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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, v. ERIC MCDAVID, Defendant.	CASE NO. 06-CR-0035-MCE UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER TO SHOW CAUSE September 3, 2015 Time: 9:00am Court: Hon. Morrison J. England, Jr.

I. INTRODUCTION

The United States of America, by and through its counsel of record, André M. Espinosa, Assistant United States Attorney, respectfully submits this opposition to the Motion by defendant Eric McDavid ("McDavid"). McDavid seeks an Order to Show Cause requiring the United States to explain why it did not disclose, in his criminal prosecution for conspiring in 2006 to destroy by fire or explosives one or more targets in the Sacramento area, certain documents produced by the FBI as a result of McDavid's post-conviction Freedom of Information Act ("FOIA") requests (the "FOIA Documents"). McDavid asks the Court to order the United States to explain its application of Rule 16 and its other disclosure obligation during McDavid's criminal prosecution. McDavid also asks the Court to order the United States to produce un-redacted copies of the FOIA Documents produced by the FBI, which were redacted pursuant to the exemption provisions of the FOIA. The relief McDavid seeks is not available in this action and the Court should deny his request for an Order to Show Cause.

In his request, McDavid primarily complains about the FBI's application of the nine exemption and three exclusion categories contained in the FOIA, which permit executive agencies to withhold parts

or all of documents otherwise responsive to a FOIA request but that contain sensitive, protected information. Those complaints are not cognizable in this action. Rather, the FOIA establishes a statutory vehicle pursuant by which a complainant may challenge an agency's disclosure decisions in administrative proceedings and, later, in an action at law. If a remedy exists for McDavid's complaints about the FOIA Documents, it should be pursued in a challenge under FOIA and not in this action.

McDavid also argues that the United States should have disclosed the FOIA Documents in his criminal prosecution. However, that argument conflates the extraordinarily broad disclosure requirements under the FOIA – which contains no relevancy or materiality limitations and *requires* disclosure in the absence of a statutory exemption or exclusion – with the more narrow and discovery obligations of Rule 16, which includes a materiality requirement and other limitations. The disclosure obligations imposed under Rule 16 and under the FOIA are not co-extensive, as McDavid assumes or fails to admit. In any event, McDavid's opportunity to litigate his discovery quarrels and Brady claims was extinguished by his voluntary settlement of his § 2255 claims and his unconditional guilty plea to the charge in the Superseding Indictment. McDavid's criminal case and § 2255 action are over. The only relief now available to McDavid is a challenge to the FBI's redaction and withholding decisions pursuant to a separate action under the FOIA.

For at least five reasons, McDavid may not re-litigate his settled § 2255 claims by this request for an Order to Show Cause. First, the request is barred by the doctrine of res judicata. Second, the request is barred by the unambiguous waiver and release provisions of the settlement agreement that resolved McDavid's § 2255 action, and to which McDavid expressly agreed to be bound. Third, McDavid may not invoke the Court's inherent authority to abandon his promises in the settlement agreement or to engage in a roving and extrajudicial inquiry in support of unavailable relief arising out of claims he has already settled. Fourth, McDavid's settlement of his § 2255 claims renders his request for an Order to Show Cause moot, as there is no longer a live controversy between the parties or a cognizable claim to be remedied. Finally, McDavid's guilty plea and admission of the material facts of his crime extinguished any non-jurisdictional claims relating to any pre-plea deprivation of constitutional rights. Accordingly, for the reasons that follow, the Court should deny McDavid's Motion seeking an Order to Show Cause.

II. RELEVANT PROCEDURAL AND FACTUAL HISTORY

A. McDavid's Criminal Trial and Direct Appeal

As the Court is aware, McDavid and two co-defendants were charged with conspiring, between June 2005 and January 13, 2006, to destroy by fire or explosives one or more targets in the Sacramento area, including the United States Forest Service Institute of Forest Genetics, the Nimbus Dam, and local cellular telephone towers, in violation of 18 U.S.C. § 844(n). McDavid's two co-defendants pled guilty, cooperated with the United States, and testified against McDavid at trial. After a 10-day trial, the jury rejected McDavid's entrapment defense and convicted McDavid of the crimes charged in the Indictment.[1] The Court sentenced McDavid to 235 months in custody, and the Ninth Circuit affirmed McDavid's conviction and sentence. United States v. McDavid, 396 Fed. Appx. 365 (9th Cir. 2010), cert. denied, 131 S.Ct. 2469 (May 16, 2011).

