm, in violation of 26 U.S.C. § 5861(d); and false declaration before the Grand Jury, in violation of 18 U.S.C. § 1623(a). (*See* ECF No. 132) (*Verdict*). Defendant was sentenced to a term of 444 months in prison. (*See* ECF No. 149) (*Judgment*). On appeal of his arson conviction, Defendant raised issues about how the government investigated the crime and whether

[1] Unless otherwise indicated, citations to the docket hereafter will refer to the Defendant's criminal proceedings, Case No. 15-CR-042-S.

the building's occupant was receiving federal funds at the time of the fire. *United States v. Joel S. Elliott*, No. 15-8138, at 1 (10th Cir. Apr. 5, 2017). By unpublished Order and Judgment, the Tenth Circuit Court of Appeals affirmed. *Id.* at 30.

In support of his § 2255 motion, Defendant claims his attorneys were constitutionally ineffective for not seeking suppression under the Sixth Amendment of certain surreptitiously-recorded statements he made to an undercover informant. Defendant also claims that the United States violated the requirements established by *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing certain email communications between the prosecuting attorney and an attorney advisor in the Department of Justice's Professional Responsibility Advisory Office ("PRAO") concerning the recording of the undercover informant's conversations with the Defendant. Because neither of Defendant's claims is cognizable, his motion must be denied.

BACKGROUND

On June 4, 2014, a fire broke out at the Sheridan County Attorney's Office in Sheridan, Wyoming. Fire investigators quickly determined the fire was incendiary. Evidence collected at the scene indicated that around 1:18 a.m. on June 4, 2014, the power for the building was turned off, and someone had cut the phone and cable lines. Subsequently, someone entered the building through the north window of the Sheridan County Attorney's Office, poured gasoline throughout the basement, first floor and second floor, and then left behind an incendiary device to ignite the fumes at a later time. The fire occurred sometime after 4:00 a.m.

During the months following the arson, Special Agent Paul Claflin ("SA Claflin") of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") and Lieutenant Koltiska of the Sheridan Police Department investigated possible suspects concerning the fire. One such suspect was, in fact, the Defendant because investigators had learned he may have been upset with the Sheridan County Attorney's Office for charging him with felony forgery in June of 2013 which would result in the loss of his firearms rights. Another reason suggesting Defendant may have had a motive to start the fire was Defendant's belief that members of the district attorney's office were giving favorable treatment to a woman with whom he had an ongoing relationship, Dr. Amanda Turlington, in relation to events which ultimately led to charges of stalking and burglary against Defendant.

The Defendant was set to appear in court to plead guilty to the forgery charge on June 5, 2014, the day after the fire. The change of plea went forward as scheduled. The Defendant remained free on bond after his plea until July 13, 2014, when he was arrested on the new offenses of stalking and burglary.

On August 14, 2014, the Defendant's attorney on his state forgery, stalking and burglary charges approached the state prosecutor, Darci Phillips, about the possibility of a plea deal in regard to his state charges if the Defendant proffered about information he had learned about methamphetamine trafficking. Ms. Phillips declined a proffer with the Defendant. When the defense attorney pressed Ms. Phillips about what information the Defendant could provide to get a favorable sentencing recommendation, she "flippantly" replied, "The location of a dead body or the person responsible for burning our office

down." (Trial Tr. at 559.) Ms. Phillips described her comment as "flippant" because "in no way, shape, or form did [she] expect [Mr. Elliott] to have that kind of information." *Id.*

But contrary to Ms. Phillips' belief, the Defendant did have information about the fire. On October 8, 2014, Defendant's attorney contacted Ms. Phillips again and told her that his client could provide information regarding who started the fire at the County Attorney's Office. Before sharing this information, however, the Defendant demanded an upfront guarantee that he would not have to serve any jail time for his pending state charges. This, according to Ms. Phillips, is not the way a proffer works, and so she once again declined to speak with the Defendant. *Id.* at 560.

