MASTER APPENDIX

subject

1. United Sattes district Court
   a. Order Denying §2255
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2. United States Appeals Court
   a. Order denying Certificate of Appealability
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00511-PAB
(Criminal Case No. 14-cr-00160-PAB-1)

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. DONALD BRIAN WINBERG,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Denying § 2255 Motion [Docket No. 236] of United States District Judge Philip A. Brimmer entered on December 31, 2018, it is

ORDERED that the amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Docket No. 216] filed by Donald Brian Winberg is DENIED. It is further

ORDERED that, under 28 U.S.C. § 2253(c)(2) and the Rules Governing Section 2255 Proceedings for the United States District Courts, a certificate of appealability is DENIED. It is further

ORDERED that the corresponding Civil Action No. 17-cv-00511-PAB is dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 17-cv-00511-PAB
(Criminal Case No. 14-cr-00160-PAB-1)

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. DONALD BRIAN WINBERG,

Defendant.

ORDER DENYING § 2255 MOTION

Movant, Donald Brian Winberg, has filed, *pro se*, an amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("§ 2255 motion") (Docket No. 216). The United States has responded to the motion. Docket No. 220. Mr. Winberg filed a reply [Docket No. 221] and a memorandum of law [Docket No. 228].

The Court construes Mr. Winberg's filings liberally because he is not represented by counsel. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court will not act as a *pro se* litigant's advocate. *See Hall*, 935 F.2d at 1110. For the reasons discussed below, the § 2255 motion will be denied.

I. PROCEDURAL HISTORY

Mr. Winberg pled guilty to Counts 1 and 16 of the Superseding Indictment, charging two violations of 18 U.S.C. § 1349, conspiracy to commit wire fraud. Docket No. 110. The Court sentenced Mr. Winberg to a total of 87 months imprisonment.

Docket No. 145 at 2. Mr. Winberg filed a direct appeal, Docket No. 147, but the Court of Appeals for the Tenth Circuit enforced Mr. Winberg's waiver of his right to file such an appeal and therefore dismissed it. Docket No. 203.

Mr. Winberg's § 2255 motion claims that (1) he was selectively prosecuted; (2) the government committed a Brady violation; (3) his guilty plea was "coerced" by his attorney because his attorney did not spend sufficient time on his case and advise him about the statute he pled guilty to having violated; (4) his attorney failed to conduct a proper pre-trial investigation; and (5) there was a *Crawford* confrontation violation. Docket No. 216 at 4. He seeks to have his convictions vacated and be released from custody. *Id.* at 8.

II. ANALYSIS

A. Plea Agreement Waiver

Mr. Winberg's § 2255 motion is subject to dismissal based on the collateral-attack waiver in his plea agreement. The plea agreement states, in relevant part:

> [T]he defendant also knowingly and voluntarily waives his right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255. This waiver provision, however, will not prevent the defendant from seeking relief otherwise available if: (1) there is an explicitly retroactive change in the applicable guidelines or sentencing statute; (2) there is a claim that the defendant was denied the effective assistance of counsel; or (3) there is a claim of prosecutorial misconduct. Additionally, if the government appeals the sentence imposed by the Court, the defendant is released from this waiver provision.

Docket No. 111 at 3.

A collateral-attack waiver in a plea agreement will be enforced if: (1) the collateral attack falls within the scope of the waiver; (2) the defendant's waiver of his collateral

rights was knowing and voluntary; and (3) enforcement of the waiver would not result in a miscarriage of justice. *See United States v. Viera,* 674 F.3d 1214, 1217 (10th Cir. 2012) (applying analysis in *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004), for determining whether a plea agreement waiver of appellate rights is enforceable); *see also United States v. Frazier-LeFear*, No. 16-6128, 665 F. App'x 727, 729 (10th Cir. Dec. 15, 2016) (unpublished) (same).

B. Ineffective Assistance of Counsel Claims

The Court first considers Mr. Winberg's claims of ineffective assistance of counsel, which are an explicit exception to his appeal waiver. In his third claim, Mr. Winberg argues that his plea was "coerced," Docket No. 216 at 6, 15-16, 19, but provides no argument or evidence of any coercion by his attorney or anyone else. Instead, he argues that his attorney spent little time on the case and that not until Mr. Winberg read the statute in the prison law library did Mr. Winberg understand that his "plea agreement was wrong." *Id.* at 16. In his fourth claim, Mr. Winberg elaborates on his counsel's alleged ineffectiveness, claiming that his attorney was distracted by billing issues, did not read five boxes of evidence that defendant gave him, did not conduct a suppression hearing, did not challenge various evidence, failed to inform him regarding the "stacking" of charges, and did not hire an investigator. *Id.* at 17-18. The defendant states that, as a result of this ineffective assistance of counsel, he was misinformed about the terms of his plea agreement, a conflict with his attorney existed, and there was a complete breakdown in communications. *Id.* at 19.

Mr. Winberg's claims of ineffective assistance of counsel are contrary to what he told the Court at his change of plea hearing. "[S]tatements on the record, 'as well as any

findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings.'" *Romero v. Tansy*, 46 F.3d 1024, 1033 (10th Cir. 1995) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Thus, a defendant's "subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Id.* Under oath, Mr. Winberg stated that he had a sufficient amount of time to review his plea agreement and to talk to his attorney about it. Docket No. 199 at 17. Although Mr. Winberg says he did not understand the charge, Docket No. 216 at 15, 17, and was misinformed about the terms of his plea agreement, *id.* at 19, the Court explained the charges to Mr. Winberg at the plea hearing, Docket No. 199 at 11, and, after reviewing all the material terms of the plea agreement with Mr. Winberg, the Court found that he understood his plea agreement. *Id.* at 20. When asked at the hearing if he had any complaints or criticisms of his attorney or concerning the plea agreement that his attorney negotiated on Mr. Winberg's behalf, Mr. Winberg said, "I have no complaints." *Id.* at 18. When asked if he was satisfied with his attorney's representation, Mr. Winberg stated, "Yes, sir, very." *Id.* If his counsel did not read five boxes of documents, was distracted by billing issues, failed to file a suppression motion or challenge evidence, and did not hire an investigator contrary to Mr. Winberg's wishes, there would have been no reason for Mr. Winberg to indicate that he was satisfied with his attorney. Similarly, although Mr. Winberg claims that his attorney did not spend sufficient time with him discussing the plea agreement, Docket No. 216 at 15, Mr. Winberg told the Court that he had a sufficient amount of time to review the plea agreement and talk to his attorney about it. Docket No. 199 at 17. Mr. Winberg

complains that his attorney failed to challenge the victim's exaggerated loss claim, Docket No. 216 at 18, but had no disagreement with the loss amount at the change of plea hearing. Docket No. 199 at 12. Mr. Winberg's assertions under oath and in open court are entitled to a "strong presumption of verity" and should be credited over the post-hoc allegations in his motion. *Blackledge*, 431 U.S. at 74; *cf. United States v. Freixas*, 332 F.3d 1314, 1318-19 (11th Cir. 2003) (holding that, in denying motion to withdraw guilty plea, court could discredit allegations that were inconsistent with findings when plea was entered).

