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

DEREK PELKER, **Petitioner**	:	**No. 1:16-cr-00240-1**
v.	:	**(Judge Kane)**
UNITED STATES OF AMERICA, **Respondent**	:	

MEMORANDUM

This matter is before the Court on Petitioner Derek Pelker ("Petitioner")'s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 514) and his motion for appointment of counsel (Doc. No. 529). For the following reasons, the Court will deny both motions.

I. BACKGROUND

In 2015, the Pennsylvania State Police ("PSP") investigated a York County bank robbery that occurred in April of that year. (Doc. No. 514 at 4.) During the ensuing months, the Federal Bureau of Investigation ("FBI") began to assist in the PSP's investigation. (Id.) Specifically, the FBI and PSP worked together to create a commercial, using recordings of the bank's video surveillance, to solicit help from the general public in order to identify suspects depicted in the video recording. (Doc. No. 514-1 at 2.) The commercial led to the disclosure of information relating to the robbery. (Id. at 5, 7.) The FBA and PSP also shared information with one another, conducted joint interviews of witnesses and suspects, and used the information obtained to further the investigation into the robbery. (Id. at 17, 19, 25, 27, 29.)

Following its investigation, in April 2016, the PSP apprehended Petitioner, whereupon he was arraigned, on April 8, 2016, by the state court on robbery charges. (Id. at 27, 36.) A PSP trooper later applied for a search warrant—at the behest of an FBI agent—to take a saliva sample

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from Petitioner using a buccal swab. (Id. at 27; Doc. No. 402 at 95.) The PSP sent the swab to an FBA laboratory for DNA analysis. (Doc. Nos. 514-1 at 27, 402 at 95.) The state court scheduled an April 22, 2016 preliminary hearing, which was twice rescheduled—the first time to May 26, 2016, due to the assigned judge's unavailability, and the second time to July 18, 2016, at the federal government's request (apparently unbeknownst to Petitioner) and without opposition from Petitioner's then-counsel. (Doc. No. 514-1 at 36, 38.)

In August 2016, federal grand juries returned two indictments charging Petitioner and others with armed bank robbery (in violation of 18 U.S.C. § 2113) and related charges. (Doc. No. 1.) The charges stemmed from the York County robbery and another robbery that occurred in April 2016 in Lebanon County. (Id.); United States of America v. Pelker, No. 1:16-cr-00241 (M.D. Pa. filed Aug. 24, 2016). Petitioner entered pleas of not guilty to all counts. (Doc. No. 26); United States of America v. Pelker, No. 1:16-cr-00241 (M.D. Pa. filed Aug. 24, 2016), ECF No. 26.[1] Meanwhile, in state court, Petitioner filed pretrial motions claiming that "the delay in his state proceedings to assist the federal government violated his constitutional rights and state procedural rules." (Doc. Nos. 514 at 5, 514-1 at 60-61.) Requesting dismissal of all state charges pending against him, Petitioner asserted that the state prosecution was being pursued in bad faith and was a sham for the federal prosecution. (Doc. Nos. 514 at 5, 514-1 at 60-61.) The state court scheduled a hearing on Petitioner's motions, hours before which the prosecution nolle prossed all charges against him. (Doc. Nos. Doc. Nos. 514, 514-1 at 65.)

As the federal prosecution of Petitioner proceeded, the Court appointed Petitioner counsel and scheduled a November 2016 jury trial,[2] which was later continued, at Petitioner's request, to

[1] Petitioner's codefendants ultimately entered guilty pleas.

[2] At the time, former District Judge John E. Jones, III was presiding over the case. The case was reassigned to the undersigned in late 2017 when Judge Jones recused himself. (Doc. No. 206.)

February 2017. (Doc. Nos. 25, 52, 60, 62.) In the interim, in late 2016, the Court granted Petitioner's counsel leave to withdraw from Petitioner's representation, terminated him as counsel, and appointed Petitioner new counsel, Jeffrey A. Conrad ("Attorney Conrad"). (Doc. Nos. 69-70.) The Court consolidated the two indictments under the above-captioned case number and continued jury selection and trial to May 9, 2017. (Doc. No. 91.)