In October or early November of 2014, the attorney for another Sheridan County jail inmate, Robert Weber, contacted Ms. Phillips and advised her that Weber, too, had information about who started the fire at the County Attorney's Office. Weber hoped to leverage this information to help him with several state charges he was facing. And so, on November 6, 2014, SA Claflin and Lt. Koltiska conducted a proffer interview of Weber.

During his proffer, Weber stated that he, the Defendant, and Joseph Wilhelm were all incarcerated together at the Sheridan County Detention Center. (Tr. at 126.) According to Weber, Wilhelm was in jail because he tried to start a vehicle on fire. Weber claimed Wilhelm confessed to him and the Defendant that he had started the fire at the County Attorney's Office in order to destroy certain paperwork related to one of his "brothers." *Id.* Weber further stated Wilhelm provided specific details about how he

started the fire which Wilhelm shared during the interview, details investigators had not previously disclosed to the public. Finally, Weber told the investigators that Defendant knew even more details about the fire than he did.

Naturally, SA Claflin was interested in speaking with the Defendant about Wilhelm's supposed confession to the arson. But because SA Claflin was aware of Defendant's unwillingness to cooperate with the county attorney, SA Claflin enlisted the aid of the U.S. Attorney's Office to call the Defendant before the federal grand jury, which occurred on November 19, 2014. *Id.* at 127-28.

Before his testimony, however, Defendant asked to meet with SA Claflin and Lt. Koltiska so that he might receive some consideration with respect to the state charges he was facing for the information he was to provide about the arson. Accordingly, the night prior to his testimony before the grand jury, Defendant sat down with SA Claflin, Lt. Koltiska, the Assistant United States Attorney ("AUSA") assigned to the federal arson investigation, and the Defendant's state public defender who represented him on his unrelated state charges, and gave a proffer. *Id.* at 142.

At the proffer, the Defendant, his attorney and the AUSA all signed the proffer letter which set forth the proffer conditions. In the first enumerated paragraph of the proffer letter, the Defendant was advised:

> 1. **Purpose:** The purpose of a proffer is to give your client a one-time opportunity to provide to the United States a complete and truthful account of any information he has related to any crimes that are the subject of a state or federal investigation. The information supplied by your client will be evaluated by the government in connection with any recommendations made to the State of Wyoming with respect to an appropriate sentence.

(Def.'s Ex. B, CV Case ECF No. 2 at 54.) During the course of the ensuing proffer, the Defendant told the investigators Wilhelm admitted to him and Weber that he had started the fire, and that he had done so to destroy paperwork related to drug charges against Wilhelm's brother. And the Defendant repeated what Weber had earlier claimed with respect to specific details of the crime Wilhelm allegedly discussed. However, most importantly, the Defendant provided additional information to the investigators which Weber had not mentioned, and which investigators had also withheld from the public. Specifically, the Defendant stated Wilhelm told them he used a timing device and a rocket motor. This information was so fact specific to the arson that SA Claflin asked the Defendant's attorney after the proffer, "Are you 100 percent sure that your guy didn't [start the fire]? Because either he did it or he knows the guy that did it." (Tr. at 128-29.) The Defendant's attorney assured SA Claflin, "If I thought he had anything to do with this, I wouldn't have let him proffer." *Id.* at 144.

The day following his proffer, the Defendant appeared before the grand jury and testified consistent with what he told the investigators.[2] *Id.* at 129. The investigators then turned their attention toward Wilhelm. *Id.* But after a fairly exhaustive investigation, including a search of Wilhelm's truck where the Defendant said Wilhelm kept evidence of the fire, and after an interview with Wilhelm, the investigators determined that Wilhelm could not have started the fire. *Id.* at 130-31.

[2] That testimony ultimately resulted in the Defendant's conviction at trial in this case for false declarations before the grand jury.

It became clear, then, that the Defendant and Weber were likely framing Wilhelm. And between the two of them, Weber or the Defendant, the investigators suspected the Defendant was leading the charade because of his motive to start the fire, and because he, even more than Weber, knew the undisclosed intricacies of the arson. *Id.* at 131. So, on December 17, 2014, SA Claflin and Lt. Koltiska re-approached Weber to confront him about his previous proffer implicating Wilhelm in the arson. Although initially he denied lying to the investigators, Weber soon admitted that everything he knew about the fire he had learned from the Defendant. He explained that the Defendant had approached him with a plan to get both of them reduced sentences. The Defendant told Weber that Wilhelm had confessed to starting the fire at the County Attorney's Office. *Id.* at 132. And according to the Defendant, his attorney had advised him that if he had information about the fire, he could get a lighter sentence on his pending state charges, but that the prosecutors would not believe the Defendant unless someone else corroborated his story. Weber chose to be that corroborating source, and further agreed to split with the Defendant an ATF-offered cash award for information leading to the arrest of the person responsible for the fire. At some point, however, Weber began suspecting that Defendant had started the fire and was framing Wilhelm to get a reduced sentence. This was so, he told investigators, because the Defendant "slipped up" in telling Weber there were too many gas cans to take to the building in one trip. *Id.* at 132-33.

The next day, on December 18, 2014, SA Claflin and Lt. Koltiska went to the jail to speak with the Defendant again; however, Defendant initially indicated he did not want to speak with them. Sometime later the jailer contacted the investigators and told them

Defendant "wants to talk to you now." *Id.* at 133. But when the investigators told the Defendant they wanted to "talk more about the fire," the Defendant stated he wanted his lawyer present. *Id.* So the interview ended. That same day, the AUSA assigned to the arson investigation made it clear to the Defendant's state public defender through an email that Defendant would not receive a favorable recommendation from the government for his proffer because he had lied. (ECF No. 92-1.) The AUSA further advised defense counsel of the following:

> The arson investigation is active and will continue to remain entirely separate from the state matter. We will conduct the investigation and communicate with Elliott in the future in compliance with the applicable substantive law and Rules of Professional Conduct, including contact with your client concerning matters entirely unrelated to your representation of him on the state matters.

Id.

In January of 2015, the investigators learned through Weber's attorney that the Defendant, still believing Weber was in on his scheme, was continuing to make incriminating statements about the fire to Weber in their jail pod, and Weber was willing to assist the investigators in recording the conversations. (Tr. at 134.) Accordingly, SA Claflin and Lt. Koltiska once again met with Weber at the Sheridan County Detention Center. After admonishing Weber not to speak with the Defendant about his pending state cases, and not to discuss with him any conversations that Defendant had with his attorney, SA Claflin placed a wire on Weber and sent him back into the jail pod. *Id.* Weber spoke with Defendant while wearing a wire on that day as well as the next day, January 15. *Id.* at 134-35.

During Weber's recorded conversations with the Defendant, particularly those on January 15, 2015, the Defendant made several admissions concerning the fire, including specific details not known by the public about the explosive device used to set the fire. *Id.* 136-38. For example, the Defendant stated his fingerprints would not be found because he "wore gloves the whole time." *Id.* at 137. The Defendant also admitted he set the fire to "buy time" on the state charge he was set to plead guilty to on June 5, 2014, the day after the arson. *Id.* The Defendant further expressed some concern that some evidence could still implicate him, though he had enlisted his father to get rid of as much of the evidence as possible.

On March 19, 2015, Defendant was charged by indictment with five offenses, each of which related to his arson of the Sheridan County Attorney's Office. (ECF No. 6.) On April 3, 2015, Defendant appeared for his arraignment and pleaded not guilty to each charge.[3]

Prior to his trial on these charges, the Defendant filed several motions, one of which was a motion to suppress the statements he made to Weber on the basis that his Fifth Amendment right to counsel was violated. (*See* ECF Nos. 73 & 74.) The government argued the circumstances surrounding the Defendant's voluntary statements to Weber were indistinguishable from the facts in *United States v. Cook*, 599 F.3d 1208 (10th Cir. 2010), for Fifth Amendment purposes. (*See* United States' Resp. to Def.'s Mot. to Suppress, ECF No. 92 at 10.) A hearing on Defendant's motion was held, during

[3] Count Three, using fire or an explosive to commit a felony, was ultimately dismissed by the Court, with the concurrence of the government and the Defendant. (*See* ECF No. 34.)

which the Court heard the facts described above and was provided with the January 14 and January 15 recordings. (*See* ECF No. 103.)

