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APPENDIX A

- Opinion of the United States Court of Appeals for the Tenth Circuit (p. 1-19) 07/01/26

FILED
United States Court of Appeals
Tenth Circuit

July 1, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KYLE QUENTIN SAGO,

Defendant - Appellant.

No. 25-5057

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. Nos. 4:23-CV-00492-GKF-MTS & 4:20-CR-00094-GKF-1)

Timothy C. Kingston of the Law Office of Tim Kingston, Foley, Alabama, for Defendant-Appellant.

Steven J. Briden, Assistant United States Attorney (Clinton J. Johnson, United States Attorney, with him on the brief), Tulsa, Oklahoma, for Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **MATHESON** and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

Kyle Quentin Sago shot and killed Daniel Morgan, who was unarmed. He admitted to the shooting during his testimony at trial. A jury convicted

him of first-degree murder and other crimes related to the shooting. His convictions and sentence were affirmed by this court on direct appeal.

Sago then brought a motion in the district court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, asserting his trial counsel was ineffective. The district court denied his motion. Sago petitioned this court for a certificate of appealability (COA), which was granted on one claim: whether trial counsel was ineffective for conceding guilt against Sago's wishes resulting in a failure to subject the prosecution's case to a meaningful adversarial testing process. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

The factual background of this case is detailed in this court's prior opinion on Sago's direct appeal. *See United States v. Sago*, 74 F.4th 1152, 1154–55 (10th Cir. 2023). We will briefly recount the facts that are relevant to this § 2255 appeal.

On July 25, 2020, Sago reconnected with Daniel Morgan, a man he lived with for a few years as a teenager. *Id.* at 1154. He drove to a home Morgan was staying at in Tulsa, Oklahoma and visited with Morgan for several minutes. *Id.* Sago departed on good terms but returned to the home a few hours later for reasons that are unclear. *Id.* Once he arrived, he called Morgan's cell phone repeatedly. *Id.* Morgan's girlfriend answered and told

Sago that Morgan was asleep. *Id.* at 1154–55. He asked Morgan's girlfriend to wake Morgan because he wanted to talk to him. *Id.* at 1155. Sago waited in his vehicle. *Id.* According to Sago, when Morgan woke up and came out from his home, Morgan threw his phone on the ground, seemed angry, and began to approach Sago's vehicle. *Id.* Sago shot at Morgan several times, hitting him once in the chest and three times in the back as Morgan ran away. *Id.* Sago testified at trial to these facts and that, at the time of the shooting, he was afraid Morgan may have been armed. *Id.*

Sago was indicted and charged with one count of first-degree murder in Indian Country, 18 U.S.C. §§ 1151, 1153, 1111. Sago eventually entered a plea of guilty to the lesser included offense of second-degree murder as part of a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). At the scheduled sentencing, the district court rejected the plea agreement because it concluded the underlying facts met the premeditation element of first-degree murder and so "the settlement . . . that was effectuated was the rock bottom" of penalties Sago could face. R. I at 256–57. The district court then asked if, considering its decision to reject the plea agreement, Sago wanted to withdraw his guilty plea. Sago confirmed that he did.

After Sago withdrew his guilty plea, a grand jury returned a superseding indictment. Sago was charged with four counts: (1) first-degree

murder in Indian Country, 18 U.S.C. §§ 1151, 1153, 1111; (2) felon in possession of ammunition, 18 U.S.C. §§ 922(g)(1) & 924(a)(2); (3) felon in possession of ammunition, 18 U.S.C. §§ 922(g)(1) & 924(a)(2); and (4) causing death by using and discharging a firearm during and in relation to a crime of violence, 18 U.S.C. §§ 924(c)(1)(A) & 924(j)(1).

At the pre-trial conference, Sago's defense counsel requested a jury instruction for the lesser included offense of second-degree murder, which the district court approved. Defense counsel also moved the court to reconsider its prior decision to reject the plea agreement, which the district court denied. The case then proceeded to a three-day jury trial.

Opening statements occurred on the first day of trial, September 20, 2021. During his opening, defense counsel said:

> [DEFENSE COUNSEL]: Everything the government just told you is true. This is not a case of a who-done-it. There's not going to be any question that Mr. Sago was the shooter that day. The issue for you in this trial is going to be whether or not it was first-degree murder versus a second-degree murder[.]
>
> * * *
>
> Your job's going to be from the facts that are presented from this witness stand, do they support that Mr. Sago had premeditation and he went over there that day with the intent of killing the victim or was it the result of something happened after they got there?
>
> * * *

> We believe that after you hear all the facts, see all the actions of all the parties involved, you'll make the determination that this was a second-degree murder.

Op. Br. Attachment 4 at 18–19.

Sago testified in his own defense on the third and last day of trial, just prior to the closing arguments. During the direct examination, he admitted to being convicted of the prior felonies as set out in the indictment's felon-in-possession charges, which was also subject to a stipulation. He also testified that he shot Morgan:

> [SAGO]: When I seen him throw down the phone and start coming out me, I pulled out the – pulled out my gun and I fired a shot which missed him. He seemed like he didn't even notice that I fired a gun. He just kept on coming, he was charging at the car. So this time I decided – I aimed and I fired and I hit him and he just kept on coming. He just kept on coming. He kept on coming all the way up to my car. I was firing several more shots after this and he just kept on coming.
>
> * * *
>
> [DEFENSE COUNSEL]: Why did you shoot him again?
>
> [SAGO]: I was scared.
>
> [DEFENSE COUNSEL]: Scared of what?
>
> [SAGO]: Scared he's going to kill me.

Op. Br. Attachment 6 at 78–79.

The Government then cross examined Sago. During a break from testimony and outside the presence of the jury, the district court sua sponte raised to the parties that it may be appropriate to include a self-defense

jury instruction. The district court's law clerk asked the district court if it wanted to address a related lesser included instruction and the district court said, "No. It's got to be requested." *Id.* at 94. Once the cross examination resumed, Sago again admitted to shooting Morgan, including shooting him several times while he was running away:

> [GOVERNMENT]: You also agree with me that what you did do was to shoot Daniel in the chest; correct?
>
> [SAGO]: Yes.
>
> [GOVERNMENT]: You also agree with me that you turned – as Daniel turned, ran away, you shot him in the back and then you shot him again and then you shot him again and then you shot at him again hitting the truck; correct?
>
> [SAGO]: Yes.
>
> * * *
>
> [GOVERNMENT]: We agree that you shot and killed Daniel; correct?
>
> [SAGO]: Out of fear, yes, correct.
>
> [GOVERNMENT]: Out of fear of what?
>
> [SAGO]: Of my life.

Id. at 95–96.

At the conclusion of Sago's testimony, the district court informed the parties outside the presence of the jury that it was adding a self-defense instruction. Once the jury returned, the parties proceeded to make their closing arguments. During his closing argument, defense counsel said:

> [DEFENSE COUNSEL]: Yesterday morning when I gave my opening statement, I told you that this was not going to be a who-done-it, that this was going to be a case for you to decide the degree of murder. [Defense counsel discusses inconsistencies in the evidence, goes over Sago's account of the shooting, how evidence shows there was something odd or violent going on in Morgan's home.]
>
> * * *
>
> But if you believe that it was unreasonable for [Sago] to believe he needed to use self-defense, if you believe that he wasn't being threatened with unlawful force from Daniel, I believe it reinforces that [Sago]'s proper punishment should be a second-degree murder, not first-degree.
>
> * * *
>
> And if you don't believe the self-defense, that's our desire is for you to find him guilty of second-degree, which fits the law in this case.

Id. at 108–114.

The jury returned a verdict that same day and found Sago guilty on all counts. The district court later sentenced Sago to life imprisonment for the first-degree murder and discharge of a firearm counts, running consecutively to a sentence of 120 months' imprisonment for the unlawful possession of ammunition counts.

Sago filed a direct appeal, where he argued the district court erred when it did not sua sponte include an imperfect self-defense instruction. This court reviewed for plain error and affirmed, holding that there was no error because that instruction is not required unless expressly requested by the defendant. *Sago*, 74 F.4th at 1160.

This court also held that Sago failed to satisfy the third prong of plain error (error affected substantial rights) because of the ample evidence in favor of the jury's verdict – there was no evidence the victim was about to use deadly force, and there was evidence (including by his own admission) that Sago shot the victim three times in the back. *Id.* at 1162–63. The court noted that it was unlikely the imperfect self-defense instruction would have changed the outcome given that Sago was convicted of first-degree murder despite the second-degree murder instruction, asking "[h]ow likely is it on the facts of this case that the jury would conclude that Mr. Sago premeditated the murder but then in fact decided to kill Mr. Morgan only out of fear?" *Id.* at 1163.

Following affirmance in his direct appeal, Sago moved the district court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. He asserted his counsel was ineffective for several reasons, including that his counsel "conced[ed] guilt against [his] wishes resulting in a failure to subject the prosecution's case to a meaningful adversarial testing process." R. I at 227. The district court analyzed this claim under the *United States v. Cronic* framework, where prejudice to the defendant is presumed when their counsel's performance effectively "fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. 648, 658–59 (1984). It held that Sago was not entitled to the *Cronic* presumption of

prejudice because (1) trial counsel did not completely fail to contest guilt given that he challenged premeditation; and (2) trial counsel made opening and closing statements, cross examined witnesses, requested the second-degree murder instruction, and presented Sago's testimony, so he did not abandon his client or completely fail to participate in the trial proceedings. In a footnote, the district court held that structural error under *McCoy v. Louisiana*, which requires a new trial without harmless error analysis when counsel usurps the defendant's Sixth Amendment right to decide the objectives of his own defense, was not implicated here. 584 U.S. 414, 427–28 (2018). It reasoned *McCoy* wasn't implicated because Sago twice tried to plead guilty to second-degree murder and admitted he shot and killed Morgan during his trial testimony, thus distinguishing the case from the facts of *McCoy*, where the defendant "steadfastly" asserted factual innocence to the charged crimes. R. I at 264 n.7.

The district court then analyzed Sago's motion under *Strickland v. Washington*, the standard two-step framework for ineffective assistance of counsel claims, where the inquiry is first whether counsel's performance was deficient and then whether counsel's deficient performance prejudiced the defendant. 466 U.S. 668, 687 (1984). It found that Sago failed to satisfy either prong of *Strickland*. The district court held the first prong wasn't satisfied because counsel's decision to focus on contesting premeditation

rather than pursuing acquittal through self-defense was a sound trial strategy given the lack of evidence that Morgan had a weapon and admission that Sago shot Morgan in the back three times. The district court found that the second *Strickland* prong was not satisfied for the same reasons that this court previously found no prejudice on plain error in the direct appeal.

The district court denied Sago's § 2255 motion, denied a COA, and entered final judgment on April 4, 2025. Sago appealed and filed a pro se brief requesting a COA from this court. The Government did not respond. This court granted a COA for one claim: whether "trial counsel was ineffective for conceding guilt against Mr. Sago's wishes resulting in a failure to subject the prosecution's case to a meaningful adversarial testing process." Doc. 16.

II

On appeal, Sago's primary argument is that his trial counsel committed structural error under *McCoy* when he conceded Sago's guilt to second-degree murder at trial. He argues in the alternative that his counsel was ineffective for the same reason and that he can demonstrate prejudice pursuant to *Strickland*. Additionally, he asserts that the district court abused its discretion by not holding an evidentiary hearing on his motion and, finally, that his trial counsel was ineffective in not requesting an

instruction for imperfect self-defense. A COA was granted on only one issue, so prior to our analysis we must determine whether the arguments Sago raises are within its scope. *See Fields v. Gibson*, 277 F.3d 1203, 1216 n.8 (10th Cir. 2002) ("'[A]ppellate review of the habeas denial is limited to the specified issues' in the certificate of appealability." (quoting *Ramsey v. Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998) (alteration in original))).

The COA was granted on the issue of whether "trial counsel was ineffective for conceding guilt against Mr. Sago's wishes resulting in a failure to subject the prosecution's case to a meaningful adversarial testing process." Doc. 16. Sago's arguments regarding *Strickland* error, the evidentiary hearing, and the imperfect self-defense instruction are beyond the scope of the COA so will not consider them. The more difficult question is whether the COA encompasses Sago's argument regarding *McCoy* structural error.

The COA's language mirrors that of *Cronic*, 466 U.S. 648. In *Cronic*, the Supreme Court held that counsel's failure to "subject the prosecution's case to meaningful adversarial testing" was a "denial of [a defendant's] Sixth Amendment rights" such that prejudice to the defendant should be presumed. *Id.* at 659–60. And the district court's order denying Sago's § 2255 motion primarily analyzed counsel's concession of Sago's guilt to second-degree murder under *Cronic*.

Sago's briefing on appeal, however, argues structural error primarily under *McCoy*, not *Cronic* error. *McCoy* error, where a harmless error analysis is not undertaken at all, is separate from *Cronic* error. *See McCoy*, 584 U.S. at 426–27. *McCoy* was decided in 2018 and prior to that, this circuit analyzed the "admission by counsel of his client's guilt to the jury" without authorization under *Cronic*. *See, e.g.*, *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995). Therefore, the COA in this case can be read narrowly to encompass only *Cronic* error or broadly to encompass both *Cronic* and *McCoy* error.

There is no need to dwell on the breadth of the COA's language, however, because Sago's counsel requested at oral argument that we exercise our discretion to expand the COA so as to consider both *McCoy* and *Cronic* errors. We will exercise our discretion to do so and proceed by analyzing Sago's arguments under *McCoy* and then under *Cronic*. *See Honie v. Powell*, 58 F.4th 1173, 1183 (10th Cir. 2023) (This court has "authority 'to expand the COA to cover uncertified, underlying constitutional claims asserted by an appellant.'" (quoting *United States v. Shipp*, 589 F.3d 1084, 1087–88 (10th Cir. 2009))).

For a denial of a § 2255 motion, we generally review the district court's factual findings for clear error and conclusions of law de novo. *United States v. Aguayo-Montes*, 169 F.4th 1205, 1209 (10th Cir. 2026). "Where, as here, the

district court did not hold an evidentiary hearing, but rather denied the motion as a matter of law upon an uncontested trial record, our review is strictly de novo." *Id.* (alterations accepted) (quoting *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015)).

A

Sago argues that his trial counsel's concession that the evidence supported a second-degree murder charge amounted to a usurpation of his autonomy constituting structural error under *McCoy*.[1] Sago asserts that he

[1] There seems to be an open question whether *McCoy* error, like ineffective assistance of counsel claims, can only be brought via postconviction review or if, like other claims of structural error, it should be raised on direct appeal to be preserved and benefit from automatic reversal. Ineffective assistance of counsel claims are usually dismissed on direct appeal to allow for the development of factual support, including trial counsel's explanation for his or her actions. *United States v. Poterbin*, 162 F.4th 1254, 1265–66 (10th Cir. 2025). For structural error, the general rule is that when it is unpreserved and raised first in postconviction proceedings as an ineffective assistance of counsel claim, "courts must determine whether the petitioner needs to show actual prejudice–as is required under *Strickland*–or whether automatic reversal is warranted–the remedy used for structural errors." *Meadows v. Lind*, 996 F.3d 1067, 1076 (10th Cir. 2021). This may occur when trial counsel fails to object to a structural error before a lower court (*e.g.*, lack of a public trial) and therefore implicates considerations underlying waiver doctrine. *Id.*

We do not answer this question here but observe that even if Sago's *McCoy* claim is unpreserved, a showing of actual prejudice under *Strickland* on postconviction review would not be appropriate given the Supreme Court's express language stating that *Strickland* does not apply to *McCoy* claims. *See McCoy*, 584 U.S. at 426–27; *see also United States v. Felicianosoto*, 934 F.3d 783, 787 (8th Cir. 2019) (doubting that a defendant who proves *McCoy* error in a postconviction posture would be required to show prejudice).

"repeatedly asked defense counsel before and during trial to request an instruction on [the] lesser included defense" of imperfect self-defense and that "defense counsel's strategy conceding guilt to second degree murder and the other charges was against [his] wishes and unauthorized." Op. Br. at 18.

When "a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." *McCoy*, 584 U.S. at 426 (discussing how *Strickland* and *Cronic* do not apply). "Violation of a defendant's Sixth Amendment-secured autonomy ranks as [structural error]" that "is not subject to harmless-error review." *Id.* at 427. "[C]ounsel's admission of a client's guilt over the client's express objection is error structural in kind" because it "blocks the defendant's right to make the fundamental choices about his own defense." *Id.* at 427–28. This "free-standing autonomy claim" does not encompass "strategic disputes about whether to concede an element of a charged offense." *United States v. Holloway*, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019) (quoting *McCoy*, 584 U.S. at 426); *see also Crawford v. Mississippi*, 146 S. Ct. 33, 38 (2025) (mem.) (Sotomayor, J., dissenting) ("'Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against him, or reject the assistance of legal counsel despite the defendant's own inexperience,' so too may a defendant 'insist on maintaining his innocence.' That is because

'these are not strategic choices about how best to *achieve* his objectives' but rather 'choices about what his objectives in fact *are*.'" (alterations accepted) (quoting *McCoy*, 584 U.S. at 422)).

In *McCoy*, the defendant continuously and "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." 584 U.S. at 417. Specifically, he (1) pleaded not guilty; (2) told his counsel not to make a concession of guilt even after being advised it might save him from the death penalty; (3) testified to his complete innocence and asserted an alibi; (4) tried to terminate representation when counsel would not comply with his desire not to concede guilt; (5) protested contemporaneously to his counsel's concession of guilt during opening statements, saying his counsel was selling him out; and (6) moved for a new trial, arguing it was error to allow his counsel to concede guilt. *Id.* at 418–20. Contrary to the defendant's express wishes, his counsel told the jury that he "committed three murders. . . . [H]e's guilty." *Id.* at 417 (alterations in original). The Supreme Court held that such an admission was an "error structural in kind" and that the defendant "must . . . be accorded a new trial without any need first to show prejudice." *Id.* at 427–28.

Here, Sago points to nothing in the record that indicates he disagreed with or objected to his counsel's trial strategy contemporaneously. He did not maintain his innocence throughout the entirety of the proceedings,

protest his counsel's statements during trial or otherwise to the district court, or attempt to fire his counsel or obtain new representation. In this way, the facts of this case are less like *McCoy* and more like those of *Florida v. Nixon*, where the Supreme Court held that cases where a defendant challenges his counsel's strategic concession of guilt that occurred without the defendant's *express* objection or consent should be analyzed under the *Strickland* standard. 543 U.S. 175, 178–79, 189 (2004) ("[W]hen a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to [achieving his defense goals], counsel is not automatically barred from pursuing that course."). While Sago asserts in these postconviction proceedings that he never agreed to his counsel's concession of guilt, there is no indication he "object[ed] to th[is] course" when it was ongoing. *Id.* at 178. Sago's autonomous right to decide the objectives of his defense was not usurped by his counsel.

Furthermore, there *is* indication in the record that Sago affirmatively agreed with his counsel's trial strategy and presentation to the jury. Sago entered into a Rule 11(c)(1)(C) agreement and tried to plead guilty to second-degree murder, although the district court declined to accept the agreement. His counsel then moved the district court to reconsider its rejection of the plea agreement at the pre-trial hearing that occurred just prior to trial. While Sago ultimately withdrew his guilty plea and proceeded to trial on a

not guilty plea, his two attempts to plead guilty at least signal that his mindset regarding the goals of his defense was not to assert absolute innocence. Rather, Sago's goal was to mitigate his sentencing exposure after admitting culpability, which is aligned with the strategy his counsel pursued during trial. This is even more apparent considering Sago himself admitted on the witness stand during direct and cross examinations that he shot and killed Morgan from inside his vehicle and didn't testify on direct to seeing Morgan armed.

~~Indeed, unlike the defendant in *McCoy*, Sago at no point maintained~~ factual innocence of the actions underlying the charged crime. Rather, his own stated goal from trial through these postconviction proceedings was mitigation of first-degree murder – though Sago wished to mitigate using imperfect self-defense rather than only contesting premeditation. Thus, the record supports the conclusion that Sago's counsel honored Sago's choice about what his objectives were and pursued a trial strategy consistent with those objectives. Sago may now voice post hoc disagreement with his counsel's strategy, or perhaps even consider his counsel's performance deficient, but this present grievance is not redressable under *McCoy*. *See Holloway*, 939 F.3d at 1101 n.8.

Here, Sago never insisted on maintaining his innocence of shooting Morgan. To the contrary, he admitted to the shooting during his testimony.

What this record shows is that Sago and his counsel wanted to pursue a strategy of mitigation and that Sago never contemporaneously objected to counsel's strategic choices to achieve that objective at trial. Sago now asserts that he disagreed with counsel's strategy and didn't know his counsel was going to concede his guilt to second-degree murder. But *McCoy* requires more, to wit, at least some contemporaneous indication of such a disagreement in the record. No structural *McCoy* error occurred here. We turn next to Sago's argument that his counsel erred under *Cronic*.

B

Sago appears to briefly argue that the district court erred by not applying the *Cronic* presumption of prejudice to his claim that his counsel erred by conceding Sago's guilt to second-degree murder. "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland* 466 U.S. at 692. The "situations when *Strickland* does not apply such that a court may presume prejudice without inquiring into counsel's performance" include "a breakdown in the adversarial process" in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Hooks v. Workman*, 689 F.3d 1148, 1185–86 (10th Cir. 2012) (internal quotations marks and citations omitted).

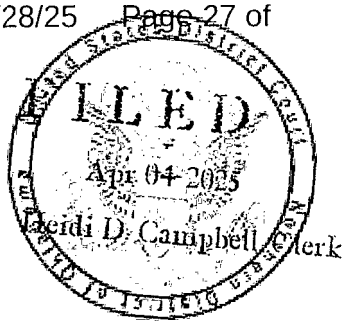
Sago does not argue that his counsel completely failed to subject the Government's evidence and presentation to adversarial testing beyond the concession to second-degree murder. On our review of the record, we find that Sago's counsel did not completely fail to subject the Government's case to the adversarial process. Sago's counsel did not concede his guilt to the charged crime of first-degree murder, challenged the premeditation element at trial, requested a lesser included offense instruction for second-degree murder, vigorously cross examined witnesses, presented Sago's testimony in his defense, and made opening and closing arguments, including briefly arguing in support of Sago's assertion of self-defense. We have previously held that the *Cronic* presumption of prejudice is not applicable under similar circumstances and do again on this record. *See Hooks*, 689 F.3d at 1186.

In sum, Sago fails to establish either *McCoy* or *Cronic* error, and a *Strickland* analysis is outside the scope of the COA granted in this case.

AFFIRMED. Sago's motion to supplement the brief in support of his motion for a COA, Doc. 13, is DENIED as moot.

APPENDIX B

Opinion of the United States District Court for the Northern District of Oklahoma 04/28/25 (p. 27-58)



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

KYLE QUENTIN SAGO,

Defendant/Petitioner.

Case No. 20-CR-00094-GKF
23-CV-00492-GKF-MTS

JUDGMENT

Pursuant to the Order dated April 4, 2025 denying the Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 of defendant/petitioner Kyle Quentin Sago, judgment is hereby entered in favor of plaintiff/respondent the United States of America and against defendant/petitioner Kyle Quentin Sago.

ENTERED in Tulsa, Oklahoma this 4th day of April, 2025.

GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. KYLE QUENTIN SAGO, Defendant/Petitioner.	Case No. 20-CR-00094-GKF 23-CV-00492-GKF-MTS

ORDER

This matter comes before the court on the Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Doc. 128] of defendant/petitioner Kyle Quentin Sago, as well as the related Motion for an Evidentiary Hearing [Doc. 132], Motion for Appointment of Counsel [Doc. 134], and Motion for Discovery and Production of Documents [Doc. 135]. For the reasons set forth below, the motions are denied.

Factual Background and Procedural History

This case relates to the July 25, 2020 death of Daniel Morgan. On August 4, 2020, a federal grand jury returned an Indictment charging Mr. Sago with one count of Murder – First Degree in Indian Country pursuant to 18 U.S.C. §§ 1151, 1153, and 1111, and alleging that Mr. Sago "willfully, deliberately, maliciously, and with premeditation and malice aforethought did unlawfully kill Daniel Morgan, by shooting him multiple times with a firearm." [Doc. 9]. A U.S. magistrate judge subsequently appointed attorney Heath Hyde to represent Mr. Sago.[1] [Doc. 31].

[1] On July 28, 2020, the magistrate judge initially appointed attorney Martin Gambill Hart to represent Mr. Sago. [Doc. 5]. However, on December 4, 2020, Mr. Sago filed a motion for appointment of new counsel [Doc. 21] and, on December 14, 2020, Mr. Hart filed a motion to withdraw as counsel [Doc. 23]. On December 22, 2020, the magistrate judge granted counsel's

On April 1, 2021, Mr. Sago appeared before the court, withdrew his not guilty plea, and entered a guilty plea as to the lesser-included offense of Murder – Second Degree in Indian Country. [Doc. 38]. The plea of guilty was the result of a plea agreement to Federal Rule of Criminal Procedure Rule 11(c)(1)(C). [Doc. 40, p. 4; Doc. 41]. In the Plea Agreement, Mr. Sago and the United States stipulated that "the appropriate disposition in this case is a sentence of 25 years of incarceration, a period of Supervised Release to be determined by the Court, and a fine and restitution determined by the Court." [Doc. 41, p. 12]. The court adjudged Mr. Sago guilty and set sentencing for July 13, 2021 at 10:30 a.m. [Doc. 38].

On July 13, 2021, Mr. Sago appeared before the undersigned for the scheduled sentencing. [Doc. 45]. During the hearing, the court heard argument as to whether or not it should accept the Plea Agreement given that it was to Second-Degree Murder, rather than First-Degree Murder. [Doc. 46, pp. 4-5]. The court noted that "the only issue is premeditation," [*Id.* at pp. 5-6], and raised an unpublished Tenth Circuit panel decision, *United States v. Wooten*, 696 F. App'x 337 (10th Cir. 2017), for the proposition that "a killer can develop premeditation during the incident at issue and the government does not need to show that the defendant deliberated for any particular period of time." [Doc. 46, pp. 6-8]. Further, the court noted that Mr. Morgan had been shot once in the chest and three times in the back, and "[t]he three shots in the back might also be reflective of premeditation." [*Id.* at pp. 17-19]. At the close of argument, the undersigned concluded as follows:

> With all due respect – and I do respect [the Assistant United States Attorney's] experience in these matters – but given the law in the Tenth Circuit and the facts of this case, primarily the three shots in the back, I'm going to have to reject the plea agreement. That is not a guarantee of anything for the victim's families. It's a guarantee of nothing. But I do think the facts here, the three shots in the back, concern the court with regard to the issue of premeditation and I think there is sufficient evidence.

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motion to withdraw and appointed Mr. Hyde. [Doc. 30; Doc. 31].

> I respect the government in its assessment. But with all due respect, I think the very lowest penalty this defendant could justly suffer would be the 25 years. I think the settlement here that was effectuated was the rock bottom. And I may be wrong. I may be wrong. A jury could potentially acquit. I don't think that's very likely. But I'm going to reject the 11(c)(1)(C) plea agreement.

[*Id.* at p. 24].

The court questioned Mr. Hyde as to whether Mr. Sago wished to withdraw his plea of guilty. [*Id.* at p. 24]. After an off-the-record discussion, Mr. Hyde confirmed that Mr. Sago did wish to withdraw his plea. [*Id.* at p. 25]. Accordingly, the court set trial of this matter for September 20, 2021. [*Id.* at pp. 25-26].

On August 17, 2021, a federal grand jury returned a Superseding Indictment charging Mr. Sago with one count of First Degree Murder in Indian Country pursuant to 18 U.S.C. §§ 1151, 1153, and 1111, two counts of Felon In Possession of Ammunition pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and one count of Causing Death by Using and Discharging a Firearm During and in Relation to a Crime of Violence pursuant to 18 U.S.C. §§ 924(c)(1)(A) and 924(j)(1). [Doc. 49].

The charges against Mr. Sago proceeded to trial from September 20, 2021 to September 22, 2021. [Doc. 71]. During a pretrial conference held immediately prior to jury selection on September 20, 2021, Mr. Hyde requested the Tenth Circuit Pattern Instruction 1.33, titled "Lesser-Included Offense," and confirmed that the parties were in agreement as to the government's proposed jury instructions.[2] [Doc. 91, pp. 2-3].

Additionally, Mr. Hyde made an oral motion seeking the court's reconsideration of the Rule 11(c)(1)(C) Plea Agreement. [Doc. 91, p. 3]. Mr. Hyde argued:

[2] Prior to the pretrial conference, Mr. Sago did not submit any proposed jury instructions.

> Just in reviewing the case for trial, we believe that the case firmly stands in the second-degree murder, which was the agreement that we had reached with the government. We're just reurging you consider accepting that plea.
>
> In addition to believing that our facts fall into that section of the code, we believe that the nature of the facts that a second-degree charge gives you a wider range in determining what the proper sentence in this case is and that a first-degree would be more restrictive and not necessarily fall in line with the facts. We just ask that you accept that plea.

[*Id.* at p. 3]. The court denied the motion to reconsider the Plea Agreement, stating:

> With due respect, the motion will be denied. The court's decision was based in no way with the opposition by the family of the decedent, but rather with the fact that the decedent was shot three times in the back after being shot once in the chest.
>
> The Tenth Circuit pattern instruction on first-degree murder states, "A killing is premeditated when it is the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the killer, after forming the intent to kill, to be fully conscience of that intent."
>
> And counsel may very well be correct, that a jury decides that the defendant is guilty of second-degree murder, but having been shot three times in the back as he's running away from the defendant is such that a reasonable jury, depending on how the facts lay out, may well be long enough for the defendant to be fully conscience of the intent to kill.

[*Id.* at pp. 3-4].

The case proceeded to trial. Mr. Hyde made an opening statement on Mr. Sago's behalf, during which he described the case as follows:

> Everything the government just told you is true. This is not a case of a who-done-it. There's not going to be any question that Mr. Sago was the shooter that day. The issue for you in this trial is going to be whether or not it was a first-degree murder versus a second-degree murder, and the judge is going to give you the law on that before you go back and deliberate in this case.
>
> Your job's going to be from the facts that are presented from this witness stand, do they support that Mr. Sago had premeditation and he went over there that day with the intent of killing the victim or was it the result of something happened after they got there?

[Doc. 93, pp. 18-19]. During the course of trial, Mr. Hyde cross-examined ten of the government's thirteen witnesses. [Doc. 94; Doc. 95].

Mr. Sago testified in his own defense. Mr. Sago described being in his vehicle outside of Mr. Morgan's house and seeing Mr. Morgan come outside, "throw[] his phone down" and "start[] coming out there to the car." [Doc. 95, pp. 77-78]. Mr. Sago testified that Mr. Morgan's "body language suggested that he was probably pretty pissed," [*Id.* at p. 78], and that he believed that Mr. Morgan "may have had a gun" and, possibly, a knife. [*Id.* at pp. 96-97]. Mr. Sago stated that he fired a shot, but missed. Mr. Sago testified "he [Mr. Morgan] seemed like he didn't even notice that I fired a gun" and "kept on coming, he was charging at the car." [*Id.* at p. 78]. Mr. Sago described firing several shots at Mr. Morgan, but that "he just kept on coming." [*Id.*]. Mr. Sago testified that he was scared that Mr. Morgan was going to kill him. [*Id.* at p. 79].

During a bench conference prior to the close of Mr. Sago's defense, the court requested that the parties "give some thought" as to whether a self-defense instruction should be given. [*Id.* at p. 92]. Mr. Hyde characterized a self-defense instruction as a "safety precaution" and the government agreed that it was wise to include the instruction. [*Id.* at 92-93].

At the close of trial, the court instructed the jury as to the four charged counts, the lesser-included offense of Second Degree Murder in Indian Country, and self-defense. [Doc. 73]. Neither the government nor Mr. Sago objected to the court's proposed jury instructions. [Doc. 95, p. 100].

In closing, Mr. Hyde reiterated his earlier statement that "this was not going to be a who-done-it, that this was going to be a case for you to decide the degree of murder." [*Id.* at p. 108]. Defense counsel urged the jury to find Mr. Sago's belief that he needed to use self-defense as indicative of the killing not being premeditated and therefore find this a case of Second Degree Murder. [*Id.* at pp. 113-14].

On September 22, 2021, the jury unanimously found Mr. Sago guilty of the charged counts, including First Degree Murder in Indian Country. [Doc. 74].

On January 27, 2022, the court sentenced Mr. Sago to a term of life imprisonment as to Counts One and Four and 120 months as to Counts Two and Three, with Counts Two and Three

to run concurrently with each other but consecutively to Counts One and Four. [Doc. 78; Doc. 79].

Mr. Sago appealed. [Doc. 80]. In a July 24, 2023 decision, the United States Court of Appeals for the Tenth Circuit affirmed Mr. Sago's convictions of First Degree Murder in Indian Country and Causing Death by Using and Discharging a Firearm During and in Relation to a Crime of Violence (Count One and Count Four).[3] [Doc. 102; Doc. 103]. The mandate issued on August 15, 2023. [Doc. 104].

On November 15, 2023, Mr. Sago filed the original Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255, as well as a brief and affidavit in support. [Doc. 105; Doc. 106; Doc. 107]. The court directed the government to file an answer, motion, or other response. [Doc. 111].

Prior to the government filing an answer, motion, or other response, on February 9, 2024, Mr. Sago sought leave to amend his § 2255 motion to assert additional grounds for relief. [Doc. 123]. In a February 12, 2024 Order, the court granted Mr. Sago leave to file an amended § 2255 motion. [Doc. 127].

On March 4, 2024, Mr. Sago filed the Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. [Doc. 128]. Mr. Sago subsequently filed the Motion for Evidentiary Hearing and Brief in Support [Doc. 132; Doc. 133], Motion for Appointment of Counsel [Doc. 134], and Motion for Discovery and Production of Documents and Brief in Support, as well as the requested Interrogatories. [Doc. 135; Doc. 136; Doc. 137].

The government responded in opposition to Mr. Sago's § 2255 motion [Doc. 139], and Mr. Sago filed a reply brief. [Doc. 144]. Additionally, Mr. Sago has sent the court several letters and supplemental briefs related to his amended § 2255 motion and the relief requested therein, all

[3] Mr. Sago did not appeal his convictions as to the two counts of Felon in Possession of Ammunition pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

of which the court has considered. *See* [Doc. 145; Doc. 146; Doc. 147; Doc. 148; Doc. 149; Doc. 151; Doc. 155].

Analysis

Pursuant to 28 U.S.C. § 2255(a), "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." In the amended § 2255 motion, Mr. Sago argues that trial counsel was ineffective in violation of his Sixth Amendment right to counsel.[4] Specifically, Mr. Sago alleges that Mr. Hyde fells below the objective standard of reasonableness, and was therefore constitutionally deficient, on eight bases: (1) conceding guilt against Mr. Sago's wishes resulting in a failure to subject the prosecution's case to a meaningful adversarial testing process; (2) failing to adequately investigate and present evidence of Mr. Sago's mental health and history of PTSD; (3) failing to request a self-defense instruction; (4) failing to request a lesser-included instruction; (5) representing a conflicting interest during trial (the government) which resulted in a denial of counsel at a critical stage of the criminal proceeding; (6) his conduct related to the July 13, 2021 hearing and Plea Agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C); (7) failing to file any pretrial motions; and (8) cumulative error. [Doc. 105; Doc. 106; Doc. 107; Doc. 123; Doc. 124; Doc. 128].[5]

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[4] The Sixth Amendment to the U.S Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

[5] In a letter dated February 22, 2024, Mr. Sago asked the court to consider his original motion and brief in support, as well as his motion to amend and brief in support, to determine his amended § 2255 motion collaterally attacking his conviction and sentence. [Doc. 131].

A. Concession of Guilt

Generally, to determine an ineffective assistance of counsel claim, the court must apply the two-prong test articulated by the U.S. Supreme Court in *Strickland*. *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015). Pursuant to the *Strickland* test, first, the movant "must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. Second, movant must demonstrate "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

However, the U.S. Supreme Court has recognized "three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Bell v. Cone*, 535 U.S. 685, 695 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 685-59 (1984)). "First and '[m]ost obvious' was the 'complete denial of counsel.'" *Bell*, 535 U.S. at 695 (quoting *Cronic*, 466 U.S. at 659). Second, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Bell*, 535 U.S. at 696 (quoting *Cronic*, 466 U.S. at 659). Finally, "in cases like *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." *Bell*, 535 U.S. at 696 (quoting *Cronic*, 466 U.S. at 659-62). "If a defendant can prove such circumstances actually existed, prejudice will be presumed." *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995).

Mr. Sago first argues that defense counsel was ineffective for conceding guilt against Mr. Sago's wishes and without his permission, allegedly resulting in a failure to subject the prosecution's case to a meaningful adversarial testing process such that prejudice is presumed. [Doc. 106, p. 5; Doc. 144, pp. 15-16]. Thus, Mr. Sago invokes the second *Bell* situation with respect to this issue.

The Tenth Circuit has recognized that the unauthorized "admission by counsel of his

client's guilt to the jury[] represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice." *Williamson*, 53 F.3d at 1511. However, "[w]hether such an admission actually occurred is necessarily fact-intensive" and the inquiry must focus on "whether, in light of the entire record, the attorney remained a legal advocate of the defendant who acted with 'undivided allegiance and faithful, devoted service' to the defendant." *Williamson*, 53 F.3d at 1511 (quoting *Osborn v. Shillinger*, 861 F.2d 612, 624 (10th Cir. 1988)). Further, "in order to implicate the *Cronic* presumption, any such admission by counsel must be complete." *United States v. Gonzalez*, 596 F.3d 1228, 1239 (10th Cir. 2010); *see also Bell,* 535 U.S. at 696-97 ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete.").

Here, *Cronic* is not implicated because defense counsel did not completely concede Mr. Sago's guilt as to the charged counts. Mr. Sago directs the court to no statements conceding guilt as to Counts Two and Three. As to first degree murder as charged in Count One and Count Four, defense counsel repeatedly challenged the government's proof as to premeditation, or specific intent. *See United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000) (the difference between first degree murder and second degree murder is *mens rea*). As previously stated, in his opening statement, Mr. Hyde argued to the jury, "[y]our job's going to be from the facts that are presented from this witness stand, do they support that Mr. Sago had premeditation and he went over there that day with the intent of killing the victim or was it the result of something happened after they got there?" [Doc. 93, pp. 18-19]. Mr. Hyde cross-examined witnesses as to whether there were any circumstances indicating a problem between Mr. Morgan and Mr. Sago immediately prior to

the shooting.[6] [Doc. 94, pp. 78-79, 11, 114, 157-59]. And, significantly, in closing, Mr. Hyde directed the jury to evidence that he argued did not support premeditation, including that, immediately prior to the shooting, Mr. Sago ran a variety of mundane errands, which was not indicative of a plan to commit murder. [Doc. 95, pp. 109-111]. Mr. Hyde characterized the absence of premeditation as his "main argument" to the jury. [Doc. 95, pp. 113-14]. Thus, defense counsel's admission of guilt to the jury was not complete and *Cronic* is inapplicable with respect to this issue.[7]

Nor does the balance of defense counsel's trial representation suggest that "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Defense counsel made an opening and closing statement, cross-examined the government's witnesses, requested a lesser-included offense instruction, and presented Mr. Sago's testimony. The Tenth Circuit has consistently declined to apply the *Cronic* presumption under similar circumstances. *See Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012); *Turrentine v. Mullin*, 390 F.3d 1181, 1207-08 (10th Cir. 2004) (presumption inapplicable "where 'counsel actively participated in all phases of the trial proceedings'") (collecting cases).

Because *Cronic* is inapplicable, a presumption of prejudice is unwarranted and the *Strickland* standard applies to Mr. Sago's ineffective assistance of counsel claim premised on

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[6] Defense counsel also examined Mr. Sago with respect to his self-defense theory and pointed to evidence indicating that Mr. Morgan may have been bent over when shot, which would be consistent with Mr. Sago's testimony. [Doc. 95, pp. 77-80, 112].

[7] Insofar as Mr. Sago cites *McCoy v. Louisiana,* 584 U.S. 414 (2018), to argue structural error and that prejudice is presumed because counsel's partial concession of guilt was unauthorized, the argument is belied by the record. Mr. Sago twice sought to plead guilty to second degree murder. [Doc. 46, p. 24; Doc. 91, pp. 3-4]. Further, during his trial testimony, Mr. Sago conceded that he had shot and killed Mr. Morgan. [Doc. 95, p. 96]. For this reason, *McCoy* is distinguishable. *Cf. McCoy*, 584 U.S. at 11509-11 (structural error for counsel to concede guilt where defendant had steadfastly maintained his innocence).

concession of guilt. As previously stated, pursuant to the *Strickland* test, first, the movant "must show that counsel's performance was deficient." *Strickland,* 466 U.S. at 687. Deficiency is "a demanding standard," *Barrett,* 797 F.3d at 1213, and requires the movant to show that defense counsel's representation "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 687-688; *see also id.* at 688 ("[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."). It "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland,* 466 U.S. at 687, and this "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689.

Second, movant must demonstrate "that the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687. The prejudice showing requires movant to demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Barrett*, 797 F.3d at 1214 (quoting *United States v. Rushin,* 642 F.3d 1299, 1302 (10th Cir. 2011)). The Tenth Circuit has recognized that the "two [*Strickland*] prongs may be addressed in any order, and failure to satisfy either is dispositive." *Hooks*, 689 F.3d at 1186; *see also Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017) ("As a rule . . . a 'violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.'").

Mr. Sago fails to satisfy either of *Strickland*'s two-prongs. First, he has not shown that defense counsel's decision to attack the premeditation/intent element of first degree murder, rather than seeking an outright acquittal (presumably through the self-defense affirmative defense) fell outside "the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. As previously stated, during his testimony, Mr. Sago conceded to shooting Mr. Morgan, but indicated

that he did so out of fear for his life. [Doc. 95, pp. 78-79, 96-97]. However, as acknowledged by Mr. Hyde, nothing in the witness testimony or the evidence admitted indicated that Mr. Morgan had in his possession a firearm at the time he was shot. [Doc. 139-1, pp. 1-2]. Further, Mr. Morgan was shot three times in the back in a matter consistent with him bending over and attempting to run away from his assailant. [Doc. 95, pp. 39, 45-46]. Given this evidence, defense counsel's decision not to pursue a complete acquittal through self-defense "was within the realm of sound trial strategy." *United States v. Brown*, 398 F. App'x 352, 354 (10th Cir. 2010) (unpublished)[8]; *see also Trice v. Ward*, 196 F.3d 1151, 1162 (10th Cir. 1999); *Williamson*, 53 F.3d at 1512 (quoting *Jones v. Barnes,* 463 U.S. 745, 751 (1983)) ("[E]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments . . . and focusing on one central issue if possible.").

Mr. Sago also argues that defense counsel was ineffective for "fail[ing] to properly address the issue of premeditation as it was presented by the Government, in that premeditation was formed in an instant, during the course of the incident, between the first series of shots and the second." [Doc. 106, p. 8; Doc. 144, p. 4]. However, that was not the entirety of the government's theory. Rather, the government pointed to evidence indicative of premeditation prior to Mr. Sago's first shot, including that Mr. Sago's firearm was fully loaded and that he did not begin shooting until Mr. Morgan was "close enough." [Doc. 95, pp. 105-06]. Accordingly, Mr. Hyde's decision to highlight other evidence contrary to premeditation fell within "the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. Further, although Mr. Sago contends that Mr. Hyde acted unreasonably by failing to address the formation of premeditation during the incident, Mr. Sago points to no evidence which would undermine defense counsel's trial strategy.

[8] "Unpublished decisions are not precedential but may be cited for their persuasive value." 10th Cir. R. 32.1(A).

Rather, as set forth above, the evidence demonstrated that Mr. Morgan was first shot in the chest, then three times in the back in a matter consistent with him bending over and attempting to run away from his assailant. [Doc. 95, pp. 39, 45-46].

Nor has Mr. Sago demonstrated a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. *See Strickland,* 466 U.S. at 694. The jury was presented with Mr. Sago's self-defense theory through his testimony and jury instructions, but nevertheless convicted him of first degree murder. Even if Mr. Hyde had not focused his defense theory on obtaining a second degree murder conviction, and instead sought acquittal through an affirmative defense, "[h]ow likely is it on the facts of this case that the jury would conclude that Mr. Sago premeditated the murder but then in fact decided to kill Mr. Morgan only out of [a reasonable] fear?" *United States v. Sago,* 74 F.4th 1152, 1163 (10th Cir. 2023).

For the foregoing reasons, Mr. Sago's ineffective assistance of counsel constitutional claim fails insofar as it is premised on concession of guilt.

B. Self-Defense Instruction, Lesser-Included Instructions, and Representation of a Conflict of Interest Resulting in a Denial of Counsel

For ease of analysis, the court next jointly considers Mr. Sago's third, fourth, and fifth arguments. That is, that defense counsel was constitutionally ineffective for: (1) failing to request a self-defense instruction [third argument]; (2) failing to request additional lesser-included offense instructions [fourth argument]; and (3) "representing a conflicting interest during trial which resulted in a denial of counsel at a critical stage of the criminal proceeding" [fifth argument].[9]

[9] In his amended § 2255 motion, Mr. Sago explains that "Ground 5 of this Amendment [*sic*] Motion, that counsel was ineffective for actively representing a conflicting interest (the Government) during trial which resulted in a denial of counsel at a critical stage of the criminal proceedings, was partly contained in grounds 3 and 4 of the original § 2255 Motion. Mr. Sago then states that he "maintains that counsel actively representing a conflicting interest is still a major factor of Grounds 3 and 4 of the original § 2255 Motion," but that he raised the issue in Ground 5 of the amended § 2255 motion "to insure that it is properly addressed." [Doc. 123, pp. 2-3].

As an initial matter, Mr. Sago argues that the presumption of prejudice applies because defense counsel's alleged conflict of interest resulted in a "'complete denial of counsel'" at a critical stage of the proceedings. *Bell,* 535 U.S. at 695 (quoting *Cronic*, 466 U.S. at 659).

The U.S. Supreme Court has held that "prejudice is presumed when counsel is burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 692. However, the presumption is "more limited" and "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland,* 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)). "[A]n actual conflict exists when 'counsel [is] forced to make choices advancing other interests to the detriment of his client.'" *United States v. Williamson*, 859 F.3d 843, 852 (10th Cir. 2017). The conflict must actually "affect[] counsel's performance—as opposed to a mere theoretical division of loyalties." *Williamson*, 859 F.3d at 852 (emphasis altered from original) (quoting *Mickens v. Taylor*, 535 U.S. 162, 171 (2002)).

"[T]he Supreme Court has indicated that only the concurrent representation of multiple defendants creates an actual conflict of interest." *Watson v. Fairbairn*, No. 23-1392, 2024 WL 1005070, at *5 (10th Cir. Mar. 8, 2024); *see also Williamson*, 859 F.3d at 854, 854-55 n.3 (10th Cir. 2017) (stating "[s]o far, the Supreme Court has applied the 'presumed prejudice' rule only for conflicts of interest in multiple representation cases" and acknowledging question of whether *Cuyler* applied "beyond prototypical multiple representation" was "an open question"); *LaPointe v. Oliver*, 807 F. App'x 770, 781 (10th Cir. 2020). This is not a multiple representation case and therefore an "open question" exists as to whether the presumption *could* apply.

Mr. Sago argues the presumption is applicable pursuant to the Tenth Circuit's decision in

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Thus, the court considers the arguments together.

Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988), *overruled on other grounds as recognized in Shafer v. Stratton*, 906 F.2d 506, 509 (10th Cir. 1990). In *Osborn*, the Tenth Circuit held that "[a] defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction . . . suffers from an obvious conflict of interest." *Osborn,* 861 F.2d at 629. *Osborn* applies where the defense "attorney so abandoned his 'overarching duty to advocate the defendant's cause,' that the [trial] proceedings were almost totally non-adversarial." *Osborn,* 861 F.2d at 628 (internal citation omitted) (quoting *Strickland,* 466 U.S. at 688).

Mr. Sago argues that defense counsel "actively represent[ed] a conflicting interest," [Doc. 123, p. 5], based on the following exchange during a bench conference:

> **The Court**: All right. I need to ask because we're on our third draft of jury instructions and I thought we were close. But you're going to need to give some thought as to whether or not we need to give a self-defense jury instruction now. So, I don't know, are you in a position to make that determination now, Mr. Hyde?
>
> **Mr. Hyde**: I think that's a safety precaution. Legally I'm not sure that it applies, but I think that there's more chance of it being evaluated on appeal if it wasn't in there than if it was. My argument would still not necessarily be that but –
>
> **The Court**: Yeah, that's what I'm concerned about on appeal. We found a Tenth Circuit case. Let me give you the –
>
> **Mr. Hyde**: I just know in Texas the only – state court's different from federal court – the only thing they ever reverse is not having something in the charging document.

[Doc. 95, p. 92].[10] Based on the court's review, Mr. Hyde's statements do not constitute abandonment of Mr. Sago such that the "proceedings were almost totally non-adversarial." *Osborn,* 861 F.2d at 628. Most significantly, unlike in *Osborne,* Mr. Hyde did not act in reckless

[10] In reply, Mr. Sago also argues that Mr. Hyde failed to remain an active and loyal advocate to him by "conced[ing] the defendant's guilt as to second degree murder and all underlying charges," and then "fail[ing] to properly address the issue of premeditation, the only issue he left in dispute." Mr. Sago states this argument is "covered in detail in Part 1a of his reply (directed to constitutional claim insofar as premised on concession of guilt). [Doc. 144, p. 16]. For the reasons set forth above, this argument fails. *See supra* pp. 8-13.

disregard of his client's interests but, rather, furthered Mr. Sago's self-defense defense by agreeing that the instruction should be provided. *Cf. Osborn*, 861 F.2d at 629. Although Mr. Hyde's closing argument did not focus on self-defense, as discussed above, Mr. Hyde challenged the government's case with a clear defense theory—that Mr. Sago did not act with the necessary premeditation/intent—which was a reasonable strategic decision given the evidence. That Mr. Morgan was shot multiple times in the back and there being no evidence that he had a weapon, Mr. Hyde was "left . . . with little room to maneuver." *See Davis v. Exec. Dir. of Dep't of Corrs.*, 100 F.3d 750, 759 (10th Cir. 1996). Finally, unlike in *Osborn*, the statements occurred during a bench conference, outside the hearing of the jury. *Cf. Osborn*, 861 F.2d at 629. Thus, the court concludes that Mr. Sago was not abandoned by defense counsel and the presumption of prejudice is inapplicable.

Because the presumption of prejudice is inapplicable, Mr. Sago's claim in this respect is governed by *Strickland*. As discussed above, Mr. Sago argues that defense counsel breached his duty of loyalty and made choices to Mr. Sago's detriment by (1) failing to request a self-defense instruction, [Doc. 123, p. 5; Doc. 128, p. 2; Doc. 144, pp. 31-32] and (2) failing to request lesser-included offense instructions. *See* [Doc. 144, pp. 31-32].

The court may quickly dispense with Mr. Sago's contention that defense counsel was constitutionally ineffective for failing to request a self-defense instruction. A self-defense instruction was provided. *See* [Doc. 73, p. 24]. However, the jury rejected the defense. *See* [Doc. 74]. Thus, Mr. Sago cannot show that the result of the proceedings would have been different had defense counsel requested a self-defense instruction.[11] *See Barrett*, 797 F.3d at

[11] In his reply, Mr. Sago argues for the first time that defense counsel was constitutionally deficient for failing to request "the following related instructions to supplement the self-defense instruction: (1) use of force against intruder instruction; (2) defense of an occupied vehicle instruction; (3) no duty to retreat 'stand your ground' instruction; (4) self-defense immunity instruction; and (5) initial

1214.

Turning to Mr. Sago's contention that defense counsel was constitutionally deficient for failing to request a lesser-included offense instruction, it is first necessary to consider the scope of Mr. Sago's argument. Although framed as a "failure to request a lesser-included offense instruction," based on the court's review of Mr. Sago's filings, petitioner conflates involuntary manslaughter and imperfect self-defense and asserts that defense counsel was constitutionally ineffective for failing to request jury instructions as to both. *See* [Doc. 106, p. 35; Doc. 144, p. 34; Doc. 146, p. 8; Doc. 149]. As recently recognized by the Tenth Circuit, an instruction regarding involuntary manslaughter is not the same as an instruction regarding imperfect self-defense. *United States v. Walker*, 130 F.4th 802, 806-07 (10th Cir. 2025). Accordingly, the court considers Mr. Sago's constitutional claim with respect to defense counsel's failure to request additional lesser-included offense instructions and imperfect self-defense.[12]

Looking first to a lesser-included offense instruction, "there is no Constitutional right to a lesser included offense instruction in non-capital cases." *Yingling v. Workman*, 206 F. App'x 738, 741 (10th Cir. 2006) (unpublished) (citing *Dockins v. Hines*, 374 F.3d 936, 938 (10th Cir. 2004)). Rather, requesting a lesser-included offense generally constitutes a strategic decision which

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aggressor instruction." [Doc. 144, p. 31]. The court generally does not consider arguments raised for the first time in reply. *See generally United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019). Regardless, the court provided the Tenth Circuit Pattern instruction as to self-defense, and Mr. Sago offers no explanation of what these instructions might be or why they are warranted. And the jury rejected Mr. Sago's self-defense defense, despite being instructed on same. It is "exceedingly unlikely" that any further instruction as to the defense would have altered the result, particularly given that there was no evidence to support the defense outside of Mr. Sago's testimony. *See Barrett*, 797 F.3d at 1214. Thus, Mr. Sago cannot demonstrate that the results of the proceeding would have been different and his constitutional claim fails in this respect. *Id.*

[12] The court provided a lesser-included offense instruction as to second degree murder. [Doc. 73, pp. 29-30]. Thus, the court considers Mr. Sago's constitutional claim only with respect to defense counsel's failure to request voluntary manslaughter and involuntary manslaughter lesser-included offense instructions.

presumptively falls "within the range of objectively reasonable representation." *United States v. Smith,* 10 F.3d 724, 729 (10th Cir. 1993); *see also United States v. Hall,* 843 F.2d 408, 413 (10th Cir. 1988) ("[T]he decision not to request a lesser included offense instruction falls within the wide range of reasonable professional representation."); *Bullock v. Carver,* 297 F.3d 1036, 1048-51 (10th Cir. 2002). "For counsel's actions to rise to the level of constitutional ineffectiveness, his strategic decisions must have been 'completely unreasonable, not merely wrong, so that [they] bear no relationship to a possible defense strategy.'" *Fox v. Ward,* 200 F.3d 1286, 1296 (10th Cir. 2000) (quoting *Hatch v. Oklahoma*, 58 F.3d 1447, 1457 (10th Cir. 1995)).

Here, Mr. Sago concedes in his affidavit that he and defense counsel discussed a lesser-included offense instruction, but that Mr. Hyde believed that the instruction would reduce the chances of acquittal. [Doc. 107, p. 2]. Nor does Mr. Sago offer any evidence that defense counsel was unaware of the law in this area or that the defense strategy was otherwise uninformed. As previously stated, the evidence presented at trial was that Mr. Sago shot Mr. Morgan first in the chest, then three times in the back (most likely as Mr. Morgan attempted to run). At the time, Mr. Sago was in his vehicle. There was no evidence of any confrontation between Mr. Morgan and Mr. Sago so as to create a "heat of passion," nor was there evidence to substantiate Mr. Sago's belief that Mr. Morgan was armed and acted as the initial aggressor such that self-defense was required. "[U]nder these facts an attorney could reasonably choose to avoid confusing the jury" and focus on negating premeditation. *Smith*, 10 F.3d at 729. Thus, defense counsel's decision not to request additional lesser-included offense instructions falls within the bounds of objectively reasonable representation and Mr. Sago fails to satisfy *Strickland*'s first prong in this regard.

Nor can Mr. Sago demonstrate that the results of the trial would have been different had defense counsel requested additional lesser-included offense instructions. With respect to voluntary manslaughter, the jury convicted Mr. Sago of first degree murder, which requires

premeditation. "[A] finding of premeditation is inconsistent with a finding that defendant acted in the heat of passion" and therefore Mr. Sago cannot show prejudice by defense counsel's failure to request a voluntary manslaughter instruction.[13] *United States v. Greschner*, 99 F.3d 1151, at *3 (10th Cir. 1996) (unpublished table decision).

