APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

November 30, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIAM J. SEARS,

Defendant - Appellant.

No. 22-1243
(D.C. Nos. 1:21-CV-00141-WJM &
1:16-CR-00301-WJM-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON, KELLY**, and **ROSSMAN**, Circuit Judges.

William J. Sears pled guilty to securities fraud conspiracy and failing to file a tax return. He was sentenced to 96 months in prison. Appearing pro se, he seeks a certificate of appealability ("COA") to challenge the district court's denial of his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. See 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal an order denying a petition for relief under § 2255). Mr. Sears also seeks leave to proceed in forma pauperis ("ifp").

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny both requests and dismiss this matter.[1]

I. BACKGROUND

A. Investigation

In 2014, the Federal Bureau of Investigation ("FBI") obtained a search warrant for a company owned in part by Mr. Sears. The FBI supported its warrant request with an affidavit from Special Agent Kate Funk. She said in the affidavit that before working for the FBI, she "received an Accounting degree from the University of Kansas" and "became a Certified Public Accountant in 1996 through the state of Kansas." ROA, Vol. I at 266 ¶ 1. The affidavit described apparent irregularities in the company's revenue stream suggesting financial malfeasance by Mr. Sears.

Before the FBI investigation, attorney Frederick Lehrer advised Mr. Sears about activities underlying this case. During the investigation, the FBI interviewed Mr. Lehrer, who provided incriminating evidence. The Government never disclosed to Mr. Sears that Mr. Lehrer and Kenneth Harmon, the Assistant United States Attorney ("AUSA") who prosecuted Mr. Sears, had served together on a securities fraud task force in Florida in the 1990s before AUSA Harmon became a federal prosecutor.

[1] Because Mr. Sears is pro se, we "construe his arguments liberally" but do not "serve as his advocate." United States v. Pinson, 584 F.3d 972, 975 (10th Cir. 2009).

B. Guilty Plea, Motion to Withdraw, and Sentencing

In September 2016, the Government filed an Information, charging Mr. Sears with (1) conspiring to commit securities fraud and (2) filing a false tax return.

In November 2016, Mr. Sears pled guilty to both charges under a plea agreement. In the plea agreement, Mr. Sears "knowingly and voluntarily waive[d]" the right to appeal his sentence unless it exceeded the statutory maximum. ROA, Vol. I at 68. The district court held a change of plea hearing during which Mr. Sears confirmed he had reviewed the plea agreement with his attorney, was aware of the waiver, and entered the agreement voluntarily.

In April 2019, Mr. Sears moved to withdraw his guilty plea, alleging the Government withheld exculpatory evidence that (1) Special Agent Funk "lied about her credentials" as a CPA to obtain the search warrant and (2) there was a connection between Mr. Lehrer and AUSA Harmon. ROA, Vol. I at 142-44. The district court rejected these arguments and denied Mr. Sears's motion.

In January 2020, the district court sentenced Mr. Sears to 96 months in prison. He timely appealed, asserting the Government engaged in misconduct and his attorney rendered ineffective assistance. The Government moved to enforce the appeal waiver in Mr. Sears's plea agreement. We granted that motion and dismissed the appeal. See United States v. Sears, 822 F. App'x 818 (10th Cir. 2020) (unpublished).

C. Section 2255 Proceedings

Mr. Sears then filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He asserted that his plea agreement was involuntary because he was unaware—due to Government misconduct or ineffective assistance from his attorney—of Special Agent Funk's alleged misrepresentations about her CPA status and the connection between AUSA Harmon and Mr. Lehrer. Mr. Sears argued this violated his rights to due process and effective assistance of counsel. He also asserted other claims not at issue here.

The district court denied the § 2255 motion. It found that "Agent Funk is a CPA, and Sears is only questioning the contexts in, and purposes for which, she may represent herself as such, under Kansas Law." ROA, Vol. I at 577 (quotations omitted). Also, because any evidence that Special Agent Funk misstated her status as a CPA "is, at best, impeachment evidence," the court held that the Government was not required to disclose it before Mr. Sears pled guilty. Id. (quotations omitted).

As to Mr. Lehrer, the district court observed that Mr. Sears "does not explain how any information . . . about any such relationship [between him and AUSA Harmon] would lead to anything more than, at best, impeachment evidence," which "[t]he Government had no duty to disclose." Id. at 578-79.

The district court declined to issue a COA. Mr. Sears requests this court to issue a COA, and he asks to proceed ifp.

II. DISCUSSION

Mr. Sears seeks a COA on whether his plea was involuntary because (1) the Government withheld exculpatory evidence in violation of the Fifth Amendment Due Process Clause under Brady v. Maryland, 373 U.S. 83 (1963); and (2) his counsel was ineffective in failing to discover the exculpatory evidence in violation of the Sixth Amendment under Strickland v. Washington, 466 U.S. 668 (1984).

In support of both claims, Mr. Sears asserts that (1) Special Agent Funk "lied about her qualifications as a [CPA] in the affidavit supporting the Government's search warrants," Aplt. Br. at 8, and (2) Mr. Lehrer lied to the FBI due to his prior relationship with AUSA Harmon, id. at 18-19.[2]

Mr. Sears also argues he should have received an evidentiary hearing in district court.

A. Legal Background

1. COA Requirement

To obtain a COA, Mr. Sears must make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by demonstrating "that reasonable

[2] Mr. Sears further suggests the FBI's search warrant violated his Fourth Amendment rights, or that his attorney performed deficiently by failing to move to suppress the evidence the warrant produced. See, e.g., Aplt. Br. at 20-21. But because Mr. Sears pled guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may attack only the voluntary and intelligent character of the guilty plea . . . ." Tollett v. Henderson, 411 U.S. 258, 267 (1973). Thus, Mr. Sears's arguments turn on whether his plea was voluntary.

jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotations omitted). When assessing the district court's denial of a § 2255 motion, "we review the district court's findings of fact for clear error and its conclusions of law de novo." United States v. Rushin, 642 F.3d 1299, 1302 (10th Cir. 2011).

2. **Knowing and Voluntary Plea**

Mr. Sears argues that his plea was not knowing and voluntary. "The Due Process Clause of the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty." United States v. McIntosh, 29 F.4th 648, 655 (10th Cir. 2022) (quotations omitted). For a plea to be voluntary, the "defendant's decision to plead guilty must be deliberate and intelligent and chosen from available alternatives." Id. (quotations omitted).

A defendant may establish that his guilty plea was involuntary if he should have been but was not informed of information relevant to his case. If the Government failed to disclose material exculpatory evidence or if the defendant's attorney failed to discover that information through a reasonable investigation, the defendant may not have "chosen from available alternatives" when he entered a guilty plea. Id.

B. Analysis

1. Involuntary Plea Based on Brady Violation

a. Additional legal background

Brady v. Maryland requires the Government to disclose exculpatory evidence to criminal defendants. 373 U.S. 83, 87 (1963). "[U]nder certain limited circumstances, the prosecution's violation of Brady can render a defendant's plea involuntary." United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994).

To prove that a Brady violation rendered a plea involuntary, a defendant must demonstrate the exculpatory evidence is "material"—that there is "a reasonable probability that but for the failure to produce such information the defendant 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) (quotations omitted). "Assessment of [materiality] involves an objective inquiry that asks not what a particular defendant would do but rather what is the likely persuasiveness of the withheld information." Id. at 1215 (quotations omitted). In other words, the withheld evidence must be significant enough, in the context of the case as a whole, to "have affected the outcome of the trial." United States v. Combs, 267 F.3d 1167, 1175 (10th Cir. 2001) (quotations omitted). Brady does not "require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." United States v. Ruiz, 536 U.S. 622, 633 (2002) (emphasis added).

b. Application

Mr. Sears argues the Government violated Brady in two ways, rendering his plea involuntary. We address each in turn.