B. McDavid's Action under 28 U.S.C. § 2255

On or about May 15, 2012, McDavid filed an action under 28 U.S.C. § 2255, seeking collateral review of his conviction and sentence and alleging: (a) five distinct claims of ineffective assistance by his trial and appellate counsel[2]; (b) that the United States procured and used false testimony at trial; and (c) that the United States violated his due process rights by failing to disclose during discovery in the underlying criminal prosecution all favorable evidence material to guilt or punishment, as required under Brady v. Maryland, 373 U.S. 83 (1963). (CR 399.) On or about July 2, 2012, McDavid filed an amended memorandum in support of his § 2255 motion. (CR 410.) On or about October 12, 2012, the United States filed a response in opposition to McDavid's § 2255 petition. (CR 420.) On or about February 22, 2013, McDavid filed a reply to the United States' opposition. (CR 432.)

On or about March 6, 2013, the Court granted McDavid's motion to file an amended reply to the United States' opposition, which McDavid had filed a day earlier on March 5, 2013 (with an accompanying request for an order permitting the filing of the amended reply). (CR 433.) On or about January 30, 2014, McDavid filed a supplemental memorandum in support of his § 2255 motion, in

[1] The United States Opposition to McDavid's 2255 petition contains a lengthy statement of facts setting forth the investigation and prosecution in the underlying criminal case. That recitation is incorporated herein by reference.

[2] McDavid was represented at trial in 2007 and on direct appeal by his current counsel, Mr. Reichel. McDavid was represented by separate counsel in his § 2255 action.

which he raised claims based on the decisions in Alleyne v. United States, 133 S.Ct. 2151 (2013) and Peugh v. United States, 133 S.Ct. 2072 (2013). (CR 436.)

Following a hearing on May 14, 2014 before the Honorable Edmund F. Brennan ("Judge Brennan"), the Court ordered McDavid to file a supplemental memorandum in support of his Brady claim and any related motion for discovery, both of which McDavid filed on or about July 14, 2014. (CR439.) On or about September 19, 2014, the Court granted the United States' request for an extension of time to file a response to the supplemental memoranda in support of McDavid's § 2255 motion, and ordered the United States to file such response by November 17, 2014. (CR 449.) The Court also ordered McDavid to file any reply by December 8, 2014. (Id.)

On or about November 6, 2014, the United States disclosed to McDavid approximately eleven documents comprised of correspondence between McDavid and a government informant who testified at McDavid's trial, which were not disclosed during the criminal proceedings that preceded his § 2255 action (the "First Disclosure"). The correspondence delivered by the government to McDavid in the First Disclosure was not produced pursuant to McDavid's post-convictions FOIA requests. Nor was that correspondence addressed by the United States in its written opposition to McDavid's § 2255 petition.[3] On or about November 13, 2014, the Court accepted a stipulation between the parties, vacated the pending briefing schedule, and set a status conference on December 15, 2014. (CR 452.)

On or about December 12, 2014, the United States disclosed to McDavid un-redacted copies of the Miami Reports (the "Second Disclosure"). Later in December 2014, the United States voluntarily

[3] In response to McDavid's FOIA requests, the FBI produced approximately 75 documents, comprised of approximately 2,450 pages. Forty-two of those 75 documents are internal FBI memos, communications, and notifications of case events. The remaining 33 documents are investigative reports, including 16 reports based on information from the informant who testified at McDavid's trial, 5 reports based on information from a second non-testifying informant, and 12 reports concerning interviews of non-witnesses or other irrelevant data. Those documents did not include 868 pages, which the FBI deemed exempt from disclosure. In connection with McDavid's FOIA request, the Miami FBI office produced 51 reports (the "Miami Reports"), comprised of 5 reports that had been previously disclosed to McDavid, 35 undisclosed reports that made no mention of McDavid, and 11 undisclosed reports that mentioned McDavid but contained information released in other documents produced in discovery in the criminal case. All of the FOIA Documents were catalogued and summarized in the United States' written opposition to McDavid's § 2255 motion, in a declaration by FBI case agent in the criminal prosecution, Special Agent Nasson Walker (the "Walker Declaration"). In its written opposition to McDavid's § 2255 petition, the United States argued that the FOIA Documents were either properly withheld during discovery or, alternatively, were not exculpatory or material under Brady. (CR32.)

agreed to disclose to McDavid un-redacted copies of certain of the remaining FOIA Documents but only after a review of those documents for sensitive information that required redaction (the "Proposed Third Disclosure"). As with the documents in the Second Disclosure, the United States had already specifically addressed the documents in the Proposed Third Disclosure in its written opposition to McDavid's § 2255 petition, in the Walker Declaration. The United States argued that all of the FOIA Documents were either properly withheld in discovery or, alternatively, were not exculpatory or material under Brady. On or about December 15, 2014, the parties appeared before Judge Brennan and presented the outline of a proposed settlement of McDavid's § 2255 claims. (CR 453.)

C. The Final Settlement Agreement Resolving McDavid's § 2255 Claims

Beginning at least as early as November 2014, the parties acknowledged their disagreements about the merits of McDavid's arguments but engaged in negotiations toward a comprehensive and final settlement of his claims. The United States took the position that McDavid's § 2255 claims, including his Brady claims relating to all of the FOIA Documents, were without merit. However, the United States took a different position with respect to the eleven documents of correspondence between McDavid and the informant, which it produced in the First Disclosure. With respect to those eleven documents *only*, the United States concluded that this Court or a reviewing court might find its inadvertent failure to disclose those eleven documents was sufficient to justify relief under Brady. McDavid agreed. Therefore, to avoid the expense and risks of further litigation, to advance the interests of justice, and to conclude McDavid's § 2255 action and the underlying prosecution in every respect, the parties jointly agreed to enter into a Final Settlement Agreement compromising and settling McDavid's disputed § 2255 claims. See January 8, 2015 Final Settlement Agreement (the "Final Settlement Agreement") at ¶¶ 14 and 22, attached hereto as Government's Exhibit 1 ("Gov. Ex. 1").

To achieve the goal of a complete settlement of all of McDavid's claims, the parties reduced their negotiations to writing in the comprehensive Final Settlement Agreement and stipulated that this Court could and should grant McDavid relief pursuant to 28 U.S.C. § 2255, as set forth under the terms of the Final Settlement Agreement. Specifically, the parties stipulated and agreed that: (i) no evidentiary hearing was necessary pursuant to Rule 8(a) of the Rules Governing Section 2255 Cases in the United States District Courts (the "§ 2255 Rules"); (ii) no Report and Recommendation was

necessary pursuant to Rule 8(b) of the § 2255 Rules; and (iii) instead of the procedures contemplated under Rules 8(a) and (b) of the § 2255 Rules, this Court could and should accept and file the Final Settlement Agreement, and order the relief recommended by the parties in that Agreement. Id.

After a hearing on January 8, 2015 (the "January Hearing"), the Court accepted the parties' stipulations and agreed to enter the relief described in the Final Settlement Agreement. See Reporters Transcript of January 8, 2015 Hearing at 1-42, attached hereto as Government's Exhibit 2 ("Govt. Ex. 2"). Specifically, the Court: (i) accepted McDavid's waiver of indictment and plea of guilty, pursuant to a written plea agreement, to a Superseding Information that charged him with conspiracy to destroy by fire or explosives one or more targets in the Sacramento area, contrary to 18 U.S.C. §§ 844(f) and (i), in violation of 18 U.S.C. § 371[4]; (ii) held an immediate sentencing hearing, relied on the Pre-Sentence Investigation Report filed by the United States Probation Office for the Eastern District of California on February 21, 2008, and sentenced McDavid to time already served in custody and a two-year period of Supervised Release; (iii) granted McDavid's motion under 28 U.S.C. § 2255 to the extent stipulated by the parties in the Final Settlement Agreement, and vacated McDavid's conviction and sentence as finalized by the Judgment and Commitment entered by the Court on May 19, 2008, in the underlying criminal prosecution. See Gov. Ex. 2 at 25-42.

Thereafter, the Court ordered the relief recommended by the parties in the Final Settlement Agreement and filed that Agreement. Id. at 40-42. After the hearing, the Court executed and filed a new Judgment and Commitment memorializing McDavid's new conviction and sentence, and McDavid was released from custody. McDavid served approximately 108 months in custody.

[4] McDavid's plea agreement included a recitation of facts supporting his guilty plea to conspiring to destroy target in the Sacramento area, including that: (i) in August 2005, McDavid and his co-conspirators discussed using explosives to destroy commercial and/or government property; (ii) in November 2005, McDavid and his co-conspirators discussed committing acts of property destruction, knew that their meeting was for the purpose of planning criminal acts, and agreed to reassemble later to manufacture homemade explosives for possible detonation at commercial and government targets; (iii) in early January 2006, McDavid and his co-co-conspirators discussed plans to construct homemade explosive and incendiary devices and to target commercial and government facilities; (iv) on January 10, 2006, McDavid and co-conspirators performed reconnaissance at the US Forest Service Institute of Forest Genetics in Placerville, to determine the site's potential as a target; (v) on January 11, 2006, McDavid assisted in purchasing items to be used in making destructive devices from a recipe he believed to be a viable explosive recipe; (vi) On January 12, 2006, McDavid assisted in the initial stages of manufacturing homemade explosives; and (vii) on January 13, 2006, McDavid was arrested after buying more items to be used in making destructive devices. See Gov. Ex. 1 at Exhibit A.

III. ARGUMENT

The Court should deny McDavid's request for an Order to Show Cause. First, his claim is barred under the doctrine of res judicata. McDavid's § 2255 action sought post-conviction relief arising out of alleged Brady and other claims, all of which were resolved by settlement. McDavid now seeks further relief arising out of those settled claims. The doctrine of res judicata bars the re-litigation of resolved claims. Second, McDavid's request is barred by the waiver and release provisions of the Final Settlement Agreement that resolved his § 2255 action. The Ninth Circuit favors resolution of litigation by settlement and the finality of such settlements. McDavid agreed to be bound by the terms of the Final Settlement Agreement and he received the benefit of his bargain. The Court should enforce his reciprocal promises. Third, McDavid may not invoke the Court's inherent powers to avoid his promises in the Final Settlement Agreement or to justify a roving, extrajudicial inquiry into his settled § 2255 claims. Fourth, McDavid's request is moot because no live controversy or cognizable action survived the Final Settlement Agreement. Finally, McDavid's unconditional guilty plea extinguished all non-jurisdictional defenses and cured all antecedent constitutional defects that preceded his guilty plea. Thus, his attempt to re-litigate his settled Brady claims is barred by his voluntary admission of guilt.

A. McDavid's Effort to Re-litigate his Settled § 2255 Claims is Barred by the Doctrine of Res Judicata

McDavid's request for an Order to Show Cause is barred by the doctrine of res judicata and the Court should deny it without a hearing. "Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." W. Radio Servs. Co., Inc. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997). Res judicata applies where there is (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties. Tritz v. U.S. Postal Service, 721 F.3d 1133, 1141 (9th Cir. 2013). Court-approved settlement agreements, like the Final Settlement Agreement in this case, have res judicata effect. Id. See also Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746–47 (9th Cir. 2006) (holding that court's approval of settlement agreement constituted a final judgment on the merits and enforcing preclusive effect of waiver provisions in final settlement agreement against collateral attack by represented class member). Res judicata bars "all grounds for recovery which could have been asserted, whether they

were or not, in a prior suit between the same parties on the same cause of action." Gregory v. Widnall, 153 F.3d 1071, 1074 (9th Cir. 1998) (per curiam).

In the Final Settlement Agreement that resolved his § 2255 claims, McDavid "agree[d] to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly only from the acts or omissions that gave rise to McDavid's motion under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution." See Govt. Ex. 1 at ¶ 14. McDavid personally signed the Final Settlement Agreement and, in doing so, expressly acknowledged, warranted, and represented that he: (i) had sufficient time to discuss the terms of the Agreement with his counsel; (ii) did discuss the terms of the Agreement with his counsel; (iii) understood and knowingly, intelligently, and voluntarily agreed to be bound by the terms of the Agreement; and (iv) was satisfied with the advice provided by his counsel concerning the meaning and effect of each and every term of the Agreement. See Govt. Ex. 2 at ¶ 25.

After the January Hearing, the Court issued an Order that recited certain findings of fact, including, among other things, that:

> The parties disagree about the merits of the individual claims asserted in McDavid's § 2255 motion. However, the parties agree and stipulate to enter into a Final Settlement Agreement for the purpose of compromising the disputed claims in McDavid's § 2255 motion, to avoid the expenses and risks of further litigation, and to advance the interests of justice.

See January 9, 2015 Finding and Order on Motion under 28 U.S.C. § 2255 at ¶ 14, attached hereto as Government Exhibit 3 ("Govt. Ex. 3"). In the same Order, the Court granted "the parties request to enter into and be bound by the Final Settlement Agreement." Id. at 3.

Here, the doctrine of res judicata bars McDavid from seeking additional or alternative relief arising out of his settled § 2255 claims. First, there is an identity of claims, i.e., McDavid's renewed request for post-conviction relief arising out of documents not disclosed during discovery in the criminal prosecution underlying his § 2255 action. Second, the court-approved Final Settlement Agreement is the equivalent of a final judgment on the merits and has preclusive effect. See Glickman, 123 F.3d at 1192 (9th Cir. 1997). Third, there is identity or privity between parties, i.e., McDavid and the United States are parties to both actions. Consequently, McDavid may not re-litigate, in this action, claims he raised and voluntarily settled in his §2255 action.

B. McDavid is Barred from Re-litigating His Settled § 2255 Claims by the Waiver and Release Provisions in the Final Settlement Agreement

Even if issue preclusion were not applicable, which it is, McDavid's request was waived and released under the terms of the Final Settlement Agreement, and the Court should enforce that Agreement. The Ninth Circuit is firmly "committed to the rule that the law favors and encourages compromise settlements." United States v. McInnes, 556 F.2d 436, 441 (9th Cir. 1977). "[T]here is an overriding public interest in settling and quieting litigation." Id. (citations omitted). "It is well recognized that settlement agreements are judicially favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit expensive litigation." Speed Shore Corp. v. Denda, 605 F.2d 469, 473 (9th Cir. 1979). A district court possesses the "equitable power to enforce summarily an agreement to settle a case pending before it." Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987); see also Doi v. Halekulani Corp., 2176 F.3d 1131, 1137-38 (9th Cir. 2002) (enforcing settlement agreement affirmed by parties in open court and chastising plaintiff for "agreeing to settle a case in open court, then subsequently disavowing the settlement when it suits her."). While a court may question the wisdom of a settlement, it should not resolve that doubt "in a manner that sends the parties back to litigation," and should set aside a settlement "only for the strongest of reasons." See Utility Reform Project v. Bonneville Power Admin., 869 F.2d 437, 443 (9th Cir. 1989).