Turning to involuntary manslaughter, Mr. Sago argues that the jury could have found that he acted in imperfect self-defense and therefore convicted him of involuntary manslaughter rather than first degree murder. [Doc. 106, p. 35; Doc. 144, p. 35; Doc. 146, p. 8; Doc. 149]. "Imperfect self-defense is a mitigating defense that requires the defendant to prove that he 'subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others, [even if] his belief was not objectively reasonable.'" *Walker,* 130 F.4th at 807 (quoting *United States v. Britt*, 79 F.4th 1280, 1287 (10th Cir. 2023)). "A defendant who succeeds in asserting imperfect self-defense is guilty of involuntary manslaughter." *Walker,* 130 F.4th at 807. Thus, the court first considers defense counsel's failure to request an imperfect self-defense instruction.

Counsel's failure to raise a potential defense "does not automatically render counsel's performance constitutionally deficient." *United States v. Harms*, 371 F.3d 1208, 1212 (10th Cir. 2004). This is because "[c]ounsel does not have to take every position and make every argument that the client requests." *United States v. Boigegrain*, 155 F.3d 1181, 1187 (10th Cir. 1998). Rather, petitioner must show that the defense likely would have prevailed at trial. See *United States v. Gray*, 182 F.3d 762, 767 (10th Cir. 1999).

Here, there was no evidence to substantiate Mr. Sago's claim that he feared for his life immediately prior to shooting Mr. Morgan. There was no evidence presented during trial that Mr.

[13] Voluntary manslaughter is the "unlawful killing of a human being without malice . . . [u]pon sudden quarrel or heat of passion." 18 U.S.C. § 1112(a).

Morgan was armed. Mr. Sago was in a vehicle while Mr. Morgan was on foot. Mr. Sago shot Mr. Morgan from the car, first in the chest and then three times in the back, likely while Mr. Morgan attempted to run away. Under the circumstances, defense counsel's decision not to focus self-defense—perfect or imperfect—was "within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689.

Regardless, Mr. Sago has not shown that he was prejudiced by defense counsel's failure to request an imperfect self-defense instruction as he has not demonstrated that the mitigation defense was likely to have succeeded at trial. *Gray*, 182 F.3d at 767; *Strickland,* 466 U.S. at 687. In fact the Tenth Circuit previously found that Mr. Sago was not prejudiced by this court's declining to *sua sponte* give an imperfect self-defense instruction. *Sago*, 74 F.4th at 1163. This court concurs.[14] Thus, Mr. Sago has not demonstrated that he was prejudiced by defense counsel's failure to request an imperfect self-defense instruction. For the same reasons, Mr. Sago has not shown prejudice due to counsel's failure to request an involuntary manslaughter instruction. Thus, Mr. Sago's constitutional claim fails in this regard.

C. Investigation of Mr. Sago's Mental Health and History of PTSD

Mr. Sago next argues that defense counsel was constitutionally deficient for failing to investigate and present evidence of his mental health history, including PTSD.

In this regard, Mr. Sago first asserts that defense counsel should have requested that he undergo a mental health evaluation. [Doc. 106, p. 17-18; Doc. 144, p. 21]. However, other than the fact of his diagnoses, Mr. Sago submits no evidence suggesting that he was either (1) unable

[14] Mr. Sago urges the court to apply the Tenth Circuit's decision in *United States v. Britt*, 79 F.4th 1280 (10th Cir. 2023), rather than its opinion in his own direct appeal. *See generally* [Doc. 149]. However, *Britt* involved a direct appeal, not a habeas claim. And, in *Britt*, the Tenth Circuit recognized the importance of the procedural posture of the case to its ultimate decision. *See Britt,* 79 F.4th at 1294.

to understand what he was doing or that it was wrong at the time of the offense such that an insanity defense would have been warranted or (2) subsequently incapable of assisting in his defense such that his competency was in question. Nor does the PSR indicate that Mr. Sago was either insane or incompetent at any relevant time. In fact, in his Petition to Enter Plea of Guilty, Mr. Sago swore that no psychiatrist, physician, or psychologist had found him to be mentally ill and that he knew of "no reason why [his] mental competence at the time of the commission of the alleged offense(s), or at the present time, should be questioned." [Doc. 40, p. 4]. Under the circumstances, defense counsel was not deficient for failing to request a mental health evaluation. *See United States v. Price,* 213 F. App'x 680, 682 (10th Cir. 2007) (unpublished); *Redden v. Calbone,* 223 F. App'x 825, 830 (10th Cir. 2007) (unpublished). Nor has Mr. Sago demonstrated that the outcome of the trial would have been different as he has not shown that any additional affirmative defenses would have been warranted based on the results of the evaluation or that he would have been adjudged incompetent. *See Lucero v. Medina,* 535 F. App'x 769, 770 (10th Cir. 2013) (finding no prejudice based on competency issue where defendant "was not tried while incompetent").

Mr. Sago argues that defense counsel nevertheless should have investigated and presented evidence of his mental health. Of counsel's duty to investigate, the Tenth Circuit has explained:

> No "set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland,* 466 U.S. at 688-89, 104 S.Ct. 2052. But counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. 2052. A "decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* "[W]hat investigation decisions are reasonable depends critically" on "information supplied by the defendant." *Id.*

Newmiller v. Raemisch, 877 F.3d 1178, 1196 (10th Cir. 2017). Mr. Hyde was aware of Mr. Sago's PTSD diagnosis. [Doc. 107, p. 3, ¶ 8; Doc. 139-1, p. 1]. However, significantly, Mr. Sago *does not* aver that he informed Mr. Hyde of his contention that he "was thrown into a PTSD episode the day the shooting occurred." [Doc. 106, p. 22]. In fact, Mr. Sago did not mention PTSD or otherwise suggest that he was in an "episode" during the trial of this matter. [Doc. 95, pp. 74-79, 96]. Further, as previously stated, in the Petition to Enter Plea of Guilty, Mr. Sago affirmed that he knew of "no reason why [his] mental competence at the time of the commission of the alleged offense(s), or at the present time, should be questioned." [Doc. 40, p. 4]. And the PSR prepared in advance of the July 13 sentencing hearing indicated that Mr. Sago had been prescribed Remeron for his PTSD and Celexa for his depression but he had ceased taking those medications in 2018—two years prior to the crime—because they were "too powerful" and made him "sleep too hard." Although Mr. Hyde was aware of Mr. Sago's PTSD diagnosis, given the information provided to counsel and under the circumstances, counsel's decision not to investigate and present evidence during trial regarding Mr. Sago's mental health constitutes a reasonable decision. *Newmiller,* 877 F.3d at 1196. Thus, Mr. Sago fails to satisfy *Strickland*'s first prong. Moreover, Mr. Sago cannot demonstrate prejudice pursuant to the second prong as he has not demonstrated that the evidence would have been helpful to his defense. *See Young v. Att'y Gen. for the State of New Mexico,* 534 F. App'x 707, 711 (10th Cir. 2013) (unpublished); *see also generally Wackerly v. Workman*, 580 F.3d 1171, 1178 (10th Cir. 2009) (recognizing "double-edged nature" of mitigating evidence).

Finally, Mr. Sago specifically criticizes counsel for not calling a mental health expert witness to testify on his behalf. [Doc. 106, p. 17; Doc. 144, pp. 21-22]. Mr. Sago speculates that a mental health expert would have testified that his PTSD "played a significant role in the shooting, particularly the second round of shots." [Doc. 144, p. 21]. However, Mr. Sago has not submitted

the affidavit of any mental health professional offering such opinions nor has he offered any medical records or other evidence to substantiate his claim. Thus, Mr. Sago has failed to "identif[y] precisely what these purported experts would have testified to" and, further, it is uncertain that the testimony would have been admissible. *Cummings v. Sirmons*, 506 F.3d 1211, 1233 (10th Cir. 2007). Moreover, "[t]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney." *Barrett*, 797 F.3d at 1214; *see also Dunn v. Reeves*, 594 U.S. 731, 739 (2021) ("[W]e have often explained that strategic decisions—including whether to hire an expert—are entitled to a 'strong presumption' of reasonableness."). As set forth above, although Mr. Hyde was aware of Mr. Sago's PTSD diagnosis, Mr. Sago himself stated that no reason existed to question his mental competence, either at the time of the crime or during the proceedings. Nor was there any evidence suggesting insanity or incompetence. Under the circumstances, Mr. Sago has not established that trial counsel was constitutionally deficient for failing to retain and present a mental health expert. *Cummins*, 506 F.3d at 1233. Nor has Mr. Sago demonstrated prejudice as he has not shown that the testimony of a mental health professional would have been helpful to his defense. *See Young,* 534 F. App'x at 711; *see also Wackerly*, 580 F.3d at 1178.[15] Thus, Mr. Sago's constitutional claim fails insofar as it is premised on defense counsel's failure to investigate and present evidence of Mr. Sago's mental health history.

D. July 13, 2021 Hearing and Rule 11(c)(1)(C) Plea Agreement

"Like other claims of ineffective assistance of counsel, ones made 'in the plea bargain context are governed by the two-part test set forth in *Strickland*.'" *United States v. Watson*, 766 F.3d 1219, 1225 (10th Cir. 2014) (quoting *Missouri v. Frye,* 544 U.S. 134, 140 (2012)). "This test

[15] Mr. Sago cannot demonstrate that he was prejudiced with respect to consideration of mental health evidence at the sentencing as: (1) the court considered the evidence and (2) he was subject to a mandatory minimum of life imprisonment, *see* 18 U.S.C. § 1111(b).

requires a defendant to demonstrate that counsel's performance (1) was unconstitutionally deficient, and (2) resulted in prejudice." *Watson,* 766 F.3d at 1225. Here, Mr. Sago contends that defense counsel was constitutionally deficient with the respect to the Rule 11(c)(1)(C) Plea Agreement and the July 13, 2021 hearing in three respects: (1) failing to properly advise Mr. Sago of his rights concerning withdrawal of the guilty plea; (2) advising Mr. Sago to withdraw his guilty plea and proceed to trial only to concede guilt as to second degree murder at trial; and (3) making a "confusing statement" during the July 13 hearing.[16] [Doc. 123, pp. 6-9; Doc. 144, pp. 44-46; Doc. 145; Doc. 155]. Mr. Sago argues that, but for these alleged deficiencies, he would not have withdrawn his guilty plea and would have "opted to keep the guilty plea for second degree murder, but with an upward departure." [Doc. 155, pp. 2-3]; *see also* [Doc. 144, p. 46 (stating he would have "left the guilty plea in place"); Doc. 145, p. 1 (same); Doc. 146, pp. 1-2].

Mr. Sago fails to show prejudice and therefore the court need not consider whether defense counsel's representation was constitutionally deficient. *See Hooks*, 689 F.3d at 1186. Where the prejudice alleged is rejecting a plea agreement and going to trial, the defendant must show that:

> [1] [the] defendant would have accepted the plea . . . [2] the prosecution would not have withdrawn it in light of intervening circumstances . . . [3] *the court would have accepted its terms*, and . . . [4] the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

[16] In the amended motion, Mr. Sago also asserted that defense counsel was constitutionally ineffective for "failing to file a motion to enforce the terms of the plea agreement." [Doc. 128; Doc. 123, pp. 6, 8-9]. However, in his reply brief, Mr. Sago concedes this argument. [Doc. 144, pp. 44-45]. Regardless, pursuant to Rule 11(c)(1)(C)'s plain language, the plea agreement binds the court only "once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Although the court accepted Mr. Sago's guilty *plea*, it did not accept the *plea agreement*. *See generally United States v. Byrum*, 567 F.3d 1255, 1259 (10th Cir. 2009) ("An important distinction exists, though, between a guilty plea and the underlying plea agreement. A district court can accept the guilty plea but defer acceptance of the plea agreement."). Thus, the plea agreement was not binding upon the court and any motion to enforce the agreement against the court would have been futile.

