

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 29 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL ROCKY LANE, AKA Michael
Lane,

Defendant-Appellant.

No. 18-15645

D.C. Nos. 2:16-cv-04231-DGC
2:12-cr-01419-DGC-1

District of Arizona,
Phoenix

ORDER

Before: FARRIS and LEAVY, Circuit Judges.

Appellant's petition for rehearing and rehearing en banc, and the supplement filed August 24, 2018 (Docket Entry Nos. 8 & 9) are construed together as a combined motion for reconsideration and motion for reconsideration en banc.

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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District of Arizona,
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ORDER

Before: SCHROEDER and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Rocky Lane,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.
14

CV-16-04231-PHX-DGC (DMF)

CR-12-01419-PHX-DGC

ORDER

15
16 Petitioner Michael Rocky Lane filed a Motion to Vacate, Set Aside, or Correct
17 Sentence under 28 U.S.C. § 2255 on December 2, 2016. Doc. 1. On December 14, 2017,
18 Magistrate Judge Charles R. Pyle issued a Report and Recommendation ("R&R") that the
19 Court deny the motion on the merits. Doc. 23. On April 2, 2018, the Court issued an
20 order accepting the R&R and denying Petitioner's motion (the "Order"). Doc. 32. The
21 Clerk entered judgment accordingly. Doc. 33. Petitioner now moves pro se for
22 reconsideration of the Order under Rule 59(e). Doc. 38.¹

23 On April 13, 2018, Petitioner filed a notice of appeal of the Order and the Clerk's
24 judgment. Doc. 39. The Court nonetheless retains jurisdiction to decide Petitioner's
25 timely motion for reconsideration pursuant to Federal Rule of Appellate
26 Procedure 4(a)(4). *See also Miller v. Marriott Int'l, Inc.*, 300 F.3d 1061, 1063-64 (9th

27 ¹ Petitioner filed an original motion for reconsideration on April 9, 2018. Doc. 36.
28 On April 12, 2018, he requested leave to amend the motion. Doc. 37. The Court will
grant Petitioner's request and consider the amended motion (Doc. 38) with the original
exhibits incorporated.

1 Cir. 2002); *United Nat. Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1109 (9th Cir.
 2 2001) (Notice of appeal did not “divest the district court of jurisdiction at the time it was
 3 filed because there was then a pending motion for reconsideration.”).

4 **I. Legal Standard.**

5 Motions for reconsideration are disfavored and are not the place for parties to
 6 make new arguments not raised in their original briefs and arguments. *See Carroll v.*
 7 *Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Nor should such motions ask the Court to
 8 rethink what it has already considered. *See United States v. Rezzonico*, 32 F. Supp.
 9 2d 1112, 1116 (D. Ariz. 1998) (citing *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*,
 10 99 F.R.D. 99, 101 (E.D. Va. 1983)). Rule 59(e) permits alteration or amendment only if:
 11 (1) newly discovered evidence has been presented, (2) the Court committed clear error,
 12 (3) the judgment is manifestly unjust, or (4) there is an intervening change in controlling
 13 law. *See United Nat’l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir.
 14 2009).

15 **II. Discussion.**

16 Petitioner’s § 2255 motion, filed through counsel, raised five grounds for relief.
 17 Doc. 1. Each ground alleged ineffective assistance based on his trial or appellate
 18 counsel’s failure to make various arguments. *Id.*

19 Petitioner’s motion for reconsideration argues that the Court improperly excluded
 20 “evidence of [Petitioner’s] subjective belief of legality” at trial, thereby denying him the
 21 opportunity to present a complete defense in violation of the Sixth Amendment. Doc. 38
 22 (citing Case 12-CR-01419, Doc. 364). Petitioner asserts that such evidence was relevant
 23 to proving the knowledge requirement under the Controlled Substance Analogue
 24 Enforcement Act of 1986, as explained in *McFadden v. United States*, 135 S. Ct. 2298
 25 (2015). *Id.*

26 Petitioner’s *McFadden* argument is something of a moving target. His § 2255
 27 motion argued that “*McFadden* changed the knowledge requirement for analogues and
 28 should be applied to this case, and counsel was ineffective for failing to point out that the

1 knowledge element required Lane to know both the chemical structure of the analogue
2 and the chemical structure of the controlled substance.” Doc. 7 at 3. Judge Pyle and this
3 Court correctly noted that the jury instructions in Petitioner’s case required the
4 government to prove that Petitioner knew the analogues at issue had a chemical structure
5 substantially similar to a controlled substance. Doc. 23 at 19-20; Doc. 32 at 7-8.
6 Because this comports with *McFadden*, Petitioner’s counsel did not err by failing to urge
7 the *McFadden* standard at his trial – it was already being applied.

8 In his objection to the R&R, Petitioner shifted his argument a bit, asserting that his
9 counsel erred by failing to argue that Petitioner believed what he was doing was legal.
10 Doc. 24. The Court noted in response that even under *McFadden*, “ignorance of the law
11 is typically no defense to criminal prosecution[.]” Doc. 32 at 8; *McFadden*, 135 S. Ct.
12 at 2304. True, the government after *McFadden* must meet a knowledge requirement:

13 That knowledge requirement can be established in two ways. First,
14 it can be established by evidence that a defendant knew that the substance
15 with which he was dealing is some controlled substance—that is, one
16 actually listed on the federal drug schedules or treated as such by operation
17 of the Analogue Act—regardless of whether he knew the particular identity
18 of the substance. Second, it can be established by evidence that the
19 defendant knew the specific analogue he was dealing with, *even if he did*
20 *not know its legal status as an analogue*. The Analogue Act defines a
21 controlled substance analogue by its features, as a substance “the chemical
22 structure of which is substantially similar to the chemical structure of a
23 controlled substance in schedule I or II”; “which has a stimulant,
24 depressant, or hallucinogenic effect on the central nervous system that is
25 substantially similar to or greater than” the effect of a controlled substance
26 in schedule I or II; or which is represented or intended to have that effect
with respect to a particular person. § 802(32)(A). A defendant who
possesses a substance with knowledge of those features knows all of the
facts that make his conduct illegal, just as a defendant who knows he
possesses heroin knows all of the facts that make his conduct illegal. A
defendant need not know of the existence of the Analogue Act to know that
he was dealing with “a controlled substance.”

27 *Id.* at 2305 (emphasis added). If a defendant possesses this knowledge, he need not also
28 know that his conduct is illegal. *See United States v. Beltran-Flores*, 707 F. App’x 495,

1 496 (9th Cir. 2017) (finding that *McFadden* “does not imply that the government must
2 prove that a defendant knew that their conduct was illegal”). As a result, the Court
3 correctly concluded in its previous order that Petitioner’s counsel was not ineffective by
4 failing to argue that Petitioner believed what he was doing was legal.

5 In his current motion, Petitioner shifts his argument again. He now asserts that the
6 Court precluded him at trial from presenting any evidence of his subjective belief of
7 legality, and that counsel was ineffective for failing to object. Doc. 38 at 2. But the
8 Court drew the same line as the Supreme Court. It did not permit him to argue that he
9 subjectively believed his actions were legal, but it did permit him to rebut every
10 knowledge and intent element the government was required to prove:

11 The Court will grant the government’s motion in limine with respect
12 to any evidence or argument that Defendants believed their conduct to be
13 legal, or any advice-of-counsel defense. *In light of the government’s proof*
14 *requirements as set forth above, however, Defendants may present evidence*
15 *and argument that they did not know the substances at issue in this case*
16 *had chemical structures substantially similar to that of a controlled*
17 *substance or that the substances had substantially similar physiological*
effects. Defendants may also present evidence that they did not intend or
represent that the substances had such effects.

18 Case 12-CR-01419, Doc. 364 at 5-6 (emphasis added). Thus, the Court allowed
19 Petitioner to present the very evidence the Supreme Court would allow under *McFadden*.
20 As a result, counsel was not ineffective in failing to object.

21 Petitioner also seems to argue at times that his counsel was ineffective in failing to
22 present evidence that would rebut the elements of the offense under *McFadden*. The
23 Court does not agree, as Petitioner’s counsel attempted at trial to show that Petitioner did
24 not know the substances were analogues. But even if the Court could conclude that
25 counsel erred in failing to present the e-mails cited by Petitioner or similar evidence, the
26 Court could not conclude that Petitioner was prejudiced as required for an ineffective
27 assistance claim under *Strickland*. As Judge Pyle noted, there was overwhelming
28 evidence of Petitioner’s knowledge presented to the jury:

1 For example, the record amply supports conclusions that Movant: (1) was
2 aware under both alleged conspiracies that MDPV had been listed, and
3 sought replacement substances (Doc. 18-1 at 24-28, 147-149, 185-186, 236,
4 241, 295, 464, 719); (2) discussed the quality of the chemicals he used for
5 his products (*Id.* at 331, 376, 420-421, 641-643, 719-720); (3) was familiar
6 with literature defining both chemical structure and stimulant effects of
7 MDPV, a-PVP, a-PBP, and a-PPP (*Id.* at 725-727); (4) was aware of the
8 Analogue Act and knew the substances he was using to replace MDPV
9 were treated as controlled substances under that Act (*Id.* at 149-150, 156,
10 184, 236, 239, 248, 392, 643); (5) knew the substances he was distributing
11 had a substantially similar effect to a controlled substance (*Id.* at 28-29, 40-
12 41, 50, 158, 163, 295, 318, 467, 722-723); (6) was aware that packages of
13 analogue substances he had ordered from overseas had been seized by U.S.
14 Customs agents (*Id.* at 304, 317-318, 330, 561-563, 654-655); (7) was
15 aware that consumers of his products were using them to get high (*Id.* at 67,
16 171-172, 316, 706, 723); (8) employed evasive behavior with respect to law
17 enforcement with respect to both conspiracies, including use of “lingo” to
18 identify products (*Id.* at 31-32, 161, 243); (9) labeled product as “not for
19 human consumption” and “novelty only” (*Id.* at 55, 156, 161-162, 308,
20 465-466, 716); (10) received chemicals shipped from China with decoy
21 labels (*Id.* at 177-178, 181, 386, 713-714); and (11) used various other
22 means to evade law enforcement (*Id.* at 161-162, 173-174, 176, 236, 308,
23 720).

24 Doc. 23 at 20.

25 Nor has Petitioner presented newly discovered evidence or an intervening change
26 in law. The e-mails Petitioner cites were either sent or received by Petitioner himself (*see*
27 Doc. 36 at 58-68), and Petitioner admits that his trial counsel was aware of them and the
28 Court considered them before or during trial (Doc. 38 at 2, 6-7). Petitioner does not
argue that the e-mails constitute newly discovered evidence. Petitioner submits two cases
with his motion. One is a case from the Northern District of Oklahoma that was
overturned by the Tenth Circuit more than a year before Petitioner filed his § 2255
motion. *See* Doc. 36 at 24-28; *United States v. Makkar*, 810 F.3d 1139 (10th Cir. 2015).
The other is a Ninth Circuit opinion finding that a district court denied a defendant the
right to present a defense under circumstances completely unrelated to Petitioner’s. *See*
Doc. 36 at 47-57; *United States v. Brown*, 859 F.3d 730 (9th Cir. 2017). Neither case

1 announces an intervening change in law that is material to Petitioner's § 2255 grounds for
2 relief.

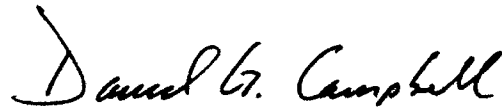
3 **III. Certificate of Appealability.**

4 Petitioner's motion for a certificate of appealability (Doc. 42) will be denied
5 because Petitioner has not "made a substantial showing of the denial of a constitutional
6 right," 28 U.S.C. § 2253(c)(2), and reasonable jurists would not find Petitioner's
7 constitutional claims debatable or wrong, *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

8 **IT IS ORDERED:**

- 9 1. Petitioner's motion for leave to file an amended motion for reconsideration
10 (Doc. 37) is **granted**.
- 11 2. Petitioner's first motion for reconsideration (Doc. 36) is **denied** as moot.
- 12 3. Petitioner's amended motion for reconsideration (Doc. 38) is **denied** for
13 reasons stated in this order.
- 14 4. Petitioner's motion for certificate of appealability (Doc. 42) is **denied**.