The Government filed a five-count superseding information on May 8, 2017, charging Petitioner with another armed bank robbery that occurred in May 2015. (Doc. No. 110.) On the same day, Petitioner entered a plea of guilty on the superseding information. (Doc. No. 116). During the course of plea discussions, Petitioner signed a plea agreement, an addendum to the plea agreement, and a model proffer agreement. (Doc. No. 111, 252, Ex. 1-3.) The plea agreement reflected the agreement that Petitioner would receive a sentence of twenty-five years' imprisonment. (Doc. No. 111 at 9.) The plea agreement further provided:

> Remedies for Breach. The defendant and the United States agree that in the event the court concludes that the defendant has breached the Agreement:
>
> (a) Any evidence or statements made by the defendant during the cooperation phase will be admissible at any trials or sentencings.

(Id., Ex. 1 at 21.) The addendum to the plea agreement provided that "[t]he United States agrees that any statements made by [Petitioner] during the cooperation phase of this Agreement shall not be used against the [Petitioner] in any subsequent prosecutions unless and until there is a determination by the court that [Petitioner] has breached this Agreement." (Id., Ex. 2 at 2.)

The model proffer agreement, which contains a provision waiving the application of Rule 410 to the proffer statement,[3] provided that: "[e]xcept as set forth below, no statements or

[3] The waiver provision provided that "there will be no limitations on the right of the United States to make derivative use of the statements and other information provided by [Defendant]." (Doc. No. 252, Ex. 3 ¶ 3.) The waiver provision further provided that Petitioner "agrees that

information provided by [Petitioner] in the proffer will be used against him in the government's case-in-chief in any criminal case other than a prosecution for perjury, false statements, or obstruction of justice." (Id. ¶ 2.) The agreement also provided that, "[i]n the event [Petitioner] is a witness or party at any trial . . . and testifies and/or offers evidence contrary to the proffer or through counsel presents a position inconsistent with the proffer, the United States may use [Petitioner] statements and the information derived directly or indirectly from the proffer . . . including [in] its case-in-chief, and for impeachment, cross-examination, and rebuttal." (Id. ¶ 4.)

The Court deferred acceptance of Petitioner's plea pending its review of the presentence report. Petitioner thereafter engaged in a proffer session with the Government during which he admitted to criminal conduct for which he ultimately faced additional charges. (Doc. No. 514 at 7, 9.) He then moved, on June 16, 2017, to withdraw his guilty plea. (Doc. No. 118.) The Court denied his motion (Doc. No. 119), granted Attorney Conrad permission to withdraw as counsel, and appointed Petitioner new counsel, John A. Abom ("Attorney Abom"). (Doc. Nos. 120, 127-28.) Petitioner filed a second motion to withdraw his guilty plea, and the Court granted his motion and set his trial to commence on October 10, 2017. (Doc. Nos. 137, 142, 151.) In doing so, the Court noted that the relief Petitioner "sought was unnecessary inasmuch as the Court never formally accepted his plea." (Doc. No. 151 at 1 n.1.)

On September 7, 2017, Petitioner moved for leave to proceed pro se. (Doc. No. 155.) Following an extensive colloquy (Doc. No. 504), and upon Petitioner's execution of a waiver of

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Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 do not govern such derivative use." (Id. ¶ 3(b).) Under Rule 410, "a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea." See Fed. R. Evid. 410(a)(4).

prejudice resulting from the default." See Hodge, 554 F.3d at 379.[4] Petitioner does not argue that he is actually innocent of his crimes of conviction, but he does argue that Attorney Abom was ineffective for failing to raise these claims on direct appeal. (Doc. No. 530 at 23-24.) A claim of ineffective assistance of counsel can, in some circumstances, form a basis for excusing a defaulted claim. See Hodge, 554 F.3d at 379.

The question remains whether Petitioner has established that Attorney Abom provided constitutionally deficient representation by failing to raise the claims in Ground One in Petitioner's direct appeal. A collateral attack of a sentence based upon a claim of ineffective assistance of counsel must meet a two-part test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). See George v. Sively, 254 F.3d 438, 443 (3d Cir. 2001). The first Strickland prong requires Petitioner to "establish first that counsel's performance was deficient." See Jermyn v. Horn, 266 F.3d 257, 282 (3d Cir. 2001). This prong requires Petitioner to show that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. See id. Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. See id. (citing Strickland, 466 U.S. at 688). However, "[t]here is a 'strong presumption' that counsel's performance was reasonable." See id.

