CASE NO. 22-1243

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE,

v.

WILLIAM J. SEARS,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO

CASE NO. 16-cr-301-WJM

THE HONORABLE WILLIAM J. MARTINEZ

APPELLANT'S COMBINED OPENING BRIEF AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY

William J. Sears
#56353-054
Florence FPC
P.O. Box 5000
Florence, CO 81226
Appellant

JURISDICTION

COMES NOW, William J. Sears, the Appellant, and moves this Court, pro se and on his own behalf, from the final order from the United States District Court, District of Colorado, Case No. 16-cr-301-WJM, entered on July 15, 2022. As part of the District Court's Order, Judge Martinez stated that the "Court has sua sponte considered whether a certificate of appealability is appropriate" and ultimately ordered that no certificate of appealability will issue.

Sears timely filed a Motion for Certificate of Appealability, which this Court construed as a Notice of Appeal. Moreover, he timely filed his Request to Proceed In Forma Pauperis. This Court subsequently established a briefing schedule and ordered Sears to file a combined Motion for Certificate of Appealability and Opening Brief. Sears now timely files his combined Motion for Certificate of Appealability and Opening Brief.

This Court has jurisdiction pursuant to28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

ISSUE NO. 1: **THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING ON MY § 2255 WRIT OF HABEAS CORPUS.**

ISSUE NO. 2: **THE DISTRICT COURT ERRED WHEN DECIDING THAT SEARS' PLEA AGREEMENT WAS NOT OBTAINED INVOLUNTARILY AS IT WAS PROCURED BY THE GOVERNMENT'S FRAUD AND PERJURY.**

ISSUE NO. 3: **THE DISTRICT COURT WRONGLY DECIDED SEARS' CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL.**

STATEMENT OF THE CASE

On September 15, 2016, Sears was charged by information with conspiracy to defraud the United States and filing a false income tax return. Sears pled guilty to one count of each in November, 2016. The plea agreement contained standard language that Sears waived his right to appeal except in certain circumstances.

Because Sears learned about serious fraud and misrepresentations in the Government's investigation of his case, on May 4, 2019, Sears filed a Motion to Withdraw Plea of Guilty. The Court denied that motion on May 22, 2019. Sears then filed a Motion for Reconsideration on August 1, 2019, and on September 30, 2019, the district court denied that motion. On February 10, 2020, Sears was sentenced to 96 months in federal custody.

On January 15, 2021, Sears filed a Petition to Vacate, Set Aside, or correct Sentence under 28 U.S.C. § 2255. Although Section 2255 instructs the district court to hold an evidentiary hearing, the court in my case did not. Moreover, the district court waited 19 months to rule on my Petition. On July 15, 2022, the district court denied my Petition, and sua sponte, ordered that no certificate of appealability will issue. It is from that Order that I now appeal.

ARGUMENT

Although the Court has requested a combined Motion for Certificate of Appealability and Opening Brief, the Court must first determine whether a Certificate of Appealability should issue in my case. It is clear that "[u]nless a circuit justice or judge issues a

certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a proceeding under Section 2255." 28 U.S.C. § 2253(c)(1)(B). "The issuance of a COA is a jurisdictional prerequisite to an appeal from the denial of an issue raise in a § 2255 motion." United States v. Gonzalez, 596 F.3d 1228, 1241 (10th Cir. 2010).

"To obtain a COA after a district court has rejected a petitioner's constitutional claims on the merits, the 'petitioner must demonstrate that reasonable jurists would find the district court's assessment of the ... constitutional claims debatable or wrong.'" Milton v. Miller, 812 F.3d 1252, 1263 (10th. Cir. 2016) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A COA is necessary if an issue is "debatable among jurists of reason" or if "a court could resolve the issue [differently], or the question [is] adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

Importantly, the certificate of appealability "inquiry ... is not coextensive with a merit analysis." Buck v. Davis, 137 U.S. 759 (2017). A petitioner "need not show that he should prevail on the merits." Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000). Rather, a petitioner needs to make a "modest" showing. In fact, according to the Supreme Court, a "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of the claims" and ask "only if the District Court's decision was debatable." Buck, 137 U.S. at 759. A claim may be debatable and thus deserving of a COA, "even though

every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

ISSUE NO. 1: THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING ON MY § 2255 WRIT OF HABEAS CORPUS.

1) Because Reasonable Jurists Could Debate That I Should Have Received An Evidentiary Hearing, This Court Should Grant My Request For A Certificate of Appealability.

Section 2255 provides that unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255. See also, United States v. Marr, 856 F.2d 1471, 1472 (10th Cir. 1998) (holding that an evidentiary hearing "is mandatory" whenever the record does not affirmatively manifest the factual or legal invalidity of the petitioner's claims); United States v. Jackson, 209 F.3d 1103, 1110 (9th Cir. 2000) (district court abused its discretion in denying evidentiary hearing, given that the motion, files, and record in that case did not show conclusively that petitioner was not entitled to relief); and Anderson v. United States, 948 F.2d 704 (11th Cir. 1991) (movant entitled to evidentiary hearing because "record does not conclusively show that [his] contentions are without merit.")

In this case, I filed my § 2255 petition on January 15, 2021. The district court believed there was at least enough legitimacy to my petition to order the government to file an opposition or

otherwise respond. The government responded on February 9, 2021. On April 23, 2021, I filed a reply to the government's opposition.

Although § 2255 requires a district court to "promptly" order an evidentiary hearing, on February 7, 2022, over one year after filing my § 2255 petition, and nine months from the last filing on the issue, I still had not heard from the district court nor had an evidentiary hearing been scheduled. As a result, I filed a motion requesting a hearing. On February 9, 2022, the district court denied that motion. Then, five months later, the Court finally ruled on my petition - without ever holding an evidentiary hearing.

My § 2255 Petition to Vacate, Set Aside, or Correct Sentence was approximately 17 pages as well as included 175 pages of exhibits supporting my claims of fraud on the court, constitutional violations, ineffective assistance of counsel, and vindictive prosecution, including the withholding of exculpatory evidence. As the district court noted in its Order, I am not an attorney and perhaps my exhibits were in "seemingly random order," but nevertheless, I included significant and substantive evidence of constitutional violations and rampant fraud in my case. At the very least, I provided sufficient evidence to contradict the record and warrant an evidentiary hearing. And, because reasonable jurists could have debated whether an evidentiary hearing should have been held, this Court should issue a Certificate of Appealability.

2) The District Court Erred In Refusing To Hold An Evidentiary Hearing.

As noted above, Section 2255 explicitly provides that a district court must conduct an evidentiary hearing "unless the motion and

the files and records of the case conclusively show that the prisoner is entitled to no relief ...." § 2255(b). See also, United States v. Kennedy, 225 F.3d 1187, 1193 (10th Cir. 2000). The Tenth Circuit reviews a "district court's refusal to hold an evidentiary hearing for an abuse of discretion." United States v. Moya, 676 F.3d 1211, 1214 (10th Cir. 2012).

It is clear in this Circuit, the only rational basis for a district court declining to hold an evidentiary hearing is if a petitioner offers only conclusory allegations such that the court does not have a "firm idea" of the evidence that petitioner will present and how it will support petitioner's motion. Id. "Conclusory allegations either state an inference without stating the facts from which the inference derives or lack any factual enhancement." Brooks v. Mentor Worldwide, LLC, 985 F.3d 1272, 1281 (10th Cir. 2021).

Because my 17-page petition, and 175 pages of supporting exhibits, were replete with factual allegations that, if true, would have entitled me to the relief sought, the district court should have held an evidentiary hearing. Importantly, my § 2255 petition alleged - as does this Opening Brief - that FBI agent, Kate Funk, lied under oath in order to obtain a search warrant, that the government violated my Fourth Amendment rights against unreasonable search and seizures, that my plea agreement was obtained involuntarily as it was predicated on fraud, misrepresentations, and the government's illegal conduct, and that my previous attorney's counsel was so ineffective that it did not satisfy the guarantee

provided by the Sixth Amendment. Even if the district court determined, as it did in my case (albeit erroneously), to reject those claims, the district court abused its discretion by not holding an evidentiary hearing. Importantly, a petitioner "need not prove his allegations before an evidentiary hearing." United States v. Jenks, 2022 U.S. App. LEXIS 11483 (10th Cir. April 28, 2022). Therefore, this Court should grant Sears' requested relief and remand this matter back to the district court for the court to hold an evidentiary hearing on my factual, evidence-supported claims.

ISSUE NO. 2: THE DISTRICT COURT ERRED WHEN DECIDING THAT MY PLEA AGREEMENT WAS NOT OBTAINED INVOLUNTARILY AS IT WAS PROCURED BY THE GOVERNMENT'S FRAUD AND PERJURY.

1) A Certificate of Appealability Should Issues Because Jurists Of Reason Could Debate The Fact My Plea Agreement Was Obtained Involuntarily and Illegally, and Therefore Invalid

As with the previous issue, the first determination this Court must make is whether a Certificate of Appealability should issue. And, because reasonable jurists could debate tha the plea agreement I entered into was procured by fraud, lies, and perjury on the part of the United States, it was therefore gained involuntarily and illegally, and as such, is invalid.

Set forth in much greater detail in the substantive sections below, as alleged in my § 2255 petition, and supported by factual allegations and exhibits, my plea agreement was only entered into as a result of fraud and perjury by Special Agent Kate Funk and the subsequent misrepresentations and reliance by the government on that false testimony. The allegations in the § 2255 petition

are clear and well supported, and certainly contradict the government's arguments. As a result, reasonable jurists could debate that the plea agreement was obtained illegally and involuntarily, and therefore a certificate of appealability should issue.

2) The District Court Erred When It Wrongly Rejected My Argument That The Plea Agreement Was Obtained Involuntarily.

In my § 2255 petition, I clearly allege that the search warrants in my case were defective because FBI Special Agent Kate Funk lied about her qualifications as a Certified Public Accountant in the affidavit supporting the Government's search warrants. (ECF 298 at 6). This is important because but for Special Agent Funk's lies, the government would not have received the search warrants. Moreover, the government refused to provide the search warrants until after my guilty plea, and had I seen the lies, perjury, and misrepresentations in the affidavit prior to my plea, I would not have pled guilty. Thus, as a direct result of the government's conduct, my plea was obtained involuntarily and illegally and therefore was the proper subject of my § 2255 petition. See United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994) (holding that a defendant who has pleaded guilty may challenge the voluntariness of the plea based on the government's failure to produce exculpatory evidence).

(i) Kate Funk lied to obtain the search warrant.

The Fourth Amendment to the United States Constitution, along with Federal Rules of Criminal Procedure 4.1 and 41 are clear, that in order to obtain a search warrant, the FBI had to attest - under oath - to certain facts sufficient to satisfy the probable cause requirement. This information may come from either the applicant federal law enforcement officer, or a witness willing to make a

statement. Any oral testimony must be recorded so that any transcribed affidavit will provide an adequate basis for determining the sufficiency of the evidence. F.R.Cr.P. 4.1 & 41.

The facts underlying the charges against me were complex and technical in nature. As I was involved in a publicly-traded company with complex financial and accounting rules, in order for the government to obtain a search warrant, the affiant would have to have a certain level of experience and education with forensic accounting, GAAP accounting principles, and auditing to satisfy the probable cause requirements. When government agencies lie, in an effort to enhance the impression of reliability and credibility, then any evidence obtained as a result of that fraudulent conduct must be excluded.

In this case, Special Agent Kate Funk did just that. In order to give the impression of "enhanced reliability," Agent Funk claimed that she graduated from the University of Kansas in 1995 with a degree in accounting. She further stated that she became a Certified Public Accountant in Kansas in 1996. Both of these statements are materially false and were provided to the judge solely for the purpose of enhancing Agent Funk's credibility. She then included the phrase "knowledge and experience" at least 47 times in her affidavit, again, materially misrepresenting and misleading the district court in an effort to satisfy the probable cause threshold and obtain a search warrant.

The bottom line is that the only probable cause the government had to obtain a search warrant against me was the materially false

and misleading "knowledge and experience" of Agent Funk. Unfortunately, she had neither knowledge nor experience. As such, all of the evidence obtained pursuant to that search warrant should have been excluded.

(ii) Kate Funk was not a Certified Public Accountant.

Because the basis of the government's investigation into me and my business was the affidavit of Special Agent Funk, her perjury, material misrepresentations, and misconduct constitutes a clear violation of my Fourth Amendment rights. Specifically, Agent Funk's testimony that she was a Certified Public Accountant who possessed the knowledge and experience to properly evaluate the financial transactions at issue constitutes perjury.

In her affidavit, Special Agent Funk claims that she "received an Accounting degree from the University of Kansas in 1995." She further claimed that she "became a Certified Public Accountant in 1996 through the state of Kansas." Both of those statements are intentional misrepresentations, and made for the sole purpose of enhancing her credibility with the judge.

In Kansas, to become a Certified Public Accountant ("CPA"), one has to first obtain a CPA certificate and then, in order to practice as a CPA (perform or offer to perform services as a CPA), a person must have the permit to practice. In order to obtain a permit to practice, one has to provide proof to the Kansas Board of Accountancy of the requisite experience requirement, complete a form, pay a fee, and then be subject to continuing education requirements in order to maintain the permit to practice. KS Stat. 1-316(1).

Special Agent Funk was similarly NOT a CPA in Colorado, where she has been living and working for the FBI since 2011. Importantly, in order to hold oneself out in Colorado as a CPA, one must obtain reciprocity and a license from the Board in Colorado. And, in order to satisfy those requirements, Agent Funk would have had to have one year qualified work experience and attest to having completed all continuing education requirements. Special Agent Kate Funk did not - and could not - do so.

The probable cause identified in the search warrant affidavit is based entirely on Special Agent Funk's ability to read bank statements and records, audits and reports, brokerage records and transfer agent records, and to "follow the flow of money" in my business. The myriad of problems with Agent Funk's affidavit and her inexperience, and therefore inaccurate conclusions, are not important for the arguments in this section (those arguments are indeed covered in the ineffective assistance of counsel portion - and in fact are very important). Rather, what matters for this argument is that in order to satisfy the probable cause requirement to obtain a search warrant, is that Special Agent Funk lied about her credentials in order to enhance her credibility in order to obtain the search warrant. Had Special Agent Funk been honest, and told the judge that she only had a business degree (not accounting) and that she was not a licensed CPA, the judge would not have signed the search warrant. The government could not have met its relatively low burden. Therefore, but for Special Agent Funk's perjury and lies, I would not have pled guilty.

Again, this is important because the government's entire basis for its case against me is alleging financial improprieties and irregularities in monetary transactions. Special Agent Funk has neither the experience nor the skill - nor the qualifications as a CPA - to opine on those matters. And, had Agent Funk not improperly "enhanced" her credentials, the government would not have obtained a warrant. To say that Special Agent Funk is a CPA is the equivalent of saying someone who took the MCAT is a doctor or someone who took the LSAT is a lawyer. It's ludicrous. And, it's fraud.

As noted herein, this is critical because Judge Martinez wrongly rejected these allegations when he stated "The Court noted that Agent Funk is a CPA ...." The district court further noted that Special Agent Funk's intentional misrepresentations "did not render [my] guilty plea involuntary. The Court comes to this conclusion because the allegedly withheld information regarding Agent Funk is not exculpatory. (ECF No. 289 at 9). With all due respect to Judge Martinez, such information is exculpatory, it did render my plea involuntary, and the court plainly erred in finding otherwise.

(iii) Agent Funk's lies and the government's withholding of exculpatory evidence rendered my plea involuntary.

Agent Funk's representations about her education, her degree, her experience, and her qualifications were all embelished. She intentionally misled the district court in an effort to appear more credible. And, her embelishments were not "clerical" or "harmless." Rather, they were substantive, meaningful, and had catastrophic consequences. Agent Funk's financial reporting was riddled with errors and inaccuracies, and it's clear she had no experience to

perform the functions of an actual CPA. Nevertheless, Agent Funk represented to the district court that she was a certified public accountant and qualified to offer the opinions and conclusions that she did.

In 2017, Tonya Leshun Hall was sentenced to six months in prison for lying to a federal judge in Western North Carolina. Ms. Hall prepared an affidavit opining on one party's finances. In her affidavit, she represented to the court that she graduated college with a degree in accounting and was a certified public accountant. It turns out, just like Special Agent Funk, that Ms. Hall did not graduate with a degree in accounting nor was she a CPA.

In that case, the court stated that Ms. Hall's lies "misled" the court in its assessment, and that prison was necessary to "promote respect for the law" and important in maintaining the truthfulness of the justice system. Candidly, there is no difference in what Ms. Hall did - and was sentenced to six months in prison for - and what Special Agent Kate Funk did.

Colorado Revised Statute § 12-2-129 makes it a class 2 misdemeanor to use the CPA designation in Colorado when one is not authorized to do so; and, a class 6 felony for any subsequent offense. In light of the fact Agent Funk lied to the court and called herself a CPA - when she was not - and completely misrepresented her credentials for the sole purpose of enhancing her legitimacy in pursuit of a search warrant - and committed at least one crim in Colorado while doing so - it is clear that my guilty plea was involuntary and induced by fraud on the government's part.

In light of Special Agent Funk's perjury and material misrepresentations, and the fact that her actions constitute a crime under Colorado law, I respectfully request that this Court reverse Judge Martinez's July 15, 2022, order denying my § 2255 petition on the grounds that my plea agreement was obtained involuntarily and illegally.

ISSUE NO. 3: THE DISTRICT COURT WRONGLY DECIDED SEAR'S CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

1) Because Reasonable Jurists Could Debate That My Previous Attorneys Were Ineffective, A Certificate oF Appealability Should Issue.