15 Dated this 19th day of April, 2018.

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20 David G. Campbell
21 United States District Judge
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Rocky Lane,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.
14

CV-16-04231-PHX-DGC (DMF)

CR-12-01419-PHX-DGC

ORDER

15 Petitioner Michael Rocky Lane filed a Motion to Vacate, Set Aside, or Correct
16 Sentence under 28 U.S.C. § 2255 based on ineffective assistance of counsel. Doc. 1.
17 Magistrate Judge Charles R. Pyle has issued a Report and Recommendation ("R&R")
18 suggesting that the Court deny the motion. Doc. 23. Petitioner filed objections to the
19 R&R, the government responded, and Petitioner filed a reply. Docs. 24, 25, 31. For the
20 reasons stated below, the Court will deny the objections and adopt Judge Pyle's
21 recommendation.

22 **I. Background.**

23 On March 23, 2013, Petitioner was charged on three counts in a second
24 superseding indictment (the "Indictment"), along with multiple codefendants. Doc. 23
25 at 2. On July 19, 2013, Petitioner was found guilty by a jury on all three counts: Count
26 One, conspiracy to manufacture or distribute controlled substance analogues MDPV, a-
27 PVP, a-PBP, Pentedrone, and Pentylone in violation of 21 U.S.C. §§ 846 and 841(a)(1),
28 (b)(1)(c); Count Three, conspiracy to manufacture controlled substance analogues MPPP,

1 a-PVP, a-PBP, Pentedrone, and Pentylone in violation of 21 U.S.C. §§ 846 and 841(a)(1),
2 (b)(1)(c); and Count Five, possession or aiding and abetting in the possession with intent
3 to distribute controlled substance analogues a-PVP, Pentedrone, and MPPP, in violation
4 of 21 U.S.C. § 841(a)(1), (b)(1)(c), and 18 U.S.C. § 2. *Id.*; Case No. 2:12-cr-01419-
5 PHX-DGC, Doc. 676 at 3-5. Petitioner was sentenced to 180 months in prison on each
6 count, to be served concurrently. Doc. 23 at 3.

7 On December 2, 2016, Petitioner, through counsel, filed a Motion to Vacate, Set
8 Aside, or Correct Sentence under 28 U.S.C. § 2255, alleging five grounds for relief.
9 Doc. 1. Each ground claims ineffective assistance based on counsel's failure to argue
10 that: (1) Counts One and Three are multiplicitous; (2) *McFadden v. United States*, 135 S.
11 Ct. 2298 (2015), changed the knowledge requirement for analogues and was not properly
12 applied to this case; (3) the pharmacological effects and potency of pyrovalerone are
13 more closely related to the analogues in this case and should have been used for
14 sentencing purposes; (4) the standard of proof at sentencing should have been clear and
15 convincing evidence; and (5) the Analogue Act is unconstitutionally vague pursuant to
16 *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Id.* at 5-9; Doc. 7. Judge Pyle rejected
17 each of these grounds on the merits. Doc. 23 at 7-30. Petitioner objects to Judge Pyle's
18 recommendations and reargues the merits of each claim. Doc. 24 at 1-15.

19 **II. Standard of Review.**

20 The Court must undertake a de novo review of those portions of the R&R to which
21 specific objections are made. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1); *Thomas*
22 *v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
23 (9th Cir. 2003). The portions of the R&R to which Petitioner does not specifically object
24 will be adopted without further discussion. *Id.* The Court will not review generalized
25 objections, nor undertake a global reevaluation of the merits of Petitioner's grounds for
26 relief. *See Warling v. Ryan*, No. CV 12-01396-PHX-DGC, 2013 WL 5276367, at *2 (D.
27 Ariz. Sept. 19, 2013); *Reyna-Tapia*, 328 F.3d at 1121.

28 ///

1 **III. Discussion.**

2 All of Petitioner's § 2255 claims assert that his trial counsel, appellate counsel, or
 3 both rendered ineffective assistance. The Supreme Court set out the relevant test in
 4 *Strickland v. Washington*, 466 U.S. 668 (1984). "To establish ineffective assistance of
 5 counsel under *Strickland*, a prisoner must demonstrate *both*: (1) that counsel's
 6 performance was deficient, *and* (2) that the deficient performance prejudiced his
 7 defense." *Miles v. Ryan*, 713 F.3d 477, 486 (9th Cir. 2013) (emphasis in original) (citing
 8 *Strickland*, 466 U.S. at 688-93). Courts must "indulge a strong presumption that
 9 counsel's conduct falls within the wide range of reasonable professional assistance," and
 10 attorneys are afforded "wide latitude . . . in making tactical decisions." *Strickland*, 466
 11 U.S. at 689. The reasonableness of counsel's performance is judged under an objective
 12 standard. *United States v. Davis*, 36 F.3d 1424, 1433 (9th Cir. 1994).

13 "A defendant is prejudiced by counsel's deficient performance if 'there is a
 14 reasonable probability that, but for counsel's unprofessional errors, the result of the
 15 proceeding would have been different.'" *Clark v. Arnold*, 769 F.3d 711, 725 (9th Cir.
 16 2014) (quoting *Strickland*, 466 U.S. at 694). "A 'reasonable probability is a probability
 17 sufficient to undermine confidence in the outcome' of a proceeding." *Id.* Petitioner
 18 "need not prove 'counsel's actions more likely than not altered the outcome,' but rather
 19 he must demonstrate that '[t]he likelihood of a different result [is] substantial, not just
 20 conceivable.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011)).

21 **A. Multiplicitous Claims.**

22 Ground One asserts that Petitioner's trial and appellate counsel were ineffective
 23 for failing to argue that Counts One and Three arise under a single conspiracy and are
 24 therefore multiplicitous. Doc. 23 at 7. Judge Pyle found that the Counts are not
 25 multiplicitous. *Id.* at 8. Petitioner argues that a correct analysis shows there was only
 26 one conspiracy. Doc. 24 at 1-5.

27 The Fifth Amendment's Double Jeopardy Clause provides that no person shall "be
 28 subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const.

1 amend. V. It prohibits “the government from dividing a single conspiracy into separate
2 charges and pursuing successive prosecutions against a defendant.” *United States v.*
3 *Stoddard*, 111 F.3d 1450, 1454 (9th Cir. 1997). “[T]o determine whether two conspiracy
4 counts charge the same offense and so place the defendant in double jeopardy,” the Ninth
5 Circuit considers five factors: (1) the differences in time periods covered by the
6 conspiracies; (2) the location where the conspiracies occurred; (3) the individuals charged
7 as coconspirators; (4) the overt acts committed; and (5) the violated statutes. *Id.* “No
8 single factor in the . . . analysis controls the determination of whether there was a single
9 conspiracy; after consideration of all, the question is whether there was more than one
10 agreement.” *United States v. Guzman*, 852 F.2d 1117, 1121 (9th Cir. 1988).

11 **1. Time Periods.**

12 Count One charged a conspiracy from early 2011 to July 2012. Doc. 23 at 8-9.
13 Count Three charged a conspiracy from October 2011 through July 25, 2012. *Id.* at 9.
14 Petitioner argues that the time periods favor a finding of a single conspiracy. Doc. 24
15 at 2. The time period of a conspiracy, however, “is determined not by the dates alleged in
16 the indictment, but by the evidence adduced at trial.” *Guzman*, 852 F.2d at 1120.

17 Nicholas Zizzo, one of Petitioner’s coconspirators, testified at trial that he started
18 the company Consortium Distribution in early 2011 and that Petitioner began to work for
19 him in mid-2011. Doc. 23 at 9. Another coconspirator, Colin Stratford, testified that he
20 had a discussion with Petitioner in September 2011 about developing a competing
21 substance similar to that sold by Consortium Distribution, but under Petitioner’s new
22 company, Dynamic Distribution. *Id.* at 9-10. Zizzo testified that he “kicked [Petitioner]
23 out” of Consortium in October 2011 because, among other reasons, Petitioner was
24 developing his own competing product. *Id.* The Court agrees with Judge Pyle that the
25 evidence supports a finding of two conspiracies: one under Consortium from mid-2011
26 through October 2011, and a second under Dynamic from October 2011 through July
27 2012. *Id.* at 10.

28 ///

1 **2. Location.**

2 Petitioner argues that the second factor supports a finding of one conspiracy
3 because both alleged conspiracies took place in the area of Phoenix, Arizona. Doc. 24
4 at 2. Consortium Distribution was first based out of the back of Zizzo's brother's smoke
5 shop and then moved to other locations in the Phoenix-metro area. Doc. 23 at 10.
6 Consortium had facilities at 10729 North 19th Avenue and 1540 West Hatcher road in
7 Phoenix. Case No. 2:12-cr-01419-PHX-DGC, Doc. 143 at 4. Dynamic Distribution, by
8 contrast, was first based out of Petitioner's garage in Cave Creek, Arizona, and then
9 moved to a warehouse in Tempe, Arizona. Doc. 23 at 10. The two conspiracies may
10 have been in the same general area, but they were in different locations. *See Guzman*,
11 852 F.2d at 1120 (finding separate conspiracies where both occurred in California, but in
12 different areas of the state). This factor suggests two separate conspiracies.

13 **3. Participants.**

14 Petitioner argues that the third factor favors a finding of one conspiracy because
15 there is an overlap in participants between Counts One and Three. Doc. 24 at 2. Count
16 One charged Zizzo as the owner of Consortium Distribution and Benjamin Lowenstein,
17 Petitioner, and Clinton Strunk as coconspirators. Doc. 23 at 11. Count Three charged
18 Petitioner as the owner of Dynamic Distribution, with Andrew Freeman, Vincent Collura,
19 David Titus, and Clinton Strunk as coconspirators. *Id.* at 9. The only overlap between
20 Counts One and Three are Petitioner and Clinton Strunk. Additionally, Petitioner's roles
21 in the two conspiracies were different – he was charged as a sales manager with
22 Consortium, but as the founding owner of Dynamic. *Id.* at 11; *See Stoddard*, 111 F.3d
23 at 1455 (finding that the third factor indicates the existence of separate conspiracies if the
24 roles of overlapping members are different). The third factor indicates two conspiracies.

25 **4. Overt Acts.**

26 Petitioner argues that this factor indicates the existence of one conspiracy because
27 both Counts allege the same overt acts using the same analogue substances. Doc. 24 at 3.
28 Count One charges Zizzo, Petitioner, and coconspirators involved in Consortium with

1 illegally “manufacturing or distributing ‘bath salts’ or ‘designer drugs’ . . . that contained
 2 controlled substance analogues . . . intended to be consumed or ingested by persons in
 3 violation of the Analogue Act.” Doc. 23 at 12. Count One describes the products as
 4 containing MDPV, a-PVP, a-PBP, pentylone, and pentedrone. *Id.* Count Three charges
 5 Petitioner and coconspirators involved in Dynamic Distribution with the same overt acts,
 6 manufacturing and distributing “bath salt” products containing controlled substance
 7 analogues for human consumption. *Id.* Count Three describes the products as containing
 8 a-PVP, a-PBP, pentedrone, pentylone, and MPPP. *Id.* While the substances used in the
 9 Counts are slightly different, the Court agrees with the R&R and Petitioner that the overt
 10 acts are substantially similar. This factor weighs in favor of finding one conspiracy.

11 **5. Statutes Violated.**

12 The two conspiracy counts allege violations of the same statutes, 21 U.S.C. §§ 846
 13 and 841(a)(1), (b)(1)(c). *Id.* at 2. In the Ninth Circuit, when two conspiracies allegedly
 14 violate the same statute, courts consider “whether the goals of the two conspiracies were
 15 similar.” *Montgomery v. Buxton*, 150 F.3d 983, 991 (9th Cir. 1998). The R&R found
 16 that the goal in both conspiracies was the same – to sell compounds using analogue
 17 substances to get the user “high.” Doc. 23 at 13.

18 **6. Conclusion.**

19 While the two conspiracies involved similar overt acts and goals, they differed in
 20 time, location, and participants. Judge Pyle correctly found that the evidence points to
 21 two separate conspiracies, one at Consortium Distribution, owned and operated by Zizzo,
 22 and the other at Dynamic Distribution, owned and operated by Petitioner. Thus, even if
 23 Petitioner’s counsel erred in not arguing that Counts One and Three are multiplicitous,
 24 Petitioner has not shown prejudice.

25 **B. *McFadden* Knowledge Requirement.**

26 Petitioner argues that his trial and appellate counsel were ineffective for not
 27 arguing that the Supreme Court decision *McFadden v. United States*, 135 S. Ct. 2298
 28 (2015), “changed the knowledge requirement for analogues” and should be applied

1 retroactively to this case. Doc. 23 at 14. Petitioner argues that *McFadden* requires the
2 government to prove Petitioner knew “both the chemical structure of the analogue and
3 the chemical structure of the controlled substance,” and the jury instructions given in his
4 case did not meet that standard. *Id.* at 14. Judge Pyle found that the jury instructions
5 were consistent with the knowledge requirement set forth in *McFadden* and therefore
6 Petitioner did not receive ineffective assistance of counsel. Doc. 23 at 14-21.

7 Under *McFadden*, “the Government must prove that a defendant knew that the
8 substance with which he was dealing was ‘a controlled substance,’ even in prosecutions
9 involving an analogue.” 135 S. Ct. at 2305. This knowledge requirement can be
10 established in two ways: (1) evidence that the defendant knew that the substance with
11 which he was dealing is a controlled substance, or (2) evidence that the defendant knew
12 the specific analogue he was dealing with, even if he did not know of its legal status as an
13 analogue. *Id.* To establish the second method of knowledge, the government must prove
14 the defendant knew that the substance had a chemical structure substantially similar to
15 the structure of a controlled substance; and had a stimulant, depressant, or hallucinogenic
16 effect on the central nervous system that is substantially similar to or greater than the
17 effect of a controlled substance, or was represented or intended to have that effect. *Id.*
18 This proof can be made through direct or circumstantial evidence. *Id.* at 2304 n.1.

19 In Petitioner’s case, the jury instructions on Counts One and Three required the
20 jury to find that he “knew that one or more of the substances that were the object of the
21 conspiracy were controlled substance analogues.” Case No. 2:12-cr-01419-PHX-DGC,
22 Doc. 461 at 22, Jury Instruction #19. To make this showing, the government had to
23 prove that Petitioner:

- 24 1. Knew that one or more of the alleged analogues
25 had a chemical structure substantially similar to substances
26 which are listed in Schedules I or II of the Controlled
27 Substance Act; and
28

1 2. Either (a) that he knew one or more of the
2 alleged analogues had a stimulant, depressant, or
3 hallucinogenic effect on the central nervous system that is
4 substantially similar to or greater than the stimulant,
5 depressant, or hallucinogenic effect of one or more of the
6 controlled substance identified in Part I above; or (b) that he
7 represented or intended that one or more of the alleged
8 analogues had a stimulant, depressant, or hallucinogenic
9 effect on the central nervous system that is substantially
10 similar to or greater than the stimulant, depressant, or
11 hallucinogenic effect of one or more of the controlled
12 substances identified in Part 1 above.

13 *Id.*

14 These instructions comport with *McFadden*. The instructions also allowed the
15 jury to consider both direct and circumstantial evidence, consistent with *McFadden*. *Id.*

16 To the extent that Petitioner argues his trial counsel rendered ineffective assistance
17 by failing to present evidence of Petitioner's ignorance of the law, his reading of
18 *McFadden* is incorrect. *See McFadden*, 135 S. Ct. at 2304 (“[I]gnorance of the law is
19 typically no defense to criminal prosecution.”); *United States v. Beltran-Flores*, 707 F.
20 App’x 495, 496 (9th Cir. 2017) (finding that *McFadden* “does not imply that the
21 government must prove that a defendant knew that their conduct was illegal” because
22 ignorance of the law continues to be no excuse). Petitioner cannot show that he was
23 prejudiced by his counsel not arguing on appeal that the jury instructions were
24 inconsistent with *McFadden*. They were not.

25 **C. Pyrovalerone Effects and Potency.**

26 At sentencing, the Court used methcathinone, a Schedule I controlled substance, to
27 determine Petitioner's base offense level under the guidance in the United States
28 Sentencing Guidelines (U.S.S.G) 2D1.1, application note 6. Doc. 23 at 21-23. Petitioner
 argues that his counsel was ineffective for failing to present evidence that pyrovalerone, a
 Schedule V controlled substance, is the most closely related substance for determining
 his base offense level. *Id.* at 21. Citing an abundance of federal cases, including the

1 Ninth Circuit's decision affirming Petitioner's sentence, Judge Pyle concluded the Court
2 properly applied the guidance from U.S.S.G. 2D1.1, and that Petitioner did not receive
3 ineffective assistance of counsel on this ground. *Id.* at 23-24. The Court agrees with
4 Judge Pyle's recommendation. Petitioner's citation to "Amendment 679" to application
5 note 6 does not change this analysis, nor does it show that Petitioner's counsel was
6 ineffective. Doc. 24 at 10.

7 **D. Standard of Proof.**

8 Petitioner argues that neither his trial nor appellate counsel argued that the
9 standard of proof applicable to his sentencing should have been clear and convincing
10 evidence. Doc. 23 at 25. Petitioner argues that *United States v. Hopper*, 177 F.3d 824
11 (9th Cir. 1999), and *United States v. Valensia*, 222 F.3d 1173 (9th Cir. 2000), *vacated on*
12 *other grounds*, 532 U.S. 901 (2001), mandate a higher standard of proof in his case.
13 Judge Pyle correctly found that neither case applies to Petitioner's sentencing. Doc. 23
14 at 28-29. Both *Hopper* and *Valensia* involved sentence enhancements based on
15 uncharged conduct. *See Valensia*, 222 F.3d at 1182 ("[T]he Due Process Clause requires
16 the application of a clear and convincing evidence standard when an enhancement based
17 upon uncharged conduct has an extremely disproportionate effect on the length of a
18 defendant's sentence."). The issue identified by Petitioner did not involve uncharged
19 conduct.

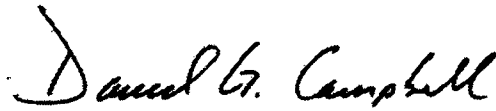
20 **E. The Analogue Act.**

21 Petitioner's final objection is that the Analogue Act is unconstitutionally vague
22 pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and his appellate counsel
23 was ineffective for failing to appeal on this basis. Petitioner does not make a specific
24 objection, but rather directs the Court to his opening and reply briefs. Doc. 24 at 14. The
25 Court will not reevaluate the merits of this ground for relief in the absence of a specific
26 objection to the R&R's analysis. *See Warling v. Ryan*, No. CV 12-01396-PHX-DGC,
27 2013 WL 5276367, at *2 (D. Ariz. Sept. 19, 2013); *Reyna-Tapia*, 328 F.3d at 1121.

IT IS ORDERED:

1. Magistrate Judge Charles R. Pyle's R&R (Doc. 23) is **accepted**.
2. The motion to vacate sentence (Doc. 1) is **denied**.
3. A certificate of appealability is **denied**.
4. The Clerk is directed to **terminate** this action.

Dated this 2nd day of April, 2018.



David G. Campbell
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael Rocky Lane

Movant,

v.

United States of America,

Respondent.

No. CV-16-04231-PHX-DGC (DMF)

**REPORT AND
RECOMMENDATION**

**TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT
JUDGE:**

Movant Michael Rocky Lane (“Movant” or “Lane”) filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (“Motion”) on December 2, 2016 (Doc. 1). This action is related to Movant’s underlying criminal case number CR-12-01419-PHX-DGC.

Movant raises five grounds for relief, each including a claim of ineffective assistance by either his trial or appellate counsel, or both (“IAC”), for failure to: (1) argue that two counts on which he was tried were multiplicitous; (2) argue that the knowledge requirement applicable to chemical compound analogues required Movant to know the chemical structure of both a controlled substance and its analogue; (3) raise the issues of the pharmacological effects and potency of an analogue chemical compound; (4) argue that the standard of proof at sentencing should have been “clear and convincing evidence”; and (5) argue that the Analogue Act is unconstitutionally vague pursuant to

Johnson v. United States, 135 S. Ct. 2551 (2015). For the reasons set forth below, the undersigned recommends that the Court deny the Motion and dismiss this case without prejudice.

I. BACKGROUND

On March 28, 2013, Movant was charged in a second superseding indictment on three counts, along with a number of co-defendants. (CR Doc. 143¹) He was charged with Count 1 (conspiracy to manufacture or distribute controlled substance analogues MDPV², a-PVP³, a-PBP⁴, Pentedrone⁵, and Pentylone⁶ in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(c)); Count 3 (conspiracy to manufacture controlled substance analogues MPPP⁷, a-PVP, a-PBP, Pentedrone, and Pentylone in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(c)); and Count 5 (possession or aiding and abetting in the possession with intent to distribute controlled substance analogues a-PVP, Pentedrone, and MPPP, in violation of 21 U.S.C. §841(a)(1), (b)(1)(c), and 18 U.S.C. § 2). (*Id.* at 2-5, 6-9, 10)

In a June 24, 2013 order, this Court provided background about the charges against Movant, and noted that such charges were violations of the federal comprehensive Drug Abuse Prevention and Control Act of 1970 (“CSA”) and also of the federal Controlled Substance Analogue Enforcement Act of 1986 (“Analogue Act”):

The CSA prohibits the manufacture, distribution and possession of controlled substances, which are drugs or other substances listed in Schedules I and II of the Act. [CR Doc. 143] at 2, ¶ 1; *see* 21 U.S.C. § 841. The Analogue Act prohibits the manufacture, distribution, and possession

¹ “CR Doc.” references are to the docket in the underlying criminal action in Case No. CR-12-01419-DGC.

² The acronym for “3,4-Methylenedioxypyrovalerone.” (CR Doc. 143 at 2)

³ The acronym for “alpha-Pyrrolidinopentiophenone.” (*Id.* at 3)

⁴ The acronym for “alpha-Pyrrolidinobutiophenone.” (*Id.*)

⁵ 2-(Methylamino)-1-phenyl-pentane-1-one. (*Id.*)

⁶ Beta-keto-methylbenzodioxolylpentanamine. (*Id.*)

⁷ 4'-Methyl-pyrrolidinopropiophenone. (*Id.* at 7)

1 of controlled substance analogues. [*Id.* at 2], ¶ 3; 21 U.S.C. § 813. These
2 are substances that have a substantially similar chemical structure to a
3 Schedule I or Schedule II controlled substance and that have or are
4 represented or intended to have a substantially similar effect on the central
5 nervous system. *Id.*, see 21 U.S.C. § 802(32)(A). To the extent that a
6 controlled substance analogue is intended for human consumption, it is
treated as a Schedule I controlled substance for purposes of the CSA. *Id.*,
see 21 U.S.C. § 813.