i. Special Agent Funk

Mr. Sears contends the Government failed to disclose evidence that Special Agent Funk "lied to obtain the search warrant." Aplt. Br. at 8. Special Agent Funk represented on the search warrant application affidavit that she graduated from college with an accounting degree and "became" a CPA in Kansas. ROA, Vol. I at 266 ¶ 1. Mr. Sears asserts Special Agent Funk was not a qualified CPA in Kansas because "in order to practice as a CPA (perform or offer to perform services as a CPA), a person must . . . provide proof to the Kansas Board of Accountancy of the requisite experience requirement, complete a form, pay a fee, and then be subject to continuing education requirements." Aplt. Br. at 10 (citing Kan. Stat. Ann. § 1-316). He contends Special Agent Funk had not met these requirements, id. at 8, and that the Government should have disclosed this "exculpatory" evidence, id. at 5. We disagree.

Special Agent Funk did not misrepresent her credentials in the affidavit. The affidavit said she graduated with an accounting degree and "became" a CPA—not that she was currently licensed and practicing as a CPA. Kansas law might limit Special Agent Funk's ability to "perform or offer to perform services as a CPA" to the general public, as Mr. Sears suggests, Aplt. Br. at 10, but she did not claim to be performing CPA services when she wrote the affidavit. Rather, she used her

specialized training to assess Mr. Sears's company's finances for investigative purposes. See ROA, Vol. I at 266 ¶ 2 ("At all times during the investigation described in this affidavit, I have been acting in my official capacity as a Special Agent with the FBI.").

Additionally, Special Agent Funk's alleged misrepresentation was, at most, impeachment evidence. But Brady does not require the Government to disclose impeachment evidence—even if it is material—before entering a plea agreement with a criminal defendant. Ruiz, 536 U.S. at 633.

Finally, even if Mr. Sears should have received information about Special Agent Funk's CPA status from the Government, this evidence would have lacked probative value. Under Brady, Mr. Sears must demonstrate the "likely persuasiveness of the withheld information" is such that he "would not have entered the plea but instead would have insisted on going to trial." Walters, 269 F.3d at 1214-15 (quotations omitted); see also United States v. Reed, 39 F.4th 1285, 1293 (10th Cir. 2022). At most, the information about Special Agent Funk would have enabled Mr. Sears to cross-examine her about her CPA qualifications. Mr. Sears has not demonstrated a reasonable probability that possessing this information would have changed his decision to plead guilty.

ii. Mr. Lehrer

Mr. Sears also contends his plea was involuntary because the Government wrongfully withheld information about Mr. Lehrer's "personal relationship with the prosecutor." Aplt. Br. at 19. As discussed, Mr. Lehrer—an attorney who at one

point advised Mr. Sears and later gave incriminating evidence to the FBI—once served on a task force with AUSA Harmon. Mr. Sears asserts that Mr. Lehrer "lied under oath during his discussions with the FBI and prosecutors. His lies are verifiably false, and had I known about them prior to pleading guilty, I would not have done so . . . ." Aplt. Br. at 18-19. We again disagree.

Mr. Sears has not shown that Mr. Lehrer's relationship with AUSA Harmon affected his statements to the FBI. Also, the Lehrer-Harmon connection was impeachment evidence, which the Government was not required to disclose before entering a plea agreement with Mr. Sears. Ruiz, 536 U.S. at 633. Thus, Mr. Lehrer has not asserted a viable Brady claim.

Even if he had, Mr. Sears has not shown that impeachment of Mr. Lehrer would have significantly affected his likelihood of success. Absent a reason to believe that Mr. Sears "would not have entered the plea but instead would have insisted on going to trial" if he possessed information about Mr. Lehrer's connection with AUSA Harmon, Walters, 269 F.3d at 1214, lacking that information did not prejudice him.

* * * *

For the foregoing reasons, we conclude that reasonable jurists would not debate the district court's denial of habeas relief based on Mr. Sears's claim that a Brady violation rendered his guilty plea involuntary. We therefore deny a COA on this issue.

2. Involuntary Plea Based on Ineffective Assistance

a. Additional legal background

Receiving ineffective assistance of counsel may render a defendant's guilty plea involuntary. Reed, 39 F.4th at 1293. "We review a challenge to a guilty plea based on a claim of ineffective assistance of counsel using the two-part test announced in Strickland v. Washington," id. (citation and quotations omitted), which requires the defendant to show that (1) his attorney performed deficiently and (2) he suffered prejudice as a result. Id.

"To show prejudice in the guilty plea context, the defendant must establish that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial." Id. (quotations omitted). "This prejudice inquiry . . . of an alleged 'failure to investigate or discover exculpatory evidence' . . . depends largely on whether the evidence or defense 'likely would have changed the outcome of a trial.'" United States v. Graham, 179 F. App'x 528, 533 (10th Cir. 2006) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

b. Application

Mr. Sears asserts his plea was involuntary because his attorney failed to uncover evidence about Special Agent Funk's alleged misrepresentations about her CPA qualifications and Mr. Lehrer's alleged connection with AUSA Harmon, thereby rendering ineffective assistance. Aplt. Br. at 17-19. These arguments are unavailing for much the same reasons as Mr. Sears's arguments about his Brady claims.

Mr. Sears has failed to show prejudice. As discussed above, Mr. Sears's assertions about Special Agent Funk's alleged misrepresentations lack merit, and he does not explain how the Lehrer-Harmon connection affected the evidence against him. And even if there were merit to these arguments, the information would have been at most relatively weak impeachment evidence. Mr. Sears has not shown how this evidence "would have changed the outcome of a trial." Hill, 474 U.S. at 59. He thus has not established "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial." Reed, 39 F.4th at 1293 (quotations omitted).

* * * * *

The foregoing shows that reasonable jurists would not debate the district court's denial of Mr. Frederick's claim of an involuntary plea based on ineffective assistance of counsel. We therefore deny a COA on this issue.

3. **Evidentiary Hearing**

Mr. Sears contends the district court abused its discretion in declining to hold an evidentiary hearing on his § 2255 motion. Aplt. Br. at 4-7. We disagree.

Section 2255(b) provides that a district court must hold an evidentiary hearing on a petitioner's motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." "We review the district court's refusal to hold an evidentiary hearing for an abuse of discretion." United States v. Moya, 676 F.3d 1211, 1214 (10th Cir. 2012) (quotations omitted). Because the district court's ruling denying an evidentiary hearing would be reviewed for

abuse of discretion during a merits appeal, the Supreme Court has accepted a formulation of "the COA question" as "whether a reasonable jurist could conclude that the District Court abused its discretion." Buck v. Davis, 137 S. Ct. 759, 777 (2017) (quoting Slack, 529 U.S. at 484).

The district court is "not required to hold [an] evidentiary hearing[] [for a § 2255 motion] without a firm idea of what the testimony will encompass and how it will support a movant's claim." Moya, 676 F.3d at 1214 (quotations omitted). Moreover, if the district court, in denying a § 2255 motion, "relate[s] what sources in the record it relied on and why it denied" the arguments in the motion, it did not abuse its discretion for failing to hold a hearing. United States v. Johnson, 42 F.3d 1407 (Unpublished Table Decision), 1994 WL 683930, at *2 (10th Cir. 1994) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).

Where, as here, a petitioner's habeas claims are capable of being resolved on the existing record, there is no entitlement to an evidentiary hearing. Torres v. Mullin, 317 F.3d 1145, 1161 (10th Cir. 2003). Mr. Sears does not explain what additional evidence he could have presented at a hearing to support his claims. Aplt. Br. at 4-7. He has failed to present a "firm idea of what the testimony [at a hearing] w[ould] encompass and how it w[ould] support [his] claim." Moya, 676 F.3d at 1214. And the district court supported its holdings by identifying the "sources in the record it relied on." Johnson, 1994 WL 683930, at *2. The district court thus did not abuse its discretion in declining to grant an evidentiary hearing. We conclude

reasonable jurists could not debate that an evidentiary hearing was unnecessary. We decline to grant a COA on this issue.

