IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case Nos. 03-3009-JWL**
98-20030–01-JWL

DAN ANDERSON,

Defendant/Movant.

MEMORANDUM AND ORDER

Defendant/movant Dan Anderson has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On July 2, 2003, the court issued a memorandum and order largely denying Mr. Anderson's § 2255 motion, but ruling that the court would hold an evidentiary hearing regarding his claim that the government violated his Fifth Amendment due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the fact that a government witness, Sarah Grim, had a prior relationship with federal officials.

The matter is presently before the court on a variety of related motions which have delayed the court from setting a date for the evidentiary hearing on this matter. The first of these is the government's motion to supplement the record and dismiss the § 2255 motion (Doc. 806), which the court will deny. The court will also deny Mr. Anderson's motion to amend his § 2255 motion (Doc. 813) and his motion to conduct discovery regarding the claims raised in his motion to amend (Doc. 810). In light of the court's ruling denying Mr. Anderson's motion to amend on its merits, the court will also deny as moot the government's

motion to strike Mr. Anderson's motion to amend (Doc. 815). The court will deny the government's motion to strike Mr. Anderson's supplement to memorandum in support of his motion to amend his § 2255 motion (Doc. 820),[1] and will grant in part and deny in part Mr. Anderson's motion for additional discovery with respect to a deposition of Sarah Grim (Doc. 807).

BACKGROUND[2]

On April 5, 1999, a jury convicted Mr. Anderson of one count of conspiracy, 18 U.S.C. § 371, and one count of violating the Medicare Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), because of his involvement as Chief Executive Officer of Baptist Medical Center in a so-called pay-for-patient-referral arrangement with Blue Valley Medical Group. Mr. Anderson filed a § 2255 motion in which he argued the sentencing court violated his Fifth and Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by enhancing his offense level based on facts that were not charged in the indictment or proven beyond a reasonable doubt before a jury. He also contended the government violated his due process rights under *Brady* by failing to disclose thirty-party threats against Ms. Grim and the fact that Ms. Grim had a prior relationship with federal officials. On July 2, 2003, the court issued a

[1] The clerk is directed to terminate Doc. 816, which was erroneously docketed as a motion. The substance of the motion clearly reveals it is simply a supplemental memorandum, as nowhere in the motion does Mr. Anderson seek leave to file this document.

[2] The facts underlying Mr. Anderson's § 2255 motion are more thoroughly explained in the court's July 2, 2003, memorandum and order.

memorandum and order summarily dismissing Mr. Anderson's *Apprendi* claim and his *Brady* claim regarding the government's alleged failure to disclose thirty-party threats against Ms. Grim. However, the court held that it could not summarily dismiss his *Brady* claim regarding Ms. Grim's alleged ongoing relationship with federal officials.

During the trial, Ms. Grim, Baptist's Director of Geriatric Services from 1986 to 1988, testified that Mr. Anderson: "(1) made it clear to her the Baptist Blue Valley relationship was a business deal in which Baptist would pay money to Blue Valley in return for patient referrals; and (2) told her he was very protective of the Baptist Blue Valley relationship, because, in her words, Baptist was 'going to get patients. It was about occupancy.'" *United States v. LaHue*, 261 F.3d 993, 998 (10th Cir. 2001), *cert. denied*, 534 U.S. 1083, 1083-84 (2002). According to Mr. Anderson's § 2255 motion, in June of 2000, the South Florida Business Journal published a series of articles discussing corruption in the Medicaid bidding procedures in Florida. The articles state that a lobbyist approached Ms. Grim, who was at that time the Chief Executive Officer of the Missouri Patient Care Review Foundation ("MOPRO"), and offered her a contract involving the Florida Agency for Health Care Administration. The article described Ms. Grim's history in exposing fraud, including her efforts in the early 1990s to investigate an offshore insurance company. The article further reported that Ms. Grim was called back to Florida in April of 2000 to be questioned about the Florida healthcare contract. The reports claim that "[w]hen Grim travels to Florida on business, she is met by FBI agents and accompanied by them wherever she goes." It is undisputed that the government did not disclose this information to the defense at trial. In the court's July 2, 2003, memorandum and

order, the court ruled that this evidence would have been probative of Ms. Grim's bias and credibility, and that Mr. Anderson was entitled to an evidentiary hearing on this issue. *See United States v. Anderson*, Nos. 03-3009-JWL & 98-20030-01-JWL, 2003 WL 21544241, at *8-*9 (D. Kan. July 2, 2003). The parties have now filed a variety of motions relating to this issue, as follows.

THE GOVERNMENT'S SUPPLEMENTATION OF THE RECORD AND MOTION TO DISMISS PLAINTIFF'S § 2255 PETITION

The first of these motions is the government's supplementation of the record and motion to dismiss Mr. Anderson's § 2255 petition (Doc. 806). The court has already ruled that Mr. Anderson's *Brady* claim regarding Ms. Grim's alleged bias based on her relationship with federal law enforcement officials cannot be summarily dismissed without an evidentiary hearing. Because this motion is an attempt to avoid that evidentiary hearing, the court construes it as a motion to reconsider the court's prior order granting Mr. Anderson an evidentiary hearing on that issue.

There is no provision for a motion to reconsider in the Federal Rules of Criminal Procedure, and therefore federal courts recognize motions to reconsider pursuant to the common law doctrine recognized in *United States v. Healy*, 376 U.S. 75 (1964). *United States v. Corey*, 999 F.2d 493, 495 (10th Cir. 1993). Where such motions ask the court to reconsider dispositive rulings, they are essentially treated the same as motions to alter or amend a judgment in the civil context under Fed. R. Civ. P. 59(e). *United States v.*

Schweibinz, No. 93-40001-06-SAC, 1994 WL 129998, at *1 n.1 (D. Kan. Mar. 15, 1994). Here, though, the government is effectively challenging the court's decision to grant Mr. Anderson an evidentiary hearing. Thus, the motion actually seeks the court's reconsideration of a nondispositive ruling, and the court will therefore evaluate the motion under the standards set forth in D. Kan. Rule 7.3(b). *See, e.g., United States v. Anderson*, No. 98-20030-JWL, 1999 WL 79652, at *1 (D. Kan. Jan. 12, 1999) (evaluating a motion to reconsider a non-dispositive ruling in a criminal case under the standards of D. Kan. Rule 7.3); *United States v. Anderson*, 36 F. Supp. 2d 1264, 1265 (D .Kan. 1998) (same); *United States v. Anderson*, 31 F. Supp. 2d 933, 946 (D. Kan. 1998) (same).

Under that rule, a motion to reconsider a non-dispositive order must be filed within ten days after the order in question was filed. D. Kan. Rule 7.3(b). The court issued its order granting Mr. Anderson an evidentiary hearing on his *Brady* claim regarding Ms. Grim's alleged bias on July 2, 2003. The government did not file this motion until nearly two months later on August 28, 2003, which was well after Rule 7.3(b)'s ten-day time limit expired. Therefore, the government's motion is denied as untimely.

It is also denied on its merits. A motion seeking reconsideration of a non-dispositive order "shall be based on (1) an intervening change in controlling law, (2) the availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice." D. Kan. Rule 7.3(b). Whether to grant or deny a motion to reconsider is committed to the district court's sound discretion. *Wright ex rel. Trust Co. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1235 (10th Cir. 2001). Here, no intervening change in controlling law has occurred. The court did not

commit error by granting Mr. Anderson an evidentiary hearing, and manifest injustice will not occur simply by virtue of proceeding with that evidentiary hearing. Thus, the only colorable basis for the government's motion to reconsider is the availability of new evidence. The government has submitted additional evidence in support of its motion to dismiss and now contends the court should dismiss plaintiff's § 2255 motion on the basis of that evidence. However, this evidence was not *un*available when the government filed its motion to dismiss; the government simply had not yet collected this evidence at that time. The government is essentially attempting to take another opportunity to present its strongest case, and that is an impermissible basis for the court to grant a motion to reconsider. *See Schweibinz*, 1994 WL 129998, at *1 n.1 (noting a motion to reconsider should not be viewed as a second opportunity "for the losing party to make its strongest case or to dress up arguments that previously failed").

Accordingly, the government's motion to dismiss, which the court construes as a motion to reconsider the court's July 2 order that Mr. Anderson is entitled to an evidentiary hearing on the issue of Ms. Grim's alleged bias,[3] is denied.

---

[3] The government's motion is also styled a "supplementation of the record." The court could arguably construe this aspect of the motion as a motion to expand the record pursuant to Rule 7(a) of the Rules Governing Section 2255 Proceedings. However, because the motion was not styled as such, Mr. Anderson has not had an opportunity to weigh in on the merits of the motion under Rule 7(a). Instead, both parties' arguments are concerned with the government's request that the court dismiss Mr. Anderson's § 2255 motion rather than hold an evidentiary hearing regarding Ms. Grim's alleged bias. Because the government has not actually sought to expand the record pursuant to Rule 7(a), and because the government will have an adequate opportunity to present the evidence that it wishes to present at the evidentiary hearing, the court will not construe this aspect of the motion as a motion to expand the record.

MR. ANDERSON'S MOTION FOR LEAVE TO AMEND AND RELATED MOTIONS

Next, the court will consider Mr. Anderson's motion for leave to amend (Doc. 813) his § 2255 motion to include additional *Brady* claims regarding the government's failure to disclose to the defense: (1) the stance taken by the Health Care Financing Administration ("HCFA") regarding the prosecution of this case; and (2) the fact that Ms. Grim possessed information favorable to the defense, and that she informed federal officials she did not want to testify and would change her testimony if recalled to testify. For the reasons explained below, the court will deny the motion to amend as both untimely and futile.

I. HCFA'S Stance Regarding This Prosecution

By way of background, at trial, the government argued it was required to prove that a person who offers or pays remuneration to another person violates the anti-kickback statute if *one of* the purposes of the offer or payment is to induce Medicare or Medicaid patient referrals. By comparison, defendants argued this statute is violated only if the *primary or substantial* purpose of the offer or payment is to induce Medicare or Medicaid patient referrals. The government's position was supported by the seminal case on this issue, *United States v. Greber*, 760 F.2d 68, 71-72 (3d Cir. 1985). Defendants argued they relied on their attorney's advice that they would not run afoul of the statute if the expectation of patient referrals was not a primary or substantial purpose of the subject payments. The court ultimately adopted and applied *Greber*'s "one-purpose" rule, and the Tenth Circuit agreed with

this interpretation of the law. *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000).

On August 4, 2003, the court held a hearing to discuss Mr. Anderson's discovery requests regarding the outstanding *Brady* issue of Ms. Grim's alleged bias. At that time, in discussing whether HCFA was a member of the prosecution team in this case, the following dialogue occurred between the court and Assistant United States Attorney Tanya Treadway:

The Court:	Without disclosing anything that you're not able to disclose as a result of attorney/client privilege or something else you want to make an argument about, why is it that HCFA was not supportive of prosecution?
Ms. Treadway:	Because they did not think that the *Greber* rule would stand up at the Tenth Circuit. And, in fact, it did, didn't it?
The Court:	So they were simply as a matter of legal strategy --
Ms. Treadway:	They thought it would make bad precedent; right.

Based solely on this dialogue in open court, Mr. Anderson now contends that the fact that HCFA—which is the agency responsible for administering the Medicare program and interpreting statutes governing it, and which is also the alleged victim in this case—did not support the government's prosecution of this case was *Brady* material, and he seeks to amend his § 2255 motion to include this claim.

A. Timeliness of the Proposed Amendment[4]

[4] Mr. Anderson has failed to properly assert his arguments regarding the timeliness of his motion. He first raised these arguments in his supplement to his memorandum in support of his motion to amend, which he was not entitled to file because it was filed ten days after his original motion and therefore did not accompany his motion. *See* D. Kan. Rule 7.1(a) ("All motions . . . shall be *accompanied* by a brief or memorandum . . . ." (emphasis added)). He then raised these arguments again in his reply brief. *See Minshall v. McGraw Hill*

Both parties agree that Mr. Anderson's motion to amend was filed after expiration of the one-year limitation period established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2255. Rule 12 of the Rules Governing Section 2255 Proceedings in the United States District Courts ("§ 2255 Rules") states that, "[i]f no procedure is specifically prescribed by these rules, the district court . . . may apply . . . the Federal Rules of Civil Procedure . . . to motions filed under these rules." The § 2255 Rules do not specify a procedure for amending motions, and therefore courts typically apply Fed. R. Civ. P. 15 to proposed amendments of § 2255 motions. Thus, the relation back doctrine embodied in Rule 15(c) may save untimely requests to amend § 2255 motions. *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000). However, Rule 15(c) only saves the untimely amendment if: (1) the original motion was timely filed; and (2) the proposed amendment seeks to add additional facts to clarify or amplify a claim or theory raised in the original motion, not to insert a new claim or theory into the case. *Id.*

Mr. Anderson's original motion was timely filed. However, the proposed amendment seeks to add a new *Brady* claim that arises from an entirely separate and distinct set of operative facts from the claims raised in his original motion, which did not mention HCFA's stance regarding the prosecution of this case. Indeed, Mr. Anderson does not even attempt to

---

Broadcasting Co., 323 F.3d 1273, 1288 (10th Cir. 2003) (argument raised for the first time in reply brief is waived); *Coleman v. B-G Maintenance Mgmt.*, 108 F.3d 1199, 1205 (10th Cir 1997) (issues not raised in the opening brief are deemed abandoned or waived). However, the court will consider these arguments because they are without merit in any event, and will deny the government's motion to strike Mr. Anderson's supplement (Doc. 820).

argue that his amendment regarding HCFA's stance is saved by Rule 15(c)'s relation-back doctrine.[5] Instead, Mr. Anderson cites 28 U.S.C. § 2255(2) & (4) in support of his argument that his motion to amend is timely because the government allegedly impeded him from asserting this claim until August 4, 2003, when Ms. Treadway revealed HCFA's stance regarding this prosecution, and because he allegedly could not have known through the exercise of due diligence about HCFA's stance until that date.

Under 28 U.S.C. § 2255(2), the one-year limitation period can be tolled until "the date on which the *impediment* to making a motion *created by governmental action in violation of the Constitution or laws of the United States* is removed, if the movant was prevented from making a motion by such governmental action." *Id.* § 2255(2) (emphasis added). The court is not convinced that a government-created impediment necessarily "prevented" Mr. Anderson from filing his motion to amend based on HCFA's stance regarding the prosecution of this case. Clearly, though, Mr. Anderson was not impeded from asserting this claim because of an *unlawful* government-created impediment. The government's failure to reveal this information would be unlawful only if it were *Brady* material and, as explained below, it is not. Therefore, Mr. Anderson is not entitled to tolling under § 2255(2).

Similarly, under 28 U.S.C. § 2255(4), the one-year limitation period can be tolled until "the date on which the facts supporting the claim . . . could have been discovered through the exercise of due diligence." *Id.* § 2255(4). Mr. Anderson has not demonstrated that he

[5] His arguments regarding Rule 15(c)'s relation back doctrine are confined solely to his proposed amendments arising from Ms. Grim's e-mails.

exercised any diligence in asserting this claim, and surely if he believed that HCFA's stance on this issue was imperative to his defense, he could have at least attempted to communicate with HCFA officials or at a bare minimum submitted a Freedom of Information Act request to HCFA on this issue without awaiting disclosure of this fact in open court from the prosecutor.[6] More importantly, though, again as explained below, Mr. Anderson has not "discovered" any "facts" that actually support his *Brady* claim, and therefore he is not entitled to tolling under § 2255(4).

Mr. Anderson also argues this court has jurisdiction over the claims asserted in his motion under 28 U.S.C. § 2241 and the common law writ of error coram nobis.[7] The court disagrees. A § 2241 petition attacks the execution of a sentence and must be brought in the district where the petitioner is confined. *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). Section 2241 "is not an additional, alternative, or supplemental remedy to 28 U.S.C. § 2255." *Id.* The petitioner must show that § 2255 is "inadequate or ineffective" in order to challenge the validity of a judgment or sentence under § 2241. *Id.* Mr. Anderson has failed to demonstrate that there is anything inadequate or ineffective about the remedies available to him under § 2255, and therefore he is not entitled to relief under § 2241.

---

[6] As a practical matter, the court is by no means faulting counsel for Mr. Anderson for not being more proactive in attempting to discover this information. However, because Mr. Anderson has argued his claims are timely under § 2255(2) & (4), the court must make these observations in order to rule on the legal issue of whether counsel acted with the degree of diligence necessary to entitle Mr. Anderson to claim the benefits of these tolling provisions.

[7] This is the sum total of Mr. Anderson's argument in this regard. He notably does not even attempt to explain why this motion should be so construed.

Further, the writ of coram nobis is only available when § 2255 motions or other forms of relief are not. *Adam v. United States*, 274 F.2d 880, 882 (10th Cir. 1960). Thus, "a prisoner may not challenge a sentence or conviction for which he is currently in custody through a writ of coram nobis." *United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002); *see also Adam*, 274 F.2d at 882 (observing that § 2255 is the exclusive means for a defendant to challenge his conviction while he is still in custody). Mr. Anderson is still in federal custody, and therefore he is not entitled to a writ of coram nobis.

For all of these reasons, Mr. Anderson's motion to amend his § 2255 motion to include a claim based on HCFA's stance regarding the prosecution of this case is denied because it is untimely.

B. Futility of the Proposed Amendment

In addition, this motion is denied because the proposed amendment is futile. *See Moore v. Reynolds*, 153 F.3d 1086, 1116 (10th Cir. 1998) (listing the considerations under Fed. R. Civ. P. 15(a) in which a court may deny a motion to amend a habeas petition, including the futility of the proposed amendment).

Mr. Anderson argues he would have used this evidence to support his advice-of-counsel defense, to impeach Jimmy Frisbie (who was a government witness from HCFA), to support his uncertainty of law defense, and to argue that *Greber* was not a correct statement of the law. Counsel for Mr. Anderson has run amuck with Ms. Treadway's statements regarding whether HCFA was a member of the prosecution team. During the August 4, 2003, conference, Ms. Treadway did not state that HCFA did not believe *Greber* was a correct statement of the law.

Rather, she stated that HCFA did not support the prosecution of this case because of the associated litigation risk that the Tenth Circuit could potentially reject *Greber* and follow a primary or substantial purpose approach. In fact, it cannot even be reasonably inferred from her statements that HCFA did not believe *Greber* was a correct statement of the law. She specifically stated that HCFA "did not think the *Greber* rule would stand up at the Tenth Circuit" and that HCFA "thought [this] would make *bad* precedent." (Emphasis added.) Counsel for Mr. Anderson has now twisted that statement and used it to file a pleading that is borderline frivolous. Thus, all of Mr. Anderson's arguments, which are based solely on permutations of Ms. Treadway's statement to the court, are pure speculation and therefore cannot support a § 2255 motion. *See Smallwood v. Gibson*, 191 F.3d 1257, 1280 n.14 (10th Cir. 1990) (noting that "pure speculation" cannot support habeas relief).

Nevertheless, even if the court were to give Mr. Anderson the utmost latitude and construe Ms. Treadway's statements as liberally as possible in favor of Mr. Anderson,[8] none of his arguments have any merit. Under *Brady*, the government's suppression of "evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. "[T]o establish a *Brady* violation, a habeas petitioner must show that '(1) the prosecutor suppressed evidence; (2) the evidence was favorable to the defendant as exculpatory or impeachment evidence; and (3) the evidence was material.'"

[8] The government contends that it did not learn about HCFA's stance on this issue until after the trial, and even then only learned this information through the grapevine. These arguments are immaterial given the court's finding that HCFA's stance regarding this prosecution was neither exculpatory nor material.

Knighton v. Mullin, 293 F.3d 1165, 1172 (10th Cir. 2002) (quoting *Gonzales v. McKune*, 247 F.3d 1066, 1075 (10th Cir. 2001), *vacated in part on other grounds*, 279 F.3d 922, 924 (10th Cir.) (en banc), *cert. denied*, 537 U.S. 838 (2002). "Generally, evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Combs*, 267 F.3d 1167, 1175 (10th Cir. 2001) (quotation omitted).

The alleged "evidence" of HCFA's stance regarding the prosecution of this case would not have been exculpatory under Mr. Anderson's advice-of-counsel defense. That defense pertained to Mr. Anderson's state of mind—*i.e.*, his allegation that he acted with subjective good faith—because he argued he relied on the advice of his attorney, Ruth Lehr, that the Baptist/Blue Valley contract complied with the law and therefore he did not knowingly and willfully violate the law. There is no suggestion that Mr. Anderson relied on or was even aware of HCFA's stance regarding this litigation. Therefore, this evidence could not have tended to exculpate him because it did not bear on his state of mind at the time he committed the offenses.

Nor would this alleged evidence have been material to Mr. Anderson's impeachment of Mr. Frisbie at trial. Mr. Anderson argues that the fact that Mr. Frisbie's "own employer (HCFA) either did not believe that a one-purpose test was appropriate or did not think that it was a correct statement of the applicable law could have been used to cross-examine him." The duty to disclose exculpatory evidence "encompasses impeachment evidence as well as

exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999). However, "impeachment *Brady* material will only require a new trial if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Scott v. Mullin*, 303 F.3d 1222, 1231-32 (10th Cir. 2002) (quotation omitted). Mr. Anderson has not directed the court to any testimony by Mr. Frisbie that would be "false" even if the court were to assume, for the sake of argument, that HCFA believed *Greber* was wrong. HCFA's position regarding *Greber* is simply one more issue that might have been raised during defense counsel's cross-examination of Mr. Frisbie, and the government would have had an opportunity to rehabilitate Mr. Frisbie on this issue, if necessary. His testimony was by no means critical and undoubtedly would not have affected the jury's judgment because the uncertainty of the law regarding the one-purpose issue was already adequately explored at trial.

Further, Mr. Anderson's argument that HCFA believed *Greber* was not a correct statement of the law is not "evidence" within the meaning of *Brady*. HCFA's stance regarding the propriety of *Greber* was not pertinent to any fact issue. Rather, the only issue to which this consideration might have even arguably been relevant was the purely legal issue of how to fashion the jury instructions. If HCFA had indeed taken an official stance on this issue at the time of trial, it would have been legal authority the government had no duty to disclose under *Brady*. *See United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1179 n.2 (9th Cir. 2001) ("Prosecutors . . . have an ethical duty to disclose relevant legal authority to the court, but that has nothing to do with *Brady*."). Also, although the court's application of the one-purpose rule was indeed an important legal issue at the time of trial, in retrospect this distinction was not

material because "the evidence produced at trial clearly demonstrated defendants negotiated and entered 'consulting' contracts in an attempt to camouflage an underlying agreement to exchange remuneration for patient referrals." *United States v. LaHue*, 261 F.3d 993, 1005 (10th Cir. 2001). Simply put, the jury clearly believed the contracts were a sham for a pay-for-patient referral arrangement, and therefore Mr. Anderson would undoubtedly have been convicted even under the more lenient substantial or primary purpose standard.

In sum, Mr. Anderson has not alleged any *Brady* violation with respect to HCFA's stance regarding the prosecution of this case. Therefore, his motion to amend his § 2255 motion to include that claim is also denied as futile.

II. Additional Evidence Regarding Sarah Grim

Mr. Anderson also seeks to amend his *Brady* claims to allege that Ms. Grim possessed information favorable to the defense, and also that she told federal officials she did not want to testify in this case and threatened to change her testimony if recalled as a witness. Counsel for Mr. Anderson argues that he discovered this information in approximately August of 2003 when he received copies of e-mails that Ms. Grim had sent to Charles German, who is counsel for co-defendant Dennis McClatchey.[9]

A. Timeliness of the Proposed Amendment[10]

[9] The record does not disclose the date(s) Ms. Grim sent these e-mails to Mr. German.

[10] The court also declines to construe this aspect of Mr. Anderson's motion under 28 U.S.C. § 2241 or as a motion for a writ of coram nobis for the same reasons stated in Section I(A) above.

As with Mr. Anderson's other proposed amendment regarding HCFA's stance on this prosecution, Mr. Anderson's proposed claims arising from Ms. Grim's e-mails raise separate claims and theories. His original § 2255 motion alleged *Brady* violations based on the government's failure to disclose the fact that Ms. Grim had been subjected to third-party threats because she decided to testify on the government's behalf, and its failure to disclose the fact that Ms. Grim had a prior relationship with federal law enforcement officials by virtue of her involvement in other investigations. The claims that Mr. Anderson now seeks to assert are entirely separate and distinct. They arise from Ms. Grim's alleged possession of exculpatory evidence and statements she made to federal officials regarding the fact that she did not want to testify in this case. These claims do not involve the same operative facts as the claims previously asserted, and therefore they do not relate back to the filing of Mr. Anderson's original § 2255 motion under Rule 15(c).

Further, the proposed amendments are not entitled to tolling under § 2255(2) or (4) because the court is unpersuaded that an unlawful government-created impediment prevented Mr. Anderson from timely filing these claims or that he could not have discovered these claims long ago if his attorney had acted with diligence. Mr. German presumably obtained this information by simply engaging in a dialogue with Ms. Grim via e-mail, and it seems that counsel for Mr. Anderson could have easily done the same. In fact, Ms. Grim's e-mail states that Mr. German asked "[m]any more" questions than counsel for Mr. Anderson, thus indicating

that Mr. Anderson was prevented from asserting these claims earlier by virtue of his own lack of diligence, not an unlawful government-created impediment.[11]

Therefore, the court denies Mr. Anderson's motion to amend to assert claims arising from Ms. Grim's e-mails on the basis that the proposed amendment is untimely.

B. Futility of the Proposed Amendment

The court also denies this motion based on the futility of the proposed amendments. The fact that Ms. Grim may have possessed or in fact may still possess information favorable to the defense is by no means *Brady* material. *Brady* only applies to the *government's* suppression of evidence, not to evidence in the possession of a third party. *United States v. Combs*, 267 F.3d 1167, 1173 (10th Cir. 2001) (observing that *Brady* does not oblige the government to obtain evidence from third parties). Nothing in Mr. Anderson's motion suggests that the government was aware that Ms. Grim allegedly possessed information favorable to the defense that was improperly withheld.

Also, the e-mails reveal that Ms. Grim told Ms. Treadway and FBI Agent Gary Violanti that she did not want to testify at the original trial of this case. This evidence is not even conceivably material. Presumably, counsel for Mr. Anderson would have found this information useful solely for the purpose of posing a question to Ms. Grim during cross-examination to the effect of, "Isn't it true that you do not want to testify on the government's behalf in this case?" And presumably Ms. Grim would have responded, "Yes." There is no

[11] Again, as a practical matter, the court is not faulting counsel for Mr. Anderson for not being more proactive in attempting to discover this information. *See* note 6, *supra*.

possibility at all, much less a reasonable probability, that this fact, and this fact alone, might have resulted in an acquittal for Mr. Anderson. This evidence does not undermine confidence in the outcome of the trial.

Lastly, the e-mails reveal that Ms. Grim did not threaten to change her testimony until after trial. According to the e-mails, she told FBI officials that she did not intend to return to testify and in fact would change her testimony if she was recalled. Thus, she made these threats well *after* the trial had already ended in a verdict against defendants, and she was never recalled as a witness after that time. Further, the e-mails reveal that Ms. Grim threatened to change her testimony in favor of the defendants in order to avoid having to return as a witness on the government's behalf. To the extent this goes to the issue of the nature of Ms. Grim's alleged ongoing relationship with the FBI, there is no need for Mr. Anderson to amend his § 2255 motion to pursue this theory because her relationship with the FBI is already at issue. To the extent that it attempts to raise any other theory, it is not exculpatory.

Accordingly, Mr. Anderson's motion to amend is denied as both untimely and futile. Because the court is denying Mr. Anderson's motion to amend, his motion for leave to conduct discovery on the issues raised in his motion to amend (Doc. 810) is also denied. Further, the government's motion to strike Mr. Anderson's motion to amend his § 2255 motion (Doc. 815) is denied as moot.

MR. ANDERSON'S MOTION FOR LEAVE TO DEPOSE MS. GRIM

Lastly, the court will address Mr. Anderson's motion for leave to depose Ms. Grim (Doc. 807). For the reasons explained below, this motion is granted in part and denied in part.

"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). A habeas petitioner is entitled to discovery only "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6(a) of the § 2255 Rules; *see also Smith v. Gibson*, 197 F.3d 454, 459 (10th Cir. 1999) (citing the analogous rule pertaining to § 2254 proceedings). Good cause is established if the petitioner makes specific allegations that give the court "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09 (quotation omitted); *accord Moore v. Gibson*, 195 F.3d 1152, 1165 (10th Cir. 1999) (quoting *Bracy*); *Wallace v. Ward*, 191 F.3d 1235, 1245 (10th Cir. 1999) (same).

In granting Mr. Anderson an evidentiary hearing on the lingering issue of Ms. Grim's alleged bias, the court has already determined this alleged impeachment evidence may have been *Brady* material. Further, discovery has revealed that Ms. Grim, in her capacity as a MOPRO employee, received a letter from the Department of Health and Human Services Office of the Inspector General ("HHS OIG") requesting she conduct an investigation relating to health care fraud. Also, Ms. Grim spoke with FBI Special Agent Brian J. Walterman on a few occasions in late 1997 and early 1998 regarding another investigation. The court is well aware that the government is prepared to present evidence that those contacts with federal law

enforcement officials were insignificant and meaningless. However, Mr. Anderson is entitled to verify the veracity of that evidence by independently ascertaining Ms. Grim's perception of her relationship with federal officials, and the impact that relationship may have had, if any, on her testimony at trial. Just as the government will be entitled to present its version of events at the evidentiary hearing, Mr. Anderson is also entitled to attempt to marshal evidence that might support his claims. Ms. Grim is beyond this court's subpoena power, and therefore Mr. Anderson cannot compel her to attend the evidentiary hearing. For these reasons, the court believes that Mr. Anderson is entitled to take Ms. Grim's deposition.

However, Mr. Anderson seeks leave to depose Ms. Grim regarding a broad variety of topics, including: (1) HHS OIG's request that MOPRO conduct an investigation relating to health care fraud; (2) Ms. Grim's conversations with Ms. Walterman regarding the Columbia/HCA investigation; (3) her contacts with the FBI's Miami field office; (4) her statements to Ms. Treadway and Mr. Violanti that she did not want to testify; (5) her statements to Mr. Violanti and FBI Special Agent Timmerberg that she would change her testimony if recalled to testify; and (6) her statements in her e-mail that she possessed information favorable to the defense. It is the court's order that Mr. Anderson may depose Ms. Grim only regarding the lingering *Brady* issue regarding Ms. Grim's alleged bias based on her prior relationship with federal law enforcement officials. This would include the categories of information listed in (1), (2), and (3). In addition, the court can envision that it could include the categories of information listed in (4),(5), and (6), but only to the extent, if any, that this information bears on the nature of Ms. Grim's prior relationship with federal law enforcement

officials. Mr. Anderson may also require that Ms. Grim produce any documents associated with her prior relationship with federal law enforcement officials.

IT IS THEREFORE ORDERED BY THE COURT that the government's motion to dismiss Mr. Anderson's § 2255 motion (Doc. 806) is denied.

IT IS FURTHER ORDERED THAT Mr. Anderson's motion to amend his § 2255 motion (Doc. 813) is denied. His motion for leave to conduct discovery (Doc. 810) on the issues raised in his motion to amend is also denied, and the government's motion to strike Mr. Anderson's motion to amend his § 2255 motion (Doc. 815) is denied as moot. The government's motion to strike Mr. Anderson's supplement to his memorandum in support of his motion for leave to amend his § 2255 motion (Doc. 820) is denied. The clerk is directed to terminate Doc. 816, which was erroneously docketed as a motion.

IT IS FURTHER ORDERED THAT Mr. Anderson's motion for additional discovery with respect to a deposition of Sarah Grim (Doc. 807) is granted in part and denied in part.

IT IS FURTHER ORDERED THAT the evidentiary hearing on the remaining *Brady* issue regarding Ms. Grim's alleged bias based on her prior relationship with federal law enforcement officials is set for 9:30 a.m. on November 26, 2003, in Courtroom 427, Robert J. Dole United States Courthouse.

IT IS SO ORDERED this 22nd day of October, 2003.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge