

Appendices

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1850

United States of America

Plaintiff - Appellee

v.

Gary Graham

Defendant - Appellant

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:22-cr-03073-JMG-1)

JUDGMENT

Before GRUENDER, SHEPHERD, and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed in accordance with the opinion of this Court.

August 23, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

United States Court of Appeals
For the Eighth Circuit

No. 24-1850

United States of America

Plaintiff - Appellee

v.

Gary Graham

Defendant - Appellant

Appeal from United States District Court
for the District of Nebraska - Lincoln

Submitted: August 15, 2024

Filed: August 23, 2024
[Unpublished]

Before GRUENDER, SHEPHERD, and ERICKSON, Circuit Judges.

PER CURIAM.

Gary Graham appeals after he pleaded guilty to a drug offense pursuant to a plea agreement containing an appeal waiver, and the district court¹ sentenced him to

¹The Honorable John M. Gerrard, United States District Judge for the District of Nebraska.

132 months in prison. His counsel has moved for leave to withdraw, and has filed a brief under Anders v. California, 386 U.S. 738 (1967), challenging the sentence and the district court's denial of pretrial motions. Graham has filed a pro se brief claiming that counsel was ineffective in presenting his pretrial suppression motions.

Upon careful review, we conclude that the appeal waiver is valid, enforceable, and applicable to the issues raised by counsel in this appeal. See United States v. Scott, 627 F.3d 702, 704 (8th Cir. 2010) (validity and applicability of an appeal waiver is reviewed *de novo*); United States v. Andis, 333 F.3d 886, 889-92 (8th Cir. 2003) (en banc) (appeal waiver will be enforced if the appeal falls within the scope of the waiver, the defendant knowingly and voluntarily entered into the plea agreement and the waiver, and enforcing the waiver would not result in a miscarriage of justice). We decline to address Graham's ineffective-assistance-of-counsel claim in this direct appeal. See United States v. Hernandez, 281 F.3d 746, 749 (8th Cir. 2002).

We have also independently reviewed the record under Penson v. Ohio, 488 U.S. 75 (1988), and have found no non-frivolous issues for appeal falling outside the scope of the waiver. Accordingly, we dismiss this appeal based on the appeal waiver, and grant counsel's motion to withdraw. Appellant's pro se motion for leave to file a second supplemental brief and for bond review is denied as moot.

UNITED STATES DISTRICT COURT

for the
District of Nebraska

UNITED STATES OF AMERICA

v.

GARY GRAHAM

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22CR3073-001
USM Number: 15716-047

Stuart J. Dornan and Theodore C. Turnblacer, Jr.
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count I of the Indictment.
 pleaded nolo contendere to count(s) which was accepted by the court.
 was found guilty on count(s) after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section& Nature of Offense

21:846 and 841(b)(1)(A) CONSPIRACY TO DISTRIBUTE AND
POSSESSION WITH INTENT TO DISTRIBUTE
METHAMPHETAMINE

Offense Ended
June 13, 2022

Count
I

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 The enhancement regarding Count I and Count II are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

April 18, 2024

Date of Imposition of Sentence:

s/ John M. Gerrard
Senior United States District Judge

April 18, 2024

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **one hundred thirty-two (132) months**.

The Court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be allowed to participate in the Residential Drug Treatment Program or any similar drug treatment program available.
2. That the defendant be **initially incarcerated at either FMC Springfield or FMC Rochester**.
3. Upon entry into BOP, that the defendant receive a complete physical examination and a co-occurring drug and psychiatric evaluation and that the recommended treatment be followed.
4. Defendant should be given credit for time served. Defendant has been detained since 6/22/22.
5. That the defendant be allowed to participate in vocational and educational training while incarcerated appropriate with his past skills and education.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1850

United States of America

Appellee

v.

Gary Eugene Graham

Appellant

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:22-cr-03073-JMG-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 04, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

TRULINCS 15716047 - GRAHAM, GARY - Unit: TOM-H-A

FROM: 15716047
TO: Heng, Tina
SUBJECT: Request Rehearing/Suggestion for Rehearing En Banc
DATE: 09/02/2024 11:43:26 AM

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 24-1850

United States of America

Plaintiff - Appellee

v.

Gary Graham

Defendant - Appellant

Appeal for U. S. District Court for the District of Nebraska
(4:22-cr-03073-JMG-1)

REQUEST FOR REHEARING/

SUGGESTION FOR REHEARING EN BANC

COMES NOW, Gary Graham, Pro Se, and without the assistance of counsel, interposing *Haines v. Kerner*, 404 U.S. 519 (1972), requesting liberal construction, to Request a Rehearing from this Honorable Court and to Suggest a Rehearing En Banc for this panel's order of August 23, 2024. In support, Graham states:

That this rehearing/rehearing en banc request is timely as it is being given to prison authorities for mailing on September 3, 2024, which is only 5 days after he received the order (August 28) and 9 days after the issuance of the order. In addition, this is being faxed and sent electronically to the Acting Clerk of the Court on September 3, 2024, well within the 14 day window.

That he believes he has a constitutional issue which either the original panel can rehear and correct or an en banc court can decide, if necessary, in that he was denied effective assistance of counsel throughout the entire process. The appeal waiver referenced in the panel's order of August 23, 2024, does not apply when Graham did not receive effective assistance of counsel or when he received an extremely longer sentence than his counsel had told him he would receive because counsel failed to perform his duties to represent him properly.

REQUEST FOR REHEARING

If Graham were to have received effective assistance of counsel from the beginning, virtually all the evidence would have been suppressed and Graham would have had a very strong plea bargaining position, and would have received less than 3 years for the 6 grams of drugs he was guilty of. But, counsel failed to adequately investigate the situation, and failed to even cite the rudimentary caselaw [as noted by the district judge] to support the suppression motion. Graham presented over 50 complaints about his attorney not doing his job trying to "fire" him. In fact, District Judge Zwarts ordered counsel to file a brief to support the motion to suppress, which was never done. But, the district court judge refused to dismiss Graham's attorney.

The lack of effective assistance of counsel applies to the Fourth Amendment search and seizures. There were numerous illegal searches made and counsel failed to suppress any of the "fruits of the poisonous tree" where property was searched

TRULINCS 15716047 - GRAHAM, GARY - Unit: TOM-H-A

without valid affidavits and/or search warrants. Without the illegally obtained evidence, there would be NONE against Graham. Plus, there was the fact that the "chain of evidence" was broken and tainted by these illegal searches and counsel failed to do anything about it.

Counsel failed to file any motions with the district court regarding the Speedy Trial violations where Graham was held in custody and his rights were violated. Graham brought this up to the district court, but the attorney failed to do anything about it.

Graham informed his counsel about how the law enforcement individuals involved were using his daughter sexually [as a hostage] to coerce him. However, again counsel failed to follow up or file anything with the district court on this. Now, the deputy in question has been fired and charges brought forth against him. This is now a matter of public record where law enforcement has been using the federal courts to cover up their illicit activities. There were videos erased and body cam footage deleted as a cover up and counsel refused to investigate or file anything with the district court even though Graham requested it of him numerous times.

When counsel talked Graham into signing the plea agreement, counsel told Graham that due to his age and poor health and the limited amount of drugs attributed to him (6 grams), that he would receive less than a 3 year sentence if he pled guilty [versus the 132 months he actually received]. This is clearly a lack of effective assistance of counsel.

Graham even filed a Motion with this Honorable Court on May 5, 2024, requesting again to dismiss his attorney due to his ineffectiveness, which this Court never addressed. Graham's issues were again constitutionally based (illegal search and seizure, and lack of effective assistance of counsel), which go beyond the appeal waiver in his plea agreement.

