UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

HARRY KEILHOLTZ, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	2:20-CV-176

REPORT AND RECOMMENDATION

Petitioner Harry Keilholtz has filed a Motion for Discovery [Doc. 2] and a Supplemental Motion for Discovery [Doc. 24] pursuant to 28 U.S.C. § 2255. These motions were referred to the undersigned for consideration and issuance of a report and recommendation by the District Judge [Doc. 35] and are before the Court pursuant to 28 U.S.C. § 636(b). For the reasons stated herein, the undersigned recommends Petitioners Motion for Discovery [Doc. 2] and Supplemental Motion for Discovery [Doc. 24] be **DENIED**.

I. PROCEDURAL AND FACTUAL OVERVIEW

On August 1, 2019, Petitioner pleaded guilty to one count of Conspiracy to Distribute and to Possess with the Intent to Distribute 50 Grams or More of Methamphetamine, a Schedule II Controlled Substance in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A) and one count of Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A), and was sentenced to 240 months imprisonment. *United States v. Kielholtz*, 2:16-CR-30 (E.D. Tenn. April 16, 2019) ECF No. 392. As part of Petitioner's plea agreement, he waived his right to file any motions or pleadings pursuant to 28 U.S.C. § 2255 except for claims alleging prosecutorial misconduct or ineffective assistance of counsel.

On August 14, 2020, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence in Case No. 2:16-CR-30 pursuant to 28 U.S.C. § 2255 alleging both prosecutorial misconduct and ineffective assistance of counsel, as well as asserting that the provisions of the sentencing statutes and guidelines under which Petitioner was sentenced are unconstitutional. [Doc. 1]. Specifically, Petitioner alleges the Government failed to advise Petitioner's trial counsel of an agreement between the Organized Crime Drug Enforcement Task Force and Petitioner that promised sentence reduction in exchange for cooperation in procuring the arrest of Petitioner's supplier, a drug dealer known as "Flaco." Petitioner alleges that the Government's failure to disclose this agreement resulted in the Government making "incorrect, misleading, half-true, or exaggerated" statements in its sentencing memorandum and during the sentencing hearing. [Doc. 1-1, p. 9, 12]. Additionally, Petitioner argues that under the terms of the agreement the United States was obligated to file a motion for downward departure in exchange for Petitioner's substantial assistance. Petitioner claims that he did in fact provide substantial assistance and fulfilled his obligations under the agreement, but the Government made the arbitrary and irrational decision not to file a motion for downward departure on his behalf in violation of the agreement. [Doc. 1-1, p. 15]. Petitioner alleges these acts constitute prosecutorial misconduct. [Doc. 1-1, p. 15-18]. Petitioner asserts that the Government's misconduct resulted in an unfair sentencing hearing and an excessive sentence. *Id.*

Petitioner alleges ineffective assistance of counsel as an alternative basis for relief should he be unsuccessful in advancing his prosecutorial misconduct claims. [Doc. 1-1, p. 18-19]. In support, Petitioner asserts that his counsel in the underlying matter failed to raise a breach of agreement argument and by failing to do so deprived the Court of information demonstrating that a downward departure in sentencing was required. [Doc. 1-1, p. 19].

Petitioner also contends that the provision in his plea agreement wherein he waived most of his appellate rights is an unenforceable adhesion contract. [Doc. 39, p. 5]. Despite Sixth Circuit precedent stating that such provisions are not adhesion contracts, Petitioner takes the position that the precedent relied upon by the Government is inapplicable here because the question is one of fact and must be addressed on a case-by-case basis. By obtaining discovery regarding the use of the waiver provision in this District, Petitioner claims that he will be able to demonstrate that the Government requires the waiver provision on a take-it-or-leave-it basis in virtually all plea agreements in the District, making it an unenforceable adhesion contract. *Id.*

Petitioner further alleges that 18 U.S.C. § 3553(e) and Federal Sentencing Guideline §5K1.1, both of which applied to his sentencing, violate principles of due process of law guaranteed by the Constitution. [Doc. 1-1, p. 20]. Specifically, Petitioner asserts that these provisions transfer sentencing authority from the Court to the prosecutor, which amounts to a violation of due process. *Id.* Petitioner submits it is only the Court and not the prosecutor who should have decided whether he had rendered substantial assistance. Petitioner further alleges that the Court did not in any way taken into account the "substantial assistance" he claims to have rendered.

Petitioner now seeks discovery in the form of interrogatories and requests for production. [Doc. 2, Ex. 1-2; Doc. 24, Ex. 1-2]. Petitioner's initial Motion for Discovery asks the Court to permit interrogatories and requests for production that probe the Government's knowledge of his alleged Task Force cooperation agreement, the existence of communications to or from the Government regarding any cooperation agreement with Petitioner, and the names and numbers of arrests and/or convictions resulting from Petitioner's cooperation. [Doc. 2]. Petitioner's Supplemental Motion seeks permission to submit supplemental interrogatories in which Petitioner

makes several broad requests for information, such as the frequency in which the Office of the United States Attorney for the Eastern District of Tennessee used 28 U.S.C. § 2255 waiver language in plea agreements, particularly in drug and methamphetamine cases and cases with appointed counsel, and any available statistical information regarding the inclusion of this language in plea agreements during the years of 2015-2019. [Doc. 24-1, p. 3-4]. Petitioner also requests information relating to any policy regarding substantial-assistance motions where a defendant has fled from law enforcement or become a fugitive. *Id.*, p. 4-5.

The United States characterizes Petitioner's initial request for discovery as a "fishing expedition" based on "conclusory allegations." [Doc. 18, p. 2]. The Government argues Petitioner's discovery requests are based upon a reckless and false assumption that Guy Mayns, a defendant charged in Case No. 2:16-CR-55 known by the alias "Flaco", is the same "Flaco" who supplied Petitioner with methamphetamine when in fact these are two separate individuals who merely use the same nickname. *Id.* Specifically, in its response to Petitioner's § 2255 motion, the Government alleges Mayns was a small quantity drug dealer operating primarily out of Hamblen County, Tennessee while the "Flaco" with whom Petitioner did business was a large quantity drug dealer affiliated with a Mexican drug cartel who lived and sold drugs in the State of Georgia. [Doc. 17, p. 6]. As such, the United States argues Petitioner has failed to articulate a non-frivolous claim or establish that any of the requested discovery is indispensable to the resolution of his § 2255 claims. [Doc. 18, p. 2]. Additionally, the United States argues Petitioner's broad requests for information regarding the frequency with which wavier provisions were included in plea agreements are unrelated to any claim presented in his § 2255 motion, and Petitioner has failed to establish good cause for additional discovery related to office policies regarding the use of waiver

language in plea agreements and substantial-assistance motions for fugitives requested in his Supplemental Motion. [Doc. 32, p. 3-4].

II. LEGAL ANALYSIS

In cases where a convicted person is attacking his or her sentence pursuant to 28 U.S.C. § 2255, the convicted person may request leave to conduct discovery in furtherance of his or her claim. 28 U.S.C. § 2255 Rule 6. Unlike the usual civil litigant in federal court, a habeas corpus petitioner is not entitled to discovery as a matter of course. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). At the same time, a court may permit a habeas corpus petitioner to undertake discovery upon a showing of good cause. 28 U.S.C. § 2255 Rule 6(b). Good cause "is established where specific allegations ... show reason to believe that [the movant] may, if the facts are fully developed, be able to demonstrate entitlement to relief." *Cornell v. United States*, 472 F. App'x 352, 354 (6th Cir.2012) (citations and internal quotation marks omitted). "Habeas petitioners may not 'use federal discovery for fishing expeditions to investigate mere speculation.'" *Bates v. United States*, No. 1:06-CR-69, 2014 WL 12826589, at *2 (E.D. Tenn. Apr. 16, 2014) (quoting *Calderon v. United States District Court*, 98 F.3d 1102, 1106 (9th Cir. 1996)).

Petitioner contends that the discovery requested in his initial Motion will enable him to develop a factual basis for his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. [Doc. 3, p. 1]. Petitioner alleges that he was detained by Detective Lawrence Riddle in 2016 and Detective Riddle told him that if he would make a call to "Flaco" to set up a drug buy it would "make a big difference" in his sentence. *Id*. at p. 2. Petitioner argues this statement by Detective Riddle constitutes a cooperation agreement and further alleges that he is entitled to discovery as to the terms and circumstances surrounding such agreement. *Id.* at p. 4-5.

The Court initially notes the record demonstrates that the United States disclosed Petitioner's initial cooperation with the Task Force to the Court. A transcript of the sentencing hearing, filed in this cause by Petitioner [Doc. 4-1], reflects that the Government specifically conveyed to the Court that after his initial arrest, Petitioner cooperated and made a call to his supplier which ultimately resulted in the seizure of an additional kilogram of methamphetamine and the conviction of two of Petitioner's co-defendants. [Doc. 4-1, p. 8-9]. Based upon this phone call and the results, Petitioner agreed to continue cooperating and was permitted to remain on release to facilitate this cooperation. *Id.* at p. 9. However, after approximately two weeks Petitioner went "on the run" and remained a fugitive for approximately 30 months until he was apprehended in Florida. *Id.* During the time that Petitioner was a fugitive he was not cooperating with the investigation and his case had to be severed from his co-defendants, all of whom were sentenced before Petitioner. *Id.* The United States took the position that despite Petitioner's early cooperation, his efforts did not qualify him for a downward departure in sentencing because he so quickly ceased cooperating and became a fugitive. *Id.* Still, the United States left the ultimate determination with a fully informed District Court by stating as follows during Petitioner's sentencing hearing: "to acknowledge to the Court certainly this cooperation happened and leave that to the Court for consideration." *Id.* at p. 10.

In the Court's view, the existence of an enforceable cooperation agreement between Petitioner and Detective Riddle and/or the Task Force is central to whether Petitioner should prevail in his requests for discovery. Without such an agreement, Petitioner cannot demonstrate that he is entitled to relief on his § 2255 claims. Additionally, there must be reason to believe that the terms of that agreement required the United States to file a motion for downward departure based on substantial assistance from Petitioner despite the fact that Petitioner only cooperated with

the Government for approximately two weeks before becoming a fugitive from justice who successfully evaded capture for roughly 30 months.

"Fundamental fairness may require the government to honor promises that its agents have made in situations that are analogous to a plea bargain." *Taylor v. United States*, 2 F. App'x 485, 488 (6th Cir. 2001) (citing *United States v. Streebing*, 987 F.2d 368, 372 6th Cir. 1993)). There are two requirements that must be fulfilled for such a promise to be enforceable. *Id.* First, the promise must have been made by an authorized agent; second, the defendant must have relied on the promise to his detriment. *Id.* "If either part of this showing fails, the promise is unenforceable." *Id.* (citing *United States v. Flemmi*, 225 F.3d 78, 84 (1st Cir. 2000)).

The United States alleges that there was no binding agreement that required the Government to move for a reduced sentence. [Doc. 17, p. 10]. Petitioner's primary evidence that such an agreement did exist is a declaration made by Detective Riddle [Doc. 4-2]. According to the declaration, after Petitioner was arrested on February 12, 2016, Detective Riddle told Petitioner that "under the circumstances he was going to do some time in prison, but that if he made a call to Flaco to set up a drug buy, it would make a big difference in the sentence he would receive." [Doc. 4-2, p. 3]. Detective Riddle made this statement to Petitioner almost immediately after his arrest and without consulting with or receiving authorization from anyone in the United States Attorney's Office for the Eastern District of Tennessee, who was prosecuting Petitioner. In fact, Detective Riddle's declaration demonstrates that he did not have direct contact with anyone on the prosecution team in Petitioner's case at all. Instead, Detective Riddle communicated with Tennessee task force agents regarding Petitioner's willingness to cooperate who passed the information on to the prosecution. *Id.* at p. 5.

Detective Riddle's declaration also explains that despite Petitioner's willingness to cooperate, it was determined that his cooperation was not useful to the investigation because after Petitioner's initial call that resulted in the arrest of two individuals "no one in the organization would deal with him." [Doc. 4-2, p. 4]. At that point, Detective Riddle advised Petitioner that he would have to turn himself in and scheduled a time for Petitioner to surrender at the FBI office where Detective Riddle worked, but Petitioner did not show up as instructed. *Id.* Instead, Petitioner absconded and remained a fugitive from justice for approximately 30 months. Despite Petitioner's failure to turn himself in as instructed and decision to flee instead, Detective Riddle claims that Petition "did everything we asked him to do." *Id.* The Declaration goes on to state that Detective Riddle and Petitioner memorialized a cooperation agreement in writing and Detective Riddle made Petitioner aware of all the expectations and rules of the agreement. *Id.* The declaration does not mention whether the rules and expectations cover the consequences of flight, and the written cooperation agreement has not been produced.

Nowhere in Detective Riddle's declaration does he mention discussing a cooperation agreement with the prosecuting United States Attorney's Office or being authorized to make such an agreement. Additionally, Detective Riddle's declaration fails to explain what rules and expectations he discussed with Petitioner regarding his cooperation and what effect his flight might have on any agreement that he believed to be in existence, whether it was enforceable or not. Considering the information and circumstances provided, the Court must conclude that Detective Riddle was not authorized by the prosecuting United States Attorney's Office to make a cooperation agreement with Petitioner. As such, Petitioner has failed to demonstrate the existence of an enforceable agreement. *See Taylor*, 2 F. App'x at 488.

At the same time the Court acknowledges that Detective Riddle's declaration does reference his communication with officers in Tennessee and states the Tennessee officers were conveying back to him that they had spoken with the prosecuting attorney in Tennessee who had approved of Detective Riddle's plan for Petitioner to cooperate. [Doc. 4-2, p. 5]. Even assuming that Petitioner has demonstrated that a valid cooperation agreement existed that would not carry the day here because he later signed an amended plea agreement which states that it supersedes all other prior agreements. The terms of that plea agreement did not require the Government to file a motion for downward departure, and it specifically states that it and the supplement to the plea agreement constitute the "full and complete agreement and understanding between the parties concerning the defendant's guilty plea….and that any and all other promises, representations, and statements whether made before, contemporaneous with, or after [the] agreement, are null and void." *United States v. Kielholtz*, 2:16-CR-30 (E.D. Tenn. April 16, 2019), ECF No. 392, pp. 11-12. The terms of the plea agreement further stated the United States would "not oppose a two-level reduction for acceptance of responsibility…" but made no mention of a motion for downward departure. *Id.* at p. 7. Additionally, an earlier supplement submitted in advance of the amended plea agreement states in plain and easily understood language that Petitioner "understands and agrees that the United States will not make any motions for additional consideration or sentence reduction based upon the defendant's cooperation…"*Id.* at ECF No. 383, pp. 2-3.

Petitioner also sets forth a barebones claim of ineffective assistance of counsel in which he claims that his counsel was ineffective because he did not raise the issue of prosecutorial misconduct when the United States failed to file a motion for downward departure and did not do more than merely reference Petitioner's cooperation during his sentencing hearing nor object when prosecutors allegedly misrepresented and exaggerated various facts relevant to sentencing. [Doc.

26, p. 28]. In raising these claims of ineffective assistance, Petitioner has failed to demonstrate how any discovery requested would assist him in further developing the ineffective assistance claims.

The Court further acknowledges Petitioner's challenge to the validity of the provision in his plea agreement waiving his right to an appeal except to raise claims of prosecutorial misconduct or ineffective assistance, claiming that it is an adhesion contract; however, in making this argument Petitioner overlooks the fact that before his plea agreement was approved, the District Court reviewed it with him in detail including whether he was entering into the agreement freely and voluntarily. Petitioner makes no claim that the District Court improperly instructed him as to the nature of the appellate waiver contained in his plea agreement. The Sixth Circuit has clearly held that such provisions are not adhesion contracts and are enforceable. *U.S. v. Robinson,* 455 F.3d 602, 610-611 (6th Cir. 2006). While Petitioner cites to a Seventh Circuit case in support of his contention that under certain circumstances such waivers might constitute an adhesion contract, in this Circuit it is only when the District Court incorrectly advises a defendant regarding the nature of the appeal rights being waived that relief is available. *See U.S. v. Melvin,* 557 F. App'x 390, 394-395 (6th Cir. 2013) (holding that where the court misstated the appeal wavier provision in defendant's plea agreement the waiver was not knowing and voluntary and therefore not enforceable). For that reason, it would be futile to permit Petitioner to engage in discovery as to this issue.

Finally, the Court notes Petitioner's constitutional challenge to 18 U.S.C. § 3553(e) and Federal Sentencing Guideline §5K1.1. Petitioner has not demonstrated how discovery would be necessary or of any assistance in moving forward with this challenge.

III. CONCLUSION

As set forth above, the record demonstrates that the United States did in fact disclose Petitioner's early cooperation to the District Court for its consideration during sentencing. Additionally, Petitioner has failed to demonstrate the existence of an enforceable cooperation agreement which would have required the filing of a motion for downward departure. Even if such agreement existed, Petitioner has failed to demonstrate that the cooperation agreement survived entry of his plea agreement which contained clear language noting that it superseded all prior agreements. Moreover, Petitioner has failed to make out a colorable claim for ineffective assistance of counsel and even if he had, has not demonstrated how any discovery requested would aid in him proving his claim. The Court further finds that Petitioner has not demonstrated a likelihood of success sufficient to justify ordering discovery as to his assertion that the appellate waiver in his plea agreement is an unenforceable adhesion contract. Lastly, Petitioner has failed to show that discovery would aid him in addressing the constitutional challenge he has raised to 18 U.S.C. § 3553(e) and Federal Sentencing Guideline §5K1.1.

Upon consideration of the foregoing, the Court finds that Petitioner has failed to establish reason to believe that if the facts in this matter were fully developed, he would be entitled to relief under any of the grounds he has asserted. As such, Petitioner has failed to show that good cause exists which entitles him to discovery in this action. *See Cornell*, 472 F. App'x at 354. For these

reasons, the undersigned **RECOMMENDS** that Petitioner's Motions [Docs. 2 & 24] be **DENIED**.[1]

Respectfully Submitted,

s/Cynthia Richardson Wyrick
United States Magistrate Judge

[1]Objections to this Report and Recommendation must be filed within 14 days after service of this recommended disposition on the objecting party. 28 U.S.C. 636(b)(1); Fed. R. Civ. P. 72(b)(2). Such objections must conform to the requirements of Fed. R. Civ. P. 72(b). Failure to file objections within the time specified waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).