The Defendant chose to testify at the suppression hearing about his interactions with Weber on January 14 and 15, 2015. (Tr. at 149.) The Defendant claimed that when he all but admitted to Weber that he was the one responsible for the arson, he actually knew Weber was in league with the police. *Id.* at 150. And in order to answer the obvious question of why the Defendant would make such incriminating statements to Weber if he, in fact, knew Weber was working for law enforcement, the Defendant mysteriously claimed he felt he had no choice due to certain coercive elements in the jail. *Id.* at 159-60.

At the suppression hearing, the Defendant also attempted to argue his recorded statements to Weber should be suppressed based on what he asserted were the government's violations of the Wyoming Rules of Professional Responsibility. *Id.* at 196. Defendant offered a copy of one provision of those rules along with the case annotations in support of his argument. This Court disallowed such evidence, however: "Well, you may refer to the case law as referenced in the annotation. Certainly, the rules themselves are not applicable, and it carries little weight in terms of that annotation because it's tied to rules that are inapplicable." *Id.* at 197.

The Court issued an oral ruling on the Defendant's motion to suppress, agreeing with the government that *United States v. Cook* was controlling and thus denying the motion insofar as Defendant claimed a violation of his Fifth Amendment rights. (Oral Ruling Tr. at 30-34.) In so doing, this Court concluded that, based upon a review of the

transcript and recordings of Weber's conversations with Defendant on January 14 and 15, "The objective evidence, facts, and circumstances, and [D]efendant's conduct simply do not suggest or support a finding that [D]efendant knew Weber was acting as a Government agent in seeking to elicit incriminating statements in a coercive atmosphere . . . ." *Id.* at 33-34. This Court did not further address Defendant's argument regarding his asserted violation of the Rules of Professional Responsibility, nor did the Court address any claims with respect to the Defendant's Sixth Amendment rights.[4]

On direct appeal of his conviction, Defendant raised the issue of Weber's surreptitious, undercover recording of his incriminating admissions while in the Sheridan County jail. However, rather than challenging this Court's rejection of his Fifth Amendment claim, the Defendant instead argued his incriminating statements should have been suppressed because of the alleged ethical violation by the prosecution. 684 F. App'x at 686-87 & n.3. Specifically, Defendant argued Rule 4.2 of the Wyoming Rules of Professional Conduct – which generally prohibits an attorney from knowingly communicating with a person represented by another lawyer about the subject of that representation, "unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order" – prohibited the AUSA from using an undercover informant to elicit incriminating admission from him.

In responding to this argument on appeal, the government attached to its response brief a series of email exchanges it had with the Justice Department's Professional

[4] Defendant's counsel recognized the Defendant's Sixth Amendment rights to counsel had not yet attached in regard to the arson charges at issue in this case because, at the time of his conversations recorded by Weber, he had not yet been formally charged with any offenses connected to the arson. (*See* Def.'s Memo. in Supp. of Mot. to Suppress at 10-11 (citing *Texas v. Cobb*, 532 U.S. 162 (2001)), ECF No. 74.)

Responsibility Advisory Office ("PRAO") concerning the question whether the proposed undercover, surreptitious contact with the Defendant by Weber could be undertaken consistent with the Wyoming Rules of Professional Conduct – in particular Rule 4.2. In attaching this email exchange to its appellate brief, the government recognized it was not part of the official record of the case for purposes of the appeal, but was provided to the Court of Appeals simply for informational purposes and to provide context for the Defendant's accusations of misconduct. (*See* Gov't Resp. Br., Appellate Case No. 15-8138, Doc. No. 01019645653, at 12 n.5.)

The email exchange generally concerns two matters with respect to the application of Rule 4.2 to the proposed contacts with Defendant. (*See* Def.'s Ex. A, CV Case ECF No. 2 at 45-52.) First, there was a question whether, by offering a benefit to the Defendant in connection with the state prosecution at the time of his proffer, a later ex parte communication with the Defendant regarding the arson investigation would violate Rule 4.2; in other words, could the government argue the ex parte communication was about a separate subject for which Defendant has not been charged and on which he is not represented. Defendant did have a lawyer in connection with the then-ongoing state court proceedings. And while those state charges plainly had no connection to the arson investigation, the Defendant's state court lawyer did arrange for and participate in a proffer by the Defendant concerning his knowledge about the arson. That proffer, had it been truthful, might have resulted in a favorable sentencing recommendation from the United States with respect to the Defendant's state charges.

Mr. Prest, the PRAO lawyer advising the AUSA on these issues, recommended the AUSA instruct the agent who will communicate with the Defendant not to ask the Defendant any questions related to his state prosecution or conversations between Defendant and his attorney and to inform Defendant he would not receive a benefit in connection with the state prosecution in exchange for agreeing to speak with the agent moving forward. Mr. Prest further recommended that before ex parte contact with the Defendant occurred, the AUSA should specifically advise the Defendant's attorney that the government would not provide a sentencing recommendation on the Defendant's behalf in regard to his state charges, and that henceforth the government would treat its arson investigation as a separate matter from the state prosecution and will conduct its investigation and communicate with Defendant in compliance with the applicable substantive law and Rules of Professional Conduct. *See id.* at 47 (Prest email to AUSA dated 12/18/2014). As mentioned previously, the AUSA sent such a communication to Defendant's attorney later that day. *See id.* at 51 (AUSA email to Jeremy Kisling dated 12/18/2014).

The second issue more specifically addressed the use of Weber to obtain incriminating statements from Defendant. *See id.* at 50-51 (AUSA email to Prest dated 1/6/2015). In Mr. Prest's judgment, the investigative communication between Weber and the Defendant regarding the arson investigation was not a violation of Rule 4.2 because the Defendant was not likely a "represented person" insofar as the government's arson investigation was concerned which, as the government had made clear, was a separate matter from the state prosecution. Mr. Prest went on to note that, even if the Defendant

could have been considered to be "represented by counsel" for purposes of Rule 4.2, the undercover contact between Weber and the Defendant was in any event "authorized by law" with the meaning of the Rule. *See id.* at 49 (Prest email to AUSA dated 1/6/2015).

In resolving Defendant's allegation of an ethical violation on direct appeal, the Tenth Circuit made no reference to the government's email exchange with the PRAO. Instead, the Court of Appeals rejected the Defendant's suppression argument under the Rules of Professional Conduct on two grounds. First, the appellate court determined the Defendant waived the argument. But that aside, the court concluded Rule 4.2's "authorized by law" exception "allowed the AUSA to use an undercover informant, prior to indictment, to elicit incriminating admissions from [the Defendant]" regardless of whether he was then represented by counsel in connection with the government's arson investigation. 684 F. App'x at 695.

The Tenth Circuit decision affirming Defendant's conviction was issued April 5, 2017. Defendant did not seek further review by the Supreme Court, so his one-year limit for filing his § 2255 motion would have expired one year from when his deadline for seeking *certiorari* expired – i.e., 90 days after the court of appeals decision. *See* S.Ct. Rule 13.1; *Clay v. United States*, 537 U.S. 522, 532 (2003). Accordingly, Defendant's § 2255 motion filed on January 17, 2018 is timely.

STANDARD OF REVIEW

Section 2255 entitles a prisoner to relief "[i]f the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of

the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). The standard of review applied to § 2255 motions is stringent. "Only if the violation constitutes a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure can § 2255 provide relief." *United States v. Gordon*, 172 F.3d 753, 755 (10th Cir. 1999). The Court presumes the proceedings which led to defendant's conviction were done rightly. *See Parke v. Raley*, 506 U.S. 20, 29-30 (1992).

"Section 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994). A defendant who fails to raise an issue on direct appeal is barred from raising the issue in a § 2255 motion, unless he can demonstrate cause excusing his procedural default and actual prejudice resulting from the alleged errors, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed. *Id.* The procedural bar for failure to raise a claim on direct appeal, however, does not apply to an ineffective assistance of counsel claim. *United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002).

To establish ineffective assistance of counsel, a defendant must show that his counsel's "representation fell below an objective standard of reasonableness," and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Taylor*, 454 F.3d 1075, 1079 (10th Cir. 2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). In other words, a defendant must show that his counsel's performance was deficient and that

different offenses, the government arranged to have the defendant covertly contacted by one of her co-defendants, who was then acting as a government informant. *Id.* During those contacts, the defendant made inculpatory statements the government subsequently used against her at trial on the new charges. *Id.*

The defendant argued – both at trial and on appeal – that her statements to the informant were obtained in violation of her Sixth Amendment right to counsel and were therefore inadmissible. The appellate court rejected defendant's argument:

> The Sixth Amendment forbids the government from eliciting incriminating statements from a defendant outside the presence of counsel. *See Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). But, the Supreme Court has instructed, this protection is "offense specific." *Texas v. Cobb*, 532 U.S. 162, 164, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). It "attaches only to charged offenses"—that is, offenses for which "adversary judicial criminal proceedings" have begun, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 167–68, 172, 121 S.Ct. 1335 (2001) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)). Accordingly, the government remains free to seek uncounseled statements from a defendant about uncharged offenses without offending the Sixth Amendment. That said, the scope of the Sixth Amendment right is not completely defined by "the four corners of a charging instrument": its bar against the government seeking incriminating statements from the defendant "encompass[es] offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* [*v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)] test." *Id.* at 173, 121 S.Ct. 1335. Apart from this narrow exception, however, **there is no Sixth Amendment right to counsel for uncharged offenses**, even if they are "closely related to" or "inextricably intertwined with" charged offenses. *Id.* (quoting *id.* at 186, 121 S.Ct. 1335 (Breyer, J., dissenting)).
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> So it is that, even assuming without deciding that [defendant] enjoyed a Sixth Amendment right to counsel between indictments, the right pertained only to the offenses charged in the original indictment (or those that would be considered the same offense under the *Blockburger* test). With respect to other offenses that appeared only in later, superseding indictments, the criminal adversary process simply hadn't begun; the Sixth Amendment

> hadn't been triggered. And, as it happened, it was only on those latter offenses that [defendant] was convicted. She thus can't establish a Sixth Amendment violation that might undermine the validity of any of those convictions and give us grounds to reverse them.

Id. at 1286 (emphasis added).

The same applies here. At the time Defendant made his admissions to Weber, he had not yet been charged by any authority with any offense having a factual connection to the arson of the Sheridan County Attorney's Office, never mind any offense bearing a sufficient connection to satisfy *Blockburger's* test. Accordingly, Defendant had no Sixth Amendment right to counsel when he incriminated himself to Weber, and "no amount of tortured linguistic gymnastics" concerning the Defendant's proffer letter, or the email exchange with PRAO, can change that reality. (Gov't Resp. to § 2255 Mot. at 23.)

Based on the foregoing, any argument by Defendant's trial counsel (as trial counsel himself recognized in his memorandum in support of the suppression motion) or by his appellate counsel to the effect that his Sixth Amendment rights were somehow violated in connection with Weber's covert contacts with the Defendant would necessarily have failed. And failure to raise an issue that is legally without merit is not ineffective assistance of counsel, either at the appellate or trial level. *See Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001) (appellate counsel); *United States v. Barrett*, 797 F.3d 1207, 1219 (10th Cir. 2015) (trial counsel). Therefore, Defendant's Sixth Amendment claim must be rejected.

B. Brady/Giglio

The Defendant's second claim is that the government violated the principles of *Brady* and *Giglio* by not disclosing to him its email communications with PRAO prior to trial. His theory seems to be that this email chain would have shown how his Sixth Amendment rights were violated by the government's secret recording of his inculpatory statements to Weber. He further asserts that the PRAO emails could somehow have been used to impeach the credibility of SA Claflin and Weber. In support, Defendant attached the affidavit of his trial counsel, who vaguely contends the PRAO emails somehow constituted an admission on the government's part that the Defendant's state prosecution and the federal arson investigation were so intertwined as to make it clear that the recording of the Defendant's statements necessarily violated both the Wyoming Rules of Professional Conduct and the Defendant's constitutional rights. Defendant's counsel also asserts his access to the emails prior to the suppression hearing and trial would have permitted him to more effectively cross-examine SA Claflin and Weber with respect to the Defendant's suppression issues.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Smith v. Sec'y of New Mexico Dep't of Corr.*, 50 F.3d 801, 822 (10th Cir. 1995) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)) (internal quotation marks omitted). "This oft-quoted language established the prosecutor's broad duty to disclose exculpatory material to the defense." *Id.* (quoting *United States v. Buchanan*, 891 F.2d 1436, 1440 (10th Cir. 1989)) (internal quotation marks omitted). "Impeachment evidence . . . as well as exculpatory

evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). The Court must be mindful that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Smith*, 50 F.3d at 823 (quoting *United States v. Agurs*, 427 U.S. 97, 110 (1976)) (internal quotation marks omitted).

> Of course, the *Brady* principle has limitations. The Constitution, as interpreted in *Brady*, does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant. *See, e.g., Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."); *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988) ("The Government has no obligation to disclose possible theories of the defense to a defendant."). Due process only requires the disclosure of material exculpatory evidence which, "if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675, 105 S.Ct. at 3380. Therefore, in order to establish a *Brady* violation, the defendant bears the burden of establishing: "1) that the prosecution suppressed evidence; 2) that the evidence was favorable to the accused; and 3) that the evidence was material." *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994) (citing *United States v. DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993)); *accord Fero v. Kerby*, 39 F.3d 1462, 1472 (10th Cir. 1994).
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> * * *
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> "[T]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682 [citation omitted].

Smith, 50 F.3d at 823-27.

The Defendant's claims regarding an alleged *Brady/Giglio* violation lack merit. First, the Court agrees with the government that the subject email communications

between the AUSA and PRAO are not really "evidence" at all, at least in the sense that they illuminate any fact one way or the other which was "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. At most, the email exchanges comprise questions and recommendations with respect to how the government might conduct its investigation of the Defendant without violating the Wyoming Rules of Professional Conduct. They were plainly not "exculpatory" of the Defendant with respect to the arson charges, and since none of the witnesses in the case were actual parties to the emails, it is difficult to imagine how they might properly have been used for impeachment – particularly given this was a legal question for the Court, not a factual question for the jury to decide.

Beyond that, the emails have nothing to do with anything that matters here. They do not affect the Sixth Amendment issue at the heart of Defendant's present § 2255 motion because, at the time Weber surreptitiously obtained the Defendant's statement, the Defendant had not been charged with the arson at issue in this case, or with any offense sufficiently related to arson. As such, as the Court explained above, Defendant's Sixth Amendment rights simply had not yet attached.