III. CONCLUSION

Mr. Sears has not demonstrated that "reasonable jurists could debate" the district court's denial of his § 2255 motion. Slack, 529 U.S. at 484. Also, he has not presented "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." DeBardeleben v. Quinlan, 937 F.2d 502, 505 (10th Cir. 1991). We thus deny his request for a COA, deny his request to proceed ifp, and dismiss this matter.[3]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[3] Judge Rossman would grant Mr. Sears's ifp request.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Criminal Case No. 16-cr-301-WJM
(Civil Action No. 21-cv-00141-WJM)

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM J. SEARS,

Defendant.

ORDER DENYING DEFENDANT'S PETITION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

This matter is before the Court on Defendant William J. Sears' Petition to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("Petition"). (ECF No. 246.) For the following reasons, the Petition is denied.

I. LEGAL STANDARD

Section 2255 of Title 28 of the United States Code applies to requests seeking to vacate, set aside, or correct a federal sentence. A § 2255 petition "attacks the legality of detention . . . and must be filed in the district that imposed the sentence." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). "The purpose of section 2255 is to provide a method of determining the validity of a judgment by the court which imposed the sentence." *Id.*

Sears is proceeding *pro se* and is entitled to liberal construction of his pleadings. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110

(10th Cir. 1991). In other words, if the Court can "reasonably read the pleadings to state a valid claim on which [Sears] could prevail, it should do so despite [Sears'] failure to cite proper legal authority, [his] confusion of various legal theories, [his] poor syntax and sentence construction, or [his] unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, the requirement that the Court read Sears' pleadings broadly does not relieve him of the burden of alleging sufficient facts on which a recognized legal claim could be based. *Id.*

II. BACKGROUND

A. Charges

On September 15, 2016, Sears and his co-defendant in his underlying criminal case, Scott Dittman, were both charged by information with conspiracy to defraud the United States, and Sears alone was charged with filing a false income tax return. (ECF No. 1.) That same day, both defendants waived the indictment (ECF Nos. 16, 17) and then filed notices of disposition the following day (ECF Nos. 3, 5).

The essence of the Government's conspiracy charge was that Sears and Dittman had worked together to build a business called FusionPharm, but took numerous steps to, among other things, conceal Sears's relationship to the company (given Sears's prior conviction for federal securities fraud), and create free-trading (or unrestricted) FusionPharm shares without truthfully satisfying federal regulatory requirements for such shares. According to the Government, this was a willful evasion of federal securities laws and therefore a conspiracy to defraud the United States.

B. Change of Plea Hearing and Final Judgment

After reaching a plea agreement with the Government, Sears pleaded guilty in November 2016 to one count of conspiracy to defraud the United States and one count

III. ANALYSIS

Sears argues that he is entitled to habeas relief under 28 U.S.C. § 2255 based on four grounds:

Ground 1: Withholding of exculpatory evidence.

Ground 2: Fraud on the Court.

Ground 3: Violations of 4th, 5th, and 6th Amendment.

Ground 4: Ineffective assistance of counsel.

(ECF No. 246 at 4–9.) In support of each ground for relief, Sears directs the Court to a 175-page exhibit filed along with the Petition. (*Id.*) The exhibit contains Sears' legal arguments and his exhibits, intermingled with one another and in seemingly random order. (ECF No. 246-1.) The Court has taken care to sift through the Petition in an attempt to identify allegations and arguments that support Sears' Petition. Sears supports his Petition by alleging that: (1) the search warrants in this case were defective because FBI Special Agent Kate Funk lied about her qualifications as an accountant in the affidavit supporting the Government's search warrants (*id.* at 3, 23–25, 32, 90, 170, 175); (2) certain inculpatory information provided to the Government by Fred Lehrer was fabricated, and Lehrer had a conflict of interest because he had a relationship with AUSA Kenneth Harmon (*id.* at 42–44, 108–110); and (3) Sears' guilty plea was involuntary because he pleaded in part to prevent the Government from prosecuting his mother and wife (ECF No. 271 at 14).