As set forth above, the Final Settlement Agreement of McDavid's § 2255 claims "settle[d] and compromise[d] each and every claim of any kind, whether known or unknown, arising directly or indirectly only from the acts or omissions that gave rise to McDavid's motion under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution." Gov. Ex. 1 at ¶ 14. McDavid signed the Final Settlement Agreement and acknowledged, warranted, and represented that he discussed the terms of the Agreement with his counsel, understood and agreed to be bound by them, and was satisfied with the advice provided by his counsel concerning the meaning and effect of each and every term of the Agreement. See Govt. Ex. 1 at ¶ 25. Following the January Hearing, the Court executed an order granting "the parties request to enter into and be bound by the Final Settlement Agreement." See Gov. Ex. 3 at pg. 3.

Specifically, the waiver provision of the Final Settlement Agreement states:

> In consideration of the mutual promises contained in this Agreement and Exhibit A hereto, McDavid agrees and stipulates that this Agreement shall constitute the full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen injuries, including injuries to intangible civil rights, bodily and personal injuries, and damage to property and the consequences thereof, resulting and to result, from the incidents and facts that gave rise to McDavid's motion under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution, which are the subject of this Agreement, including any claims for wrongful death, for which McDavid or his guardians, heirs, executors, administrators or assigns, and each of them, now have or may hereafter acquire against the United States, its agents, servants, and employees.

Govt. Ex. 1 at ¶ 19.[5] The release provision of the Final Settlement Agreement is similarly broad and states in relevant part:

> In consideration of the mutual promises contained in this Agreement and Exhibit A hereto, McDavid and his heirs, executors, administrators or assigns, agree and stipulate that this Agreement shall constitute the full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for civil rights violations, personal injury claims, and wrongful death claims arising from, and by reason of, any and all known and unknown foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States, its agents, servants, and employees on account of the incidents and facts that gave rise to McDavid's motion under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution, which are the subject of this Agreement, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory, exemplary, or other damages.

Govt. Ex. 1 at ¶ 20.

The Court should enforce the waiver and release provisions of the Final Settlement Agreement and deny McDavid's request for an Order to Show Cause. There is more than ample evidence that McDavid understood and voluntarily agreed to be bound by the terms of the Final Settlement Agreement. McDavid affirmed his consent to be bound by the Final Settlement Agreement in writing and in open court at the January Hearing. See Gov. Ex. 1 at ¶ 25 and "Exhibit A," pg. 12 ("I have read this Plea Agreement and the Final Settlement Agreement and carefully reviewed every part of them with my attorney. I understand them, and I voluntarily agree to them."); see also Govt. Ex. 2 at 33. Moreover, through his counsel, McDavid made clear that the Final Settlement Agreement was intended by both parties to function as a "global resolution of the case." See Gov. Ex. 1 at 13. There can be no

[5] Exhibit A to the Final Settlement Agreement was the Plea Agreement between McDavid and the United States, which was incorporated by reference. See Govt. Ex. 1 at ¶ 23. Exhibit B to the Final Settlement Agreement was the Superseding Information to which McDavid pled guilty. Id. at ¶ 15.

doubt about McDavid's voluntary and knowing intention to be bound by the terms of the Final Settlement Agreement.

To be sure, McDavid could have rejected the Final Settlement Agreement and, instead, litigated his § 2255 claims to a resolution. Before the January Hearing, the United States had already made the First Disclosure and the Second Disclosure, and was working on a review of documents for the Proposed Third Disclosure. Instead, McDavid chose to avoid the risks of further litigation and to resolve his § 2255 claims by the terms of the negotiated Final Settlement Agreement. See Gov. Ex. 2 at ¶¶ 22 and 14. At the January Hearing, McDavid's counsel emphasized that point. See Govt. Ex. 1 at 33 ("We've all put a lot of effort into this. This is a compromise for both sides… It's a compromise that we've worked out given the risks, given our cost-benefit analysis in the global resolution, given the terms of the resolution that we have presented to the Court for approval."). McDavid received the benefit of his bargain and agreed to be bound by his negotiated, reciprocal promises. The Court should enforce the Final Settlement Agreement and hold McDavid to those promises, notwithstanding his apparent change of heart.[6] See Callie, 829 F.2d at 890 (noting that a district court possesses the "equitable power to enforce summarily an agreement to settle a case pending before it."); Doi, 2176 F.3d at 1137-38 (enforcing settlement agreement affirmed by parties in open court and chastising plaintiff for "agreeing to settle a case in open court, then subsequently disavowing the settlement when it suits her.").

C. McDavid May Not Invoke the Court's Inherent Authority to Avoid His Promises in the Final Settlement Agreement and Re-litigate His Settled § 2255 Claims

The Court should reject McDavid's effort to enlist it in his effort to avoid his promises in the Final Settlement Agreement. The inherent powers of federal courts are those which "are necessary to the exercise of all others." Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting United States v. Hudson, 7 Cranch 32, 34 (1812)). It is beyond dispute that this Court has broad inherent authority to, among other things, "impose silence, respect, and decorum, in [its] presence, and

[6] The Final Settlement Agreement was incorporated into McDavid's plea agreement. That plea agreement included remedial provisions that are triggered in the case of a breach of the terms of either agreement. McDavid's request for an Order to Show Cause is likely a breach of the terms of his plea agreement, which may excuse the United States from its obligations under that agreement. The United States is currently reviewing its potential remedies for McDavid's breach and whether to pursue those remedies.

submission to [its] lawful mandates."[7] Chambers v. Nacso, Inc., 501 U.S. 2123, 2132 (1990) (quoting Anderson v. Dunn, 6 Wheat. 204, 227 (1821)). The Court's inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R. Co., 370 U.S. 626, 630–631 (1962); cf. Fed. R. Civ. P. 83(b) ("A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 and 2075, and the district's local rules."). Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion. Roadway, 447 U.S. at 764 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450–51 (1911)); see also Chambers, 501 U.S. at 2132 (citing Ex parte Burr, 9 Wheat. 529, 531 (1824) (urging courts to exercise their inherent authority "with great caution")).

McDavid's request for an Order to Show Cause is merely an effort to re-litigate his settled § 2255 claims, cloaked as an attempt to invoke the Court's inherent powers. The Court should exercise its discretion and reject McDavid's request to engage in a roving, extrajudicial inquiry into those settled claims. McDavid's request for an Order to Show Cause lacks citation to any statute, regulation, rule, or other controlling legal authority authorizing or supporting the relief he seeks. Similarly, McDavid presents no factual support for such relief. He does not identify a single fact that did not exist when he agreed to settle his § 2255 claims nearly eight months ago. McDavid has not offered any evidence to contradict the proffer by counsel for the United States at the January Hearing that: (i) neither of the prosecutors who handled McDavid's criminal trial had ever seen the correspondence in the First Disclosure; and (ii) both would have disclosed the correspondence to defense counsel if they had seen it. See Govt. Ex. 2 at 17-18. Nor has McDavid offered evidence that any FBI agent, or any other person, intentionally withheld that correspondence or any other documents in the criminal prosecution.

[7] A federal district court inherent power includes the power to bar from the courtroom a criminal defendant who disrupts a trial, Illinois v. Allen, 397 U.S. 337 (1970); to dismiss an action on grounds of *forum non conveniens*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947); to act *sua sponte* to dismiss a suit for failure to prosecute, Link, 370 U.S. at 630–31; and, in narrowly defined circumstances federal courts may assess attorneys' fees against counsel, Van Bronkhorst v. Safeco Corp., 529 F.2d 943 (9th Cir. 1976). Among a court's most prominent inherent powers is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court," Cooke v. United States, 267 U.S. 517, 539 (1925); and the power to vacate its own judgment upon proof that a fraud has been perpetrated upon the court, see Hazel–Atlas Glass Co. v. Hartford–Empire Co., 322 U.S. 238 (1944).

While the Court's inherent powers are broad, they should be exercised with caution. See Roadway, 447 U.S. at 764. In this matter, there is no factual or legal basis supporting McDavid's effort to invoke the Court's inherent authority. The alleged past constitutional injuries about which McDavid complains were remedied or extinguished by the negotiated settlement of his § 2255 claims and McDavid's unconditional guilty plea to the crime charged in the Superseding Information. There is simply no legal justification, rooted in the Court's inherent authority or otherwise, to grant McDavid the relief he seeks in the current posture of this case, outside of the context of any live claim. Consequently, the Court should exercise its discretion and decline McDavid's request for permission to re-litigate his settled claims in pursuit of an unavailable remedy, and in the absence of any identifiable ongoing injury.

D. McDavid's Request to Re-litigate His Settled § 2255 Claims is Moot

The Court should deny McDavid's request for an Order to Show Cause because it is moot. Article III of the Constitution "restricts federal courts to the resolution of cases and controversies," Davis v. Fed. Election Comm'n, 554 U.S. 724, 732 (2008), and requires that "a justiciable case or controversy ... remain extant at all stages of review," United States v. Juvenile Male, —— U.S. ——, 131 S.Ct. 2860, 2864 (2011) (per curiam) (internal quotation marks omitted); see also Alvarez v. Hill, 667 F.3d 1061, 1063-64 (9th Cir. 2012). A claim is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (internal quotation marks omitted). "'Without a live, concrete controversy, [the court] lack[s] jurisdiction to consider claims no matter how meritorious.'" Id. (quotations and internal quotation marks omitted). Thus, "[a] federal court has no power to give opinions upon moot questions or declare principles of law which cannot affect the matter in issue in the case before it." Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992); United States v. Golden Valley Elec. Ass'n, 689 F.3d 1108, 1111 (9th Cir. 2012).

Here, McDavid voluntarily settled his § 2255 claims and expressly waived "any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen injuries, including injuries to intangible civil rights … and the consequences thereof, resulting and to result, from the incidents and facts that gave rise to McDavid's motion under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution." See Govt. Ex. 1

at ¶¶ 14 and 19. Consequently, there is no live, concrete controversy before the Court and McDavid's action is moot. McDavid requests no relief for any actual ongoing injury he is suffering. Indeed, likely aware that he can assert no claim cognizable in this action, McDavid urges the Court to act to protect the reputations of trial counsel for the United States in this case, or "for the sake of basic accountability, fairness, and public confidence in the integrity of the judicial system."[8] Neither such basis represents an actual and ongoing injury to McDavid. In the absence of a cognizable interest, McDavid's request for an Order to Show Cause is moot and must be denied.

E. McDavid's Attempt to Re-litigate Settled Constitutional Claims Raised in His § 2255 Action is Barred by the Preclusive Effect of His Unconditional Guilty Plea

McDavid's unconditional guilty plea extinguished any past constitutional claims associated with his criminal prosecution. Accordingly, the Court should deny his request for an Order to Show Cause. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Tollett v. Henderson, 411 U.S. 258, 267 (1973). As a result, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. See also Haring v. Prosise, 462 U.S. 306, 319–20 (1983) (guilty plea forecloses consideration of pre-plea constitutional deprivations except those that are jurisdictional); United States v. Brizan, 709 F.3d 864, 867 (9th Cir. 2013) (same); United States v. Jackson, 697 F.3d 1141, 1143-44 (9th Cir. 2012) (same); United States v. Lopez–Armenta, 400 F.3d 1173, 1175 (9th Cir. 2005) (same); Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1994) (applying waiver rule in *habeas* action") overruled on other grounds in Lockyer v. Andrade, 538 U.S. 63 (2003); Hands v. Barnes, 2010 WL 5300866 (N.D. Cal. 2010) (applying waiver in *habeas* action to claims of prosecutorial misconduct and vindictive prosecution). Instead, after entry of an unconditional guilty plea, a defendant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was [deficient]." Tollett, 411 U.S. at 267; see also United States v. Broce, 488 U.S. 563, 569 (1989) ("[T]he inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary.").

[8] See McDavid's Request for an Order to Show Cause at 3, n. 2; and at 19.

To determine voluntariness of a plea, courts examine the totality of the circumstances. United States v. Kaczynski, 239 F.3d 1108, 1114 (9th Cir. 2001). A plea is voluntary if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id. (quoting North Carolina v. Alford, 400 U.S. 25 (1970)). A plea of guilty entered with full awareness of the direct consequences must stand "unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." Kaczynski, 239 F.3d at 1114. In sum, a guilty plea is invalid only "if it was induced by promises or threats which deprive it of the character of a voluntary act." Id. (citations and quotations omitted). In making a voluntariness determination courts give "substantial weight" to a defendant's in-court statements. Id.

Here, there can be no reasonable dispute that McDavid's guilty plea was voluntary. McDavid was represented during the § 2255 proceedings by two experienced attorneys who specialized in post-conviction litigation. See Gov. Ex. 1 at Exhibit A; see also Gov. Ex. 2 (Appearances). McDavid's § 2255 counsel aggressively negotiated the Final Settlement Agreement and plea agreement with counsel for the United States. See Gov. Ex. 2 at 13. Before McDavid pled guilty to the conspiracy alleged in the Superseding Indictment, the Court engaged in a plea colloquy with McDavid in which the Court covered all of the elements set forth in Federal Rule of Criminal Procedure 11(b). See Gov. Ex. 1 at 25-39. Among other things, McDavid stated that he voluntarily agreed to plead guilty, id. at 30; that he was entering a guilty plea because he was, in fact, guilty of the crime charged in the superseding information, id.; and that no one had made any other promises to him of any kind, or threatened him, to induce him to enter a guilty plea of guilty, id. at 33. McDavid stated he understood and waived his constitutional rights, id. at 37; he stated he understood the elements of the offense with which he was charged, id. at 38; he affirmatively adopted that the Factual Basis supporting his plea agreement, id.; and he entered a guilty plea, which the Court accepted.[9]

McDavid's intelligent and voluntary guilty plea at the January Hearing "foreclose[d]

[9] The Court specifically found that McDavid was fully competent and capable of entering an informed plea, that he a factual basis had been established for his plea, and that he made a voluntary, knowing, and intelligent waiver of all of his constitutional rights. See Gov. Ex. 1 at 39.

consideration of pre-plea constitutional deprivations." See Brizan, 709 F.3d at 867. McDavid admitted that he was, in fact, guilty of the conspiracy alleged in the Superseding Information. That admission cured any constitutional deprivations associated with McDavid's original prosecution. McDavid's constitutional claims are extinguished and the Court should deny his request for an Order to Show Cause.

F. McDavid's Only Available Remedy is a Challenge to the FBI's Application of the Exemption and Exclusion Determinations Concerning His FOIA Requests

In his request for an Order to Show Cause, McDavid primarily complains about the FBI's application of the nine exemption and three exclusion categories contained in the FOIA, which permit executive agencies to withhold part or all of documents otherwise responsive to a FOIA request but that contain sensitive, protected information. Those complaints are not cognizable in this action but they may be cognizable in a separate action under the FOIA. Section 552(a)(4)(B) of the FOIA establishes a statutory vehicle pursuant to which a complainant may challenge an agency's disclosure decisions in an action at law. See 5 U.S.C. § 552(a)(4)(B) ("On complaint, the district court … in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."). That vehicle likely provides the only pathway to relief approximating that McDavid seeks.

McDavid's argument that the United States should have disclosed the FOIA Documents in the discovery process in his criminal prosecution is a naked attempt to re-litigate his settled § 2255 claims. It also misapprehends the distinct disclosure obligations required under the FOIA and under Rule 16 (and under other disclosure obligations imposed on the United States in a criminal prosecution). Those disclosure obligations are not co-extensive. Under the FOIA, documents "must be produced and disclosed on the request of any person without regard to the purpose for obtaining the documents or the relevancy of the documents for a particular use, subject to certain exclusions and exemptions."[10] United

[10] An agency may redact or withhold documents that fall into one of nine statutory exemption categories of one of three exclusion categories. See 5 U.S.C. § 552(b)(1)(A) (national security), (b)(2) (internal agency rules), (b)(3)(statutory exemptions), (b)(4)(trade secrets), (b)(5)(internal agency memos/privilege), (b)(6)(personal privacy), (b)(7) (law enforcement records), (b)(8)(bank reports), (b)(9)(oil and gas well data), (b)(9)(oil and gas well data); 5 U.S.C. § 552(c)(1) (protecting law enforcement investigations), (c)(2)(protection informants), (c)(3)(protecting certain classified FBI records).

States v. United States Dist. Court (Delorean), 717 F.2d 478, 480 (9th Cir. 1983) (comparing scope of disclosure obligation under FOIA and Rule 16, holding that FOIA does not expand the scope of Rule 16). By contrast, in criminal cases a defendant may seek discovery of documents in the government's possession only if such documents are "material to the preparation of [the] defense." Fed. R. Crim. P. 16(a)(1)(E)(i).[11] "Materiality is a necessary prerequisite to discovery." United States v. United States Dist. Court (Delorean), 717 F.2d at 480; United States v. Ness, 652 F.2d 890, 892 (9th Cir. 1981); United States v. Marshall, 532 F.2d 1279, 1284 (9th Cir. 1976). The FOIA does not enlarge the scope of discovery under Rule 16. United States v. United States Dist. Court (Delorean), 717 F.2d at 480.

Assuming an action by McDavid challenging the FBI's redactions and withholdings in its FOIA production is not barred by the waiver and release provisions of the Final Settlement Agreement, McDavid's grievances are more appropriately advanced in a separate action under the FOIA. See 5 U.S.C. § 552(a)(4)(B). Such an action would almost surely not entitle McDavid to the extraordinary relief he seeks by way of an Order to Show Cause in this action. See Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985) (affirming ruling that the FOIA does not impose a duty on agencies to answer interrogatories presented as document requests). Nevertheless, no relief for McDavid's FOIA challenges (or his efforts to re-litigate his settled § 2255 claims) is available in this action.

IV. CONCLUSION

For all of the forgoing reasons, the Court should deny McDavid's request for an Order to Show Cause.

Respectfully submitted,

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[11] The Rule also permits discovery of items within the government's possession, custody, or control that the government intends to use in its case-in-chief at trial or it the item was obtained from or belongs to the defendant. Fed. R. Crim. P. 16(a)(1)(E)(ii) and (iii).