United States v. Kearn, 90 F.4th 1301, 1309-10 (10th Cir. 2024) (emphasis added); *see also Lafler v. Cooper,* 566 U.S. 156, 163-64 (2012). Thus,

> [i]n order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

Missouri v. Frye, 566 U.S. 134, 148 (2012). *Missouri v. Frye*, 566 U.S. 134, 148 (2012). "This further showing is of particular importance because a defendant has no right to be offered a plea, nor a federal right that the judge accept it." *Frye,* 566 U.S. at 148-49 (internal citation omitted).

Mr. Sago has not, and cannot demonstrate, a reasonable probability that the court would have accepted the terms of any plea agreement to a second degree murder charge. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Kearn*, 90 F.4th at 1309 (quoting *Strickland,* 466 U.S. at 694). It "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Harrington v. Richter,* 562 U.S. 86, 102 (2011)). The trial court twice rejected the plea agreement to a second degree murder charge and, in doing so, expressed its concern that there was sufficient evidence of premeditation to support first degree murder. [Doc. 46, p. 24; Doc. 91, pp. 3-4]. Given the concern repeatedly raised by the court that the evidence was sufficient for first degree murder, Mr. Sago has not demonstrated a substantial likelihood the court would have accepted the plea to second degree murder, "but with an upward departure." While it is *conceivable* that the court could have been persuaded to accept another plea agreement, a reasonable probability requires more. *See Kearn*, 90 F.4th at 1309; *see also Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) ("[M]ere speculation is not sufficient to satisfy this burden.").[17]

[17] Mr. Sago offers no evidence that he would have plead guilty to first degree murder. Regardless,

For the foregoing reasons, Mr. Sago has not demonstrated that he was prejudiced by counsel's alleged deficiencies related to the Rule 11(c)(1)(C) Plea Agreement and July 13 hearing as required by *Strickland*. Thus, Mr. Sago's constitutional claim, to the extent premised on the July 13 hearing and plea agreement, fails.

E. Failure to File Pretrial Motions

Mr. Sago next argues that trial counsel was constitutionally ineffective for failing to file any pretrial motions, despite Mr. Sago's requests. [Doc. 123, pp. 9-10; Doc. 124, p. 1, ¶ 1; Doc. 128, p. 3; Doc. 144, pp. 47-48].

The Tenth Circuit "has held that the Sixth Amendment does not require that every possible motion be filed, but only those having a solid foundation." *Coleman v. Brown*, 802 F.2d 1227, 1234 (10th Cir. 1986). "[A]n attorney's decision whether to file a written brief on a given motion is strategic." *Coleman,* 802 F.2d at 1234.

In his reply, Mr. Sago asserts that defense counsel should have filed the following motions: (1) motion for dismissal of superseding indictment counts 2, 3, and 4; (2) "motion for amendment of ct. 1 1st degree murder to 2nd degree murder (on the basis of insufficient evidence in support of premeditation)"; (3) motion for a private investigator, and (4) "miscellaneous motions in *limine,* including mistrial, new trial, etc."[18] [Doc. 144, p. 47].

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a plea to first degree murder would also have resulted in a term of imprisonment of life and therefore Mr. Sago cannot show prejudice as a result of not being permitted to plead to first degree murder. *See* 18 U.S.C. § 1111(b) ("Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.").

[18] Mr. Sago also argues that defense counsel should have filed a motion for mental health evaluation of Mr. Sago and a motion to secure an expert forensic psychiatrist/psychologist witness. [Doc. 144, p. 47]. For the reasons discussed above with respect to Mr. Sago's assertion that counsel was constitutionally ineffective for failing to investigate and present evidence of his mental health diagnoses, Mr. Sago has not shown that defense counsel was constitutionally ineffective or that he was prejudiced as a result of defense counsel not obtaining a mental health evaluation or presenting a mental health expert witness. *See supra* pp. 20-23.

However, Mr. Sago does not identify the grounds on which defense counsel should have sought dismissal of Counts 2, 3, and 4 of the Superseding Indictment, nor is the court aware of any. Nor does Mr. Sago explain why an adequate defense required a pretrial investigator or "miscellaneous motions *in limine*." The Tenth Circuit has recognized that, although the court must liberally construe a *pro se* § 2255 motion, the court is "not required to fashion Defendant's arguments for him where his allegations are merely conclusory in nature and without supporting factual averments." *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994).

Additionally, Mr. Sago asserts that defense counsel should have filed a pretrial motion to dismiss Count One – First Degree Murder on the basis of insufficient evidence in support of premeditation.[19] Where a claim for ineffective assistance of counsel rests on failure to raise an issue, the court "must look to the merits of the omitted issue" and "[i]f the omitted issue is without merit, then counsel's failure to raise it is not prejudicial." *United States v. Orange*, 447 F.3d 792, 797 (10th Cir. 2006).

Mr. Sago argues that counsel should have sought dismissal of Count One based on insufficient evidence, but it is well-established that:

> . . . the strength or weakness of the government's case, or the sufficiency of the government's evidence to support a charge, may not be challenged by a pretrial motion. An indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true. *Courts should refrain from considering evidence outside the indictment when testing its legal sufficiency.*

United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994) (internal citations omitted) (emphasis added). Accordingly, Mr. Sago's contention that Count One of the Superseding Indictment

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[19] Although Mr. Sago asserts that defense counsel should have filed a motion to amend Count One, the court is unaware of any procedural mechanism through which Mr. Sago could have sought amendment of the Superseding Indictment. Thus, the court construes Mr. Sago's argument as asserting that defense counsel should have filed a motion to dismiss.

should have been dismissed, pretrial, for insufficient evidence of premeditation is without merit. As a result, Mr. Sago cannot show that counsel's decision not to file such a motion fell outside the bounds of reasonable representation or that he was prejudiced by same.

For the foregoing reasons, Mr. Sago has not satisfied either prong of the *Strickland* analysis with respect to defense counsel's failure to file pretrial motions and therefore his constitutional claim in this regard fails.

F. Cumulative Error

Finally, Mr. Sago argues cumulative error. [Doc. 123, pp. 10-11; Doc. 128, pp. 3-4; Doc. 144, pp. 48-49]. "A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003). To warrant habeas relief, a petitioner must show that the errors resulted in "actual prejudice"—that is, "the cumulative effect of the errors determined to be harmless had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Hanson v. Sherrod,* 797 F.3d 810, 852 (10th Cir. 2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). A cumulative error analysis applies only where there are two or more errors, whether actual or assumed. *Grant v. Royal*, 886 F.3d 874, 954-55 (10th Cir. 2018).

Here, the court has assumed two errors: (1) counsel's failure to request a self-defense instruction; and (2) counsel's representation related to the Rule 11(c)(1)(C) Plea Agreement and the July 13, 2021 hearing. Thus, a cumulative error analysis applies.

Aggregating the two assumed errors, the errors did not have such an "inherent synergistic effect" so as to undermine the outcome of trial. *See Cargle,* 317 F.3d at 1221. First, as previously stated, although the court presumed that the *failure to request* a self-defense instruction was error, a self-defense instruction was provided. Thus, the jury considered whether Mr. Sago

acted in self-defense in reaching its verdict. Further, the court's rejection of the Rule 11(c)(1)(C) Plea Agreement occurred prior to the trial. Although it ultimately resulted in this case going to trial, Mr. Sago has not shown that the earlier representation affected the proceedings itself. Under the circumstances, the court cannot conclude that the two assumed errors "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Handson,* 797 F.3d at 852.

Moreover, the government presented a strong and compelling case, while Mr. Sago's self-defense claim lacked corroboration. "As *Strickland* noted: 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" *United States v. Zajac*, 680 F. App'x 776, 785 (10th Cir. 2017) (unpublished) (quoting *Strickland,* 466 U.S. at 696). Thus, Mr. Sago's claim of cumulative error fails.

Other Pending Motions

As previously stated, Mr. Sago filed three motions related to his amended § 2255 petition: (1) Motion for an Evidentiary Hearing [Doc. 132]; (2) Motion for Appointment of Counsel [Doc. 134]; and (3) Motion for Discovery and Production of Documents [Doc. 135]. The court separately considers each motion.

Motion for an Evidentiary Hearing: "In response to a § 2255 motion, the district court 'must hold an evidentiary hearing on the prisoner's claims unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Lopez,* 100 F.3d 113, 119 (10th Cir. 1996) (quoting *United States v. Galloway*, 56 F.3d 1239, 1240 n.1 (10th Cir. 1995)). For the reasons discussed above, the motion, files, and records conclusively demonstrate that Mr. Sago is not entitled to relief. Thus, an evidentiary hearing is not necessary, and Mr. Sago's motion requesting evidentiary hearing is denied.

Motion for Appointment of Counsel: "There is no right to counsel in postconviction proceedings." *Garza v. Idaho*, 586 U.S. 232, 245 (2019). However, pursuant to 18 U.S.C. §

3006A, in a § 2255 proceeding, the court shall provide representation to a defendant if "he is financially unable to obtain counsel" and "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B), (b). For the reasons discussed above, Mr. Sago fails to demonstrate an entitlement to relief. For this reason, the interests of justice do not require appointment of counsel, and Mr. Sago's request for appointment of counsel is denied.

Motion for Discovery and Production of Documents Pursuant to Rule 6 Governing 28 U.S.C. § 2255 Proceedings: "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley,* 520 U.S. 899, 904 (1997). Rather, pursuant to Rule 6(a) of the *Rules Governing Section 2255 Proceedings for the United States District Courts*, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law." "Good cause is established 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Wallace v. Ward,* 191 F.3d 1235, 1245 (10th Cir. 1999). For the reasons set forth above, the record of the case demonstrates that Mr. Sago is not entitled to relief. There are no issues that require further development nor, having reviewed Mr. Sago's requests for discovery, would Mr. Hyde's responses alter the analysis contained herein. Thus, Mr. Sago's motion for discovery is denied.

Certificate of Appealability

Rule 11 of the *Rules Governing Section 2255 Cases in the United States District Courts* instructs that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," and the court "indicate[s] which specific issue or issues satisfy [that] showing." 28 U.S.C. § 2253(c)(3). That

standard demands that the issues raised be debatable among reasonable jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, the court denies a certificate of appealability as the Mr. Sago has not made a substantial showing of the denial of a constitutional right and, further, record is devoid of any authority suggesting that reasonable jurists would resolve the issues in this case differently.

Conclusion

WHEREFORE, the Amended Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Doc. 128] of defendant/petitioner Kyle Quentin Sago is denied.

IT IS FURTHER ORDERED the Motion for an Evidentiary Hearing [Doc. 132], the Motion for Appointment of Counsel [Doc. 134], and Motion for Discovery and Production of Documents [Doc. 135] of defendant/petitioner Kyle Quentin Sago are denied.

IT IS FURTHER ORDERED that the court denies a certificate of appealability because Mr. Sago has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Rule 11(a), Rules Governing Section 2255 Proceedings.

IT IS SO ORDERED this 4th day of April, 2025.

GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

Jury Trial Transcript 09/22/21 (p. 271-274)

P-1

Jury Trial Transcript

that we gave you all the evidence; we let you know who the witnesses were, including down to the rap sheets of our own witnesses and the order in which we would call them.

Do we agree that you knew about all of those things?

A. Yes.

Q. We also agree that you are an Indian because you enrolled in the Muscogee (Creek) Nation in 2000 and that you have one-quarter Muscogee (Creek) Nation blood. We agree there as well; correct?

A. Yes.

Q. We agree that this particular shooting happened in Indian Country, just about two blocks inside the Muscogee (Creek) Nation. We agree there as well; correct?

A. Yes.

Q. We agree that you are a felon because you have more than one felony and that you knew you had those felonies before this incident; correct?

A. Yes.

Q. We agree that you shot Daniel, meaning that you possessed ammunition not only at the scene, but also in your car and in your residence. We agree there as well; correct?

A. Yes.

Q. We agree that you not only used the firearm, but you discharged a firearm during the course of this incident and

that it is either murder I or murder II. We agree there as well; correct?

A. I don't exactly agree there. Let's back up to the last one.

There was no rounds. One of those charges should -- I think that was wrong. It said there was three rounds of 9mm ammunition. There's shell casings; right?

Q. Are you saying that you don't agree with the number of shell casings that were found at the scene?

A. I don't know about the number of shell casings. But one of the charges was specifically three 9mm rounds, which were not shell casings but actual live ammunition, which I have never seen any evidence to that.

Q. Well, there were live rounds when you shot Daniel because you pulled the trigger and a bullet came out the end of the barrel, entered his body, and the casings were left behind at the scene. You agree that you did that; right?

A. Yes.

Q. That means that at the time of the shooting, you possessed live rounds of ammunition at the scene; correct?

A. Yes.

Q. We talked about, with all of our witnesses, any convictions that they had within ten years, about any mental health treatment that they had, and any drug use. So far the only drug use that we've talked about with you was the

It's the finding of this court in the case of United States of America v. Kyle Sago that the defendant is competent and is capable of entering an informed plea, that he is aware of the nature of the charge and the consequences of his guilty plea, and that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The guilty plea is therefore accepted and the defendant is now adjudged guilty of that offense.

Has Mr. Sago fully signed and initialed the plea agreement?

DEPUTY COURT CLERK: Yes, he has.

THE COURT: All right. For the record, the court has executed the order attached to the petition to enter plea of guilty.

Mr. Sago, a written presentence report will be prepared by the probation office to assist me in sentencing.

Mr. Harrison, who will the probation officer be?

PROBATION OFFICER: Officer Jennifer Toppah.

THE COURT: All right. Officer Toppah will prepare that written presentence report. Mr. Sago, you'll be asked to provide information so that Ms. Toppah may complete that report, and your attorney may be present during that questioning, if you wish. The court will permit both you and Mr. Hyde to read that written report and to file any written

APPENDIX E

Plea Agreement Sentencing Hearing 07/13/21 (p.19-28) Doc. No. 46

THE COURT: Hollow-point ammunition?

MR. LENHARDT: The FBI special agent who investigated this particular case was also nice enough to come back for this particular one as well. I don't recall whether they were hollow-points. My recollection is that they were not. I usually look to see if they were the type of ammunition that police officers use which are even more dangerous than hollow-points, whether they're hollow-points themselves or whether there was any way that we could even tell.

I do recall that there was ammunition found in his house. I recall that it was found in sort of a hole in the wall. But I honestly don't recall if the ammunition was hollow-point or not. So if you can give me a moment, Your Honor, I'll try to see if I can find that out.

THE COURT: Well, I was wondering too. The three shots in the back might also be reflective of premeditation; right?

MR. LENHARDT: Yes. I agree that, as you noted, premeditation can happen during the course of an incident as well. You can form the specific intent to kill and premeditated death even during the middle of it.

For example, if you have 17 shots, that's really good evidence that the person premeditated it at some point before that final shot. And that is one of the things that I considered here. There was obviously more than one shot fired

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and he was hit more than one time. So those are pieces of evidence that are helpful for us and allowed us to pursue first-degree murder with the Grand Jury, and then we have to see if the balance of the evidence weighs out that we should seek first-degree murder or whether we should not.

I know your original question. I'm going to see if I can get back to that one. If your question was anytime we can potentially seek first-degree murder should we? I don't think the answer to that question is necessarily yes or necessarily no; if, for example, there was a hypothetical situation where there was a one percent chance of first-degree murder, a ninety percent chance of second-degree murder, and a nine percent chance of some other errant verdict, whether it's not guilty or a lesser degree of homicide.

I don't necessarily think that we should pursue murder on every case. However, it is my responsibility and the oath I swore was to pursue justice and to uphold the Constitution of the United States and the laws of the United States of America. So it would also be inappropriate for me to undersell a case. If this was a first-degree murder case, and nothing but a first-degree murder case, it would be inappropriate for me to handle this as a second-degree murder case. I didn't do that because I thought I wanted to leave Tulsa early. I didn't do it because I was afraid of going to trial because I've never done it before. I did it because in my assessment this was the

best, fairest resolution to the case. That's ultimately why I did this. There are always benefits. A bird in the hand is always worth two in the bush but it depends what cost it comes to.

I often tell people -- and I think I told the family in this particular case -- that as sort of simplistic as it sounds, it's often like trying to sell a car. You want to sell a car. I want to buy a car. But you want to sell it for a million dollars and I want to buy it for one dollar. So what is an appropriate resolution? Sometimes the best resolution is where neither side is happy. If we sold it for $10,000, you might be unhappy because of how low that was and I might be unhappy because of how high that was from my perspective.

And I think that that's sort of where we land with this particular case. That when you think of all the different factors that come unto play here, I don't think that either side can say that they're happy. I know that some of the family members are not. I know that some of the family members are. I know that internally we had many discussions, not only among myself and Mr. Raley, the other prosecutor assigned to this case, but to supervisors within our office. I talked to the FBI special agent.

I think the bottom line in this particular case is that everyone is going to walk away from this, assuming that you accept it, with some level of unhappiness.

THE COURT: Even the defendant?

MR. LENHARDT: Even the defendant. I think that he's probably not happy that he's going for this amount of time. He wishes he could get less time; right? Of course, he would like less time.

THE COURT: Under these facts?

MR. LENHARDT: Under these circumstances. I mean, he's -- he's pleading and agreeing to a sentence that's not at the bottom of the guidelines. So he has reason to hope for something better but I don't know that he has a realistic --

THE COURT: Well, it's only eight months from the bottom of the guidelines.

MR. LENHARDT: Correct. It's not even in the middle.

THE COURT: All right. The ammunition question is collateral, it's really not terribly important here.

If this matter were taken to a jury, the jury found first-degree, even then the likely sentencing range would be at 40 with a criminal history of 6 which is 360 to life; correct?

MR. LENHARDT: Yes, sir.

THE COURT: So that's only five years more than the 300 that he would be betting under your proposed resolution; correct?

MR. LENHARDT: Yes, sir. It's also one of the things --

THE COURT: Well, assuming that the court would go low end of the guidelines.

MR. LENHARDT: Right. I mean, you could obviously give him life. That would be the ultimate potential if he was convicted of first-degree murder.

THE COURT: Right.

MR. LENHARDT: There would essentially be no minimum that you could give him probation technically by law. No one figures that that's the most likely determination if he was convicted of first-degree murder. A sentence within the guideline range would be more likely than anything else. So a sentence of somewhere between 30 years and life is a distinct possibility if he is convicted of first-degree murder.

It's one of the things that we considered, you know, what would he get -- if it was mandatory life, that's one thing; right? If it's 360 to life, that's another thing. And so where do you get all these things to play out?

We had many discussions, as I said, and ultimately this was a -- this wasn't a negotiation where we said to the defendant, "plead to 40," and he said, "I'll do 20," and then we said, "30." That's not the way this one came out. This was a take-it-or-leave-it offer from the government. This was, from our perspective, the lowest we were willing to go. If he would have said one day less than what we were offering him, we would have gone to trial. I think that's the line that we drew

internally in the sand. We believe that this was the least sentence that we should settle this case for under the circumstances.

THE COURT: Anything further?

MR. LENHARDT: No, sir.

THE COURT: Mr. Hyde, anything further?

MR. HYDE: No, Your Honor.

THE COURT: With all due respect -- and I do respect Mr. Lenhardt's experience in these matters -- but given the law in the Tenth Circuit and the facts of this case, primarily the three shots in the back, I'm going to have to reject the plea agreement. That is not a guarantee of anything for the victim's families. It's a guarantee of nothing. But I do think the facts here, the three shots in the back, concern the court with regard to the issue of premeditation and I think there is sufficient evidence.

I respect the government in its assessment. But with all due respect, I think the very lowest penalty this defendant could justly suffer would be the 25 years. I think the settlement here that was effectuated was the rock bottom. And I may be wrong. I may be wrong. A jury could potentially acquit. I don't think that's very likely. But I'm going to reject the 11(c)(1)(C) plea agreement.

Now, the question is, Mr. Hyde, does Mr. Sago wish to withdraw his plea of guilty under the 11(c)(1)(C) plea

agreement?

(Discussion held off the record)

MR. HYDE: Yes, Your Honor, he would want to withdraw his plea.

THE COURT: Very well. We'll need to reset this matter for jury trial. How much time do we need?

MR. HYDE: Your Honor, let's see. We're in the middle of July. If we could -- I would be able to be prepared for some time in September.

THE COURT: Mr. Lenhardt.

MR. LENHARDT: That's acceptable to the government Your Honor. And as I indicated, I will come back and try it.

THE COURT: Thank you, sir. Karen.

(Discussion held off the record)

THE COURT: All right. Well, the -- so a speedy trial will not include any delay that's occurred up until now? If I reject the plea agreement, the 70 days begins now?

DEPUTY COURT CLERK: Correct.

THE COURT: Okay. So we're cutting it close. The 70 days would be September 21st and our jury docket would be September 20th, so we'll need to start it on September 20th to get within speedy trial.

MR. LENHARDT: And the defense may be willing to put in a continuance request instead of the ones that ask for it to go to September rather than next week, for example.

MR. HYDE: We're not really worried about the speedy trial issue, Your Honor.

THE COURT: Okay. So we can handle speedy trial?

MR. HYDE: Yes.

THE COURT: All right. Good. All right. Well, we'll set this matter for jury trial on September 20th.

And do we have a date for pretrial conference, Karen?

DEPUTY COURT CLERK: Yes. That would be September 8th at 9:30.

THE COURT: September 8th at 9:30.

MR. LENHARDT: That pretrial conference date again, Your Honor?

DEPUTY COURT CLERK: September 8th at 9:30.

MR. LENHARDT: Thank you.

THE COURT: Thank you.

DEPUTY COURT CLERK: And do you want dates for motions and response?

MR. LENHARDT: Yes, please.

DEPUTY COURT CLERK: How about August 13th for motions and August 27th for responses.

MR. LENHARDT: Thank you.

THE COURT: Is there any further business that we need to discuss here today, Mr. Lenhardt?

MR. LENHARDT: No, sir.

THE COURT: Mr. Hyde?

MR. HYDE: No, Your Honor.

THE COURT: All right. A difficult issue, gentlemen. This is not black and white, as you know, this is definitely gray, but that's the court's best judgment. And we are in recess.

(The proceedings were concluded)

C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 15th day of July 2021.

s/ Brian P. Neil

Brian P. Neil, RMR-CRR
United States Court Reporter