Under the second Strickland prong, Petitioner "must demonstrate that he was prejudiced by counsel's errors." See id. This prong requires Petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See id. (quoting Strickland, 466 U.S. at 694). Reasonable probability is defined

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[4] In Hodge, the Third Circuit concluded that the petitioner established cause to excuse a defaulted claim. See Hodge, 554 F.3d at 380. In that case, however, the petitioner had instructed his counsel to file a direct appeal, but his counsel failed to do so. See id.

as "a probability sufficient to undermine confidence in the outcome." See id. (quoting Strickland, 466 U.S. at 694). In the context of a petitioner who has entered a guilty plea, "the petitioner demonstrates prejudice by showing 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.'" See Arnold v. Superintendent SCI Frackville, 322 F. Supp. 3d 621, 632 (E.D. Pa. 2018) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985); Boyd v. Waymart, 579 F.3d 330, 350 (3d Cir. 2009)).

Applying the Strickland standard here, the Court concludes that Petitioner has failed to establish that Attorney Abom provided ineffective assistance of counsel by failing to raise the claims asserted in Ground One on direct appeal. Attorney Abom cannot be faulted for "failing to raise a meritless claim," see Ross v. Dist. Attorney of the Cnty. of Allegheny, 672 F.3d 198, 211 n. 9 (3d Cir. 2012), and there is no merit to Petitioner's claim that his rights were violated due to federal and state authorities' cooperative efforts in investigating and pursuing his crimes of conviction. Indeed, cooperation "between federal and state officials not only do[es] not offend the Constitution but [is] commonplace and welcome." See United States v. Leathers, 354 F.3d 955, 960 (8th Cir. 2004). Such cooperation "is to be desired and encouraged, for cooperative federalism in this field can indeed profit the Nation and the States in improving methods for carrying out the endless fight against crime." See Bartkus v. People of State of Ill., 359 U.S. 121, 168-69 (1959); see also, e.g., United States v. Mardis, 600 F.3d 693 (6th Cir. 2010) (noting that investigations jointly conducted by federal and state authorities are "an admirable use of resources that the courts have found not to be problematic"); United States v. Hernandez, 260 F.3d 621 (5th Cir. 2001) (noting that joint "federal/state cooperation is permissible").[5]

[5] In connection with this argument, Petitioner asserts that his federal prosecution was an unconstitutional sham and merely a ruse to gain some tactical advantage. However, in asserting this contention, Petitioner relies on inapplicable case law involving double jeopardy claims,

Furthermore, assuming that constitutional and procedural violations in a state court criminal proceeding can give rise to a § 2255 claim in this Court, Petitioner has not established constitutional violations arising from his state court prosecution. Petitioner claims that the federal government's request that state prosecutors delay his preliminary hearing in state court violated his due process rights and principles of federalism and separation of powers (Doc. No. 530 at 13-15, 19-21)—but as the Court previously noted in denying Petitioner's pretrial motions, nothing suggests that "continuance of [his] preliminary hearing amount[ed] to a constitutional violation or offend[ed] the concept of federalism" (Doc. No. 356 at 4-5); see Com. ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 175 (Pa. 1990) (noting "[t]here is no federal or state constitutional right to a preliminary hearing"); Vaughn v. Kiel, No. 21-cv-15194, 2022 WL 657642, at *6 (D.N.J. Mar. 2, 2022) (noting that a defendant "has no constitutional right to a preliminary hearing where he has been indicted by a grand jury"); cf. Commonwealth v. Dehner, No. 1282 WDA 2016, 2017 WL 710570, at *3 (Pa. Super. Ct. Feb. 22, 2017) (stating that a failure of the court to schedule a timely preliminary hearing "does not require automatic discharge of an accused"). Moreover, the federal government's cooperation with state authorities is not prohibited and does not offend principles of federalism or separation of powers, and violations of state procedural rules do not alone give rise to due process violations, as Plaintiff appears to suggest.

Petitioner also claims that the federal government, by asking state prosecutors to request a continuance of his preliminary hearing, violated his equal protection rights. However, he has

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which are not at issue here. (Doc. No. 530 at 14) (citing, e.g., United States v. Perry, 79 F. Supp. 3d 524, 526 (D.N.J. 2015) (finding no double jeopardy violation, stating, "dual federal and state prosecutions do not, standing alone, represent a violation of the Fifth Amendment's proscription against double jeopardy"). His reliance on those cases is therefore misplaced.

not alleged that he is a member of a protected class and has not demonstrated that he "received different treatment from that received by other individuals similarly situated." See Shuman ex rel. Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141, 151 (3d Cir. 2005). Petitioner asserts only that the federal and state "parallel" investigation exposed him to circumstances that other defendants do not face. (Doc. No. 530 at 16.) However, even assuming Petitioner belonged to a protected class, as the Court noted, supra, federal and state authorities' cooperative and joint conduct in the investigation and prosecution of criminal defendants is commonplace and even encouraged. Plaintiff has therefore failed to establish an equal protection violation.

Another theory posited in support of Petitioner's contention that his rights were violated is that federal involvement in his state court case caused unconstitutional delays, but the alleged delays amounted, at best, to a few months, and while Petitioner asserts violations of state court procedural rules (Doc. No. 530 at 13-17), he has not demonstrated how any purported violations of those rules infringed on his constitutional rights, much less in a way that would undermine his sentence and conviction in this case.

In sum, the claims asserted in Ground One are meritless, and Attorney Abom cannot be faulted for failing to raise them in Petitioner's direct appeal. As the Government notes, Attorney Abom did raise claims that were, although unsuccessful, of arguable merit—if he had raised the additional claims that Petitioner advances under Ground One of his motion, Attorney Abom may have weakened the strength of the arguments he did raise on direct appeal. Accordingly, given that the claims asserted in Ground One are defaulted—and given Petitioner's failure to establish ineffective assistance of counsel excusing the default—he has failed to establish an entitlement to relief under Ground One. Further, because Petitioner's claims in Ground One are meritless, he cannot establish prejudice for Attorney Abom's failure to raise them on direct appeal. The Court

will therefore deny Petitioner's § 2255 motion with respect to Ground One.

B. Ground Two: Ineffective Assistance of Counsel; Coercive Plea

In Ground Two of Petitioner's § 2255 motion, he asserts that Attorney Conrad provided ineffective assistance of counsel by coercing Petitioner to plead guilty to the charges in the initial superseding information with the aid of Petitioner's girlfriend, Ms. Mohn, who is alleged to have assisted Attorney Conrad to coerce a guilty plea from Petitioner despite his wish to proceed to trial. (Doc. No. 530 at 37-43.) Petitioner asserts that Attorney Conrad admitted that he contacted Ms. Mohn for the purpose of imploring her to convince Petitioner to plead guilty, told Ms. Mohn that Petitioner's case was a "train wreck" and that, if she loved Petitioner, she would do everything in her power to convince him to plead guilty, and represented to Ms. Mohn that Petitioner was lying if he said he had a good chance at an acquittal at trial. (Id. at 35-36.) Petitioner avers that Ms. Mohn's subsequent communications with him were "demoralizing and made him fear that if he didn't plead guilty Ms. Mohn would leave him." (Id. at 36.) Petitioner further contends that Ms. Mohn did not disclose her previous conversation with Attorney Conrad until after he pleaded guilty and provided the proffer, and that he would not have accepted the plea agreement "if it wasn't for Ms. Mohn's actions." (Id.). Petitioner similarly argues that, but for Attorney Conrad's conduct, he would not have pleaded guilty. (Id. at 43.)

Petitioner relatedly contends that Attorney Conrad's failure to disclose that he was "campaigning and seeking employment as a judge in Lancaster County" constituted a conflict of interest warranting vacatur of his conviction, that Attorney Conrad engaged in "overzealous plea negotiations" in violation of ethical rules that prohibit undue influence on a client's decision whether to enter a guilty plea, and that Attorney Conrad was ineffective for requiring Petitioner to provide a self-incriminating proffer against Petitioner's best interest. (Id. at 37-46.)

The Court has thoroughly considered the claims in Ground Two of Petitioner's motion and finds them unavailing. Even if Attorney Conrad provided ineffective assistance of counsel by vehemently and unwaveringly pursuing a plea deal on Petitioner's behalf, Petitioner has not satisfied the second Strickland prong—that is, he has not established a reasonable probability that, but for Attorney Conrad's conduct, he would not have entered a plea of guilty. See Arnold, 322 F. Supp. 3d at 632. As is the case with Ground One of Petitioner's motion, Petitioner previously raised the claims advanced in Ground Two in one of his pretrial motions. Petitioner argued that he was coerced into entering into the plea agreement and model proffer agreement by Attorney Conrad, who enlisted the assistance of Petitioner's girlfriend, Ms. Mohn, in order to coerce Petitioner to enter a guilty plea and sign the relevant agreements. (Doc. No. 257 at 7, 10.) The Court rejected Petitioner's claims, reasoning as follows:

> The Court concludes that the evidence of record demonstrates that [Petitioner]'s waiver was made voluntarily. . . . [T]he relevant documents establish that [Petitioner] signed and understood the substance of the plea agreement, addendum to the plea agreement, and model proffer agreement. Moreover, during the change-of-plea hearing . . ., the Court explicitly found that [Petitioner] was "fully alert, competent, and capable of entering an informed plea," and that the plea was "knowing and voluntary." Additionally, when asked by the Court whether he was satisfied with his counsel's representation of him, [Petitioner] answered in the affirmative.
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> In addition, the Court finds that the testimony presented at the [] evidentiary hearing [on Petitioner's pretrial motions] lends further support to the conclusion that [his] waiver was voluntary. While being questioned by [Petitioner] as to a phone call that took place between himself and Mohn prior to [Petitioner] entering the plea agreement, Conrad admitted to referring to [Petitioner]'s case as a "train wreck," in light of what he considered to be overwhelming inculpatory evidence against [Petitioner]. Conrad stated further that he believed [Petitioner] should agree to a plea, rather than pursue a trial, as a result of his own professional judgment and what he saw as [Petitioner]'s best interests. Conrad's conveyance of such a belief to Mohn—which resulted from his professional judgment as to the benefits of a plea deal compared to those of a trial—does not render [Petitioner]'s entrance into a plea agreement involuntary, as such commentary from counsel did not prevent [Petitioner] from making a decision that was "the product of a free and deliberate choice rather than intimidation, coercion or deception." See United States v. Velasquez, 885 F.2d 1076, 1088 (3d Cir. 1989) (quoting Moran v. Burbine, 475

representation, and to the extent it has been applied in other contexts,[6] it requires a showing that "(1) some plausible alternative defense strategy might have been pursued, and (2) the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." See Hester v. Pierce, No. 13-cv-00816, 2016 WL 5539585, at *5 (D. Del. Sept. 28, 2016) (citing United States v. Morelli, 169 F.3d 798, 810 (3d Cir. 1999)). "In a conflict of interest situation prejudice will be presumed only if the defendant proves that his counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." United States v. Costanzo, 740 F.2d 251, 259 (3d Cir. 1984) (internal quotation marks omitted).

Here, the fact that Attorney Conrad was campaigning for judicial office falls short from demonstrating that he persuaded Petitioner to enter into the plea agreement due to other loyalties or interests. Indeed, the record indicates the opposite, i.e., that Attorney Conrad used his professional judgment to reasonably conclude that Petitioner would fare better if he pleaded guilty rather than proceed to trial. Nothing in the record indicates that Attorney Conrad actively represented conflicting interests or that an actual conflict affected his representation.

Accordingly, because the evidence of record demonstrates that Petitioner entered into the plea agreement and pleaded guilty voluntarily, he has failed to demonstrate prejudice, i.e., that, but for Attorney Conrad's conduct, Petitioner would not have pleaded guilty and provided the related proffer and would have instead proceeded to trial. Accordingly, the Court will deny Petitioner's § 2255 motion as to Ground Two.

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[6] As one court has observed, "the Supreme Court [has] questioned the applicability of [the doctrine] to conflicts arising outside the context of multiple representation . . . ." See Hester v. Pierce, No. 13-cv-00816, 2016 WL 5539585, at *5 (D. Del. Sept. 28, 2016) (citing Mickens v. Taylor, 535 U.S. 162, 175 (2002) (noting "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice")).

C. Ground Three: The COVID-19 Pandemic on Petitioner's Inability to File a Petition for a Writ of Certiorari

Turning to Ground Three of Petitioner's § 2255 motion, Petitioner has not provided any support for his argument that he suffered constitutional violations due to his alleged inability to file a timely petition for writ of certiorari with the Supreme Court. Moreover, Petitioner had ample time to file a petition. Ordinarily, Petitioner would have had ninety days from the denial of his direct appeal (on July 29, 2020) to file a petition for a writ of certiorari (by October 27, 2020). See U.S. Sup. Ct. R. 13(1). However, in March 2020, the Supreme Court extended the ninety-day deadline by an additional sixty days in light of the COVID-19 pandemic.[7] Applying that extension here, Petitioner had until December 26, 2020—about five months—to file a petition with the Supreme Court. Additionally, if Petitioner submitted a petition that did not comply with the Supreme Court's rules, he would have been entitled to an additional sixty days to remedy the deficiencies. See U.S. Sup. Ct. R. 14. Given the proficiency with which Petitioner has presented his pro se motions and briefing throughout his criminal proceedings, the Court discerns no basis to conclude that his constitutional rights were violated due to a complete inability to file a petition for writ of habeas corpus. As such, the Court will deny Petitioner's § 2255 motion in its entirely, as none of the grounds raised in the motion entitles him to relief.

D. Evidentiary Hearing

Section 2255(b) advises that a petitioner may be entitled to a hearing on his motion. The decision to hold a hearing is wholly within the discretion of the district court. See Gov't of V.I. v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). If "the files and records of the case conclusively show

[7] See United States Supreme Court General Order dated March 19, 2020, available at www.supremecourt.gov/announcements/COVID-19.aspx.

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Appendix 2

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

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October 26, 2022

Scott R. Ford, Esq.
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Derek Pelker
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RE: USA v. Derek Pelker
Case Number: 22-2291
District Court Case Number: 1-16-cr-00240-001

ENTRY OF JUDGMENT

Today, **October 26, 2022** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App.

P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

s/Patricia S. Dodszuweit,
Clerk

By: Stephanie
Case Manager
267-299-4926

ALD-001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-2291**

UNITED STATES OF AMERICA

v.

DEREK PELKER, Appellant

(M.D. Pa. Crim. No. 1:16-cr-00240-001)

Present: HARDIMAN, RESTREPO, and BIBAS, Circuit Judges

Submitted is Appellant's Application for a Certificate of Appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to deny Derek Pelker's claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2). Specifically, Pelker's claims that his constitutional rights were violated by federal and state authorities' cooperation are procedurally defaulted because they could have been raised on direct appeal, but were not. See Massaro v. United States, 538 U.S. 500, 504 (2003). Pelker has not shown cause and prejudice or a fundamental miscarriage of justice sufficient to overcome the default. Cristin v. Brennan, 281 F.3d 404, 412 (3d Cir. 2002). Although ineffective assistance of counsel could constitute cause for the default, see United States v. Sanders, 165 F.3d 248, 250 (3d Cir. 1999), counsel was not ineffective here because the underlying claims have no merit, principally for the reasons stated by the District Court. See Werts v. Vaughn, 228 F.3d 178, 202 (3d Cir. 2000); United States v. Leathers, 354 F.3d 955, 960 (8th Cir. 2004). In addition, reasonable jurists would not debate the District Court's rejection of Pelker's claim that counsel performed

ineffectively by coercing him into entering a guilty plea and failing to disclose that he was campaigning to be a judge. Strickland v. Washington, 466 U.S. 668, 687 (1984); Fields v. Gibson, 277 F.3d 1203, 1213-14 (10th Cir. 2002); United States v. Morelli, 169 F.3d 798, 810 & n.15 (3d Cir. 1999).

By the Court,

s/ *Thomas M. Hardiman*
Circuit Judge

Dated: October 26, 2022
Sb/cc: Derek Pelker
Scott R. Ford, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-2291

UNITED STATES OF AMERICA

v.

DEREK PELKER,
Appellant

(D.C. Crim. No. 1-16-cr-00240-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and FREEMAN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas M. Hardiman
Circuit Judge

Dated: December 6, 2022
Sb/cc: Derek Pelker
Scott R. Ford, Esq.

Appendix 47

Appendix 3