IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 23-cr-00074-NYW
Civil Case No. 23-cv-03024-NYW

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

DEJANE REANIECE LATTANY,

Defendant-Movant.

UNITED STATES' RESPONSE TO MOTION TO VACATE

Dejane Reaniece Lattany applied for and received millions of dollars in loans and grants under federal programs designed to help small businesses respond to the COVID-19 pandemic. As it turned out, she made numerous material misrepresentations on those applications, which earned her a federal conviction for wire fraud under a pre-indictment plea agreement. She now moves to vacate her conviction on the grounds that (1) the government failed to disclose certain evidence, and (2) her counsel was ineffective. The court should deny the motion.

BACKGROUND

Congress, with the assent of the President, enacted two programs to help small businesses suffering economic hardship prompted by the COVID-19 pandemic: The Economic Injury Disaster Loan (EIDL) Program and the Paycheck Protection Program (PPP). Both were administered by the Small Business Association (SBA) and generally provided loans and grants to small businesses. Where the EIDL Program was funded by the SBA, the PPP Program was funded by private lenders and backed by the SBA. To qualify under either program, a business had to provide information about its operations and finances, which in turn dictated the loan amount. Program funds could only be used to pay certain business costs. *See* Doc. 13 at 8-10.

Between June 2020 and January 2022, Lattany applied for loans and grants under both programs. She did so in her own name and on behalf of various businesses that she supposedly owned and operated. Some applications succeeded. Others did not. *See* Doc. 13 at 11-15.

The problem for her was that many applications contained material false statements. Lattany misrepresented her ownership of other businesses. She lied about her businesses' payroll costs, number of employees, and compliance with program rules. And she certified that program funds would be used to pay only permissible business costs when in reality a significant portion subsidized her personal expenses (for example, a new house and two Hummers). In all, Lattany fraudulently received $450,000 in loans and grants under the EIDL Program and nearly $3 million in loans under the PPP Program. She fraudulently applied for more than $7 million under both programs. *See* Doc. 13 at 11-15.

Rather than charge Lattany right away, the government engaged in pre-indictment plea negotiations with her and her counsel, which culminated in her agreement to plead guilty to one count of wire fraud. Doc. 13 at 1-2; 18 U.S.C. § 1343. She also agreed to certain restitution and forfeiture obligations, along with a limited waiver of her appellate and collateral-review rights. Doc. 13 at 2. The government agreed to recommend a sentence at the low-end of the guidelines range (as finally calculated) and not bring other charges based on known information. *Id.* at 3.

Lattany's agreement to plead guilty before an indictment preempted some of the rights and procedures that would otherwise follow an indictment. For example, there was no discovery conference or memorandum, and consequently no requests by Lattany to trigger the government's disclosure obligations under Rule 16. *See* Fed. R. Crim. P. 16(a).

This court sentenced Lattany to a below-guidelines sentence of 48 months to run concurrent to a state sentence for Medicaid fraud. Doc. 27 at 2; *see also* Doc. 22 at 13. Lattany picked up the state conviction and sentence after her plea in the federal case. Doc. 22 at 13.

RULE 5 STATEMENT AND TIMELINESS

Lattany has not previously used any other federal remedies to attack her conviction or sentence. Her motion (filed November 13, 2023) is timely because it was filed within one year of the date her judgment of conviction became final (that is, when the time to file a direct appeal ran out on September 4, 2023). 28 U.S.C. § 2255(f)(1); Fed. R. App. P. 4(b)(1)(A)(i).

ARGUMENT

Lattany claims (1) that the government violated its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and (2) that she was denied effective assistance of counsel. This court construes her pro se motion liberally, but does not "assume the role of advocate" for her. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Even so, both claims fail.

I. Lattany's *Brady* claim is meritless and procedurally defaulted.

The government generally has a due-process obligation under *Brady* to disclose material exculpatory evidence to the defendant before trial. *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 823 (10th Cir. 1995). Lattany procedurally defaulted her *Brady* claim. But the claim fails for the more straightforward reason that it is meritless on its face.

A. Lattany's *Brady* claim is meritless.

Lattany claims that the government withheld several pieces of evidence in violation of

Brady. Her claim fails as an initial matter because *Brady* does "not apply to pre-indictment plea negotiations." *United States v. Sgarlat*, 705 F. Supp. 2d 347, 359 (D.N.J. 2010). That's because *Brady* concerns a defendant's right to a fair trial, which is "among the many rights waived by an individual who decides to waive indictment and plead guilty to an information." *Id.* at 360. A pre-indictment plea agreement has "many advantages for a defendant," but includes "among its disadvantages the simple procedural fact" that the government "need never make discovery disclosures under Rule 16. A defendant accepts the benefits and burdens of such a plea, and there is nothing unfair about this compromise of rights and obligations." *Id.* (cleaned up).

Even if *Brady* applied, Lattany has not made out a violation. She must show that the government suppressed material exculpatory evidence. *Smith*, 50 F.3d at 823. Exculpatory means "expressly exculpatory," which does not include evidence that "might possibly be favorable to the accused by inferential reasoning." *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988). Material means a "reasonable probability" that the outcome at trial would have been different had the evidence been disclosed. *Smith*, 50 F.3d at 827.

This obligation extends only to evidence within the possession of the "prosecution team." *McCormick v. Parker*, 821 F.3d 1240, 1247 (10th Cir. 2016). The prosecution team includes only those who act "at the behest of law enforcement as part of the criminal investigation." *Id.* (cleaned up). The government has no duty to disclose "information which it does not possess." *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (citation omitted). And "a defendant is not denied due process by the government's nondisclosure of evidence if the defendant knew of the evidence anyway." *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009).

Lattany cites five pieces of evidence that she says support a *Brady* violation.

First is an e-mail from an accountant with the Colorado Department of Health Care Policy and Financing indicating that the state owes her money. Doc. 46 at 5; *see also id.* at 22. This e-mail does Lattany no good because the state department did not take part in the federal criminal investigation and thus was not part of the prosecution team. In addition, Lattany contends that this e-mail is exculpatory to the state Medicaid fraud charge, not the federal wire-fraud charge. *See id.* at 10 ("there are payments owed to me because I didn't commit Medicaid fraud"). And Lattany obviously knew of the e-mail because it was sent to her.

Second, Lattany refers to evidence from the SBA about "the origin of the funds that were claimed to have been stolen." Doc. 46 at 5. Even assuming that the SBA was part of the prosecution team, Lattany again hints that this evidence is exculpatory to the state charge only. *See id.* at 10 (suggesting that the money supporting the state charge could be "traced back to a wire deposit" from the PPP Program).

Third, Lattany asserts that the Colorado Attorney General has "conflicting statements from employees and clients." Doc. 46 at 5. Yet the Colorado Attorney General did not participate in the federal criminal investigation (which was separate from the state investigation) and hence was not part of the prosecution team either. In any case, Lattany does not provide any details about these statements. Nor does she explain how they are exculpatory to the federal charge.

Fourth, Lattany cites reports from her payroll provider, which she says show that not all her federal loans were fraudulent. Doc. 46 at 5; *see also id.* at 8. But Lattany herself provided many of these reports to the government in response to a subpoena, which means they cannot support a *Brady* violation because she knew of them. *Erickson*, 561 F.3d at 1163. Moreover, her claim that some applications contained accurate payroll figures does not exculpate her as to other applications which undisputedly did not and served as the basis of her conviction for a single scheme to defraud. And even if the payroll figures in some applications were accurate, those applications still contained other misrepresentations: for example, that the funds would be used for permissible business costs, that Lattany did not own other businesses, and that she had not received and would not receive other PPP loans. *See* Doc. 13 at 11-14.

Fifth, Lattany says that a "line by line" analysis of records was not given to her. Doc. 46 at 4. Once again, however, Lattany asserts that this analysis is exculpatory to the state charge only. *Id.* at 7 ("I wanted them to prove I stole that money line by line and I can prove that I didn't by the financial statements from Medicaid…"). Plus, she does not explain how analysis of the records could be exculpatory when there is no claim that the records themselves were withheld.

B. Lattany has procedurally defaulted her *Brady* claim.

Lattany did not raise a *Brady* claim before final judgment. And in her plea agreement, she waived her appellate rights subject to certain exceptions, none of which allowed her to appeal such a claim. Doc. 13 at 3-4. She did not appeal on that or any other ground.

Lattany's failure to raise the claim results in a procedural default. *United States v. Frady*, 456 U.S. 152, 165 (1982). "This rule applies even where the defendant has waived [her] right to appeal." *United States v. Majid*, 196 F. App'x 685, 686 (10th Cir. 2006) (unpublished). Lattany must therefore show cause and actual prejudice, or a fundamental miscarriage of justice, to get around the procedural bar. *United States v. Cox*, 83 F.3d 336, 341 (10th Cir. 1996). She has not.

Starting with cause, although a meritorious ineffective-assistance claim can suffice, Lattany's claims here are meritless, as explained later. *United States v. Harms*, 371 F.3d 1208, 1211 (10th Cir. 2004). Moreover, Lattany does not appear to claim ineffectiveness with respect to the appellate waiver or her failure to appeal in spite of that waiver. *United States v. Smith*, 2022 WL 889178, at *3 (D. Colo. Mar. 25, 2022). Cause may also exist when "the factual or legal basis for a claim was not reasonably available to counsel." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). But Lattany does not allege that she learned about the supposedly withheld evidence so late that she could not have raised the claim before now.

Turning to actual prejudice, Lattany must show an "error of constitutional dimensions that worked to [her] actual and substantial disadvantage." *United States v. Snyder*, 871 F.3d 1122, 1128 (10th Cir. 2017) (cleaned up). Lattany has not shown any constitutional error, let alone one that worked to her actual and substantial disadvantage given that the supposedly withheld evidence generally concerns the state charge and was largely known to her anyway.

Lattany also cannot establish that a fundamental miscarriage of justice would result if her claim is not considered. *Cox*, 83 F.3d at 341. That requires "a colorable showing" of actual innocence. *Id.* Lattany all but concedes her guilt when she points out that not all the federal loans were fraudulent. Doc. 46 at 5. The uncontested implication is that the other loans were.[1]

II. Lattany was not denied effective assistance of counsel.

Ineffectiveness claims are properly raised in a § 2255 motion. *Beaulieu v. United States*, 930 F.2d 805, 807-08 (10th Cir. 1991). To establish ineffective assistance, a defendant must show both that counsel's performance "fell below an objective standard of reasonableness" and that she was prejudiced as a result. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

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[1] Lattany's *Brady* claim is procedurally barred even though her plea agreement "does not prevent [her] from seeking relief otherwise available in a collateral attack" on the ground that she "was prejudiced by prosecutorial misconduct." Doc. 13 at 5. That exception precludes enforcement of the waiver as to a prosecutorial-misconduct claim, but does not suspend normal operation of the procedural bar because the relief sought must be "otherwise available in a collateral attack." *Id.*

Lattany sets out numerous ineffectiveness claims, which broadly relate to counsel's performance in relation to both her guilty plea and sentencing. Lattany's main claim is that counsel misadvised her about the consequences of her state conviction for purposes of her federal sentencing. None of these claims have merit.

A. Lattany has not established prejudice.

"If it is easier to dispose" of an ineffectiveness claim based on a "lack of sufficient prejudice," the court may do so. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In the context of a guilty plea, prejudice means "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty." *Hill*, 474 U.S. at 57. In the sentencing context, prejudice means a reasonable probability of a shorter sentence but for counsel's errors. *United States v. Becker*, 109 F. App'x 264, 269 (10th Cir. 2004) (unpublished).

Lattany never expressly alleges the required prejudice. That is, she never says that she would have gone to trial or received a shorter sentence but for counsel's errors. She mainly regrets pleading guilty in the state case, which does not establish prejudice in the federal one.

Lattany mentions in passing that she agreed to plead guilty in the federal case "because I just had my baby and lost my grandfather who raised me on top of [counsel] promising outcomes that did not happen." Doc. 46 at 8. The promised outcomes seem to concern the idea that her state conviction would not affect her guidelines range (when in reality it increased her criminal-history category). Even with this statement, though, Lattany does not say she would have gone to trial but for the supposed promises. Not to mention, she cites other reasons why she pleaded guilty, which undermines any assertion that counsel's performance caused her to do so.

Even if one could construe this statement as an assertion of prejudice, it is inadequate.

To start, a defendant is generally not prejudiced by counsel's "erroneous advice" when she is "correctly informed" by the district court or other sources. *Schumacher v. Ortiz*, 406 F. App'x 290, 293 (10th Cir. 2010) (unpublished). Lattany was advised that there were no promises except those in the plea agreement, that the guidelines range in that agreement was an estimate and could end up higher, and that no sentencing outcomes were guaranteed. Doc. 13 at 15, 18; Doc. 14 at 7; Ex. 1 at 20. Whatever else counsel might have told Lattany about sentencing could not have prejudiced her in light of these advisements. *See United States v. Silva*, 430 F.3d 1096, 1099 (10th Cir. 2005) ("These admissions alone belie Mr. Silva's claim that he was prejudiced by counsel's failure to accurately predict the impact of his criminal history.").

Moreover, a defendant's "mere allegation that [s]he would have insisted on trial but for h[er] counsel's errors, although necessary, is ultimately insufficient." *United States v. Dominguez*, 998 F.3d 1094, 1111 (10th Cir. 2021) (cleaned up). Thus, "incorporated and subsumed" into the prejudice standard is a requirement that the defendant show that the "decision to reject the plea would have been rational under the circumstances." *Id.* (cleaned up).

Lattany cannot do so here. The plea agreement gave her the benefit of a reduction for acceptance of responsibility, a low-end recommendation by the government, and an agreement not to bring additional charges based on known information. Had Lattany gone to trial, the evidence against her would have been strong, and she would likely have faced additional charges (such as money laundering) and a higher guidelines range. Under these circumstances, it would not have been rational for her to reject the plea agreement.[2]

Not only that, Lattany's criminal-history category would have been the same after a conviction at trial as after a guilty plea. So any further advice on that issue was unlikely to make any difference in her choice between those two options. That Lattany agreed to plead guilty before an indictment stands further proof to how far away she was from ever going to trial and how unlikely it was that further advice would have pushed her in that direction. And any claim of sentencing prejudice is belied by the government's recommendation of a sentence at the low-end of the guidelines range as estimated in the plea agreement (without the criminal-history bump) and the court's decision to go even lower. *See* Docs. 24, 27.

B. Lattany has not shown that counsel's performance was deficient.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Lattany has not rebutted that presumption here.

Her primary claim, in all its various formulations, is that counsel told her the state conviction would receive no criminal-history points when it actually did. The trouble for Lattany is that "[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993).

Lattany also laments that the criminal-history points for the state conviction disqualified

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[2] The prospect of additional charges was not an idle one. The government has charged other individuals who committed similar offenses with both wire fraud and money laundering. *See, e.g.*, *United States v. Harrington*, 22-cr-00264-NYW (D. Colo.); *United States v. Foreman*, 21-cr-00165-RM (D. Colo.); *United States v. Lacona*, 23-cr-00104-DDD (D. Colo.).

her from safety-valve relief. *E.g.*, Doc. 46 at 9. The complaint is an odd one because safety-valve relief allows the court to sentence a defendant convicted of certain drug offenses below the mandatory minimum. 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2. Suffice it to say that is not Lattany.

Next, Lattany highlights that counsel was not present during her presentence report interview. This claim "lacks merit because a criminal defendant has no constitutional right to the presence or advice of counsel at a presentence [report] interview." *United States v. Saleh*, 2017 WL 599900082, at *6 (D. Colo. Apr. 19, 2017); *see also Gordon*, 4 F.3d at 1572.

Several of Lattany's claims fall into the category of inadequate communication. Insofar as Lattany claims a "complete breakdown in communication" resulting in a "presumption of ineffectiveness," she has not shown that she "had such minimal contact" with counsel "that meaningful communication was not possible." *United States v. Holloway*, 939 F.3d 1088, 1098 (10th Cir. 2019). Just the opposite according to the text messages she attaches to her motion, which demonstrate sufficient communication.

Many of Lattany's other claims concern counsel's performance in the state case and thus cannot establish deficient performance in the federal one. For instance, she protests that counsel told her to disclose information about an unrelated account that the state used against her and that counsel did not look at the aforementioned e-mail from the state accountant. Doc. 46 at 6. She also notes that counsel failed to investigate defenses to the state charge and "seemed unprepared for trial" before the state. *Id.* at 13.

Still other claims are incongruous. Lattany says that counsel failed to object to "inadmissible and prejudicial evidence" when there was no trial or hearing where evidence was admitted. Doc. 46 at 5. She is also less than clear about what it means that counsel did not raise "appropriate defenses before and during" the change of plea hearing and sentencing. *Id.*

What remains of Lattany's motion is "merely conclusory in nature" and hence insufficient to show deficient performance. *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994). For example, she claims that counsel failed "to challenge prosecutorial mischaracterizations and errors during proceedings" without specifics. Doc. 46 at 4. She similarly faults counsel's failure to "defend or explain discrepancies during or before the chance of plea or at the time of sentencing" without further explanation. *Id.* at 6. And she generally protests that she was not the beneficiary of "zealous advocacy." *Id.* at 13.

* * *

One last procedural point: Lattany is not entitled to an evidentiary hearing because "the motion and the files and records of the case conclusively show" that she is not entitled to relief. 28 U.S.C. § 2255(b). There are no disputes of material fact. And "district courts are not required to hold evidentiary hearings in collateral attacks without a firm idea of what the testimony will encompass and how it will support a movant's claim," which is the case here. *United States v. Moya*, 676 F.3d 1211, 1214 (10th Cir. 2012).

CONCLUSION

The court should deny Lattany's motion.

Dated: January 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I also certify that a copy will be placed in the U.S. Mail, postage pre-paid and addressed to the following:

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