The panel said that the appeal waiver in Graham's plea agreement is valid, enforceable, and applicable to the issues on appeal. However, the plea agreement appeal waiver specifically excludes constitutional issues, sentence length, and ineffective assistance of counsel which are the very issues Graham is asking the panel to review on a de novo basis. Graham can not have knowingly and voluntarily entered into a plea agreement and appeal waiver because of his reliance on an attorney he'd been trying to fire for over 6 months. The sentencing discrepancy alone (36 months versus 132 months) clearly shows how Graham pled to one thing (based on ineffectual advice) and received almost four times that sentence because of counsel's numerous failures. Under United States v. Andis, 338 F.3d 886, 889-92 (8th Cir. 2003), an appeal waiver is NOT to be enforced if the defendant did NOT knowingly and voluntarily enter into it, and if enforcing it will results in a miscarriage of justice [like what is being done to Graham].

Graham requests the panel look at the facts of his case de novo including his Pro Se motions, and believes that the panel will concur that his constitutional rights have been trampled by an attorney's lack of doing his job. His Fourth, Fifth, and Sixth Amendment rights were walked all over because of his attorney's failures to interview witnesses, investigate, file proper motions along with supporting documentation/caselaw and to give him proper advice as to knowingly and voluntarily pleading to something and getting quadruple the sentence.

SUGGESTION FOR REHEARING EN BANC

The Eighth Circuit has found that when consideration of the full court is necessary to secure and maintain uniformity of the court decisions or when there is an issue of exceptional importance [whether an attorney is ineffective when he fails to investigate, talk to witnesses, or file proper motions with support caselaw, and to give valid advice on plea agreements], that the entire court review the matter to ensure consistency and to avoid a miscarriage of justice. See, United States v. Lawrence, 2023 U. S. App. LEXIS 16808 (8th Cir. March 29, 2023).

The panel in Graham's case has chosen to accept the word of an attorney whom Graham tried to fire over 50 times in district court, and even in this Honorable Court. And whom the district judge admonished to file a proper motion with supporting caselaw (which he failed to do). There are so many wrongdoings in this case that this Honorable Court will find amazing if they will read Graham's Pro Se motions. As a matter of circuit precedence, Graham suggests the entire court review this matter and find that when an attorney is this ineffective, that it set his conviction and sentence aside and return it to the district court to evaluate on the facts and merits.

CONCLUSION

Appellant Graham believes this panel's opinion denying his appeal should be re-evaluated either by his original panel or this entire court en banc. Outside of the fact that a manifest injustice has been done to Graham by convicting him and sentencing him to quadruple his expected sentence, Graham believes that the items he noted were overlooked by the

TRULINCS 15716047 - GRAHAM, GARY - Unit: TOM-H-A

original panel because they were in his Pro Se motions/brief, and his conviction and sentence should be vacated in light of the above.

Graham prays this Honorable Court address these issues.

Respectfully and prayerfully submitted this 3rd day of September, 2024.

Gary Graham, Pro Se

Reg. No. 15716-047

FCI-Thomson

P.O. Box 1002

Thomson, IL 61285

Needs to be sent to:

Maureen W. Gornik
Acting Clerk of the Court
United States Court of Appeals for the Eighth Circuit
Voice (314) 244-2400
Fax (314) 244-2780
www.ca8.uscourts.gov



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY GRAHAM,

Defendant.

4:22CR3073

PLEA AGREEMENT

IT IS HEREBY AGREED between the plaintiff, United States of America, through its counsel, Susan Lehr, Acting United States Attorney and Dan Packard, Assistant United States Attorney, and defendant, Gary Graham, and Theodore Turnblacer, counsel for defendant, as follows:

I

THE PLEAA. CHARGE(S) & FORFEITURE ALLEGATION(S).

Defendant agrees to plead guilty to Count I of the Indictment. Count I charges a violation of Title 21, United States Code, Section 846, conspiracy to distribute, and possess with intent to distribute, 500 grams or more of methamphetamine mixture.

B. In exchange for the defendant's plea of guilty as indicated above, the United States agrees as follows:

1. The United States will move to dismiss the allegation pursuant to Title 21, United States Code Section 851 that before GARY GRAHAM committed the offense charged in Count I, he had a final conviction for a serious drug felony.