Even if the ineffective assistance of counsel claims of Mr. Winberg that he arguably may have discovered only after his change of plea are considered on the merits, they must be denied for lack of specificity. In order for a defendant to make an ineffective assistance claim, he must identify the specific "acts or omissions that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Conclusory allegations about the failure of counsel are insufficient to sustain a § 2255 petition. *See, e.g., Cummings v. Sirmons*, 506 F.3d 1211, 1227 (10th Cir. 2007); *United States v. Moser*, 570 F. App'x 800, 802 (10th Cir. 2014) (unpublished). Mr. Winberg fails to identify what his counsel failed to discuss with him, Docket No. 216 at 15, what matters counsel failed to research, *id.*, and how documents in the five boxes would demonstrate his actual innocence. *Id.* at 17.

Mr. Winberg also fails to indicate how he was prejudiced. Because Mr. Winberg decided to plead guilty, he must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This inquiry turns on: (1) whether going to

trial would have been objectively rational under the circumstances; and (2) whether, in light of all the factual circumstances surrounding the plea, there is in fact a reasonable probability that Mr. Winberg would have rejected the proposed plea agreement and instead proceeded to trial. *Heard v. Addison*, 28 F.3d 1170, 1184 (10th Cir. 2013). For example, he states that his attorney failed to read Mr. Winberg's outline of facts, Docket No. 216 at 17, but fails to explain why the facts in his plea agreement were not sufficient to support his pleas of guilty and why other facts were inconsistent or could have changed the result. Mr. Winberg claims that his attorney failed to explain his lack of experience with fraud cases, *id.*, but does not indicate how more experienced counsel would have done things differently. Mr. Winberg claims that counsel failed to review, investigate, and challenge witness statements, *id.* at 17-18; however, he does not explain why such review would have changed anything or caused him not to plead guilty in light of the facts he admitted to at the change of plea hearing. Mr. Winberg claims that his attorney failed to hire an investigator, *id.* at 17-19, but does not indicate what the investigator would have discovered or how an investigator's work product would have changed his decision to plead guilty. *See Sirmons*, 506 F.3d at 1228. Although Mr. Winberg makes a sweeping statement that his counsel's "errors where [sic] so serious that they would have produced an entirely differnt [sic] outcome at trial," Docket No. 216 at 20, Mr. Winberg nowhere supplies details as to why, in light of his attorney's alleged deficiencies, he would have decided to go to trial instead of pleading guilty, especially given the stipulated facts in the plea agreement that Mr. Winberg told the Court were accurate.

Mr. Winberg claims that his counsel failed to conduct a suppression hearing, to impeach a certain witness, and to present evidence of prosecutorial misconduct. Docket No. 216 at 17. However, Mr. Winberg does not indicate whether such actions would have caused him to lose his plea bargain, what such actions would have accomplished or discovered, and how such actions would have caused him to decide not to plead guilty or to cause him a better result at trial.

Mr. Winberg states that his attorney had a conflict of interest with him, *id.* at 17, 19, but he fails to explain exactly what the conflict was, which is difficult to understand in light of his statement at the change of plea hearing that Mr. Winberg was "very" satisfied with counsel. Docket No. 199 at 18.

Finally, Mr. Winberg claims that his attorney provided ineffective assistance of counsel in connection with the new charges in the superseding indictment. Docket No. 216 at 18. But Mr. Winberg does not explain why the charges in the superseding indictment were improperly brought in this case or how he could have prevented the United States from proceeding on those charges in this case, why the result would have been any different had they been filed in a separate case, or, importantly, why he indicated to the Court at his change of plea hearing that he understood the parties' estimate of his advisory guideline sentencing range. Docket No. 199 at 13.

C. Selective Prosecution and Crawford Claims

In his first claim, Mr. Winberg states that he was unconstitutionally subjected to selective prosecution because the presence of drought in Texas was an act of God that undermined the claim that he and his wife intended to defraud anyone. Docket No. 216 at 4, 9-10. He then argues that, because they were the only persons prosecuted for

failures to repay despite this act of God, this "would imply that some form of selective prosecution occurred." *Id.* at 10. In his fifth claim, Mr. Winberg states that his confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004), were violated because the "true guilty party" was a person named David Faucette.[1] *Id.* at 21.

The Court finds that each of the three *Viera* factors is satisfied and, as a result, the appeal waiver bars these claims. 674 F.3d at 1217. First, both claims fall within the scope of the waiver, which includes a waiver of the "right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack including but not limited to a motion brought under 28 U.S.C. § 2255." None of the exceptions to the waiver clause apply to these claims. Second, Mr. Winberg's plea was knowing and voluntary. At the change of plea hearing, after asking questions of Mr. Winberg about his plea agreement and his intention to plead guilty to Counts 1 and 16 of the superseding indictment, the Court concluded that he entered the plea agreement "voluntarily, knowingly, and intelligently." Docket No. 199 at 20. The Court, in fact, read the language of Mr. Winberg's appellate waivers to him and asked him whether he believed that he understood them. *Id.* at 8-11. Mr. Winberg indicated that he had a chance to review the waivers with his attorney and believed that he understood them. *Id.* In his statement in advance of guilty plea, Mr. Winberg acknowledged that he waived the

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1 Mr. Winberg's arguments in his memorandum of law [Docket No. 228] are similar in that he claims that he had no intent to defraud. To the extent such arguments are new arguments, the Court will not consider them because they are made outside the briefing, the United States has had no opportunity to reply, and they are untimely. *See United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000). To the extent that the arguments in his memorandum of law are clarifications, they fall within the scope of the appeal waiver.

right to bring a § 2255 motion, that he had discussed the terms of his plea agreement with his attorney, and that he was satisfied with counsel's representation. Docket No. 112 at 5-7.