As highlighted in my § 2255 petition (and throughout this Opening Brief), the government withheld exculpatory evidence from me, the government failed to register and produce the search warrants, and the government further withheld discovery from me prior to my plea agreement. Even so, my attorneys pushed me to accept a plea deal and not take my case to trial. It was not a strategic decision, but rather one of greed. When my attorney told my co-defendant's counsel that I did "not have the resources" to try my case, and then withdrew from representing me when I wanted to withdraw my plea agreement, it was clear that my attorney did as little as possible hoping to charge me as much as possible, and always planned to end this case with a plea deal.

Because reasonable jurists, when viewing the totality of the circumstances, could debate that my attorney's counsel was so ineffective, a certificate of appealability should issue.

2) The District Court Erred In Rejecting My Claim For Ineffective Assistance of Counsel.

The Supreme Court has long held that the Sixth Amendment right to counsel includes the right to **effective** counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984) (emphasis added). Moreover, the Sixth Amendment right to effective assistance of counsel extends to the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012). It is also clear that when "representing a criminal defendant, an attorney has a duty to reasonably investigate the facts and the evidence." Strickland, 466 at 690-91. The question is not necessarily whether the previous counsel made reasonable strategic choices that turned out to be unsuccessful, but rather did the attorney fail to investigate.

The Tenth Circuit analyzes ineffective assistance of counsel claims using the approach set forth in Strickland. Under that standard, "a defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense." United States v. Holloway, 939 F.3d 1088, 1102 (10th Cir. 2019). And, for claims arising in the context of a guilty plea, the prejudice requirement is slightly different and "focuses on whether counesl's constitutionally ineffective performance affected the outcome of the plea process. In other words ... the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also, United States v. Lustyik, 842 Fed. App'x 291 (10th Cir. 2021).

Thus, in cases like mine, where a defendant alleges that his counsel's deficient performance led him to accept a guilty plea rather than go to trial, a court does not ask whether the defendant had gone to trial would the result have been different than the result of a plea deal. Rather, the court should consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000). As the Supreme Court held in Hill, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

Because it's impossible to look back with perfect hindsight and rather than asking how a hypothetical trial would have played out absent the error, the court considers whether there is an adequate showing that the defendant, properly advised, would have opted to go to trial. In my case, because I filed a motion to withdraw my guilty plea once I finally got the exculpatory evidence and other discovery that my previous counsel should have reviewed, it is clear to see that "but for" my previous counsel's deficient performance, I would not have pled guilty and instead would have insisted on going to trial.

Finally, in this Circuit, an ineffective assistance of counsel claim is a mixed question of law and fact that this Court reviews de novo. Holloway, 939 F.3d at 1097.

(i) My previous counsel failed to investigate the search warrants, affidavits, and other alleged evidence against me.

Although the FBI obtained a search warrant in May, 2014, I was not charged with any crimes until September, 2016. During those 2.5 years, my attorney did very little to fulfill his constitutional duty to investigate the facts and the alleged evidence against me. During that time, my attorneys should have reviewed the search warrant and probable cause affidavit. Had they done so, they would have discovered that Special Agent Kate Funk committed perjury and that her opinions and conclusions were completely wrong. They would have learned that Agent Funk had no experience reviewing financial transactions for a publicly traded company, had no experience reviewing and preparing forensic audits, and had no experience with GAAP accounting principles and revenue recognition. My attorney's failure to provide even a modicum of investigation and review of the discovery was not a "strategic" decision. Instead, it was a complete and total failure to provide **effective** assistance of counsel.

Once I was finally able to review the alleged evidence against me, inexplicably only after I pled guilty, it was clear that the government misunderstood my business and initially thought I was operating a ponzi scheme, which I obviously was not. Reviewing the purported probable cause affidavit, it is clear the FBI did not understand the nature of the business, and after executing the search warrant in 2014 and not finding what they expected to find, had to manufacture new allegations against me in order to charge me in 2016 - nearly 2.5 years later. Because they withheld all of

the exculpatory evidence, and pushed for a quick plea deal, I did not have the opportunity to review the evidence prior to my plea agreement. Had my attorney's actually provided effective assistance of counsel, I would have insisted on going to trial.

At all times during the discovery phase and the plea-bargaining phase, my attorneys had a duty to provide effective representation. That means investigating, reviewing evidence, and preparing a defense. Had my attorneys done so, we would have learned that the prosecution never registered the search warrants with the court - as they were obligated to do. To this day, I still don't know what ultimately the prosecution was after or what they found, because the search warrants were never registered with the court. Had my counsel done their jobs, I would have known this before pleading guilty. And, had I known that, I would not have pled guilty and would have insisted on going to trial - as I tried to do through my motion to withdraw my guilty plea after learning this information.

(ii) My attorney's failed to seek and review the government's discovery against me.

As my business was relatively complex, I relied heavily on the advice of securities lawyers and professionals to ensure that I was compliant with all of the various rules, regulations, and laws. One of those attorneys was Fred Leher, a longtime securities attorney. During the course of the government's investigation, the FBI interviewed Mr. Leher. Unfortunately, in an effort to shield himself from any exposure or liability, Mr. Leher lied under oath during his discussions with the FBI and prosecutors. His lies are

verifiably false, and had I known about them prior to pleading guilty, I would not have done so and instead would have insisted on going to trial.

The district court rejected my argument that the government's withholding of Mr. Leher's 302, the fact that he had a personal relationship with the prosecutor in my case, AUSA Kenneth Harmon, and other exculpatory evidence did not render my plea involuntary. That may be, but my attorney's complete failure to investigate and conduct discovery, the complete failure to review such evidence and the complete failure to prepare a defense and at least discuss this information with me prior to me entering a plea agreement unequivocably constitutes ineffective assistance of counsel. Had I known about that evidence and the false testimony of Mr. Leher, I would not have pled guilty and would have instead insisted on goint to trial.

(iii) As soon as I learned about all of the fraudulent evidence put forth by the government, I tried to withdraw my guilty plea.

Once charged in September 2016, I was adamant that the government misunderstood my business and I was not guilty of the charges leveled against me. Even so, my attorneys were convinced (even though they hadn't done any actual investigating or defense work) that I could not prevail at trial. They told me that this is a "paper case" and that Agent Kate Funk is a Certified Public Accountant and that she will get on the stand and tell the jury how bad the books were. They further told me that Fred Leher will testify that I lied to him. Finally, they told me that I did not have the

resources for trial, and if I went to trial and lost, that I would be subject to the "trial tax" and my sentence would be longer than if I pled. As a result, they pushed for me to accept a plea deal a mere 60 days from the time I was charged.

In this case, the Court does not have to wonder what I would have done "but for" my attorney's deficient performance. That's because as soon as I learned about all of the problems with the government's case, including the perjury in the probable cause affidavit, the fact the search warrants were never registered with the court, the perjury in the 302's, and everything else, I moved to withdraw my plea agreement. As such, it's clear that but for my counsel's deficient, ineffective assistance, I would not have pled guilty and would have insisted on going to trial.

(iv) My attorney's deficient performance failed to protect my Fourth Amendment rights.

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The basic purpose of the Amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Camara v. Mun. Ct. of City & Cnty. of S.F., 387 U.S. 523, 528 (1967).

The Fourth Amendment mandates that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Importantly, the Fourth Amendment is violated "if police knowingly or with reckless disregard include false

statements in affidavits that formed the basis for the issuance of warrants." Pierce v. Gilchrist, 359 F.3d 1279, 1289 (10th Cir. 2004). Moreover, a Fourth Amendment violation occurs when "(1) an officer's affidavit supporting a search warrant application contains a reckless misstatement or omission that (2) is material because but for it, the warrant could not have lawfully issued." United States v. Moses, 965 F.3d 1106, 1110 (10th Cir. 2020).

In this case, it is clear that my Fourth Amendment rights were violated. Special Agent Kate Funk lied in her affidavit supporting the search warrant application, and she did so for the sole purpose of enhancing her credibility and convincing the judge to sign the search warrant. But for her misrepresentations and reckless misstatements, the warrant would not have issued.

Knowing the protections against unlawful search and seizures, as well as problems associated with search warrants, it is indefensible that my attorneys did not ever even look at the search warrant or the affidavit used in the application. A simple investigation by me - after my plea agreement when I finally received copies - indicated that Special Agent Kate Funk lied in her affidavit and did so for the sole purpose of embellishing her credibility so the judge would sign the warrant.

Additionally, as stated above, it is indefensible that my prior counsel never even sought to look at the search warrants. Had they checked the court record, they would have found that the warrants were never returned or registered with the court. The government's failure to register the search warrants flies directly in the face

of well settled law in the Tenth Circuit. See United States v. Leary, 846 F.2d 592 and United States v. Williamson, 1 F.3d 1134 (10th Cir. 1993) (both holding that in the Tenth Circuit, "both attachment and incorporation are required for an affidavit ...."). Notwithstanding the government's failure to return and register the search warrant and accompanying affidavit, that does not excuse my previous counsel's constitutionally deficient performance and failure to call the court - or the prosecutors - and get a certified copy of the warrant and affidavit. Then, and only then, could they have been able to investigate the claims made therein and provide me with guidance, direction, and counsel regarding the same. Because but for my attorney's deficient performance, I would not have pled guilty and would have insisted on going to trial, this Court should reverse the district court's July 15, 2022, order.

CONCLUSION

For the foregoing reasons, Sears respectfully requests that this Court reverse the district court's July 15, 2022, order and remand this matter back with instructions to hold an evidentiary hearing, where Special Agent Funk can testify, as well as instruct the district court to consider my additional claims pursuant to this Court's instructions.

DATED this 11th day of October, 2022.

William J. Sears
pro se

FILL OUT AND SIGN EACH OF THE FOLLOWING TWO SECTIONS

I affirm under the penalty for perjury that I placed this Appellant's Combined Opening Brief and Application for a Certificate of Appealability with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to the Clerk of the U.S. Court of Appeals for the Tenth Circuit, 1823 Stout St., Denver, CO 80257. In addition, I hereby certify that a copy of this form was placed with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to:

(identify the name and address of the opposing governmental attorney)

on the following date:

10 (month) 11 (day) 2022 (year) _____ (signature)

I certify that the total number of pages I am submitting as my Appellant's Combined Opening Brief and Application for a Certificate of Appealability is 30 pages or less or alternatively, if the total number of pages exceeds 30, I certify that I have counted the number of words and the total is _____, which is less than 13,000. I understand that if my Appellant's Combined Opening Brief and Application for a Certificate of Appealability exceeds 13,000 words, my brief may be stricken and the appeal dismissed.

10 (month) 11 (day) 2022 (year) _____ (signature)

Exhibit - KU

This is From the Kansas University Alumni Association. KATE "EGAN" FUNK as EGAN being her maiden Name is highlighted along with her degree type.

She Lied: her degree is clearly NOT in accounting as she swore under oath in her affadavits. (The Fake ones we GOT anyway) Kansas does NOT offer an accounting degree.

Step 2:

Find your name in the list below and click the radio button beside it, then click "Next."

If your record is marked as "Already Registered," please click here to log in. Tools are available to recover your password if you don't remember it.

In the KU Degree column, the first letter indicates the school that granted your degree, followed by the year of the degree. Below is a key to determining school codes.

~~*~~ No Accounting Degree offered

A	School of Architecture, Design & Planning
B	School of Business
C	College of Liberal Arts & Sciences
D	School of Education
E	School of Engineering
F	School of Fine Arts
G	Master's Degree
H	School of Health Professions
J	School of Journalism
L	School of Law
M	School of Medicine
N	School of Nursing
P	School of Pharmacy
PharmD	School of Pharmacy
S	School of Social Welfare
U	School of Music
AUD	Doctor of Audiology
DE	Doctor of Engineering
DMA	Doctor of Musical Arts
DNP	Doctor of Nursing Practice
DPT	Doctor of Physical Therapy
EdD	Doctor of Education
OTD	Doctor of Occupational Therapy
PhD	Doctor of Philosophy
SJD	Doctor of Juridical Science

If you don't see your name on the list, please use your browser's Back button to try searing again using alternate values, such as your legal name or a previous name. If you still do not see your name or have other questions about the account lookup

	First Name:	Last Name:	Birth or Former Last Name:	KU Degrees :
○	Aidan	Egan		
○	Ann	Egan		g'89
○	Anne	Cory	Egan	d'78 g'82
○	Brenda	Egan		PharmD'10
○	Brian	Egan		F05
○	Cassidy	Egan		c'10
○	Catherine	Fennelly	Egan	c'13
○	Chet	Egan		c'06 g'15
○	Drew	Egan		b'16 g'17
○	Elaine	Wilson	Egan	'72
○	F.	Egan		PhD'11
○	Georgine	Egan	Neuner	g'87
○	Gregory	Egan		C95
○	James	Egan		b'82
○	James	Egan		G85
○	Jaxon	Egan		
○	Jeanne	Binder	Egan	g'92
○	Jennifer	Egan		g'97
○	Jennifer	Egan	Clapper	s'13
Already registered	John	Egan		j'86
○	John	Egan		C99
○	Kate	Egan		B96
○	Katie	Egan		
○	Kristian	Eganhouse	Hamilton	l'96
○	Lawrence	Egan		C86
○	Lisa	Egan	Hardy	c'12
○	Lori	Egan	Wehr	d'83
○	Margaret	Egan		g'77
○	Mary	Egan	Hardman	c'42 g'44
○	Mary	Egan		'20
○	Michael	Egan		
○	Michael	Egan		g'93
○	Misti	Jones	Egan	'84
○	Mitchell	Egan		c'15
○	Patricia	Egan		g'86 PhD'94
Already registered	Philip	Egan		G72 G74 G81
○	Rebecca	Egan	Foster	f'87
○	Robert	Egan		e'86
○	Spencer	Egan		
○	Susan	Egan		
Already registered	Thomas	Egan		j'77

→ Business NOT ACCOUNTING DEGREE AS she swore uncle.- OATH!

Next >>

Contact Us

KU Alumni Association
Adams Alumni Center
1266 Oread Ave., Lawrence, KS 66045
Email: kualumni@kualumni.org
Phone: 800-584-2957

Current Issue

Shop

Featured Partner

From: AccountancyBoard, DORA
Sent: Friday, February 9, 2018 11:41 AM
To: tessa-noel@hotmail.com
Subject: Fwd: Licensure Requirements in Colorado

Ms. Noel,

Anyone who has been residing in Colorado for 4 years and completing CPA work would be violating the Colorado Board of Accountancy Rules by not having a Colorado CPA License. That would be considered as "Holding Out". Mobility only covers you when have another license in another state and you temporarily completing work in Colorado but do not reside in Colorado. I hope this clarifies your inquiry. Thank you

Kind Regards,

Colorado Department of Regulatory Agencies
Division of Professions and Occupations
Board of Accountancy
1560 Broadway, Suite 1350
Denver, CO 80202
P 303.894.7800 | F 303.869.7764
Email dora_accountancyboard@state.co.us
www.dora.colorado.gov/professions/accounting

---------- Forwarded message ----------
From: **Tessa Noel** <tessa-noel@hotmail.com>
Date: Wed, Jan 31, 2018 at 8:53 AM
Subject: Licensure Requirements in Colorado
To: "DORA_Customercare@state.co.us" <DORA_Customercare@state.co.us>

Hello….

Thank you for your time and I was unable to find the answer to this question on your website, so I decided to write to see if you might be able to provide me an answer to my question regarding Certified Public Accountancy licensing in Colorado. In Kansas it has a two-tiered system where you are issued a certificate first then you apply for a permit to practice which requires continuing education, verifiable work experience and payment of the fee….If someone does not have a permit in Kansas to practice certified public accountancy would this be acceptable to hold themselves out to be a certified public accountant in Colorado…The person is a resident of Colorado and has been for 4 years, so I am not sure how that would work here.

Thank you for your time it is greatly appreciated…

Tessa Noel

Sent from Mail for Windows 10

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DORA Customer Care

P 303.894.7855 | dora_customercare@state.co.us
1560 Broadway, Suite 110, Denver, CO 80202

>> Home >> Search for Firms

Individual Information

[Back to Search Results | Search Again]

Name:	Kate Elizabeth Egan	**Certificate Status:**	**Active**
Address:	22 N Morgan Unit 210 Chicago, IL 60607-0000	**Permit Status:**	
Firm/Employer:	Sprint	**Discipline and/or Board Action:**	NO
Certificate Issue Date:	08/04/1999		
Certificate Number:	8757		
Permit Number:			
Permit Issue/Renew Date:	/ /		
Permit Expiration Date:	/ /		

Name	License Number	License Status	Contact Type	City	State	Zip Code
No records found for the criteria entered.						

Verify a Colorado Professional or Business License

Search Criteria

Use the search options below to search for a Licensed Professional/Business with the Division of Professions and Occupations. You may enter as much or as little information as you choose. As with any query your results will depend on the amount of information you enter.

To research public action documents for **unlicensed respondents**, please visit our Division of Professions and Occupations Public Documents System (http://www.dora.state.co.us/pls/real/DDMS_Search_GUI.DPO_Search_Form).

License Type(s): Accountancy
Acupuncture
Addiction Counselors
Architects, Engineers and Land Surveyors
Athletic Trainers

License Prefix and Number:

First Name: kate

Last Name: egan

Business Name:

City:

State/Province:

Zip Code:

Search Clear Form

Current Filters

Last Name: egan
First Name: kate
License Type(s): Accountancy

Verify a Colorado Professional or Business License

More Online Services

	Name	License Number	License Status	Contact Type	City	State	Zip Code
No records found for the criteria entered.							

Online Complaint Submission

File a Complaint (/dora/licensing/Activities/Complaint.aspx)

Licensee/Discipline List Downloads

Download a List of Licensee/Discipline Information (/dora/licensing/Lookup/GenerateRoster.aspx)

About Us

DORA's Division of Professions and Occupations licenses over 50 professions, occupations and businesses in Colorado.

Contact Us

Find us at:
1560 Broadway, Suite 1350, Denver, CO 80202

Send mail to:
Colorado Department of Regulatory Agencies
Division of Professions and Occupations
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