Further, the email communications likewise would not have changed the outcome of the Defendant's Fifth Amendment claim, which formed the basis for his motion to suppress prior to trial. As this Court recognized in denying his motion, the Tenth Circuit's decision in *United States v. Cook*, 599 F.3d 1208 (10th Cir. 2010), was dispositive of his Fifth Amendment claim. Nothing in the email exchanges could have changed the Court's analysis in light of *Cook*, and so could not have affected the

Defendant's Fifth Amendment claim one way or the other. Moreover, the Tenth Circuit has suggested that *Brady* may not apply to suppression hearings because suppression hearings do not determine a defendant's guilt or punishment. *See United States v. Lee Vang Lor*, 706 F.3d 1252, 1256 n.2 (10th Cir. 2013); *United States v. Dahl*, 597 F. App'x 489, 491 n.2 (10th Cir. 2015).

In sum, setting aside all questions of attorney work product and deliberative process privileges which might have otherwise protected the emails from disclosure, the fact is that even had they been provided to the Defendant and his counsel prior to proceedings on the Defendant's suppression motion, there is nothing about them that could have changed the outcome of the Defendant's case in any imaginable way. Thus, even assuming the emails could arguable be considered *Brady/Giglio* material, there is absolutely no basis to find they satisfy *Brady/Giglio's* materiality requirement; i.e., that there is a reasonable probability that, had the emails been disclosed to the defense, the result of the suppression motion or trial would have been different.

C. Motion for Additional Discovery

Defendant has requested additional discovery "related to the 'advice and permission' the Government received prior to conducting ex parte communication with him." (CV Case ECF No. 17 at 2.) Defendant insists "this advice is critical in advancing the Movant's claim that his Constitutional rights were violated." *Id.* at 1. Defendant offers no explanation of how any unspecified discovery, in addition to the email communications he already has, will support his claims.

Rule 6(a) of the Rules Governing Section 2255 Proceedings allows the Court to authorize discovery "for good cause." A party requesting discovery must provide reasons for the request and must "include any proposed interrogatories and requests for admission, and must specify any requested documents." Rule 6(b). "Merely claiming discovery is necessary is insufficient." *United States v. Tuakalau*, 562 F. App'x 604, 610 (10th Cir. 2014) (unpublished). Nor is it sufficient to offer general, conclusory or speculative assertions that discovery would provide the factual basis for a claim. *See Wallace v. Ward*, 191 F.3d 1235, 1245-46 (10th Cir. 1999). Rather, "good cause" is established "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Id.* at 1245 (internal quotation marks and citation omitted). Defendant has not met these requirements, so his motion for discovery must be denied.

D. Motions for Evidentiary Hearing and Appointment of Counsel

Finally, Defendant has also moved the Court to appoint counsel and hold an evidentiary hearing concerning the claims raised in his § 2255 motion. (*See* CV Case ECF Nos. 15 & 18.) A court may appoint counsel for a § 2255 petitioner when the "interests of justice so require." 18 U.S.C. § 3006A. If the court determines an evidentiary hearing is warranted, it must appoint an attorney to represent a petitioner pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings. A § 2255 petitioner is entitled to an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Because the Court can, and did, resolve Defendant's ineffective assistance of

counsel claims on the record, he is not entitled to an evidentiary hearing. *See Foster v. Ward*, 182 F.3d 1177, 1184 (10th Cir. 1999). Having concluded neither discovery nor an evidentiary hearing is warranted, the Court denies appointment of counsel.

CONCLUSION

For the reasons discussed herein, the Defendant's § 2255 motion must be denied.

A certificate of appealability may issue only if Defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court further finds Defendant cannot make the required showing and a certificate of appealability should not issue in this action. THEREFORE, it is hereby

ORDERED that Petitioner/Defendant's *Motion Under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence* (CV Case ECF No. 1) (CR Case ECF No. 204) is **DENIED**; it is further

ORDERED that Petitioner/Defendant's *Motion to Appoint Counsel* (CV Case ECF No. 15), *Motion to Allow Additional Discovery* (CV Case ECF No. 17), and *Motion for Evidentiary Hearing*, (CV Case ECF No. 18) are **DENIED**; it is further

ORDERED that a certificate of appealability shall not issue.

Dated this 23rd day of May, 2018.

Scott W. Skavdahl
United States District Judge

Additional material from this filing is available in the Clerk's Office.