Because Mr. Winberg's § 2255 motion falls within the scope of the collateral-attack waiver in his plea agreement and he has not made a colorable argument that his waiver was not knowing and voluntary, he must demonstrate that enforcement of the waiver would result in a miscarriage of justice. A miscarriage of justice occurs "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327. *See also United States v. Polly*, 630 F.3d 991, 1001 (10th Cir. 2011) (explaining that four exceptions listed in *Hahn* are exclusive means to establish miscarriage of justice).

The Court finds that none of the *Hahn* factors applies. The Court did not rely on an impermissible factor, Mr. Winberg does not claim that there was any ineffective assistance of counsel in regard to his appeal waiver, the sentence did not exceed the twenty year maximum, and there is no evidence that the waiver was otherwise unlawful. *See also* Docket No. 203. Consequently, the waiver is valid and precludes the relief requested in the first and fifth claims in his § 2255 motion.

D. Brady Violation Claim

In his second claim, Mr. Winberg argues that the government did not reveal to him a variety of information about this case. Docket No. 216 at 5, 13-14. This claim is not necessarily subject to Mr. Winberg's appeal waiver. *See United States v. Wright*, 43

F.3d 491, 496 (10th Cir. 1994). However, the government is not required to produce material impeachment evidence to a defendant before he pleads guilty. *United States v. Ellsbury*, 528 F. App'x 856, 859 (10th Cir. 2013) (unpublished). Here, much of the evidence that Mr. Winberg claims was not produced relates to impeachment evidence regarding Mr. Faucette and, as a result, does not support his claim. Moreover, as to non-impeachment evidence, a § 2255 petition must show that "but for the failure to produce such information [he] would not have entered the plea but instead would have insisted on going to trial.'" *United States v. Walters*, 269 F.3d 1207, 1214 (10th Cir. 2001) (quoting *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998)). Mr. Winberg, however, does not make any attempt to explain why, had the allegedly withheld information been produced to him before his guilty plea, he would have rejected the government's plea offer and insisted on going to trial. In fact, Mr. Winberg does not claim that the information that he complains about was not produced to him before his guilty plea or how or when he learned about such information. As a result, Mr. Winberg's second claim must be denied as unsupported.

The Court concludes that each of Mr. Winberg's claims in his § 2255 petition must be dismissed.

Under Rule 11(a) of the Section 2255 Rules, a "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." Such a showing is made only when "a prisoner demonstrates 'that jurists of reason would find it debatable' that a constitutional violation occurred, and that the district court erred in its

resolution." *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In the present case, the Court concludes that movant has not made a substantial showing of the denial of a constitutional right. Therefore, the Court will deny a certificate of appealability.

III. ORDERS

For the reasons discussed above, it is

ORDERED that the amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Docket No. 216], filed by Donald Brian Winberg, is DENIED. It is further

ORDERED that, under 28 U.S.C. § 2253(c)(2) and the Rules Governing Section 2255 Proceedings for the United States District Courts, a certificate of appealability is DENIED.

DATED December 31, 2018.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge

(using Don's document of record)

APPENDIX
APPEALS COURT
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TABLE OF AUTHORITIES

STATUTES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 17-cv-01394-PAB
(Criminal Case No. 14-cr-00160-PAB-2)

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. KARLIEN RICHEL WINBERG,

Defendant.

ORDER DENYING § 2255 MOTION

Movant, Karlien Richel Winberg, has filed, *pro se*, a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("§ 2255 motion") (Docket No. 222). The United States has responded to the § 2255 motion. Docket No. 225. Ms. Winberg filed a reply. Docket No. 226.

The Court construes Ms. Winberg's filings liberally because she is not represented by counsel. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court will not act as a *pro se* litigant's advocate. *See Hall*, 935 F.2d at 1110. For the reasons discussed below, the § 2255 motion will be denied.

I. PROCEDURAL HISTORY

Ms. Winberg pled guilty to Counts 1 and 16 of the Superseding Indictment, charging two violations of 18 U.S.C. § 1349, conspiracy to commit wire fraud. Docket No. 107. The Court sentenced Ms. Winberg to a total of 87 months imprisonment.

Docket No. 146 at 2. Ms. Winberg filed a direct appeal, Docket No. 150, but the Court of Appeals for the Tenth Circuit enforced Ms. Winberg's waiver of her right to file such an appeal and therefore dismissed it. Docket No. 205.

Ms. Winberg's § 2255 motion claims that (1) she was selectively prosecuted; (2) her guilty plea was "coerced" by her attorney because her attorney did not spend sufficient time on her case and advise her about the statute she pled guilty to having violated; (3) her attorney failed to conduct a proper pre-trial investigation; (4) the government committed a *Brady* violation; (5) there was a *Crawford* confrontation violation; and (6) her criminal history category overrepresented her criminal history. Docket No. 222 at 4. She seeks to have her convictions vacated and be released from custody. *Id.* at 8.

II. ANALYSIS

A. Plea Agreement Waiver

Ms. Winberg's § 2255 motion is subject to dismissal based on the collateral-attack waiver in her plea agreement. The plea agreement states, in relevant part:

> The defendant also knowingly and voluntarily waives her right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255. This waiver provision, however, will not prevent the defendant from seeking relief otherwise available if: (1) there is an explicitly retroactive change in the applicable guidelines or sentencing statute; (2) there is a claim that the defendant was denied the effective assistance of counsel; or (3) there is a claim of prosecutorial misconduct. Additionally, if the government appeals the sentence imposed by the Court, the defendant is released from this waiver provision.

Docket No. 108 at 3.

A collateral-attack waiver in a plea agreement will be enforced if: (1) the collateral

attack falls within the scope of the waiver; (2) the defendant's waiver of her collateral rights was knowing and voluntary; and (3) enforcement of the waiver would not result in a miscarriage of justice. *See United States v. Viera,* 674 F.3d 1214, 1217 (10th Cir. 2012) (applying analysis in *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004), for determining whether a plea agreement waiver of appellate rights is enforceable); *see also United States v. Frazier-LeFear*, No. 16-6128, 665 F. App'x 727, 729 (10th Cir. Dec. 15, 2016) (unpublished) (same).