2. The United States will move to dismiss Count II at the time of sentencing.

3. The United States agrees that the defendant will not be federally prosecuted in the District of Nebraska for any drug trafficking crimes as disclosed by the discovery material delivered to the defendant's attorney as of the date this agreement is signed by all parties, other than as set forth in paragraph A, above. This agreement not to prosecute the defendant for specific crimes does not prevent any prosecuting authority from prosecuting the defendant for any other crime, or for any crime involving physical injury or death.

II

NATURE OF THE OFFENSEA. ELEMENTS EXPLAINED.

Defendant understands that the offense to which defendant is pleading guilty has the following elements:

1. Defendant reached an agreement or came to an understanding with at least one other person to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance;
2. Defendant knew that it was methamphetamine or some other prohibited drug;
3. Defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and
4. At the time the defendant joined in the agreement or understanding, defendant knew the purpose of the agreement or understanding.

B. ELEMENTS UNDERSTOOD AND ADMITTED - FACTUAL BASIS.

Defendant has fully discussed the facts of this case with defense counsel. Defendant has committed each of the elements of the crime and admits that there is a factual basis for this guilty plea. The following facts are true and undisputed.

1. That on or about December 3, 2020, a cooperating individual (CI) working with law enforcement purchased .8 grams of methamphetamine from McGinnis at the residence she shared with Gary Graham. The Nebraska State Patrol Crime lab (Crime Lab) confirmed the presence of .83 g methamphetamine.
2. On or about December 7, 2020, the same CI purchased methamphetamine from McGinnis at Graham's residence. During this transaction, McGinnis left the house to check with Gary Graham, outside, to see if she could sell 3.5 grams of methamphetamine to the CI for \$225. Investigators surveilled the transaction and it was audio recorded. The Crime Lab confirmed the substance to be 3.16 grams of methamphetamine.
3. On or about December 10, 2020, the same CI made a third controlled purchase of methamphetamine. Both Graham and McGinnis were involved in this transaction. Graham directed the CI to go to the gas station to purchase items and said that he would have McGinnis

weigh out a quantity of methamphetamine. Upon returning to the residence, the CI provided the items and the leftover drug purchase money to Graham. Graham then directed CI to the methamphetamine which was in a cup on a dresser. The Crime Lab confirmed the presence of .35 g methamphetamine. The transaction was surveilled by investigators and both video and audio recorded.

4. On February 5, 2021, Nebraska State Patrol investigators executed a search warrant at Graham's residence. When McGinnis was brought out of the residence and searched, a baggie containing approximately 0.7 grams of methamphetamine was located in her shoe. A small glass jar containing methamphetamine was also located in the residence. The Crime Lab confirmed the presence of methamphetamine on both items with a total combined weight of 1.19 grams. Plastic baggies and drug paraphernalia items were located in the toilet inside the residence, as evidence was destroyed while law enforcement attempted to enter the residence. A sample of toilet water was collected, and a pretest from a sampling of the toilet water confirmed the presence of methamphetamine in the water. Items consistent with methamphetamine distribution, to include numerous small plastic baggies, three digital scales, pipes, venue items, five cell phones, and two ammunition magazines were located in the residence.

5. On February 8, 2021, Graham waived his *Miranda* rights and admitted there was a .22 Viper nylon rifle located under the hood of his truck at his residence. Graham said that it is his rifle and he uses it for raccoon hunting. Graham stated he has owned the firearm for several years. Graham admitted to using methamphetamine every day since 2012. Graham said from 2012 until November 2020, when he started dealing methamphetamine again, he consistently purchased an "8-ball" of methamphetamine every week. Graham said in November 2020, he started to deal methamphetamine again. Graham said he purchased one to two ounces of methamphetamine every week between November 2020 and January 2021. Graham said he used one-quarter to one-half gram of methamphetamine per day. Graham indicated he was supplying another person with one-half to one ounce of methamphetamine per week. Graham stated he was charging this person \$400-\$500 per one-half ounce. Graham estimated he was making approximately \$400 per ounce from this person. Graham said that while McGinnis was living with him, she would sell some of his methamphetamine for some extra money.

6. Investigators searched Graham's cell phone. Data from his phone included messages between Graham and McGinnis between January 10, 2021, and February 1, 2021,

reflecting conversation about sales or distribution of user and dealer quantities of methamphetamine.

7. Several individuals provided information to law enforcement about their having purchased or received distribution quantities of methamphetamine from Graham or McGinnis between 2018 and 2022. Taken together, these individuals reported having purchased or received 500 grams or more of methamphetamine from Graham and McGinnis. Graham occasionally "fronted" methamphetamine to one or more of these individuals, who said McGinnis collected on drug debts owed to Graham several times. Some individuals indicated that McGinnis occasionally sold or delivered Graham's methamphetamine to customers, and helped pick up distribution quantities of methamphetamine from Graham's drug source.

8. If called to testify, an agent or investigator with the drug task force would testify that the quantity of methamphetamine possessed and distributed by Graham and McGinnis is consistent with the intent to distribute it to another person.

9. All of the foregoing events occurred in the District of Nebraska.

III

PENALTIES

A. COUNT I. Defendant understands that the crime to which defendant is pleading guilty carries the following penalties:

1. A maximum of Life in prison; and a mandatory minimum of 10 years;
2. A maximum \$10,000,000.00 fine;
3. A mandatory special assessment of \$100 per count; and
4. A term of supervised release of no less than 5 years and up to life. Defendant understands that failure to comply with any of the conditions of supervised release may result in revocation of supervised release, requiring defendant to serve in prison all or part of the term of supervised release.
5. Possible ineligibility for certain Federal benefits.

IV

AGREEMENT LIMITED TO U.S. ATTORNEY'S OFFICE DISTRICT OF NEBRASKA

This plea agreement is limited to the United States Attorney's Office for the District of

Nebraska, and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authorities.

V

SENTENCING ISSUES

A. SENTENCING AGREEMENTS.

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties agree the defendant shall receive a sentence of no less than 120 months and no more than 144 months. In arriving at this sentence, the parties thoroughly considered the defendant's criminal history, quantity and type of methamphetamine, role in the offense, and other potential adjustments. This negotiated agreement resolves all issues related to the case and is the appropriate disposition.

B. "FACTUAL BASIS" AND "RELEVANT CONDUCT" INFORMATION.

The parties agree that the facts in the "factual basis" paragraph of this agreement, if any, are true, and may be considered as "relevant conduct" under U.S.S.G. § 1B1.3 and as the nature and circumstances of the offense under 18 U.S.C. § 3553(a)(1).

The parties agree that all information known by the office of United States Pretrial Service may be used by the Probation Office in submitting its presentence report, and may be disclosed to the court for purposes of sentencing.

VI

DEFENDANT WAIVES APPEAL AND COLLATERAL ATTACK

The defendant hereby knowingly and expressly waives any and all rights to appeal the defendant's conviction and sentence, including any restitution order in this case, and including a waiver of all motions, defenses, and objections which the defendant could assert to the charges or to the Court's entry of Judgment against the defendant, and including review pursuant to 18 U.S.C. § 3742 of any sentence imposed, except:

- (a) As provided in Section I above, (if this is a conditional guilty plea); and
- (b) A claim of ineffective assistance of counsel.
- (c) A right to file a motion under Section 3582(c)(1)(A);
 - 1. the general right to file a compassionate release motion;
 - 2. the right to file a second or successive such motion; or
 - 3. the right to appeal the denial of a compassionate release.

The defendant further knowingly and expressly waives any and all rights to contest the

defendant's conviction and sentence in any post-conviction proceedings, including any proceedings under 28 U.S.C. § 2255, except:

(a) The right to timely challenge the defendant's conviction and the sentence of the Court should the Eighth Circuit Court of Appeals or the United States Supreme Court later find that the charge to which the defendant is agreeing to plead guilty fails to state a crime.

(b) The right to seek post-conviction relief based on ineffective assistance of counsel.