7 The charges in the Indictment stem from allegations that Defendants
8 manufactured and distributed, under false and misleading labels, products
9 such as “Eight Ballz Bath Salts” and “Eight Ballz Premium Glass Cleaner.”
10 Doc. 143 at 3-5, *passim*. The Indictment alleges that these products
11 contained various controlled substance analogues, were sold as powder-like
12 substances in gram and half-gram quantities, and, despite their labels, were
13 actually intended for human consumption. *Id.* The Indictment alleges that
14 prior to October 2011, Defendants used 3,4-methylenedioxypyrovalerone
15 (MDPV) in “Eight Ballz Bath Salts” in violation of the Analogue Act, and
16 that upon learning that the Drug Enforcement Administration (“DEA”) had
issued a final order temporarily scheduling mephedrone, methylone, and
MDPV as Schedule I substances under the CSA (“MDPV order”),
Defendants began importing and using replacement controlled substance
analogues commonly known as a-PVP, a-PBP, pentylone, and pentadone in
“Eight Ballz Bath Salts” and other products.

17 (CR Doc. 367 at 1-2)

18 Movant was tried and convicted in a jury trial before this Court. (CR Doc. 143,
19 660-676) The trial was held in June and July 2013, after which the jury found Movant
20 guilty on all three counts. (CR Doc. 676 at 3-5) In December 2013, the Court sentenced
21 Movant to 180 months’ imprisonment on each of the three counts, to be served
22 concurrently, with credit for time served. (CR Doc. 566 at 1)

23 Movant appealed his conviction and sentence, which the Ninth Circuit affirmed on
24 September 17, 2015. *United States v. Lane*, 616 Fed. Appx. 328 (9th Cir. 2015). On
25 appeal, Movant was represented by court-appointed counsel. (*Id.*)

26 ///

27 ///

28 ///

1 **II. MOVANT’S CLAIMS**

2 Movant summarizes the issues he presents for review, as follows:

3 1. Counts 1 and 3 are the same conspiracy and should not have been
4 indicted as separate conspiracies. Trial and appellate counsel were
5 ineffective for failing to raise the issue that Counts 1 and 3 are
6 multiplicitous.

7 2. *McFadden* [*v. United States*, 135 S. Ct. 2298 (2015)] changed the
8 knowledge requirement for analogues and should be applied to this case,
9 and counsel was ineffective for failing to point out that the knowledge
10 element required Lane to know both the chemical structure of the analogue
11 and the chemical structure of the controlled substance.

12 3. Trial counsel was ineffective at sentencing for (1) failing to raise the
13 issue of pyrovalerone’s pharmacological effects, and (2) for failing to raise
14 the issue of potency of pyrovalerone pursuant to paragraph one of the
15 2D1.1 commentary, application note 6.

16 4. The standard of proof at sentencing should have been clear and
17 convincing evidence. Trial counsel [was] ineffective for failing to raise and
18 appellate counsel ineffective for failing to raise on appeal until [the] reply
19 brief.

20 5. The Analogue Act is effectively a residual clause to the CSA and
21 should be found to be too vague under *Johnson v. United States*, 135 S. Ct.
22 [2551] (6/26/2015). Appellate counsel was ineffective for failing to raise
23 this issue as *Johnson* was pending in the courts as Lane’s appeal made its
24 way to the United States Supreme Court.

25 (Doc. 7⁸ at 3-4)

26 Respondent contends that Movant’s Ground 1 multiplicity argument is procedurally
27 barred and, in any event, lacks merit. (Doc. 21 at 18-19) Respondent argues that Movant’s
28 Ground 2 claim is procedurally barred, lacks merit, and that Movant suffered no prejudice.
29 (*Id.* at 22-30) Respondents further assert that Movant’s Grounds 3 and 4 lack merit (*Id.* at
30 31-36) Finally, Respondent concludes that Ground 5 is procedurally barred and is
31 meritless. (*Id.* at 36-38) Moreover, for each claim, Respondent argues that Movant cannot

32 ⁸ “Doc.” refers to the docket in this case, CV 16-04231-PHX-DGC (DMF).

1 show he suffered prejudice or that his counsel was ineffective for failure to raise these
2 claims at trial or on appeal. (*Id.*)

3 **III. LEGAL STANDARDS**

4 **A. 28 U.S.C. § 2255 Motion**

5 Under 28 U.S.C. § 2255(a), a prisoner “in custody under sentence of a court
6 established by Act of Congress” may move the sentencing court to vacate, set aside, or
7 correct the sentence on the grounds that “the sentence was imposed in violation of the
8 Constitution or laws of the United States, or that the court was without jurisdiction to
9 impose such sentence, or that the sentence was in excess of the maximum authorized by
10 law, or is otherwise subject to collateral attack.”

11 “A § 2255 movant procedurally defaults his claims by not raising them on direct
12 appeal and not showing cause and prejudice or actual innocence in response to the
13 default.” *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (citing *Bousley v.*
14 *United States*, 523 U.S. 614, 622 (1998)); *see also Massaro v. United States*, 538 U.S.
15 500, 504 (2003) (“[T]he general rule [is] that claims not raised on direct appeal may not
16 be raised on collateral review unless the petitioner shows cause and prejudice.”). “The
17 procedural-default rule is neither statutory nor a constitutional requirement, but it is a
18 doctrine adhered to by the courts to conserve judicial resources and to respect the law's
19 important interest in the finality of judgments.” *Massaro*, 538 U.S. at 504.

20 **B. Procedural Bar**

21 Ordinarily, a claim presented for the first time in a § 2255 motion is
22 procedurally defaulted and barred from review. *See Bousley*, 523 U.S. at 621 (finding a
23 claim defaulted when the movant challenged his guilty plea but had not raised that claim
24 on direct appeal); *United States v. Frady*, 456 U.S. 152, 165 (1982) (noting that a
25 motion to vacate or modify a sentence under 28 U.S.C. § 2255 cannot be used as a
26 substitute for a direct appeal). “Where a defendant has procedurally defaulted a claim by
27 failing to raise it on direct review, the claim may be raised in habeas only if the
28 defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ . . . or that he is
‘actually innocent’” *Bousley*, 523 U.S. at 622 (citations omitted).

1 Contrary to this general rule, claims of IAC need not be exhausted on direct
 2 appeal, but properly may be brought in a § 2255 motion. *See Massaro*, 538 U.S. at 509
 3 (“We do hold that failure to raise an ineffective-assistance-of-counsel claim on direct
 4 appeal does not bar the claim from being brought in a later, appropriate proceeding
 5 under § 2255.”).

6 C. Ineffective Assistance of Counsel Standard

7 To obtain relief for a claim of ineffective assistance of counsel, a defendant must
 8 show both: (1) that counsel’s representation fell below an objective standard of
 9 reasonableness; and (2) that counsel’s deficient performance prejudiced the defense.
 10 *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). To be deficient, counsel’s
 11 performance must fall “outside the wide range of professionally competent assistance.”
 12 *Id.* at 690. In reviewing counsel’s performance, courts “indulge in a strong presumption
 13 that counsel’s conduct falls within the wide range of reasonable professional assistance.”
 14 *Id.* “Surmounting *Strickland*’s high bar is never an easy task.” *Clark v. Arnold*, 769 F.3d
 15 711, 725 (9th Cir. 2014) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). “A
 16 fair assessment of attorney performance requires that every effort be made to
 17 eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s
 18 challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”
 19 *Id.* at 689. The standard for judging counsel’s representation is highly deferential,
 20 because it is “all too tempting” to “second guess counsel’s assistance after conviction
 21 or adverse sentence.” *Id.* “The question is whether an attorney’s representation amounted
 22 to incompetence under ‘prevailing professional norms,’ not whether it deviated from
 23 best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105
 24 (2011) (quoting *Strickland*, 466 U.S. at 690).

25 To establish prejudice, a petitioner must show a “reasonable probability that, but
 26 for counsel’s unprofessional errors, the result of the proceeding would have been
 27 different.” *Strickland*, 466 U.S. at 694. A “reasonable probability” is one “sufficient to
 28 undermine confidence in the outcome.” *Id.* The court need not reach both components of

1 *Strickland* “if the defendant makes an insufficient showing on one.” *Strickland*, 466
2 U.S. at 697 (“Although we have discussed the performance component of an
3 ineffectiveness claim prior to the prejudice component, there is no reason for a court
4 deciding an ineffective assistance claim to approach the inquiry in the same order or
5 even to address both components of the inquiry if the defendant makes an insufficient
6 showing on one.”).

7 “[A]ppellate counsel's failure to raise issues on direct appeal does not constitute
8 ineffective assistance when appeal would not have provided grounds for reversal.”
9 *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001); *see also Boag v. Raines*, 769
10 F.2d 1341, 1344 (9th Cir. 1985) (“Failure to raise a meritless argument does not
11 constitute ineffective assistance.”). Moreover, “[w]e do not expect counsel to be prescient
12 about the direction the law will take.” *Clark v. Arnold*, 769 F.3d 711, 727 (9th Cir. 2014)
13 (internal citation omitted); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994)
14 (holding that a lawyer is not ineffective for failing to anticipate a decision in a later case,
15 because counsel’s performance is evaluated “as of the time of counsel’s conduct.”
16 (quoting *Strickland*, 466 U.S. at 690)).

17 **IV. DISCUSSION**

18 **A. Ground 1: Whether Counts 1 and 3 were multiplicitous**

19 Movant contends that Counts 1 and 3 arise under a single conspiracy, and that he
20 should have been charged just once under this conspiracy. (Doc. 7 at 7-10) He alleges
21 his trial and appellate counsel were ineffective for failing to argue that Counts 1 and 3
22 were multiplicitous. (Doc. 1 at 5) Movant also explains that his trial and appellate
23 counsel advised him that Respondent was able to charge him under two counts because
24 some of the conspiracy participants, locations, and chemicals involved were different.
25 (Doc. 1 at 7) Movant contends that only one agreement between the co-conspirators was
26 proven, and that there was just one conspiracy under which he should have been
27 charged. (Doc. 7 at 7-10) Respondent concludes that Movant’s argument fails on the
28

1 merits, and consequently, that Movant's claims for ineffective assistance of trial and
2 appellate counsel also are without merit. (Doc. 21 at 18-19)

3 In cases such as this, where the allegedly multiplicitous counts were brought
4 under the same conspiracy statute (i.e., 21 U.S.C. § 846), the Ninth Circuit applies the
5 five-factor analysis adopted in *Arnold v. United States*, 336 F.2d 347, 350 (9th Cir.
6 1964) to determine whether a person's Fifth Amendment double jeopardy rights were
7 violated. *U.S. v. Stoddard*, 111 F.3d 1450, 1454 (9th Cir. 1997). In *Stoddard*, the Ninth
8 Circuit instructed:

9 [T]o determine whether two conspiracy counts charge the same offense and
10 so place the defendant in double jeopardy, we consider five factors: (1) the
11 differences in the periods of time covered by the alleged conspiracies; (2)
12 the places where the conspiracies were alleged to occur; (3) the persons
13 charged as co-conspirators; (4) the overt acts alleged to have been
14 committed; and (5) the statutes alleged to have been violated.

15 *Id.* (internal quotations and citation omitted). This consideration does not center on any
16 single factor, and involves an assessment of all factors taken together. *U.S. v. Smith*, 424
17 F.3d 992, 1000 (9th Cir. 2005). A defendant has the burden to show that two alleged
18 conspiracies are based on a single agreement, and to establish that the allegedly
19 multiplicitous conspiracies "are indistinguishable in law and in fact." *U.S. v.*
20 *Montgomery*, 150 F.3d 983, 990 (9th Cir. 1998), *quoting U.S. v. Guzman*, 852 F.2d
21 1117, 1120 (9th Cir. 1988).

22 After applying the *Arnold* factor analysis to the facts presented, the undersigned
23 recommends the Court find that Counts 1 and 3 are not impermissibly multiplicitous,
24 and that Movant's indictment, conviction and sentencing on these two counts did not
25 violate his Fifth Amendment double jeopardy protections. The factor analysis is set
26 forth below.

27 *1. Time periods of the two conspiracies*

28 Count 1 charged Nicholas Zizzo, Benjamin Lowenstein, Movant, and Clinton
Strunk with a conspiracy to manufacture and distribute a mixture or substance
containing MDPV, a-PVP, a-PBP, pentylone, and pentedrone, knowing the substances

1 were intended for human consumption. (CR Doc. 143 at 3) The time period alleged for
2 this conspiracy was “early 2011 through in or about July of 2012.” (*Id.*) Mr. Zizzo
3 testified at trial that he started his company, Consortium Distribution, in early 2011.
4 (Doc. 18-1 at 7) Mr. Zizzo stated that he began this company with his brother, at first to
5 produce and distribute “spice products,” but later to make and distribute “bath salt”
6 products, which were intended to get the user “high.” (*Id.* at 7-9) He declared that
7 Movant began to work with him in mid-2011. (*Id.* at 17) Mr. Zizzo testified that his
8 brother largely passed off control of sales for Consortium Distribution to Movant. (*Id.* at
9 21-22) In October 2011, Mr. Zizzo testified that he “kind of kicked [Movant] out of
10 [Consortium Distribution].” (*Id.* at 40) Among other reasons for Zizzo letting Movant
11 go was that Movant was developing his own competing product. (*Id.* at 41) Mr. Zizzo
12 stated that Movant’s goal in developing this competing product, called “White Water
13 Rapid,” was to produce a high that was closer to a cocaine high. (*Id.*) On cross-
14 examination, Mr. Zizzo stated that he “maybe asked [Movant] to stop coming in too
15 much,” in July or August of 2011, and that “the final severe date was after that.” (*Id.* at
16 83) According to Mr. Zizzo’s testimony, after Movant left the employ of Zizzo and
17 Consortium Distribution, Movant did not purchase any of Zizzo’s products as a
18 competitor. (*Id.* at 95)

19 Count 3 charged Movant, Andrew Freeman, Vincent Collura, David Titus, and
20 Clinton Strunk with a conspiracy to manufacture and distribute a mixture or substance
21 containing a-PVP, a-PBP, pentylone, pentedrone, and MPPP, knowing that the
22 substances were not intended for human consumption. (CR Doc. 143 at 7) The time
23 period alleged for the Count 3 conspiracy was from about October 2011 through about
24 July 25, 2012. (*Id.*) During the testimony of Colin Stratford, a biochemist who worked
25 for Movant, Mr. Stratford stated that Movant told him he had been a salesman for Mr.
26 Zizzo, but that he quit working for Zizzo because they did not see eye to eye. (Doc. 18-
27 1 at 114, 141, 145) Mr. Stratford described discussions he had with Movant in
28 September 2011 about working for Movant and developing a competing substance

1 similar to that sold by Consortium Distribution, but using a substitute for MDPV, which
2 was to be banned by the DEA. (*Id.* at 147-148) Mr. Stratford described making the new
3 product in Movant's garage. (*Id.* at 1561-152) He explained that the substitute they used
4 for MDPV, a-PVP, was not as "strong" as MDPV. (*Id.* at 163-165) Mr. Stratford
5 testified regarding an e-mail Movant sent him on October 28, 2011, which Stratford
6 explained demonstrated he was working then for Movant at Movant's house to develop
7 new product. (*Id.* at 187-190) Mr. Stratford explained that he quit working for Movant
8 at the end of December 2011, when Movant fired him. (*Id.* at 122, 180, 225)

9 The evidence supports a conclusion that a conspiracy existed between Movant,
10 Mr. Zizzo and other co-conspirators from mid-2011 through at the latest, October 2011,
11 when Movant and Mr. Zizzo ceased working together under Consortium Distribution,
12 and Movant began producing and distributing his own competing products under his
13 own separate organization, Dynamic Distribution. The evidence further supports the
14 conclusion that a separate conspiracy existed between Movant and other co-conspirators
15 from at the latest, October 2011, through July 2012, to produce and distribute products
16 utilizing substitute chemicals for the DEA-banned MDPV.

17 2. Location

18 Mr. Zizzo testified that Consortium Distribution was first based in the back of
19 Zizzo's brother's smoke shop, then moved to increasingly larger locations in the
20 Phoenix, Arizona area. (Doc. 18-1 at 16-18, CR Doc. 143 at 4-5) Mr. Stratford testified
21 he worked for Movant and Dynamic Distribution out of Movant's garage at his house in
22 North Phoenix or Cave Creek, and then in a warehouse in Tempe, Arizona. (*Id.* at 168-
23 169, CR Doc. 143 at 8) There does not appear to be detailed and complete evidence in
24 the record about the locations the products manufactured by Consortium Distribution
25 and by Dynamic Distribution were shipped. Dynamic's largest distributor was Daniel
26 Pollock, based in Escondido, California, who at one point ordered between 5,000 and
27 10,000 units of product each week, paying Dynamic about \$50,000.00 weekly. (Doc.
28 18-1 at 366, 488) However, the manufacturing locations for both enterprises were

centered in the same general geographic location, that is, the Phoenix, Arizona metropolitan area.

3. *Participants*

Count 1 of the indictment charged Nicholas Zizzo as owner, operator and manager of Consortium Distribution, and Benjamin Lowenstein as an employee. (CR Doc. 143 at 3) Movant was charged as a co-conspirator and as the owner, manager, and operator at Dynamic Distribution. (*Id.*) Clinton Strunk was also charged as a co-conspirator and as the owner, operator, and manager of BCS Distribution. (*Id.*) The testimony of Mr. Zizzo includes mention of Consortium employee E.J. Nolan, who took over Movant's job as sales manager when Movant left Consortium Distribution. (Doc. 18-1 at 78-83)

Count 3 of the indictment charged Movant, Andrew Freeman, Vincent Collura, and David Titus as employees of Dynamic Distribution. (CR Doc. 143, at 7) Movant was described as the owner and manager. (*Id.*) Other employees of Dynamic discussed in the record included Colin Stratford (Doc. 18-1 at 111-233), Scott Stone (*Id.* at 257-467), and Andrew Freeman (*Id.* at 364). As in Count 1, Clinton Strunk was charged in Count 3 as a co-conspirator and the owner, operator, and manager of BCS Distribution. (CR Doc. 143 at 7)

There is overlap in participants between Counts 1 and 3. Movant was charged in both counts, as was Clinton Strunk. However, Movant's roles in the two charged conspiracies were different, in that he was employed as sales manager with Consortium Distribution, but was the founding owner and manager of Dynamic Distribution. The record strongly supports the conclusion that after Movant left the employ of Consortium, Mr. Zizzo and he each directed independent, competing enterprises.

4. *Overt acts*

The overt acts alleged in Counts 1 and 3 are similar in many respects, and different in other respects. Each Count alleged:

1 manufacturing or distributing “bath salts” or “designer drugs,” which were
2 powder-like products, that were packaged in gram and half-gram quantities,
3 that contained false and misleading labeling and packaging, that contained
4 controlled substance analogues and other substances, and were designed for
and intended to be consumed or ingested by persons in violation of the
Analogue Act.

5 (CR Doc. 143 at 3-4, 7-8)

6 Count 1 described the manufacture and distribution, prior to October 2011, of
7 “Eight Ballz Bath Salts” containing MDPV, which had become a Schedule I controlled
8 substance in October 2011. (*Id.* at 4) Count 1 alleged that Mr. Zizzo, Movant, and
9 unnamed “others” identified a substance or substances to use in place of MDPV in
10 “Eight Ballz Bath Salts.” (*Id.*) Count 1 further alleged that after the designation of
11 MDPV as a Schedule I controlled substance in October 2011, Mr. Zizzo and others, not
12 including Movant, used “a-PVP, a-PBP, pentylone, pentedrone, and other substances in
13 ‘Eight Ballz Premium Glass Cleaner.’” (*Id.*) The indictment charged that Movant,
14 Strunk and others “obtained Eight Ballz Bath Salts, Eight Balls Ultra Premium Glass
15 Cleaner, and other products from Consortium Distribution and in turn redistributed and
16 sold these products to other persons across the United States.” (*Id.* at 5)

17 Count 3 alleged that after MDPV was designated a Schedule I controlled
18 substance, Movant and others used “different controlled substance analogues in these
19 products, to include a-PVP, a-PBP, pentedrone, pentylone, and MPPP, in violation of
20 the Analogue Act. (*Id.* at 8) The names of these products included “Amped Lady Bug
21 Attractant Exuberance Powder,” “Snowman Glass Cleaner,” “White Water Rapid Glass
22 Cleaner,” “Baja Dirt,” and “Brown Sugar.” (*Id.*)

23 Both Counts describe alleged conspiracies with the purpose of manufacturing and
24 distributing “bath salt” type substances, and each conspiracy endeavored to identify and
25 use a replacement for MDPV after it was banned in October 2011. Some of the
26 component substances varied between the two alleged conspiracies, and the names of
27 the substances manufactured by each alleged conspiracy were distinct.
28

1 5. *Goals of the two conspiracies*

2 In *United States v. Ziskin*, the Ninth Circuit explained that

3 [w]hen the two conspiracies charged violate the same statute, we consider
 4 “whether the goals of the two conspiracies were similar.” *Montgomery*, 150
 5 F.3d at 991 (quoting *Stoddard*, 111 F.3d at 1456). Different goals suggest
 6 the existence of two distinct conspiracies. *See Stoddard*, 111 F.3d at 1456
 7 (finding that the existence of two conspiracies is indicated where one
 8 conspiracy's goal was the purchase of marijuana and the other conspiracy's
 9 goal was the growth, sale and distribution of marijuana); *Guzman*, 852 F.2d
 10 at 1121 (finding that the goal of one conspiracy to distribute cocaine
 11 differed from the goal of the other conspiracy to manufacture cocaine).

12 *U.S. v. Ziskin*, 360 F.3d 934 (9th Cir. 2003). In *Montgomery*, the Ninth Circuit found the
 13 goals of two charged conspiracies were different where the goal of one conspiracy was
 14 the manufacture of low quality methamphetamine, and the goal of the other conspiracy
 15 was the distribution of high quality methamphetamine. 150 F.3d at 991. Here, the goal
 16 in both conspiracies was to sell compounds using analogue substances that would get
 17 the user “high.” The Count 1 conspiracy involved the use of MDPV before it was listed
 18 as a Schedule I controlled substance, as well as the use of “replacement” analogue
 19 substances during the period after MDPV was banned. The primary products marketed
 20 by the Count 1 co-conspirators were “Eight Ballz Bath Salts,” and subsequently, “Eight
 21 Ballz Premium Glass Cleaner.” The Count 3 conspiracy allegation involved the use of
 22 “replacement” analogue substances, and included products marketed under the names
 23 “Amped Lady Bug Attractant Exuberance Powder,” “Snowman Glass Cleaner,” “White
 24 Water Rapid Glass Cleaner,” “Baja Dirt,” and “Brown Sugar.”

25 6. *Conclusion*

26 No single factor within the *Arnold* analysis “controls the determination of
 27 whether there was a single conspiracy; after consideration of all, the question is whether
 28 there was more than one agreement.” *Guzman*, 852 F.2d at 1121. The activities alleged
 under both Counts were essentially the same, and the locations of the headquarters of
 the Zizzo’s and Lane’s operations were within the same metropolitan area. The goals of
 the two conspiracies were very similar, if not the same.

1 However, the participants involved in the two conspiracies were almost entirely
2 different. Although Movant worked for Mr. Zizzo as sales manager during part of 2011,
3 the period alleged in Count 1, he did not work for Zizzo or Consortium Distribution
4 after he and Zizzo broke ties during or prior to October 2011, and Movant went on to
5 establish his own independent enterprise as the owner and manager, which is the period
6 alleged in Count 3. After Movant's Dynamic Distribution was organized, Mr. Zizzo and
7 Movant considered their operations to be competitors. (Doc. 18-1 at 722, 731) *See*
8 *Ziskin*, 360 F.3d at 945 (finding separate conspiracies where co-conspirators broke away
9 from a prior drug operation and shortly thereafter commenced a new drug operation).

10 Considering the above-discussed factors together, the undersigned concludes that
11 the allegations in Count 1 and Count 3 involve two separate agreements, and that
12 Movant has failed to establish that the two conspiracies are "indistinguishable in law
13 and in fact." Under these circumstances, Movant's claim of ineffective assistance of
14 counsel fails on the merits, and the undersigned finds that Movant has not shown his
15 counsels' representation was less than objectively reasonable, or that counsel erred, and
16 that he has suffered prejudice.

17 **B. Ground 2: Whether Movant's counsel provided IAC for not arguing**
18 **the *McFadden* knowledge requirement**

19 Movant contends that his trial and appellate counsel were ineffective for not
20 appealing his conviction based on the government's failure to carry its burden to show
21 that Movant "knew the chemical structure of the product he sold." (Doc. 1 at 6, Doc. 22
22 at 5) He argues the U.S. Supreme Court decision in *United States v. McFadden*, 135 S.
23 Ct. 2298 (2015) "changed the knowledge requirement for analogues and should be
24 applied to this case, and counsel was ineffective for failing to point out that the
25 knowledge element required [Movant] to know both the chemical structure of the
26 analogue and the chemical structure of the controlled substance." (Doc. 7 at 10-11)

27 *McFadden* examined the Analogue Act, which "identifies a category of
28 substances substantially similar to those listed on the federal controlled substance

1 schedules and then instructs courts to treat those analogues, if intended for human
2 consumption, as controlled substances listed on schedule I for purposes of federal law.”
3 135 S. Ct. at 2302 (citations omitted). In particular, *McFadden* determined, on a direct
4 appeal, the knowledge necessary for a conviction under § 841(a)(1) when the controlled
5 substance at issue is an analogue—there, as here, certain bath salts used to produce
6 effects similar to those of cocaine, methamphetamine, and other controlled substances.
7 *Id.* at 2303.

8 The Supreme Court instructed that the Controlled Substances Act is violated
9 when a person, either knowingly or intentionally: (1) manufactures, distributes, or
10 dispenses a controlled substance; or (2) possesses a controlled substance with the intent
11 to manufacture, distribute or dispense the controlled substance. *Id.* (citing 21 U.S.C. §
12 841(a)(1)). The Supreme Court further explained that the knowledge requirement
13 pursuant to the CSA may be met by showing the defendant: (1) “knew he possessed a
14 substance listed on the schedules, even if he did not know which substance it was[]”; or
15 (2) “knew the identity of the substance he possessed” even if he did not know that the
16 substance was listed on schedules.” *Id.* at 2304. The Court found that the requisite
17 mental state may be proven through either direct evidence or circumstantial evidence.
18 *Id.* n.1. Examples of circumstantial evidence identified by the Court were “a defendant’s
19 concealment of his activities, evasive behavior with respect to law enforcement,
20 knowledge that a particular substance produces a ‘high’ similar to that produced by
21 controlled substances, and knowledge that a particular substance is subject to seizure at
22 customs.” *Id.*

23 The *McFadden* Court noted that the Analogue Act extended the framework of the
24 CSA to analogous substances and defined a “controlled substance analogue” as a
25 substance:

- 26 (i) the chemical structure of which is substantially similar to the chemical
27 structure of a controlled substance in schedule I or II;
28

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

Id. (quoting 21 U.S.C. § 802(32)(A)). The Court further recognized that the Analogue Act also requires that, to the extent a controlled substance analogue is intended for human consumption, it is “treated, for the purposes of any Federal law as a controlled substance in schedule I.” *Id.* at 2305 (quoting 21 U.S.C. § 813).

The Supreme Court stated that the “Government must prove a defendant knew that the substance with which he was dealing was ‘a controlled substance,’ even in prosecutions involving an analogue.” *Id.* The Court further explained that the knowledge requirement applicable to an analogue substance may be established in two ways. *Id.* The first way is “by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance.” *Id.* The other way of establishing the knowledge requirement set forth by the Court is by establishing the defendant “knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.” *Id.* The Court explained that knowledge of the specific analogue a defendant is dealing with involves knowing “the physical characteristics that give rise to” treatment of a substance as an analogue. *Id.* at 2306. The Court concluded that “[a] defendant need not know of the existence of the Analogue Act to know that he was dealing with a ‘controlled substance.’” *Id.* at 2305.

The *McFadden* Court found the jury instructions at issue were insufficient to “fully convey the mental state required by the Analogue Act.” *Id.* at 2307. These jury

1 instructions required only that the defendant “‘knowingly and intentionally distribut[e] a
2 mixture or substance that has an actual, intended, or claimed stimulant, depressant, or
3 hallucinogenic effect on the central nervous system’ substantially similar to that of a
4 controlled substance.” *Id.* The Court remanded the case to the Fourth Circuit Court of
5 Appeals to perform a harmless-error analysis on the insufficient instruction. *Id.*

6 On remand, the Fourth Circuit summarized the definition of a controlled substance
7 analogue in the Analogue Act as including both of the two following elements: (1) that
8 the substance have a chemical structure that is “‘substantially similar to [that] of a
9 controlled substance in schedule I or II’ (the chemical structure element)”; and (2) that
10 the substance also have “‘[an actual, claimed, or intended] stimulant, depressant, or
11 hallucinogenic effect on the central nervous system that is substantially similar to or
12 greater than [that] of a controlled substance in schedule I or II’ (the physiological effect
13 element).” *U.S. v. McFadden*, 823 F.3d 217, 220 (4th Cir. 2016), *cert. denied*, 137 S. Ct.
14 1434 (2017). The Fourth Circuit found the insufficient jury instruction harmless as to
15 some counts, but not as to other counts. The court concluded that counts charging acts
16 occurring subsequent to the defendant’s recorded telephone conversations
17 overwhelmingly demonstrated that the defendant knew “the chemical identities and the
18 physiological effects of the substances he was selling.” *Id.* at 228.

19 Following *McFadden*, other federal circuit courts of appeals have addressed the
20 question of the adequacy of jury instructions involving the knowledge requirement for
21 counts alleging violation of the Analogue Act. In *United States v. Makkar*, the 10th
22 Circuit found that the district court had erred by instructing the jury it could infer that
23 “incense” sold by the defendants “had a substantially similar chemical structure to
24 JWH-18 [a Schedule I-listed substance with marijuana-like effects] from the fact they
25 knew the incense had a substantially similar effect to marijuana.” *U.S. v. Makkar*, 810
26 F.3d 1139, 1143 (10th Cir. 2015).⁹ The Tenth Circuit deemed the instruction insufficient

27
28 ⁹ The Tenth Circuit cited this Court’s July 13, 2013 Order (CR Doc. 445) addressing the Analogue Act, in which this Court noted that the government’s experts had advised the prosecution that a comparable inferential instruction was not

1 because the jury could find knowledge of a substantially similar chemical structure
2 beyond a reasonable doubt “merely (and without more) because it found” the analogue
3 substance had a substantially similar effect to marijuana.” *Id.* By allowing this
4 inference, the Tenth Circuit found the district court improperly permitted the
5 prosecution to “collapse its two separate elemental mens rea burdens into one[,]” and to
6 “shrug off” the requirement to show a substantially similar chemical structure to a
7 controlled substance. *Id.* The court found the error not harmless and vacated the
8 defendants’ convictions. *Id.* at 1144-48.

9 Applied to the Analogue Act, the inference described in *Makkar* is known as the
10 “*Turcotte* inference,” after the opinion in *United States v. Turcotte*, 405 F.3d 515, 527
11 (7th Cir. 2005), in which the Seventh Circuit recognized a:

12 rebuttable, permissive inference of knowledge in Analogue Act cases, such
13 that a defendant knew about the chemical structure of an analogue if the
14 government can show the defendant knew about the chemical structure of
15 an analogue if the government can show the defendant knew the analogue
had similar physiological effects to those of a controlled substance.

16 *U.S. v. Novak*, 841 F.3d 721, 728 (7th Cir. 2016). The Seventh Circuit has recognized
17 that, after *McFadden*, “courts can no longer rely on the *Turcotte* inference to
18 demonstrate a defendant’s chemical-structure and physiological-effects knowledge.” *Id.*
19 at 729. However, the Seventh Circuit in *Novak* also relied on *McFadden* to conclude
20 that circumstantial evidence could be used to prove knowledge of such chemical
21 structure and physiological effects. *Id.* (citing *McFadden*, 135 S. Ct. at 2304, n.1; 2306,
22 n.3).

23 The Eighth Circuit has held that evidence of pharmacological effect “may be
24 considered as circumstantial evidence, along with the other evidence, in deciding
25 whether the evidence as a whole proved knowledge of similar chemical structure
26 beyond a reasonable doubt.” *U.S. v. Carlson*, 810 F.3d 544, 553 (8th Cir. 2016) (citing
27 *McFadden*, 135 S. Ct. at 2305 & nn.1-3). The Eighth Circuit distinguished the facts in
28

“scientifically sound.” *Makkar*, 810 F.3d at 1144.

1 *Makkar*, where the Tenth Circuit noted that the government had “introduced no
2 evidence suggesting that the defendants knew anything about the chemical structure of
3 the incense they sold[,]” from the facts in *Carlson*, where the court found a “‘rational
4 connection’ between all the evidence in the record and the defendants’ apparent
5 knowledge about the chemical structures of the substances the sold” *Id.* at 552.
6 Similarly, in *United States v. Ramos*, the Eighth Circuit was presented with a
7 defendant’s argument that the government failed to prove the knowledge element of an
8 Analogue Act charge because it did not offer “direct evidence regarding her knowledge
9 of the chemical structure and pharmacological effects of a-PVP.” *U.S. v. Ramos*, 814
10 F.3d 910, 917 (8th Cir. 2016). The Eighth Circuit instructed that the government could
11 meet its burden through circumstantial evidence of knowledge. *Id.* (citing *McFadden*,
12 135 S. Ct. at 2304 n.1; *Carlson*, 810 F.3d at 552).

13 Here, the jury instructions applicable to both Counts 1 and 3 required, in part,
14 that for Movant to be found guilty of the charges, the jury must find Movant “knew that
15 one or more of the substances that were the object of the conspiracy were controlled
16 substance analogues.” (Doc. 7-2 at 37, 39) The instructions further stated that Movant
17 had this knowledge if he:

18 1. Knew that one or more of the alleged analogues had a chemical
19 structure substantially similar to substances which are listed in Schedules I
20 or II of the Controlled Substances Act; and

21 2. Either (a) that he knew one or more of the alleged analogues had a
22 stimulant, depressant, or hallucinogenic effect on the central nervous
23 system that is substantially similar to or greater than the stimulant,
24 depressant, or hallucinogenic effect of one or more of the controlled
25 substance identified in Part 1 above; or (b) that he represented or intended
26 that one or more of the alleged analogues had a stimulant, depressant, or
hallucinogenic effect on the central nervous system that is substantially
similar to or greater than the stimulant, depressant, or hallucinogenic effect
of one or more of the controlled substances identified in Part 1 above.

27 (*Id.*) This instruction tracks the second way to establish the knowledge requirement
28 applicable to an analogue substance set forth in *McFadden*. This Court also instructed the

1 jury that both direct and circumstantial evidence could be used to prove any fact. (*Id.* at
2 23) This also mirrors the *McFadden* Court's instruction on proving the requisite mental
3 state. *McFadden*, 135 S. Ct. at 2304, n.1; 2306, n.3.

4 Accordingly, the jury in Movant's case was instructed consistent with the
5 knowledge requirement involving the chemical structure and pharmacological effects
6 approach set forth by the Supreme Court in *McFadden*. Moreover, circumstantial
7 evidence was adduced at trial that could support the jury's conclusion that Movant knew
8 he was dealing in controlled substance analogues. For example, the record amply
9 supports conclusions that Movant: (1) was aware under both alleged conspiracies that
10 MDPV had been listed, and sought replacement substances (Doc. 18-1 at 24-28, 147-
11 149, 185-186, 236, 241, 295, 464, 719); (2) discussed the quality of the chemicals he
12 used for his products (*Id.* at 331, 376, 420-421, 641-643, 719-720); (3) was familiar with
13 literature defining both chemical structure and stimulant effects of MDPV, a-PVP, a-
14 PBP, and a-PPP (*Id.* at 725-727); (4) was aware of the Analogue Act and knew the
15 substances he was using to replace MDPV were treated as controlled substances under
16 that Act (*Id.* at 149-150, 156, 184, 236, 239, 248, 392, 643); (5) knew the substances he
17 was distributing had a substantially similar effect to a controlled substance (*Id.* at 28-29,
18 40-41, 50, 158, 163, 295, 318, 467, 722-723); (6) was aware that packages of analogue
19 substances he had ordered from overseas had been seized by U.S. Customs agents (*Id.* at
20 304, 317-318, 330, 561-563, 654-655); (7) was aware that consumers of his products
21 were using them to get high (*Id.* at 67, 171-172, 316, 706, 723); (8) employed evasive
22 behavior with respect to law enforcement with respect to both conspiracies, including use
23 of "lingo" to identify products (*Id.* at 31-32, 161, 243); (9) labeled product as "not for
24 human consumption" and "novelty only" (*Id.* at 55, 156, 161-162, 308, 465-466, 716);
25 (10) received chemicals shipped from China with decoy labels (*Id.* at 177-178, 181, 386,
26 713-714); and (11) used various other means to evade law enforcement (*Id.* at 161-162,
27 173-174, 176, 236, 308, 720).

1 Here, Movant's counsel did not provide ineffective assistance of counsel, because
2 Movant in fact received the benefit of the *McFadden* knowledge standard, as is discussed
3 above. The jury was instructed consistent with the second way of proving knowledge in
4 Analogue Act cases. Moreover, the evidence at trial supported the jury's verdicts.
5 Accordingly, the undersigned recommends that Movant be found to have failed to
6 establish either prong of the *Strickland* test related to Ground 2.

7 **C. Ground 3: Whether trial counsel was ineffective at sentencing for**
8 **failing to raise the issue of pyrovalerone's pharmacological effects and potency**

9 Movant argues that his trial counsel was ineffective at his sentencing hearing
10 when he failed to raise the issue of the pharmacological effects of pyrovalerone, which
11 he believes would have caused this Court to sentence him using pyrovalerone as the
12 most closely related substance to the analogue drugs involved in his conviction. (Doc. 7
13 at 15-30) Movant also argued his appellate counsel was ineffective for failing to raise
14 this issue on appeal. (Doc. 1 at 7) Movant contends that had trial counsel raised this
15 issue and prevailed, Movant would have been sentenced for a Schedule V drug, rather
16 than for the Schedule I drug used to calculate his sentence, and that his sentence would
17 have been very significantly reduced. (Doc. 7 at 15-23) He also contends that his trial
18 counsel was similarly ineffective when he neglected to raise the issue of the potency of
19 pyrovalerone in light of application note 6 to [U.S.S.G. §] 2D1.1. (*Id.* at 23-30)

20 At Movant's sentencing, this Court documented that Movant had been found
21 guilty of Counts 1 and 3, discussed above in Section IV.A, as well as of Count 5. (Doc.
22 18-1 at 737-738) Count 5 charged Movant with "possession with intent to distribute a
23 controlled substance analogue and aiding and abetting, in violation of 21 United States
24 Code Section 8414(a)(1), 841(b)(1)(C), and 18 U.S.C. Section 2." (*Id.*) The Court
25 allowed oral argument on the question of whether methcathinone or pyrovalerone was
26 the appropriate analogous drug for use in calculating Movant's sentence. (*Id.* at 739-
27 755) The Court discussed the guidance included in U.S.S.G. 2D1.1, application note 6.
28 (*Id.*) Application note 6 addresses "analogues and controlled substances not referenced

1 in” the Guideline, and specifies that the term “analogue” has the meaning set forth in 21
2 U.S.C. § 802(32). U.S.S.G. § 2D1.1, application note 6. Application note 6 to § 2D1.1
3 provides:

4 In the case of a controlled substance that is not specifically referenced in
5 this guideline, determine the base offense level using the marijuana
6 equivalency of the most closely related controlled substance referenced in
7 this guideline. In determining the most closely related controlled substance,
the court shall, to the extent practicable, consider the following:

8 (A) Whether the controlled substance not referenced in this guideline has a
9 chemical structure that is substantially similar to a controlled substance
referenced in this guideline.

10 (B) Whether the controlled substance not referenced in this guideline has a
11 stimulant, depressant, or hallucinogenic effect on the central nervous
12 system that is substantially similar to the stimulant, depressant, or
13 hallucinogenic effect on the central nervous system of a controlled
substance referenced in this guideline.

14 (C) Whether a lesser or greater quantity of the controlled substance not
15 referenced in this guideline is needed to produce a substantially similar
16 effect on the central nervous system as a controlled substance referenced in
this guideline.

17 U.S.S.G. § 2D1.1, application note 6.

18 Movant’s counsel urged this Court to apply application note 6 to find that
19 pyrovalerone is the “most closely related controlled substance referenced” in the
20 guideline because: (1) the chemical structure for pyrovalerone is “virtually identical”
21 with that of a-PBP and a-PVP, and that MDPV is “pyrovalerone with a methyldioxy
22 ring added to it.” (Doc. 18-1 at 743) This Court advised Movant’s counsel that it had
23 reviewed the testimony of expert witnesses, and that such testimony did not support a
24 conclusion pursuant to application note 6 (B) that “pyrovalerone and MDPV had a
25 substantially similar stimulant, depressant, or hallucinogenic effect.” (*Id.* at 746)
26 Movant’s counsel explained that he did not bring the trial transcripts with him, but
27 argued that because of evidence of the close chemical structural similarities between
28

1 MDPV and pyrovalerone, it could “not be clearer that pyrovalerone is the most closely
2 related.” (*Id.* at 747)

3 This Court concluded that, after applying the guidance provided in application
4 note 6, methcathinone was the “most closely related controlled substance because
5 evidence at trial indicated that methcathinone had both a substantially similar chemical
6 structure and physiological effect to MDPV. (*Id.* at 753-754) This Court drew the same
7 conclusion regarding a-PVP, a-PBP, and MPPP. (*Id.* at 754-755)

8 Movant complains that his trial counsel was ineffective for failing to present new
9 evidence at sentencing supporting a conclusion that the pharmacological effects of
10 pyrovalerone qualify it as the most closely related controlled substance. (Doc. 7 at 15-
11 23) Movant argues that expert testimony from Dr. Prioleau included a statement that
12 pyrovalerone would be expected to have a “stimulant effect” on the central nervous
13 system. (*Id.* at 18) Movant further argues that, at the very least, his counsel should have
14 been prepared at the sentencing hearing with transcripts of expert testimony and with
15 declarations from his experts about the stimulant effects of pyrovalerone. (*Id.*)

16 However, even if Movant is correct that his trial counsel provided ineffective
17 assistance at his sentencing, he is unable to establish prejudice. That is, he cannot
18 demonstrate a reasonable probability that, but for his counsel’s alleged lack of
19 preparation, the result of his sentencing hearing would have been different.

20 In cases subsequent to Movant’s where the question of whether pyrovalerone was
21 the most closely related substance to either MDPV or a-PVP, rather than
22 methcathinone, federal courts have concluded that methcathinone was the most closely
23 related. *See United States v. Giggey*, 867 F.3d 236, 242-43 (1st Cir. 2017) (finding no
24 clear error in district court’s finding that methcathinone was “the drug referenced in the
25 sentencing guidelines that is most closely related to [a]-PVP[,]” rather than
26 pyrovalerone); *United States v. Moreno*, 870 F.3d 643, 647-50 (7th Cir. 2017) (holding
27 the district court did not err in finding methcathinone the most closely related substance
28 to a-PVP, rather than pyrovalerone); *Duong v. United States*, No. 3:14-CR-0073, 2017

1 WL 4310216, at *6-7 (M.D. Pa., Sept. 28, 2017) (in accord with opinions cited by the
2 government, finding methcathinone the most closely related analogue referenced in the
3 guideline to a-PVP, and noting that the movant did not cite any cases finding
4 methcathinone was not the most closely related substance to a-PVP); *United States v.*
5 *Emerson*, No. 2:15-CR-17, 2016 WL 1047006, at *2 (D. Vt., Mar. 10, 2016) (finding
6 methcathinone “remains the most closely related controlled substance in the Sentencing
7 Guidelines to a-PVP[,]” and declaring “it would produce an absurd result to find that a-
8 PVP, a Schedule I drug, is most closely related to pyrovalerone, a Schedule V drug[.]”);
9 *United States v. Brewer*, No. 1:15-CR-00003, 2016 WL 3580614, at *8-15 (D. Me.,
10 June 28, 2016) (concluding that “in fixing the Guideline provision applicable to
11 [defendant’s] criminal conduct, methcathinone is the ‘most closely related’ controlled
12 substance to a-PVP[,]” and rejecting defendant’s request to use pyrovalerone instead.);
13 and *United States v. Ketchen*, No. 1:13-CR-00133, 2015 WL 3649486, at *16 (D. Me.,
14 June 11, 2015) (finding the evidence supported that MDPV is a “‘controlled substance
15 analogue’ to methcathinone,” and did not “support the [d]efendant’s assertion that
16 MDPV is a ‘controlled substance analogue’ to pyrovalerone.”). In Movant’s own
17 appeal, the Ninth Circuit held that this Court “did not err in using methcathinone to
18 calculate Lane’s base offense level for sentencing. The district court properly
19 considered the factors listed in the Sentencing Guidelines to determine the most closely
20 relate controlled substance referenced in the guideline.” *Lane*, 616 Fed. Appx. at 329.

21 Faced with this one-sided collection of decisions by federal courts on this issue,
22 including that of the Ninth Circuit in his own appeal, the undersigned recommends this
23 Court find that Movant’s claims lack merit, that his trial and appellate counsel did not
24 provide ineffective assistance, and that he suffered no prejudice under the *Strickland*
25 standard.

26 ///

27 ///

D. Ground 4: Whether Movant's counsel provided IAC by not arguing the burden of proof applied at his sentencing hearing was erroneous

Movant contends that he received ineffective assistance of counsel when neither his trial nor appellate counsel raised the issue that the standard of proof applicable to his sentencing should have been by clear and convincing evidence. (Doc. 1 at 8) Ordinarily, "due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the guidelines." *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991). Movant contends that the opinions of the Ninth Circuit in *United States v. Hopper* and *United States v. Valensia* compel the application of a higher standard of proof in his case. (Doc. 7 at 31-32 (citing *U.S. v. Hopper*, 177 F.3d 824 (9th Cir. 1999) and *U.S. v. Valensia*, 222 F.3d 1173 (9th Cir. 2000), *cert. granted and judgment vacated on other grounds*, 532 U.S. 901 (2001)).

Valensia clarified the holding in *Hopper*, and explained that "the Due Process Clause requires the application of a clear and convincing evidence standard when an enhancement based upon uncharged conduct has an extremely disproportionate effect on the length of a defendant's sentence[.]" *Valensia*, 222 F.3d at 1182. In *Valensia*, the Ninth Circuit identified five cases it had decided since *United States v. Restrepo*, 946 F.2d 654 (9th Cir. 1991), in which the court addressed *Restrepo*'s dictum about the possibility of "an exception to the general rule that the preponderance standard satisfies due process[,] when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction." 222 F.3d at 1178-79. These cases were *United States v. Sanchez*, 967 F.2d 1383 (9th Cir. 1992); *United States v. Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992); *United States v. Rutledge*, 28 F.3d 998 (9th Cir. 1994); *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999), *cert. dismissed*, *United States v. Reed*, 529 U.S. 1063 (2000); and *United States v. Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000).

1 The *Valensia* court explained that in *Sanchez*, the district court enhanced the
2 defendant's sentence on the basis of heroin transactions that occurred on other dates
3 than the date of the transaction to which he pled guilty, increasing his sentencing range
4 from 10 to 16 months to 33 to 41 months. *Valensia*, 222 F.3d at 1179. The Ninth Circuit
5 "rejected the defendant's contention that the enhancement for relevant uncharged
6 conduct resulted in a sentence that was so disproportionate that due process required the
7 application of the clear and convincing standard." *Id.* (citing *Sanchez*, 967 F.2d at 1385-
8 87).

9 In *Harrison-Philpot*, the district court had not indicated what standard of proof it
10 applied in finding the quantity of drugs it used in calculating the defendant's sentence.
11 978 F.2d at 1523. The defendant's base offense level for distributing 67 grams of
12 cocaine, plus enhancements, resulted in a sentencing range between 41 and 51 months.
13 *Id.* The total quantity of drugs applicable to the conspiracy in which the defendant was
14 involved, however, resulted in a sentence range for the defendant of 292 to 365 months.
15 *Id.* The court concluded that there was no sentencing "enhancement" for uncharged
16 conduct, as had been argued in *Restrepo*, and that the increase in sentence resulting
17 from a conspiracy drug quantity determination did not warrant an elevation in the
18 standard of proof. *Id.* at 1523-24.

19 The Ninth Circuit noted that in *Rutledge*, the defendant had pled guilty to being a
20 felon in possession of a firearm, resulting in a sentencing range of between 77 and 96
21 months. *Valensia*, 222 F.3d at 1180 (citing *Rutledge*, 28 F.3d at 1000). After it found
22 the defendant had used the firearm in an uncharged attempted robbery, the court
23 increased the defendant's sentencing range to 140 to 175 months. *Id.* The Ninth Circuit
24 commented that if the enhanced sentencing range imposed in *Harrison-Philpot* did not
25 warrant a higher standard of proof, then a higher standard was not called for in
26 *Rutledge*. *Id.* The Ninth Circuit recognized this statement as dictum, because the record
27 in *Rutledge* indicated the district court in fact had applied the highest standard of proof,
28 i.e., proof beyond a reasonable doubt. *Id.*

1 In *Hopper*, the Ninth Circuit for the first time found that a district court had erred
2 by not applying the clear and convincing standard of proof in assessing evidence offered
3 to support a sentencing enhancement. *Id.* (citing *Hopper*, 177 F.3d at 833). The
4 sentencing enhancement “was based on official victim and violent conduct
5 enhancements” which increased the defendant’s sentencing range from 24-30 months to
6 63-78 months. *Id.* In *Mezas de Jesus*, the Ninth Circuit found the district court erred
7 when it applied the preponderance of the evidence standard to impose a sentencing
8 enhancement based on uncharged conduct, involving a defendant convicted of being an
9 undocumented immigrant in possession of a firearm. *Id.* (citing *Mezas de Jesus*, 217
10 F.3d at 645). The defendant’s sentencing range was increased from 21-27 months to 57-
11 71 months, after the district court enhanced his sentence by nine levels pursuant to a
12 finding that the firearm had been used in an uncharged kidnapping. *Id.*

13 In *Valensia*, the Ninth Circuit stated that it had recognized “the Due Process
14 Clause requires the application of a clear and convincing evidence standard when an
15 enhancement based upon uncharged conduct has an extremely disproportionate effect
16 on the length of a defendant’s sentence.” 222 F.3d at 1182. To assist in the application
17 of this rule, the court identified six factors. *Id.* Movant urges this Court to apply the
18 *Valensia* factors to find that the clear and convincing evidence standard should have
19 been applied in arriving at his sentence.

20 Here, the presentence report recommended that, for purposes of offense level
21 computation, methcathinone should be the controlled substance comparator, resulting in
22 a conversion ratio of 1 gram of methcathinone equal to 380 grams of marijuana. (CR
23 Doc. 518 at 3) At the sentencing hearing, this Court noted that the jury “specifically
24 found at trial that MDPV is an analogue to methcathinone.” (Doc. 18-1 at 752) The
25 Court adopted this conclusion, based on trial evidence. (*Id.*) After assessing the factors
26 described in the second paragraph of U.S.S.G. § 2D1.1, application note 6, this Court
27 concluded that the most closely-related controlled substance to MDPV, a-PVP, a-PBP,
28 and MPPP was methcathinone, and that the equivalency ratio applicable for sentencing

1 purposes was 1 to 380 of methcathinone to marijuana. (*Id.* at 753-755) This Court
2 agreed “with the guideline calculation in the presentence report of an offense level 43,
3 criminal history category of III.” (*Id.* at 757) The Court observed that these factors
4 would ordinarily result in a life sentence, but also noted that the statutory maximum in
5 Movant’s case was 20 years, or 240 months, and that this became the guideline range.
6 (*Id.*) When announcing Movant’s sentence, this Court stated that if the case had
7 involved a “clear controlled substance,” the sentence would assuredly be 20 years. (*Id.*
8 at 775) Concluding that the sentence should reflect that “people hadn’t been prosecuted
9 much for analogues, [and] there hadn’t been a court that determined some of these
10 substances were analogues,” this Court determined the proper sentence was 15 years, or
11 180 months. (*Id.*) The Court noted that the sentence was five years less than the
12 maximum, and below the guideline range, and was a downward variance “of about four
13 levels.” (*Id.* at 775-776)

14 The parties have not cited, and the undersigned was unable to identify, case law
15 deciding the issue raised in this Ground, which involves the standard of proof applicable
16 to sentencing based on a determination of the most closely related substance pursuant to
17 application note 6 to U.S.S.G. § 2D1.1. However, Movant’s reliance on *Hopper* and
18 *Valensia* is misplaced, because the analysis set forth in *Valensia* regarding a decision to
19 apply the clear and convincing evidence standard turned on sentencing enhancement
20 based upon uncharged conduct. Here, the question impacting Movant’s sentence was
21 whether pyrovalerone or methcathinone was the most closely related substance to the
22 analogue drugs, which does not involve uncharged conduct. Moreover, the facts
23 underlying this question were argued by the parties at trial, a factor the Ninth Circuit
24 has found determinative in deciding whether a heightened standard of proof applies. *See*
25 *U.S. v. Treadway*, 593 F.3d 990, 1001 (9th Cir. 2010) (concluding that the due process
26 concerns presented when considering a heightened standard of proof regarding
27 sentencing enhancements were not present where the underlying evidence was
28 presented at trial and was based on the offense of conviction). The jury followed Jury

1 Instruction 18 to find that the substances Movant was alleged to have manufactured or
 2 distributed were controlled substance analogues, with substantially similar chemical
 3 structures and an “actual, represented, or intended effect that is substantially similar or
 4 greater” than either methcathinone or MDPV, as detailed in the instructions. (CR Doc.
 5 461 at 19-21; CR Doc. 465 at 1-3) This finding was made beyond a reasonable doubt.
 6 (CR Doc. 461 at 19-21)

7 Because legal precedent provides no direct support for the strategy Movant
 8 argues his counsel should have pursued, the undersigned concludes that Movant fails to
 9 demonstrate either that counsel’s representation was less than objectively reasonable, or
 10 that he suffered any prejudice.

11 **E. Ground 5: Whether Movant’s appellate counsel was ineffective for**
 12 **failing to argue the Analogue Act is a residual clause and vague under *Johnson***

13 Movant contends that portions of the Analogue Act, along with the Controlled
 14 Substances Act, have an effect so similar to the residual clause of the Armed Career
 15 Criminal Act that the holding of the U.S. Supreme Court in *Johnson v. United States*
 16 should apply in his case, and further, that his appellate counsel was ineffective for
 17 failing to appeal on the basis of this similarity. (Doc. 7 at 42-43, citing *Johnson v. U.S.*,
 18 135 S. Ct. 2551 (2015)). Although Movant concedes that his appellant counsel made a
 19 vagueness argument on appeal, he states that this argument was “not made as a residual
 20 clause argument, which was successful in *Johnson*.” (Doc. 22 at n.7)

21 Movant’s IAC claim fails. He does not cite authority addressing this specific
 22 claim for IAC. Moreover, the case he cites in support of his argument, *United States v.*
 23 *Makkar*, is not adequate to prop up his claim. (Doc. 7, citing *Makkar*, 810 F.3d at 1142)
 24 In *Makkar*, the Tenth Circuit observed:

25 The resemblance between the Analogue Act and the residual clause of the
 26 ACCA might raise some questions in your mind. After all, the Supreme
 27 Court in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 192 L.Ed.2d
 28 569 (2015), recently declared the ACCA's residual clause too vague to
 permit its constitutional application. But so far at least the Court hasn't
 reached a similar judgment about the Analogue Act. In fact, the Court only

1 recently gave the Analogue Act a narrow construction that may go some
2 way to alleviating potential concerns about the vagueness of its terms.

3 *Makkar*, 810 F.3d at 1142 (citing *McFadden*, 135 S. Ct. at 2305 n.2). After discussing
4 the Supreme Court's statement that "[t]he scienter requirement does not . . . render the
5 statute vague[,]" the Tenth Circuit speculated on the "open question" of "what exactly it
6 means for chemicals to have a 'substantially similar' chemical structure—or effect."
7 *Makkar*, 810 F.3d at 1143 (citing *McFadden*, 135 S. Ct. at 2307). This dictum of the
8 Tenth Circuit in *Makkar* is not adequate to establish a basis for Movant's appellate
9 counsel's ineffectiveness in an earlier trial, and in another federal circuit. As
10 Respondent notes, both *Johnson* and *McFadden* were decided after briefing on
11 Movant's appeal was completed. (Doc. 21 at 36 n.24) In deciding Movant's appeal, the
12 Ninth Circuit cited *McFadden*, and stated that the Analogue Act "is not constitutionally
13 vague as applied in this case." *Lane*, 616 Fed. Appx. at 329. Accordingly, Movant has
14 not demonstrated that his counsel's performance was deficient, and therefore he cannot
15 succeed on this ineffective assistance of counsel claim.

16 V. CONCLUSION

17 For the reasons set forth above, each of Movant's claims of ineffective assistance
18 of his trial and appellate counsel fails on the merits. Movant has not shown that his
19 sentence violated the federal Constitution or laws, that this Court lacked jurisdiction to
20 impose his sentence, that the sentence exceeded the maximum authorized by law, or that
21 his sentence is subject to collateral attack. Accordingly,

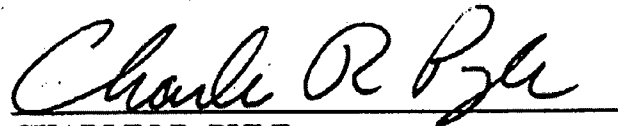
22 **IT IS THEREFORE RECOMMENDED** that the Motion Under 28 U.S.C. §
23 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Doc. 1)
24 be denied and dismissed with prejudice.

25 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability be
26 denied because dismissal of the Petition is justified by a plain procedural bar and jurists
27 of reason would not find the ruling debatable.

28 This recommendation is not an order that is immediately appealable to the Ninth

1 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
2 Appellate Procedure, should not be filed until entry of the district court's judgment. The
3 parties shall have fourteen days from the date of service of a copy of this
4 recommendation within which to file specific written objections with the Court. See 28
5 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the
6 parties have fourteen days within which to file a response to the objections. Failure
7 timely to file objections to the Magistrate Judge's Report and Recommendation may
8 result in the acceptance of the Report and Recommendation by the district court without
9 further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003).
10 Failure timely to file objections to any factual determinations of the Magistrate Judge will
11 be considered a waiver of a party's right to appellate review of the findings of fact in an
12 order or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule
13 72, Federal Rules of Civil Procedure.

14 Dated this 14th day of December, 2017.

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18 CHARLES R. PYLE

19 UNITED STATES MAGISTRATE JUDGE
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**Additional material
from this filing is
available in the
Clerk's Office.**