B. Ineffective Assistance of Counsel Claims

The Court first considers Ms. Winberg's claims of ineffective assistance of counsel, which are an explicit exception to her appeal waiver. In her third claim, Ms. Winberg argues that her plea was based on "coercion," Docket No. 222 at 4-5, 15-16, 19, but provides no argument or evidence of any coercion by her attorney or anyone else. Instead, she argues that her attorney spent little time on the case and that not until Ms. Winberg read the statute in the prison law library did Ms. Winberg understand that her "plea agreement was wrong." *Id.* at 14. In her third claim, Ms. Winberg elaborates on her counsel's alleged ineffectiveness, claiming that her attorney was distracted by billing issues, did not read five boxes of evidence that petitioner gave her, did not conduct a suppression hearing, did not challenge various evidence, failed to inform her regarding the "stacking" of charges, and did not hire an investigator. *Id.* at 15-19. The defendant states that, as a result of this ineffective assistance of counsel, she did not understand the charges and there was a complete breakdown in communications. *Id.* at 14, 19.

Ms. Winberg's claims of ineffective assistance of counsel are contrary to what she

told the Court at her change of plea hearing. "[S]tatements on the record, 'as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings.'" *Romero v. Tansy*, 46 F.3d 1024, 1033 (10th Cir. 1995) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Thus, a defendant's "subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Id.* Under oath, Ms. Winberg stated that she had a sufficient amount of time to review her plea agreement and to talk to her attorney about it. Docket No. 183 at 20. Although Ms. Winberg says she did not understand the charges, Docket No. 222 at 14, 17, the Court explained the charges to Ms. Winberg at the plea hearing, Docket No. 183 at 13-14, and, after reviewing all the material terms of the plea agreement with Ms. Winberg, the Court found that she understood her plea agreement. *Id.* at 23. When asked at the hearing if she had any complaints or criticisms of her attorney or concerning the plea agreement that her attorney negotiated on Ms. Winberg's behalf, Ms. Winberg said, "No." *Id.* at 21. When asked if she was satisfied with her attorney's representation, Ms. Winberg stated, "Yes." *Id.* at 20. If her counsel did not read five boxes of documents, was distracted by billing issues, failed to file a suppression motion or challenge evidence, and did not hire an investigator contrary to Ms. Winberg's wishes, there would have been no reason for Ms. Winberg to indicate that she was satisfied with her attorney. Similarly, although Ms. Winberg claims that her attorney did not spend sufficient time with her discussing the plea agreement, Docket No. 222 at 13, Ms. Winberg told the Court that she had a sufficient amount of time to review the plea agreement and talk to her attorney about it. Docket No. 183 at 20. Ms. Winberg

complains that her attorney failed to challenge the victim's exaggerated loss claim, Docket No. 222 at 16, but had no disagreement with the loss amount at the change of plea hearing. Docket No. 183 at 9-10, 14. Ms. Winberg asserts that her attorney never discussed a defense with her, Docket No. 222 at 19, but at the change of plea hearing the Court asked her whether she talked to her attorney about defenses to the charges and she answered "yes." Docket No. 183 at 20. Ms. Winberg's assertions under oath and in open court are entitled to a "strong presumption of verity" and should be credited over the post-hoc allegations in her motion. *Blackledge*, 431 U.S. at 74; *cf. United States v. Freixas*, 332 F.3d 1314, 1318-19 (11th Cir. 2003) (holding that, in denying motion to withdraw guilty plea, court could discredit allegations that were inconsistent with findings when plea was entered).

Even if the ineffective assistance of counsel claims of Ms. Winberg that she arguably may have discovered only after her change of plea are considered on the merits, they must be denied for lack of specificity. In order for a defendant to make an ineffective assistance claim, she must identify the specific "acts or omissions that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Conclusory allegations about the failure of counsel are insufficient to sustain a § 2255 petition. *See, e.g., Cummings v. Sirmons*, 506 F.3d 1211, 1227 (10th Cir. 2007); *United States v. Moser*, 570 F. App'x 800, 802 (10th Cir. 2014) (unpublished). Ms. Winberg fails to identify what her counsel failed to discuss with her, Docket No. 222 at 13-15, 19, what matters counsel failed to research, and how documents in the five boxes would demonstrate her actual innocence. *Id.* at 15.

Ms. Winberg also fails to indicate how she was prejudiced. Because Ms. Winberg decided to plead guilty, she must show that "there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This inquiry turns on: (1) whether going to trial would have been objectively rational under the circumstances; and (2) whether, in light of all the factual circumstances surrounding the plea, there is in fact a reasonable probability that Ms. Winberg would have rejected the proposed plea agreement and instead proceeded to trial. *Heard v. Addison*, 28 F.3d 1170, 1184 (10th Cir. 2013). For example, she states that her attorney failed to discuss any of the facts pertaining to the case, Docket No. 222 at 15, but fails to explain why the facts in her plea agreement were not sufficient to support her pleas of guilty and why other facts were inconsistent or could have changed the result. Ms. Winberg claims that her attorney failed to explain her lack of experience with fraud cases, *id.* at 15-16, but does not indicate how more experienced counsel would have done things differently. Ms. Winberg claims that counsel failed to review, investigate, and challenge witness statements, *id.* at 16-17; however, she does not explain why such review would have changed anything or caused her not to plead guilty in light of the facts she admitted to at the change of plea hearing. Ms. Winberg claims that her attorney failed to hire an investigator, *id.* at 15, 17, but does not indicate what the investigator would have discovered or how an investigator's work product would have changed her decision to plead guilty. *See Sirmons*, 506 F.3d at 1228. Although Ms. Winberg makes a sweeping statement that her counsel's "errors where [sic] so serious that they would have produced an entirely differnt [sic] outcome at trial," Docket No. 222 at 18, Ms. Winberg nowhere supplies details as to why, in light of her attorney's

alleged deficiencies, she would have decided to go to trial instead of pleading guilty, especially given the stipulated facts in the plea agreement that Ms. Winberg told the Court were accurate.

Ms. Winberg claims that her counsel failed to conduct a suppression hearing, to impeach a certain witness, and to present evidence of prosecutorial misconduct. Docket No. 222 at 16. However, Ms. Winberg does not indicate whether such actions would have caused her to lose her plea bargain, what such actions would have accomplished or discovered, and how such actions would have caused her to decide not to plead guilty or to lead to a better result at trial.

Finally, Ms. Winberg claims that her attorney provided ineffective assistance of counsel in connection with the new charges in the superseding indictment. Docket No. 222 at 16-17. But Ms. Winberg does not explain why the charges in the superseding indictment were improperly brought in this case or how she could have prevented the United States from proceeding on those charges in this case, why the result would have been any different had they been filed in a separate case, or, importantly, why she indicated to the Court at her change of plea hearing that she understood the parties' estimate of her advisory guideline sentencing range. Docket No. 183 at 16.

C. Selective Prosecution, Crawford, and Criminal History Claims

In her first claim, Ms. Winberg states that she was unconstitutionally subjected to selective prosecution because the presence of drought in Texas was an act of God that undermined the claim that she and her husband intended to defraud anyone. Docket No. 222 at 4, 9-12. She then argues that they were the only persons prosecuted for failures to repay despite this act of God. *Id.* at 10-11. In her fifth claim, Ms. Winberg

states that her confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004), were violated because the "true guilty party" was a person named David Faucette. *Id.* at 24. In her sixth claim, Ms. Winberg claims that Criminal History Category II significantly over-represented her criminal history for purposes of sentencing. Docket No. 222 at 25. Ms. Winberg is correct that the Court determined, consistent with her plea agreement, Docket No. 108 at 16, that her Criminal History Category was II. Docket No. 146 at 7.

The Court finds that each of the three *Viera* factors is satisfied and, as a result, the appeal waiver bars these claims. 674 F.3d at 1217. First, these claims fall within the scope of the waiver, which includes a waiver of the "right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack including but not limited to a motion brought under 28 U.S.C. § 2255." None of the exceptions to the waiver clause apply to these claims. Second, Ms. Winberg's plea was knowing and voluntary. At the change of plea hearing, after asking questions of Ms. Winberg about her plea agreement and her intention to plead guilty to Counts 1 and 16 of the superseding indictment, the Court concluded that she entered the plea agreement "voluntarily, knowingly, and intelligently." Docket No. 183 at 23. The Court, in fact, read the language of Ms. Winberg's appellate waivers to her and asked her whether she believed that she understood them. *Id.* at 11-13. Ms. Winberg indicated that she had a chance to review the waivers with her attorney and believed that she understood them. *Id.* In her statement in advance of guilty plea, Ms. Winberg acknowledged that she waived the right to bring a § 2255 motion, that she had discussed the terms of her plea agreement with her attorney, and that she was satisfied with counsel's representation. Docket No. 109 at 5-7.

Because Ms. Winberg's § 2255 motion falls within the scope of the collateral-attack waiver in her plea agreement and she has not made a colorable argument that her waiver was not knowing and voluntary, she must demonstrate that enforcement of the waiver would result in a miscarriage of justice. A miscarriage of justice occurs "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327. *See also United States v. Polly*, 630 F.3d 991, 1001 (10th Cir. 2011) (explaining that four exceptions listed in *Hahn* are exclusive means to establish miscarriage of justice).

The Court finds that none of the *Hahn* factors applies. The Court did not rely on an impermissible factor, Ms. Winberg does not claim that there was any ineffective assistance of counsel in regard to her appeal waiver, the sentence did not exceed the twenty year maximum, and there is no evidence that the waiver was otherwise unlawful. *See also* Docket No. 205. Consequently, the waiver is valid and precludes the relief requested in the first, fifth, and sixth claims in her § 2255 motion.

D. Brady Violation Claim

In her fourth claim, Ms. Winberg argues that the government did not reveal to her a variety of information about this case. Docket No. 222 at 6, 20-22. This claim is not necessarily subject to Ms. Winberg's appeal waiver. *See United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994). However, the government is not required to produce material impeachment evidence to a defendant before she pleads guilty. *United States v. Ellsbury*, 528 F. App'x 856, 859 (10th Cir. 2013) (unpublished). Here, much of the

evidence that Ms. Winberg claims was not produced relates to impeachment evidence regarding Mr. Faucette and, as a result, does not support her claim. Moreover, as to non-impeachment evidence, a § 2255 petition must show that "but for the failure to produce such information [she] would not have entered the plea but instead would have insisted on going to trial.'" *United States v. Walters*, 269 F.3d 1207, 1214 (10th Cir. 2001) (quoting *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998)). Ms. Winberg, however, does not make any attempt to explain why, had the allegedly withheld information been produced to her before her guilty plea, she would have rejected the government's plea offer and insisted on going to trial. In fact, Ms. Winberg does not claim that the information that she complains about was not produced to her before her guilty plea or how or when she learned about such information. As a result, Ms. Winberg's fourth claim must be denied as unsupported.

The Court concludes that each of Ms. Winberg's claims in her § 2255 petition must be dismissed.

E. Motion to Amend

Ms. Winberg has filed a Motion to Amend or Add and [sic] Addendum to a Previously Sumbitted[sic]/Pending 2255 Motion [Docket No. 227]. The Court first addresses the timeliness of the arguments in her motion. The Court entered judgment on August 18, 2015, Docket No. 146, and the Tenth Circuit dismissed Ms. Winberg's appeal on July 18, 2016. Docket No. 205. Ms. Winberg's conviction became final on October 16, 2016, when her deadline for filing a petition for certiorari expired. *See United States v. Burch*, 202 F.3d 1274, 1276 (10th Cir. 2006). Her motion to amend was filed on September 5, 2017, and therefore is timely.

Ms. Winberg makes five claims in her motion to amend. First, she argues that her guilty plea had various defects. Docket No. 227 at 1-3. Second, she claims that she received two criminal history points for a case that was actually dismissed. *Id.* at 3-4. Third, she argues that appellate counsel was ineffective by failing to argue that her sentence was procedurally unreasonable in light of the factors under 18 U.S.C. § 3553. *Id.* at 4-5. Fourth, she asserts that she was denied her right to counsel on appeal and enforcing the appeal waiver resulted in a miscarriage of justice. *Id.* at 5. Fifth, she says that she is actually innocent and, had her attorney explained to her the element of intent, there would have been no guilty plea. *Id.* at 5-6.

In her first claim, regarding her guilty plea, Ms. Winberg states that she did not admit the necessary mens rea regarding the counts to which she pled guilty, she did not discuss with the Court her conduct in her own words, and the Court failed to discuss the nature, circumstances, or elements of the charges with her. *Id.* at 1. She also claims that her placement of an advertisement was not done with intent to defraud. The Court finds that each of the three *Viera* factors is satisfied for her first claim for the same reasons discussed earlier in regard to the first, fifth, and sixth claims in her § 2255 motion. As a result, these arguments are barred by her collateral-attack waiver. She also argues that she did not review all of her plea agreement, she did not knowingly enter her plea agreement, and that her attorney was ineffective. *Id.* at 1-2. As to whether Ms. Winberg reviewed her entire plea agreement, the transcript of the change of plea hearing indicates that she did. For example, her attorney indicated that she discussed the interlineation regarding interdependence in conspiracy cases with Ms. Winberg, Docket No. 183 at 3, Ms. Winberg told the Court that she read her plea

agreement and talked to her attorney about it and the interlineation, *id.* at 6, and the Court found that she was familiar with each and every term of her plea agreement. *Id.* at 23. As noted above, the Court, after asking questions of Ms. Winberg, found that she voluntarily, knowingly, and intelligently entered pleas of guilty to Counts 1 and 16 of the superseding indictment. *Id.* Ms. Winberg's arguments concerning the ineffectiveness of her counsel are not new and have already been discussed earlier in regard to her § 2255 motion. As a result, the Court finds that Ms. Winberg's claims regarding her guilty plea must be denied.

In the second claim in her motion to amend, Ms. Winberg argues that the two criminal history points that she was assessed in the presentence investigation report ("PSIR") should not have been assessed because "her case was dismissed." Docket No. 227 at 3. The Court finds that each of the three *Viera* factors is satisfied as to this claim for the same reasons discussed earlier in regard to the first, fifth, and sixth claims in her § 2255 motion. As a result, the argument that her criminal history score is incorrect is barred by her collateral-attack waiver. She also claims that she brought the criminal history point issue to the attention of her attorney, but she convinced her not to object to the PSIR on that ground. *Id.* Because ineffective assistance of counsel is an exception to her collateral-attack waiver, the Court will consider the merits of her argument. The PSIR indicates that Ms. Winberg was convicted of providing false information in Bonneville County, Idaho in August 2010. Docket No. 121 at 13. A charge of filing a false affidavit of theft was dismissed in connection with her guilty plea. *Id.* The PSIR indicates that Ms. Winberg was found guilty of false information, was sentenced to one year of probation, completed her community service hours in

September 2010, and completed probation in August 2011. These docket entries are inconsistent with Ms. Winberg's claim that the case was dismissed. Because Ms. Winberg provides no credible evidence to support her assertion that "her case was dismissed," Docket No. 227 at 3, the Court rejects her claim of ineffective assistance of counsel in regard to that conviction. Ms. Winberg has not established any reason for her trial (or appellate) counsel to have challenged the inaccuracy of the PSIR. The Court finds that her second claim lacks merit.

In her third claim, Ms. Winberg asserts that her appellate counsel was ineffective in failing to argue that her sentence was procedurally unreasonable. *Id.* at 4. Specifically, Ms. Winberg states that the Court treated the guidelines as mandatory at sentencing and failed to appreciate its discretion by varying from the guideline range. *Id.* She says that effective counsel would have brought this to the attention of the Tenth Circuit as well as the argument that Ms. Winberg qualified for a "safety valve." *Id.* at 4-5. In her fourth claim, Ms. Winberg argues that she was denied her right to counsel on appeal because her counsel filed an *Anders* brief without consulting her. *Id.* at 5. Given that the Tenth Circuit enforced the appellate waiver against Ms. Winberg and dismissed her direct appeal, Docket No. 205, the Court finds that Ms. Winberg has failed to demonstrate how appellate counsel was ineffective in filing an *Anders* brief or how Ms. Winberg was prejudiced in light of the enforceability of her appellate waiver. *See United States v. Richardson*, 2018WL1168574, at *3 (D. Kan. Mar. 6, 2018). As a result, the Court finds no basis to grant Ms. Winberg's third and fourth claims in her motion to amend.

In her fifth claim, Ms. Winberg argues that she is actually innocent and that, had her attorney reviewed the evidence and explained the elements of intent to her, she would not have pled guilty. Docket No. 227 at 5-6. This claim is conclusory. As noted earlier, she does not explain what evidence her counsel failed to review or how her attorney reviewing such evidence would have changed Ms. Winberg's decision to plead guilty. In her Statement by Defendant, Ms. Winberg acknowledged that she made the decision to plead guilty "after full and careful thought, with the advice of my attorney, and with full understanding of my rights, the facts and circumstances of the case, and the potential consequences of my plea(s) of guilty." Docket No. 109 at 7. At the change of plea hearing, Ms. Winberg stated that she understood the elements of the charges that she intended to plead guilty to. Docket No. 183 at 13-14. Her plea agreement contains the following language:

> Defendant Karlien Richel Winberg also understands that in order to prove that she intended the object of her conspiracy, namely to commit wire fraud, the government must prove, beyond a reasonable doubt, that: (1) defendant devised or intended to devise a scheme to defraud and to obtain money or property by means of false or fraudulent pretenses, representations or promises; (2) defendant Karlien Richel Winberg acted with specific intent to defraud and to obtain money or property by means of false or fraudulent pretenses, representations or promises; (3) defendant Karlien Richel Winberg used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme; and (4) the scheme employed false or fraudulent pretenses, representations, or promises that were material.

The Court finds that the plea agreement contained an accurate definition of intent in the elements section of her plea agreement. Construing her "actual innocence" claim as being grounded in an ineffective assistance of counsel argument, the Court finds that her claim lacks specificity, especially given that Ms. Winberg stated that she did review

the elements of the charges and understood them. As a result, the Court rejects this claim.

The Court has also reviewed the Memorandum of Law in Support of Motion to Vacate, Set Aside, or Correct Sentance [sic] Pursuant 28 U.S.C.A. § 2255 [Docket No. 229]. This filing consists of arguments that repeat ones already made in the § 2255 motion or new arguments that are inappropriate for a reply brief and will therefore not be considered.

Under Rule 11(a) of the Section 2255 Rules, a "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." Such a showing is made only when "a prisoner demonstrates 'that jurists of reason would find it debatable' that a constitutional violation occurred, and that the district court erred in its resolution." *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In the present case, the Court concludes that movant has not made a substantial showing of the denial of a constitutional right. Therefore, the Court will deny a certificate of appealability.

III. ORDERS

For the reasons discussed above, it is

ORDERED that the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Docket No. 222], filed by Karlien Richel Winberg, is DENIED. It is further

ORDERED that the Motion to Amend or Add and [sic] Addendum to a Previously Sumbitted[sic]/Pending 2255 Motion [Docket No. 227] is granted to the extent that the Court permits the amendments, but the claims in the motion to amend are denied. It is further

ORDERED that, under 28 U.S.C. § 2253(c)(2) and the Rules Governing Section 2255 Proceedings for the United States District Courts, a certificate of appealability is DENIED.

DATED December 31, 2018.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

September 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONALD BRIAN WINBERG,

Defendant - Appellant.

No. 19-1005
(D.C. Nos. 1:17-CV-00511-PAB &
1:14-CR-00160-PAB-1)
(D. Colo.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KARLIEN RICHEL WINBERG,

Defendant - Appellant.

No. 19-1006
(D.C. Nos. 1:17-CV-01394-PAB &
1:14-CR-00160-PAB-2)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **O'BRIEN**, and **MATHESON**, Circuit Judges.

Donald and Karlien Winberg, appearing pro se, seek certificates of appealability ("COA") to challenge the district court's denials of their 28 U.S.C. § 2255 motions for a

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal an order denying a § 2255 motion). Exercising jurisdiction under 28 U.S.C. § 1291, we deny their requests and dismiss these matters.[1]

I. BACKGROUND

The Winbergs, husband and wife, were indicted on 18 counts of wire fraud and two counts of conspiracy to commit wire fraud. The charges stemmed from the Winbergs' soliciting, across multiple states and over several years, numerous large-scale purchases or sales of hay, corn, and other crops without intending to pay or deliver. In 2015, they each pled guilty to two counts of conspiracy to commit wire fraud in exchange for dismissal of the other charges. They were each sentenced to 87 months in prison and ordered to pay $1.5 million in restitution. We dismissed their appeals based on the waiver of appeal rights in their plea agreements. *See United States v. Karlien Winberg*, 667 F. App'x 707 (10th Cir. 2016) (per curiam); *United States v. Donald Winberg*, 646 F. App'x 632 (10th Cir. 2016) (per curiam). As discussed below, their plea agreements also included collateral review waivers.

The Winbergs filed two separate § 2255 motions. Each asserted the same five claims: (1) selective prosecution; (2) the government failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) their guilty pleas were coerced

[1] Because the Winbergs are pro se, we construe their filings liberally, but we do not act as their advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

due to deficient legal representation; (4) ineffective assistance of counsel (IAC); and (5) evidence was admitted in violation of *Crawford v. Washington*, 541 U.S. 36 (2004).[2] In separate orders, the district court denied the motions and denied a COA. The Winbergs have filed identical briefs and COA applications in this court, insisting their "cases are identicle [sic] in nature and are seeking indenticle [sic] reliefs." Aplt. Opening Br. at 3.

II. DISCUSSION

A. *COA Requirement and Standard of Review*

The Winbergs may not appeal the district court's denial of their § 2255 motions without a COA. 28 U.S.C. § 2253(c)(1)(B); *see United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010). To obtain a COA, they must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and show "that reasonable jurists could debate whether . . . the petition[s] 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).

[2] Mrs. Winberg's § 2255 motion included a sixth claim—that her criminal history was improperly calculated. She also moved to amend her § 2255 motion to add five more claims. She does not address these claims in her appellate briefing, so we do not address them. *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (declining to address a § 2255 claim that was not included in the COA application or brief to this court).

In their combined opening brief, the Winbergs do not argue their *Brady* or *Crawford* claims. We therefore decline to address them. *See United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (declining to address a claim raised in a § 2255 motion that was not included in the COA application or brief to this court); *see also Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012) (noting the waiver rule, for which "[a]rguments not clearly made in a party's opening brief are deemed waived," applies even to pro se litigants who "are entitled to liberal construction of their filings"). We address only the claims for selective prosecution, coerced guilty pleas, and IAC.

B. ***Plea Agreement and Collateral Review Waiver***

A defendant's waiver of the right to bring a collateral attack is generally enforceable and requires dismissal of a § 2255 motion. *See United States v. Cockerham*, 237 F.3d 1179, 1181 (10th Cir. 2001). Here, as part of their plea agreement, the Winbergs expressly waived their "right to challenge [their] prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255." R. (19-1005) at 47; R. (19-1006) Vol. 2 at 46. The agreement listed three exceptions to the collateral review waiver: "(1) . . . an explicitly retroactive change in the applicable guidelines or sentencing statute; (2) . . . a claim that the defendant was denied the effective assistance of counsel; or (3) . . . a claim of prosecutorial misconduct." R. (19-1005) at 47; R. (19-1006) Vol. 2 at 46. The Winbergs confirmed in open court at their change-of-plea hearings that they understood this waiver.

To determine whether a collateral review waiver bars a § 2255 claim, a court must assess: "(1) whether the disputed [claim] falls within the scope of the waiver of [collateral review] rights; (2) whether the defendant knowingly and voluntarily waived his [collateral review] rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam); *see also United States v. Viera*, 674 F.3d 1214, 1217 (10th Cir. 2012) (applying *Hahn* to collateral review waiver).

C. *COA Analysis*

1. **IAC and Coerced Guilty Pleas**

The district court first addressed the Winbergs' IAC claims, noting their exclusion from the collateral review waiver. Because the Winbergs based their coerced guilty plea claim on deficient performance of counsel, the court treated it as part of the IAC claims, and so do we.

To demonstrate IAC in the negotiation of their guilty pleas, the Winbergs must show (1) their attorneys' "representation fell below an objective standard of reasonableness"; *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (internal quotation marks omitted); and (2) but for the deficient representation, "there is a reasonable probability that . . . [they] would not have pleaded guilty and would have insisted on going to trial," *id.* at 59. As to the latter, the "mere allegation that [they] would have insisted on trial" is not sufficient. *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (internal quotation marks omitted). Rather, they must show that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*,

559 U.S. 356, 372 (2010). Prejudice is presumed when (1) there is a "complete denial of counsel" at a "critical stage" of the litigation; (2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *United States v. Cronic*, 466 U.S. 648, 659-60 (1984).

In their § 2255 motions, the Winbergs raised a litany of complaints about their attorneys but offered few specifics. They alleged their attorneys spent inadequate time on their cases, were distracted by billing issues, had a conflict due to a fee-splitting arrangement, and lacked experience in fraud cases. The Winbergs further alleged their attorneys did not read "five apple boxes" of evidence, review and investigate the government's evidence, provide the Winbergs with discovery from the government, ask for a suppression hearing, conduct an investigation, hire an investigator or inform the Winbergs of their right to an investigator, adequately communicate with them, inform them of their sentencing exposure, contest the amount of loss the victims claimed, or argue prosecutorial misconduct. R. (19-1005) at 238-40; R. (19-1006) Vol. 1 at 272-76. The Winbergs claim they did not understand the charges and did not realize they were "actualy [sic] innocent" until they conducted their own research in a prison law library. Aplt. Opening Br. at 13. They contend that, but for the allegedly deficient representation, they "would have insisted on going to trial." *Id.* at 21. As previously noted, the coerced-

guilty-plea claims were based solely on their dissatisfaction with their attorneys and are therefore part of the IAC claims.[3]

The district court first found the Winbergs' statements at their plea hearings undercut their IAC claims.[4] They acknowledged having had sufficient time to review the plea agreements, discussed the agreements with their attorneys, and satisfaction with their attorneys' representation. Such statements "carry a strong presumption of verity" and "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). The court also noted that in the § 2255 motions, the Winbergs offered only conclusory allegations regarding their attorneys' performance and possible prejudice. In their brief to this court, the Winbergs insist their IAC claims were "not conclusory," Aplt. Opening Br. at 15, but they do not point to specifics. The Winbergs' plea hearing statements' "presumption of verity" is a "formidable barrier" that easily withstands their "conclusory allegations unsupported by specifics" or "contentions that in the face of the record are wholly incredible." *Blackledge*, 431 U.S. at 74.

Based on our review of the record, we conclude reasonable jurists would not find debatable or wrong the district court's denial of the Winbergs' IAC claims.

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[3] The Winbergs have not contested the court's characterization of this claim.

[4] The Winbergs filed written statements in advance of their pleas, in which they acknowledged, *inter alia*, (1) the charges and possible sentences had been explained to them; (2) their guilty pleas had not been induced by promises or threats; and (3) they were "satisfied with [their] attorney[s]" and believed they had "been represented effectively and competently." R. (19-1005) at 69; R. (19-1006) Supp. 1 at 25.

2. **Selective Prosecution**

The Winbergs claimed selective prosecution in their § 2255 motions, contending (1) their inability to deliver crops or payment that they owed to others was due to a drought, not fraud; and (2) they "were the only ones that were criminally prosecuted as a result of [a] drought," which "would imply some form of selective prosecution." R. (19-1005) at 231; *see also* R. (19-1006) Vol. 1 at 268. The district court denied the claim based on the Winberg's collateral review waiver.[5]

The Winbergs do not dispute the district court's determination the claim fell within the scope of waiver. They therefore have waived any challenge to that ruling. *See Toevs*, 685 F.3d at 911. They rely on the other two *Hahn* factors—whether they "knowingly and voluntarily waived" their collateral review rights and "whether enforcing the waiver would result in a miscarriage of justice." *Hahn*, 359 F.3d at 1325.

The district court found the waivers were knowing and voluntary based on the Winbergs' representations at their plea hearings and their written statements filed in advance of their pleas. *See id.* (noting courts should focus on the plea agreement and colloquy in "determining whether a waiver of appellate rights is knowing and voluntary"). The Winbergs counter that their attorneys' allegedly deficient representation

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[5] In their opening brief, the Winbergs raise, for the first time, a distinct claim of vindictive prosecution. *Compare United States v. Furman*, 31 F.3d 1034, 1037 (10th Cir. 1994) (providing the elements of a claim of selective prosecution), *with United States v. Contreras*, 108 F.3d 1255, 1262-63 (10th Cir. 1997) (providing the elements of a claim of vindictive prosecution). Because the Winbergs did not allege vindictive prosecution in their § 2255 motions, we decline to address this claim. *See United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002).

rendered their waiver not knowing and voluntary. *See Romero v. Tansy*, 46 F.3d 1024, 1033 (10th Cir. 1995) (noting "[p]erformance by defense counsel that is constitutionally inadequate can render a plea involuntary"). This argument fails for the same reasons their IAC claims fail, as addressed above.

The "miscarriage of justice" factor applies only "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). Regarding the fourth element, a waiver is "otherwise unlawful" if it "embod[ies] an error that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Ibarra-Coronel*, 517 F.3d 1218, 1222 (10th Cir. 2008) (internal quotation marks omitted). We "look[] to whether the *waiver* is otherwise unlawful, not to whether another aspect of the proceeding may have involved legal error." *United States v. Shockey*, 538 F.3d 1355, 1357 (10th Cir. 2008) (internal quotation marks omitted).

The Winbergs do not argue that the district court relied on an impermissible factor or that their sentence exceeds the statutory maximum. They cannot rely on "ineffective assistance of counsel in connection with the negotiation of the waiver," *Hahn*, 359 F.3d at 1327, for the same reasons we rejected their IAC claims above. Finally, although the Winbergs do not explicitly contend waiver should be excused as being "otherwise unlawful," *id.*, they argue enforcing the waiver would be a miscarriage of justice because they are actually innocent. We need not decide whether actual innocence would satisfy

Hahn's "miscarriage of justice" exception because the Winbergs' innocence claim lacks merit.

To establish actual innocence, the Winbergs "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). The Winbergs have not demonstrated actual innocence in their § 2255 motions or their briefs to this court. They insist that drought caused their failure to deliver crops or make payments and there was no intent to defraud. But in their statements filed in advance of their guilty pleas, in the plea agreements themselves, and in interviews with a probation officer for their presentence investigation reports, the Winbergs repeatedly agreed that the factual summary supporting guilt in their plea agreements was true and accurate. They admitted their guilt at their sentencing hearings. Their statements at their hearings are incompatible with their post hoc attempts to justify their criminal conduct. Finally, the Winbergs claim in their brief to this court "that they have smoking gun evidence that would exonerate them completly [sic]." Aplt. Opening Br. at 42. But they have presented no such evidence.

Based on our review of the record, we conclude reasonable jurists would not find debatable or wrong the district court's denial of the Winbergs' selective prosecution claim as barred by the collateral review waiver.

III. CONCLUSION

We deny the Winbergs' requests for a COA and dismiss these matters. We deny their motions to proceed in forma pauperis.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

January 18, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONALD BRIAN WINBERG,

Defendant - Appellant.

No. 19-1005
(D.C. No. 1:17-CV-00511-PAB)
(D. Colo.)

ORDER

This matter is before the court on receipt of pro se appellant Donald Brian Winberg's Transcript Order. The court has received but will not file that form: it is not on the court's form and Mr. Winberg must make appropriate payment arrangements contemporaneous with submission of any transcript order.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Lisa A. Lee
Counsel to the Clerk

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