If defendant breaches this plea agreement, at any time, in any way, including, but not limited to, appealing or collaterally attacking the conviction or sentence, the United States may prosecute defendant for any counts, including those with mandatory minimum sentences, dismissed or not charged pursuant to this plea agreement. Additionally, the United States may use any factual admissions made by defendant pursuant to this plea agreement in any such prosecution.

VII

BREACH OF AGREEMENT

Should it be concluded by the United States that the defendant has committed a crime subsequent to signing the plea agreement, or otherwise violated this plea agreement, the defendant shall then be subject to prosecution for any federal, state, or local crime(s) which this agreement otherwise anticipated would be dismissed or not prosecuted. Any such prosecution(s) may be premised upon any information, statement, or testimony provided by the defendant.

In the event the defendant commits a crime or otherwise violates any term or condition of this plea agreement, the defendant shall not, because of such violation of this agreement, be allowed to withdraw the defendant's plea of guilty, and the United States will be relieved of any obligation it otherwise has under this agreement and may withdraw any motions for dismissal of charges or for sentence relief it had already filed.

VIII

SCOPE OF AGREEMENT

- A. This plea agreement embodies the entire agreement between the parties and supersedes any other agreement, written or oral.
- B. By signing this agreement, the defendant agrees that the time between the date the

defendant signs the agreement and the date of the guilty plea will be excluded under the Speedy Trial Act. The defendant stipulates that such period of delay is necessary in order for the defendant to have opportunity to enter the anticipated plea of guilty, and that the ends of justice served by such period of delay outweigh the best interest of the defendant and the public in a speedy trial.

C. The United States may use against the defendant any disclosure(s) the defendant has made pursuant to this agreement in any civil proceeding. Nothing contained in this agreement shall in any manner limit the defendant's civil liability which may otherwise be found to exist, or in any manner limit or prevent the United States from pursuing any applicable civil remedy, including but not limited to remedies regarding asset forfeiture and/or taxation.

D. Pursuant to 18 U.S.C. § 3013, the defendant will pay to the Clerk of the District Court the mandatory special assessment of \$100 for each felony count to which the defendant pleads guilty. The defendant will make this payment at or before the time of sentencing.

E. By signing this agreement, the defendant waives the right to withdraw the defendant's plea of guilty pursuant to Federal Rule of Criminal Procedure 11(d). The defendant may only withdraw the guilty plea in the event the court rejects the plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(5). Furthermore, defendant understands that if the court rejects the plea agreement, whether or not defendant withdraws the guilty plea, the United States is relieved of any obligation it had under the agreement and defendant shall be subject to prosecution for any federal, state, or local crime(s) which this agreement otherwise anticipated would be dismissed or not prosecuted.

F. This agreement may be withdrawn by the United States at any time prior to its being signed by all parties.

IX

MODIFICATION OF AGREEMENT MUST BE IN WRITING

No promises, agreements or conditions have been entered into other than those set forth in this agreement, and none will be entered into unless in writing and signed by all parties.

X

DEFENDANT AND COUNSEL FULLY UNDERSTAND AGREEMENT

By signing this agreement, defendant certifies that defendant read it (or that it has been read to defendant in defendant's native language). Defendant has discussed the terms of this

agreement with defense counsel and fully understands its meaning and effect.

UNITED STATES OF AMERICA
SUSAN LEHR
Acting United States Attorney

Date DANIEL PACKARD
ASSISTANT U.S. ATTORNEY

Date GARY GRAHAM
DEFENDANT

Date THEODORE TURNBLACER
COUNSEL FOR DEFENDANT

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4:22-cr-03073-JMG-CRZ Doc # 164 Filed: 11/06/23 Page 7 of 20 - Page ID # 1013

A
exhibit

An indictment against Graham was filed in the above-captioned case on June 14, 2022. Count I alleges Graham engaged in illegal drug trafficking from December 1, 2018 to on or about June 13, 2022. Count II alleges that on February 5, 2021, Graham had a felony record and possessed a Remington 522 Viper .22 caliber rifle and ammunition which had been shipped and transported in interstate commerce. (Filing No. 1).

ANALYSIS

Graham argues the warrant issued on February 4, 2021 did not lawfully authorize the search of his property because the warrant application lacked a sufficient showing of probable cause; the officers' search and seizure on February 5, 2021 pursuant to the warrant violated the Fourth Amendment; his custodial interrogation on February 8, 2021 was involuntary and violated the Fifth Amendment; and the information obtained from the warrantless search of his cell phone must be suppressed under the Fourth Amendment because his consent to that search was involuntary.² (Filing Nos. 133 & 135). Graham also moves to dismiss Count II of the indictment which charges him with being a felon in

² Graham's brief also states the property search violated his "fifth, sixth, and fourteenth amendment rights guaranteed by the United States Constitution, and Article 1 § 7 of the Nebraska Constitution." (Filing No. 136, at CM/ECF p. 2). Graham's brief includes no argument addressing his claim under the Nebraska Constitution, or his Fifth, Sixth, and Fourteenth amendment claims. The court may therefore deem those claims abandoned.

In addition, the court notes that the Fifth amendment secures the right to counsel during questioning, and it is not applicable to claims regarding the alleged unlawful search and seizure of property prior to any custodial interrogation. There is nothing indicating Graham invoked his right to counsel at any time before or during the search, so the Sixth amendment is not implicated. There is no case law supporting suppression of evidence arising from an alleged Fourteenth amendment violation. And since this case is filed in federal court, the question is whether suppression is warranted under the Fourth Amendment, not the Nebraska Constitution. California v. Greenwood, 486 U.S. 35, 35 (1988).

←

exhibit B NO case Law, No Constitutional
Law on No amendments or
evidence to support claims

STUART J. DORAN
 JASON E. TROIA
 JOSEPH L. HOWARD
 ANNE M. BREITKREUTZ
 RODNEY C. DAHLQUIST, JR.
 DEANA D. KLEIN

DLT

DORAN LAW TEAM

DORAN, TROIA, HOWARD, BREITKREUTZ,
 DAHLQUIST & KLEIN PC LLO

KEITH W. DORAN
 HANNAH E. FRANKEL
 TED C. TURNBLACER, JR.
 LYNAE A. TUCKER-CHELLEW
 TIMOTHY J. ANDERSON
 THOMAS J. MONAGHAN
(OF COUNSEL)
 SHAWN M. ILG
(OF COUNSEL)
 ROSS J. FRIEHE
(OF COUNSEL)

May 6, 2024

Gary Graham # 15716-047
 Leavenworth FCI
 Federal Correctional Institution
 PO Box 1000
 Leavenworth, KS 66048

Re: United States of America vs. Gary Graham, Case No. 24-1850 (8th Cir.)

Dear Mr. Graham:

I received your letter postmarked May 1, 2024. Enclosed is a copy of your plea agreement. Please see section VI, where the plea agreement limits our ability to appeal certain aspects of the case.

Your letter suggests that you would like to appeal these aspects of the case:

1. The pretrial ruling on the Motion to Suppress that we litigated in your case.
 - a. Unfortunately, the plea agreement does not allow us to challenge this aspect of the case.
 - b. Your letter says the Motion to Suppress was not briefed. That is inaccurate. There was a motion to suppress that was filed and briefed. I have attached the brief for your records.
 - c. When you enter into a plea agreement such as yours, you waive your right to challenge the pretrial ruling on a motion to suppress. It is my opinion that you cannot challenge that aspect of your case at this time, due to the limitation imposed by the terms of your plea agreement.
2. The audio/visual recordings of the controlled buys in your house, and the Government's reliance on case law that was decided *after* the search:
 - a. These issues are part of the motion to suppress, and a challenge to the pretrial ruling is limited for the reasons set forth in paragraph 1, above.
 - b. The motion to suppress that we advanced on your behalf did include challenges to the Government's use of those recordings.
3. The sufficiency of Mr. Ted Turnblacer's preparation for the motion to suppress.

1403 FARNAM ST. #232 OMAHA, NE 68102 | P: 402-884-7044 F: 402-884-7045

WWW.DLTLAWYERS.COM

May 6, 2024

exhibit C

Gary Graham # 15716-047
Leavenworth FCI
Federal Correctional Institution
PO Box 1000
Leavenworth, KS 66048

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- a. You are claiming that Mr. Turnblacer failed to subpoena evidence that Jamie McGinnis was living at a different residence which is contrary to what police said. You also claim that an affidavit that may have helped you in your motion litigation was not presented. You also claim that Anna Indigma stole evidence in your case, and that Mr. Turnblacer failed to challenge that aspect of your case.
- b. What you are describing would be a claim of **ineffective assistance of counsel**, or what is commonly referred to as a "post-conviction" proceeding that is filed pursuant to 28 U.S.C. § 2255.
- c. This type of challenge is permissible pursuant to section VI of your plea agreement. However, because Mr. Turnblacer and I represented you through the pretrial process, we are not in a position to attack our own representation (in other words, we cannot post-convict ourselves). The Court would view this as a conflict of interest. You would need a different attorney to raise that claim.
- d. I filed a motion to withdraw so that the court could appoint new counsel to help you with your appeal, as I thought, based on previous letters, that you may be unhappy with how we handled your case. However, the court denied that request.

I will file a request for an extension for your appellate brief, and I will await your response. If you want me to proceed with your appeal, with the limited avenues of attack permitted by your plea agreement, I will proceed. However, if you want to press the issue of ineffective assistance of counsel, I will have to bring that to the court's attention to see if they will appoint you someone from outside our law firm. Please respond as soon as possible.

Also, Gary, please let me know what the Marshalls have planned, i.e., when and where you will be transferred, as I hope your stay in Leavenworth is very short.

Very truly yours,
/s/ Stuart Dornan

cc: plea agreement

Change of Plea

1 on whether he -- whether the gun was functional I think
2 that's a -- we don't need to get over that, unless the court
3 wants us to, for today's factual basis.

4 THE COURT: No.

5 MR. PACKARD: Okay.

6 THE COURT: I think if we can get past this step,
7 then we're -- we'll get to the next step, which is the
8 sentencing. And at that point in time the parties can
9 discuss some of the other issues that we're talking about
10 today.

11 All right. Going back to these documents, on the
12 plea agreement -- other than I am a little concerned about
13 going through a -- having you say, though, on the record that
14 the facts that are in this factual basis are not all true.
15 Is that what you are trying to tell me?

16 THE DEFENDANT: I was outside working. I don't
17 know what Jamie did in the house. I wasn't there.

18 THE COURT: Okay. So...

19 THE DEFENDANT: I mean...

20 MR. PACKARD: Judge, I may be able to help some.

21 THE COURT: Okay.

22 MR. PACKARD: So, basically, there are three buys
23 by a confidential informant, and on two of them I think
24 Ms. McGinnis did the transaction. We don't know if
25 Mr. Graham was there or not. It was at his property. And

Change of Plea

1 then the third, he was clearly there because he was captured
2 on video.

3 Whether he was there or not or participated in
4 those first two buys is not crucial for the factual basis,
5 but he is correct. He may not have been there at the house
6 when Ms. McGinnis sold the methamphetamine to the
7 confidential informant during the first two of three buys.
8 So I think we are in agreement there.

9 THE COURT: All right. Going back to the plea
10 agreement, did your attorney answer all of your questions
11 about its meaning?

12 THE DEFENDANT: Yes.

13 THE COURT: And after going through the document
14 did you sign it?

15 THE DEFENDANT: Yes.

16 THE COURT: When you went over these documents,
17 were you under the influence of drugs or alcohol or having
18 any difficulty thinking?

19 THE DEFENDANT: No.

20 THE COURT: Are you under the influence of anything
21 today?

22 THE DEFENDANT: No.

23 THE COURT: Are you having any difficulty hearing,
24 understanding, and answering my questions?

25 THE DEFENDANT: No.