After a thorough review of the Petition, the Court finds that it does not contain specific arguments and allegations related to ineffective assistance of counsel. Sears makes a conclusory claim of ineffective counsel in two places (ECF No. 246 at 9; ECF No. 246-1 at 169), but he does not identify any specific instance of ineffective

assistance of counsel. Thus, the Court denies the Petition insofar as it is based on Ground 4. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("presentation of conclusory allegations unsupported by specifics is subject to summary dismissal").[2]

Moreover, the Government argues that all of Sears' claims are foreclosed by his plea of guilty. (ECF No. 255 at 12–13.) The Tenth Circuit has held that a voluntary and unconditional guilty plea waives all non-jurisdictional defenses except "due process claims for vindictive prosecution and double jeopardy claims that are evident from the face of the indictment." *United States v. De Vaughn*, 694 F.3d 1141, 1145–46 (10th Cir. 2012).

Sears' plea was unconditional, his defenses are non-jurisdictional, he does not argue that his prosecution was vindictive, and he does not raise a double jeopardy defense. Therefore, in determining whether Sears has waived his defenses regarding the alleged constitutional infirmities of his prosecution, the only question the Court needs to resolve is whether his plea was voluntary. *Tollett v. Henderson*, 411 U.S. 258, 266 (1973).

The Supreme Court has clearly instructed that "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." *Tollett*, 411 U.S. at 266. Thus, "claims of prior constitutional deprivation . . . are not themselves independent grounds for federal collateral relief." *Id.* at 267. Nevertheless, in limited circumstances, a defendant who

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[2] Sears makes more specific arguments regarding ineffective assistance of counsel in his Reply. (ECF No. 271.) However, because the Government does not have a further opportunity to respond to Sears' Reply, *see* D.C.COLO.LCivR 7.1C, the Court finds that Sears has waived these arguments. *See United States v. Harrell*, 642 F.3d 907, 918 (10th Cir. 2011) (arguments raised for the first time in a reply brief generally are deemed waived).

has pleaded guilty may challenge the voluntariness of the plea based on the Government's failure to produce *exculpatory* material. *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994).

At his sentencing hearing, Sears testified that his guilty plea was voluntary and that he had not been coerced or threatened to force him to plea. (ECF No. 84 at 13, 23.) A petitioner who "has made an affirmation of voluntariness and has pled guilty . . . carries a heavy burden" in subsequently claiming that his plea was involuntary. *United States v. Whalen*, 976 F.2d 1346, 1348 (10th Cir. 1992).

Sears alleges that there were numerous constitutional infirmities with his prosecution, and he argues that his guilty plea was involuntary because, had he known of these alleged constitutional defects, he would not have pleaded guilty. (ECF No. 246-1 at 170.) The Court considers each argument in turn, below.

A. Kate Funk's Qualifications as a CPA

Sears alleges that Agent Funk lied about her credentials in an affidavit supporting a search warrant that led to evidence used against him. (ECF No. 246-1 at 3, 23–25, 27, 32, 90, 170, 175.) Specifically, he alleges that Agent Funk improperly represented herself as a certified public accountant ("CPA") in her affidavit attached to a search warrant in this case because she was not a fully licensed-to-practice CPA. (*Id.* at 25.) He argues that since the search warrant was based entirely on Agent Funk's defective affidavit, the warrant lacked probable cause, and the fruits of the search would have been suppressed at trial. (*Id.* at 58.) Further, as relevant here, he argues that his guilty plea was involuntary because had he known of these alleged deficiencies in the warrant, he would not have pleaded guilty. (*Id.* at 170.)

In its May 22, 2019 Order denying Sears' Motion to Withdraw Plea, the Court

considered and rejected precisely this argument. (ECF No. 150 at 9–11.) The Court noted that Agent Funk *is* a CPA, and Sears is only questioning "the contexts in, and purposes for which, she may represent herself as such, under Kansas law." (*Id.* at 10.) Thus, the Court went on to reason that:

> [T]here is no *Brady* violation under the circumstances of this case because the allegedly withheld information is not *exculpatory*. How and when Agent Funk may call herself a CPA under Kansas law has nothing to do with whether Sears committed the crimes with which he was accused. The evidence is, at best, impeachment evidence, and "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

(ECF No. 150 at 11 (emphasis in original).) Finally, the Court concluded that Sears's lack of knowledge about Agent Funk's precise status as a CPA 'certificate' holder, and not a fully licensed-to-practice CPA, did not render his guilty plea involuntary. (*Id.* at 11–12.)

Turning to the instant Petition, the Court notes that Sears does not dispute that Agent Funk is a certified CPA. (*See* ECF No. 246-1 at 27.) Sears simply restates his argument that Agent Funk is not permitted to represent herself as a CPA as she did in the affidavit, and Sears does not engage with the Court's reasoning in its May 22, 2019 Order. Reviewing the issue anew, the Court comes to the same conclusion as it did previously: "[a]s a matter of law . . . Sears' lack of knowledge about Agent Funk's status as a CPA 'certificate' holder only, and not as a fully licensed-to-practice CPA, did not render his guilty plea involuntary." (*Id.* at 11–12.) The Court comes to this conclusion because the allegedly withheld information regarding Agent Funk is not *exculpatory*, Most notably, Sears has not identified any alleged accounting errors committed by

Agent Funk. *Wright*, 43 F.3d at 496. The Court finds this argument wholly without merit and denies this portion of the Petition

B. Fred Lehrer's Alleged Conflict of Interest

Next, Sears alleges that the inculpatory information provided to the Government by Lehrer was all false. (ECF No. 246-1 at 41–42.) Moreover, he argues that Lehrer had a conflict of interest because he had a personal relationship with AUSA Kenneth Harmon. (*Id.*) Finally, he argues that his guilty plea was involuntary because he did not know about any of the above information until after he pleaded guilty. (*Id.*)

The Court also considered and rejected this argument in its May 22, 2019 Order denying Sears' Motion to Withdraw Plea. (ECF No. 150 at 12–14.) The Court carefully considered Sears' allegations and found that:

> Sears nowhere explains how this relationship is exculpatory. As best the Court can tell . . . it would have been *impeachment* evidence had Mr. Lehrer testified in a trial and, for example, disavowed Sears's (apparent) claim that he received good-faith advice from Mr. Lehrer about the legality of the FusionPharm stock transactions. Knowledge that Mr. Lehrer and Mr. Harmon are friends, and that Mr. Lehrer was not being prosecuted, might give the jury reason to suspect that Mr. Harmon was allowing Mr. Lehrer to say whatever he needed to say to protect himself, as a courtesy to a friend. But again, the Government need not disclose potential impeachment evidence before the defendant decides to plead guilty. *Ruiz*, 536 U.S. at 633. Therefore, Sears's plea was not involuntary on this account, and so this factor does not favor allowing him to withdraw his plea.

(*Id.* at 13–14 (footnotes omitted).)

In the instant Petition, Sears repeats his allegations about Lehrer and AUSA Harmon, but he does not explain how any information regarding the allegations information about any such relationship would lead to anything more than, at best, impeachment evidence. Thus, the Court comes to the same conclusion as it did

previously. The Government had no duty to disclose impeachment evidence before Sears decided to plead guilty, therefore Sears' guilty plea was not involuntary on this account. *Ruiz*, 536 U.S. at 633

C. Potential Prosecution of Sears' Family Members

Sears also argues that his plea was not voluntary because it was based in part on his desire to prevent his mother, wife, and "entire extended family" from being prosecuted and financially ruined. (ECF No. 271 at 14.) The Supreme Court has warned that plea bargains involving "adverse or lenient treatment for some person *other* than the accused . . . might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978) (citation omitted). Because of this danger, the Government must abide by "a high standard of good faith" in its use of such tactics. *Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir. 1986). To act in good faith, prosecutors must have probable cause to indict the third person at the time they offer lenity or communicate the threat. *Wright*, 43 F.3d at 499.

The Court is not persuaded by Sears' argument for three reasons. First, the allegations are vague and conclusory, and Sears does not allege any specific facts regarding the supposed threat or threats. (ECF No. 271 at 14.) Second, Sears swore under oath at his change of plea hearing that neither he nor any member of his family had been coerced or threatened in order to force him to plead guilty. (ECF No. 84 at 23.)

Third, even assuming that the Government did offer to refrain from prosecuting Sears' mother and wife in exchange for his plea, Sears wholly fails to even allege—let alone provide any evidence—that the Government lacked probable cause to indict

them. Therefore, the Court is not persuaded that Sears has adequately alleged that the Government was acting in bad faith. *Wright*, 43 F.3d at 499; *see United States v. Marquez,* 909 F.2d 738, 742 (2d Cir. 1990) ("Where the plea is entered after the prosecutor threatens prosecution of a third party, courts have afforded the defendant an opportunity to show that probable cause for the prosecution was lacking when the threat was made.").

Thus, the Court finds that Sears' guilty plea was not involuntary on this account.

D. Totality of the Circumstances

In considering whether Sears' plea was knowing and voluntary under the totality of the circumstances, the Court has considered the Tenth Circuit's reasoning in denying habeas relief in a similar case, *United States v. Crowell*, 15 F. App'x 709, 713 (10th Cir. 2001). In that case, Crowell argued that his guilty plea was not knowing and voluntary because the Government withheld exculpatory documents prior to his plea. *Crowell*, 15 F. App'x at 713. Among other things, he alleged that the Government withheld: (1) a laboratory result finding no blood, skin, or hair on a piece of rope found at the scene of the crime; and (2) a medical report of the victim showing that the victim had no cuts or bruises. *Id.* Crowell argued that this information was exculpatory because it bolstered his chances of an acquittal on the charge for kidnapping in violation of 18 U.S.C. § 1201(a)(1), and he argued that had he known of this exculpatory evidence, he would not have pleaded guilty. *Id.* at 710.

The Tenth Circuit found that even though the reports were "somewhat exculpatory", they would "not necessarily impeach the victim's statement that [the petitioner] tied her up and raped her." (*Id.*) Therefore, the court held that the allegedly withheld material did not compromise the voluntary and knowing nature of Crowell's

plea. (*Id.*)[3]

Here, Sears' claims are far weaker than Crowell's claims because Sears has not shown that a single piece of exculpatory evidence was ever withheld from him. As discussed above, the information allegedly withheld from Sears was, *at best*, impeachment evidence, which the Government has no duty to disclose before the defendant decides to plead guilty. *Ruiz*, 536 U.S. at 633.

Based on the foregoing reasons, the Court finds that the Government's alleged conduct and the "allegedly withheld material did not compromise the voluntary and knowing nature of [Sears'] plea." *Crowell*, 15 F. App'x at 713. Consequently, all of Sears' claims are waived because they all relate to "the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett*, 411 U.S. at 267. Therefore, the Petition is denied. *De Vaughn*, 694 F.3d at 1145–46.

IV. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

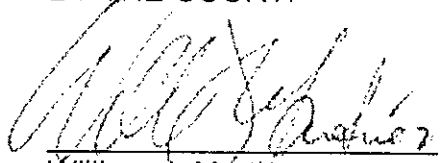
1. Defendant William J. Sears' Petition to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 246) is DENIED;
2. Case No. 21-cv-00141-WJM is DISMISSED WITH PREJUDICE; and
3. The Court has *sua sponte* considered whether a certificate of appealability is appropriate, and hereby ORDERS that no certificate of appealability will issue because Sears has not made a substantial showing that jurists of reason would

[3] The Tenth Circuit came to this conclusion even though it was reviewing the matter on a standard that was very deferential to Crowell; all he needed to show was that "the issues he raise[d] are debatable among jurists, that a court could resolve the issues differently, or that the questions presented deserve further proceedings." *Crowell*, 15 F. App'x at 711.

find it debatable whether his Petition states a valid claim of the denial of a constitutional right.

Dated this 15th day of July, 2022.

BY THE COURT:



William J. Martínez
United States District Judge

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit

January 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIAM J. SEARS,

Defendant - Appellant.

No. 22-1243
(D.C. Nos. 1:21-CV-00141-WJM &
1:16-CR-00301-WJM-1)
(D. Colo.)

ORDER

Before **MATHESON**, **KELLY**, and **ROSSMAN**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk