FILED
United States Court of Appeals
Tenth Circuit

October 4, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL JACOBY,

Defendant - Appellant.

No. 17-1431
(D.C. Nos. 1:16-CV-00133-KHV &
1:10-CR-00502-KHV-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **EID**, and **CARSON**, Circuit Judges.

Michael Jacoby, a federal prisoner appearing pro se, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255."). We deny a COA and dismiss this matter.

I.

Mr. Jacoby was convicted in 2012 of eleven counts of wire fraud, one count of money laundering, and two counts of bank fraud. He was sentenced to 108 months in

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

prison and five years of supervised release. This court affirmed his convictions and sentence on direct appeal. *United States v. Zar*, 790 F.3d 1036, 1059 (10th Cir. 2015).

We only briefly summarize the evidence supporting Jacoby's convictions, which was described in our previous decision. Jacoby, a real estate agent, recruited buyers to purchase homes they could not afford, orchestrated schemes to falsely inflate the homes' purchase prices, and helped the buyers fraudulently obtain mortgage loans for more than the true cost of the homes.

Jacoby devised two methods of inflating the purchase price. In one, the seller agreed to donate a significant portion of the stated sales price to a non-profit grant program, and the grant program immediately returned those funds to the home buyer. The lenders testified they did not receive paperwork disclosing the grant program arrangement, and lent money based on the inflated purchase price stated in the sales contract. In the other scheme, the buyers purchased a home through a solely-owned limited-liability company (LLC), and the LLC immediately resold the home to the buyer at a substantially higher price. The buyers did not disclose to their lenders that they owned the LLCs, and the lenders made loans based on the inflated sales price, having been misled into thinking the sale from the LLC to the buyer was an arms-length transaction.

One of buyers that Jacoby recruited, Mike Macy, pleaded guilty and testified against Jacoby at trial; two other buyers, Derek and Susanne Zar, were convicted along with Jacoby. Macy testified that Jacoby came up with these mortgage fraud schemes, set the prices, prepared the sales contracts, and either provided short-term loans to the buyers

to assist their fraudulent loan applications or found other lenders to do so. Jacoby got commissions on the sales and some of the fraudulently obtained loan proceeds.

Jacoby also fraudulently obtained two loans on his personal home, which he purchased from his partner, Ed Schulz, who assisted in the fraudulent scheme. Jacoby obtained the original mortgage from FirstBank by falsely representing the actual purchase price of the home and inflating its value by creating a false construction budget for improvements Schulz had made. Jacoby made false statements to the lender about his current income, supported by forged statement-of-income letters he submitted on his accountant's letterhead. He falsely stated he had no financial assistance in buying the home, but the evidence showed he borrowed the funds from a colleague, Ed Aabak, to make the down payment, which he later repaid with the mortgage proceeds. Jacoby then got a home equity line of credit (HELOC) from Citibank on his home, by again making false statements about his current income. He falsely told Citibank he was using the HELOC to repay a seller's lien held by Schulz. There was no such loan; Jacoby created and submitted fictitious loan and deed of trust documents to support his misrepresentation.

After this court affirmed Jacoby's conviction, he filed a timely § 2255 motion raising four claims, each with numerous sub-claims: (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel; (3) prosecutorial misconduct and malicious prosecution; and (4) actual innocence and cumulative error resulting in a fundamental miscarriage of justice. The district court denied the § 2255 motion, finding that all of Mr. Jacoby's claims failed because he did not set forth specific and

particularized facts which, if true, would entitle him to relief. In the same order, the district court denied a COA. Mr. Jacoby filed a timely notice of appeal and renewed his request for a COA, which the district court again denied. Mr. Jacoby then filed a motion for reconsideration under Fed. R. Civ. P. 59(e), which the district court denied. Mr. Jacoby did not amend his notice of appeal to include any challenge to the denial of his Rule 59(e) motion.

II.

In his Combined Opening Brief and Application for COA, Jacoby asserts his trial counsel was constitutionally ineffective for failing to introduce witnesses and evidence that would, he alleges, show his factual innocence. Jacoby does not reassert his claims of ineffective assistance of appellate counsel, prosecutorial misconduct, or actual innocence.[1]

To merit a COA, Mr. Jacoby must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied Jacoby's § 2255 motion on the merits, he must show reasonable jurists could debate whether the motion should have been granted or the issues presented deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To decide whether reasonable jurists could debate the district court's denial of his ineffective assistance of

[1] Our circuit has "definitively foreclose[d] independent actual innocence claims" unconnected to any independent constitutional violation in habeas petitions. *Doe v. Jones*, 762 F.3d 1174, 1188 (10th Cir. 2017) (Tymkovich, J, dissenting in part and concurring in the judgment).

counsel claim, we make a threshold inquiry into the underlying merit of the claim. *Id.* at 482.

The Sixth Amendment gives criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To show his counsel provided ineffective assistance in violation of the Sixth Amendment, Jacoby must show (1) his counsel's representation "fell below an objective standard of reasonableness," *id.* at 688, and (2) there is a reasonable probability the result of his criminal proceedings would have been different if not for his counsel's ineffectiveness, *id.* at 694. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "[T]he defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Boyle v. McKune*, 544 F.3d 1132, 1138 (10th Cir. 2008) (internal quotation marks omitted).

Jacoby asserts his trial counsel was constitutionally ineffective because he failed to have key witnesses testify, to interview some witnesses prior to trial, to introduce certain evidence, and to prepare Jacoby to testify in his own defense.

A. Failure to have key witnesses testify. Jacoby asserts trial counsel failed to present testimony from any Colorado real estate expert witness. He speculates such an expert would have testified that Jacoby properly performed his duties as a transaction broker under Colorado's real estate rules and requirements. He also claims counsel was ineffective in not calling Ed Aabak as a witness. He asserts Aabak would have testified

that Aabak owed Jacoby $603,391, and that evidence would have provided a defense to the government's evidence that Jacoby lied when he told FirstBank he had no financial assistance in purchasing the home. Jacoby did not provide an affidavit from any Colorado real estate expert or from Aabak to support his assertion of their purported testimony.

"[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney." *Id.* at 1139. Jacoby offers nothing but his own speculation as to what a Colorado real estate expert or Aabak would have testified to. But "as easily as one can speculate about favorable testimony, one can also speculate about unfavorable testimony," *id.* at 1138. Courts will not speculate that evidence counsel omitted would be positive when it is equally likely the evidence would have been harmful. *See United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986). The district court concluded Jacoby failed to rebut the presumption that his trial counsel's witnesses selections were tactical decisions, or to specifically explain how these witnesses would have changed the outcome of the trial. Reasonable jurists could not debate this conclusion.

B. Failure to interview witnesses. Jacoby asserts his trial counsel failed to interview the First Bank and Citibank witnesses prior to trial. He claims his attorney would have learned from such an interview that these lenders had his 2005 and 2006 tax returns and knew of his real estate assets, and that Jacoby could use the HELOC as he chose. He also faults counsel for not interviewing the mortgage broker for one of the new homes (1065 Ridge Oak), to ascertain whether the lender had information about the grant program. The district court concluded Jacoby did not demonstrate that any failure

to interview these or other witnesses would have changed the outcome of the trial or was unreasonable from counsel's perspective. *See Newmiller v. Raemish,* 877 F.3d 1178, 1197 (10th Cir. 2017) (citing *Strickland*'s holding that the reasonableness of counsel's investigation must be evaluated from counsel's perspective at the time the strategic decisions were made), *petition for cert. filed* (U.S. Mar. 19, 2018) (No. 17-8224). We are satisfied from our review of the evidence presented at trial that no reasonable jurist would debate this conclusion of the district court.

C. Failure to introduce evidence. Jacoby asserts his counsel was ineffective because he did not introduce evidence (1) of his 2005 and 2006 tax returns showing he had substantial income; (2) that he had tax deferred income of $1,058,978 in 2007; (3) that FirstBank and Citibank had his 2005 and 2006 tax returns and knew he owned four properties with Schulz; (4) that he was entitled to use the Citibank HELOC however he chose; (5) that Aabak owed Jacoby $603,391; (6) that he made a short-term loan to Macy after, not before, Macy was approved for one of the mortgage loans; (7) of appraisals on two properties; (8) that some sales contracts disclosed that Jacoby was not making any representations; (9) of cash and investor discounts given by DR Horton to Derek Zar and Macy; (10) letters from mortgage brokers stating they were aware some of the transactions were not arms-length.

The district court concluded that Jacoby had not demonstrated that his counsel's decisions regarding the presentation of evidence lacked any justification. The court's "task is not to determine in the first instance whether defense counsel was deficient; it is to determine whether there is any reasonable argument that counsel satisfied *Strickland*'s

deferential standard." *Newmiller*, 877 F.3d at 1203 (internal quotation marks omitted). The district court further concluded that even if Jacoby's counsel should have introduced any of this additional evidence, it was insufficient to overcome the overwhelming evidence of Jacoby's participation in the fraudulent schemes. Based on our review of the evidence, we conclude no reasonable jurist could debate the district court's denial of these claims.

D. Failure to prepare him to testify. Jacoby alleges his counsel was ineffective because he failed to prepare Jacoby to testify, or to advise him about testifying in his own defense. He asserts he could have testified as to his 2006 commission income, his 2005 and 2006 tax returns, and his real estate assets; that he did not borrow the down payment to purchase his home because Aabak owed him money; that he lent money to Macy after, not before, two loan applications; that the terms of the Citibank HELOC allowed him to use the loan however he chose; that he did not influence any home appraisals, correctly disclosed the grant program in the sales contracts, and properly performed his duties as a transaction broker; that one of the mortgage lenders knew about the grant program; and that Jacoby gave the buyers a document stating he was not involved in determining the grant amount or its terms and advising the buyers to seek legal advice.

It is well established that "[t]he decision whether to testify lies squarely with the defendant; it is not counsel's decision." *Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004). Jacoby made only passing references to this claim in his voluminous § 2255 motion, stating simply that his attorney failed to have him testify. Jacoby did not allege in his § 2255 motion that his counsel prevented him from testifying or was

otherwise ineffective in preparing or advising him of his right to testify. But even if Jacoby had presented any such evidence, his claim would fail on the prejudice prong because any failure to call him as a witness does not undermine confidence in the outcome of the trial. Based on the trial evidence, no reasonable jurist would conclude from Jacoby's description of his proposed testimony that there is a reasonable probability it would have altered the outcome of the trial.

After consideration of Jacoby's Combined Opening Brief and Application for a Certificate of Appealability and the record on appeal, we are persuaded that reasonable jurists would not debate the correctness of the district court's denial of relief under § 2255. For substantially the same reasons given by the district court, we deny Jacoby's request for a COA and dismiss this matter. Jacoby's motion to proceed in forma pauperis on appeal is granted.

Entered for the Court

Allison H. Eid
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Kathryn H. Vratil

Criminal Action No. 10-cr-00502-KHV-1
Civil Action No. 16-cv-00133-KHV

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
v.

MICHAEL JACOBY,
Defendant-Movant.

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255

This matter is before the Court on defendant's *Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody* (Doc. #813) filed January 19, 2016 and defendant's *Motion For Evidentiary Hearing* (Doc. #838) filed September 15, 2016. For reasons stated below, the Court overrules defendant's motions and denies a certificate of appealability as to the ruling on defendant's Section 2255 motion.

BACKGROUND

The Tenth Circuit Court of Appeals summarized the facts and trial as follows:

> Between January 2005 and September 2006, real estate agent Michael Jacoby devised and executed a mortgage fraud scheme involving the purchase of 18 residential properties in Colorado. Jacoby recruited willing sellers to sell homes at inflated prices, willing buyers to purchase the homes by obtaining mortgage loans based on falsified loan applications and willing investors to supply short-term loans to cover the buyers' down payments.
>
> Jacoby acted as realtor for each transaction, while [co-defendants] Derek Zar and his mother, Susanne Zar (collectively, "the Zars"), were buyers. Derek Zar purchased seven of the properties with fraudulent loan applications and participated in the sales of four other properties either by arranging for the sale of or selling three properties to Susanne Zar and one to another buyer. Susanne Zar purchased six of the properties with fraudulent loan applications and participated in the sales of four other properties by preparing false documents to support Derek Zar's purchases.

> For some transactions, Jacoby arranged for sellers to "donate" part of the sales proceeds to grant programs without disclosing to lenders that the "donation" would be funneled back to buyers to repay short-term loans from investors covering the buyers' down payments. In other transactions, Jacoby arranged for back-to-back sales involving the same property. In the first sale, an LLC – usually one formed by the individual who acted as the buyer for the second sale – would purchase a new construction home from the home builder for cash at a discounted sale price. The LLC would then sell the home to the LLC's founder, as an individual buyer, at an artificially inflated price. As part of the second sale, the buyer would obtain a mortgage loan with a fraudulent loan application. The buyer would then use some of the excess loan proceeds to repay investors who contributed cash for the first sale to the LLC. Lenders eventually foreclosed on and sold all 18 homes but experienced collective losses of nearly $3 million.
>
> Additionally, in 2007, Jacoby personally obtained two loans – one from First Bank to purchase a home and another from Citibank to refinance the same home. While securing the two loans, Jacoby made material misrepresentations and omissions by lying about his down payment source and income, failing to disclose that he did not initially purchase the home in an arm's length transaction, artificially inflating the home's sales price and supplying an artificially inflated appraisal for the refinancing loan.
>
> A federal grand jury indicted Jacoby, Derek Zar and Susanne Zar on charges of wire fraud and aiding and abetting in violation of 18 U.S.C. §§ 1343 and 2 and money laundering in violation of 18 U.S.C. § 1957. Additionally, in connection with his two personal loans in 2007, the grand jury indicted Jacoby on two counts of bank fraud in violation of 18 U.S.C. § 1344.
>
> Following a three-week joint trial, the jury convicted Jacoby of 11 counts of wire fraud, three counts of money laundering and two counts of bank fraud; Derek Zar of four counts of wire fraud and one count of money laundering and Susanne Zar of three counts of wire fraud and one count of money laundering.

Doc. #797 at 3-5; *United States v. Zar*, 790 F.3d 1036, 1040-41 (10th Cir. 2015).

The Court sentenced defendant to 108 months in prison and five years of supervised release. Doc. #652. On appeal, the Tenth Circuit affirmed. Doc. #797. The Supreme Court denied defendant's petition for a writ of certiorari. Doc. #812.

Thomas Richard Ward and Barrett Thomas Weisz represented defendant during pretrial proceedings through sentencing. Richard A. Hostetler represented defendant on appeal.

On January 19, 2016, defendant filed his *pro se* motion under 28 U.S.C. § 2255.

Doc. #813. Defendant raises four claims with numerous sub-claims: (1) Ward and Weisz provided ineffective assistance; (2) Hostetler provided ineffective assistance on appeal; (3) the government engaged in misconduct and malicious prosecution and (4) he is actually innocent and the errors cumulatively constitute a fundamental miscarriage of justice. Doc. #813-1 at 2-9.[1]

DISCUSSION

Relief under Section 2255 is an extraordinary remedy. *Bousley v. United States*, 523 U.S. 614, 621 (1998). Defendant cannot retry the issue of guilt or innocence through a Section 2255 petition. *See Robertson v. United States*, 144 F. Supp. 2d 58, 65 (D.R.I. 2001); *see also United States v. Frady*, 456 U.S. 152, 164 (1982) (once defendant waives or exhausts appeal, court may presume that he stands fairly and finally convicted, especially when he already had fair opportunity to present federal claims to federal forum).

The Court liberally construes defendant's pro se habeas application. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

I. Ineffective Assistance of Trial Counsel

To establish ineffective assistance, defendant must show that (1) the performance of counsel was deficient and (2) prejudice, or a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To meet the first element, *i.e.* counsel's deficient performance, defendant must establish that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In other words, defendant must prove that counsel's performance was "below an objective standard

[1] Along with his motion, defendant submitted a large box of exhibits. Doc. #814. On April 21, 2016, the government submitted its *Answer To Defendant Jacoby's 28 U.S.C. § 2255 Motion* Doc. #824). On June 8, 2016, defendant filed a *Reply To Respondent's Answer To Jacoby's § 2255 Motion* (Doc. #833) and attached an additional 484 pages of exhibits.

of reasonableness." *United States v. Walling*, 982 F.2d 447, 449 (10th Cir. 1992). The Supreme Court recognizes "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see United States v. Rantz*, 862 F.2d 808, 810 (10th Cir. 1988). The Court may determine the second element, prejudice, before analyzing counsel's performance. *United States v. Jones*, 852 F.2d 1275,1277 (10th Cir. 1988).

Defendant asserts that trial counsel provided ineffective assistance because they:

1(a) failed to object to a faulty indictment based on false statements and allegations, insufficient evidence and government and prosecutor misconduct;

1(b) failed to object to the indictment, which did not identify victims or loss amounts associated with properties listed in the indictment and included false allegations of defendant's involvement in co-defendants' alleged fraud;

1(c) failed to object to the stacking of charges for the same criminal act of wire fraud in Counts 12, 13 and 14 for properties that were also included in Counts 1-11 money laundering charges and failed to argue that defendant did not launder any money;

1(d) failed to properly argue that defendant's trial should be severed from co-defendant's Derek Zar and Susanne Zar's trial;

1(e) failed to file a reply to the prosecution's motion in limine concerning prejudicial, unsupported hearsay evidence at trial;

1(f) failed to file a reply to the prosecutor's motion of limiting defense strategy of blaming others for the fraud;

1(g) failed to prepare for trial, consult with defendant and fully develop a complete defense strategy;

1(h) failed to interview government and key witnesses;

1(i) failed to consult and hire the correct witnesses to testify on several key issues;

1(j) failed to develop a comprehensive witness strategy and have any witnesses testify on defendant's behalf;

1(k) failed to investigate government discovery and information from defendant;

1(l) failed to develop strategy for cross-examination of government witnesses;

1(m) failed to discover government witness and co-defendant Mike Macy was convicted of felony mortgage fraud, where government witness Diana Rosswog was his mortgage broker and government witness Mike Long was the appraiser;

1(n) failed to admit key evidence through government witness testimony;

1(o) made prejudicial statements against defendant;

1(p) failed to recognize and object to prejudicial and irrelevant statements the government, its witnesses and co-defendants' attorneys made at trial and sentencing;

1(q) failed to prepare legal arguments to rebut government objections or support their own objections;

1(r) failed to uphold key defense theories and prepare rebuttal to government attacks;

1(s) failed to recognize and file a motion regarding prosecutorial misconduct from witness tampering;

1(t) failed to offer the proper jury instructions, which included the victims and their loss amounts;

1(u) failed to move for a mistrial because the indictment and jury instructions did not include victim names and loss amounts, improperly stacked charges for Counts 12-14 that were already included in Counts 1-11 and charged money laundering when defendant did not launder money;

1(v) failed to ask for a mistrial when co-defendants' counsel questioned FBI Agent Beverly Hood in violation of a court order;

1(w) failed to object to errors in the Presentence Investigation Report (PSIR) including the lack of evidence of the actual victims, the number of victims, their loss amount for each property and that loans sold by victims/lenders listed in the HUD statements for the properties listed in the indictment did not incur a loss; and

1(x) failed to show the conviction and sentence were based on false statements and insufficient evidence and to show the Court erred in convicting and sentencing defendant for conduct that was not charged or proved beyond a reasonable doubt, violating defendant's right to a jury trial.

Defendant provided "statement of fact summaries" which fail to provide any factual support for many of the sub-claims. Such vague and conclusory allegations do not demonstrate ineffective assistance.

A. Sub-claims 1(a), 1(b), 1(t) and 1(u)

Sub-claims 1(a), 1(b), 1(t) and 1(u) contain similar allegations or overlap in some way. Sub-claims 1(a) and 1(b) assert that counsel provided ineffective assistance because he failed to move to dismiss the indictment.[2] In sub-claim 1(t), defendant asserts that he received ineffective assistance because counsel failed to offer jury instructions that included the victims and their loss amounts. Sub-claim 1(u) alleges that counsel were ineffective because they failed to ask for a mistrial because the indictment and jury instructions did not include victim names and loss amounts, improperly stacked charges for Counts 12 through 14 that were already included in Counts 1 through 11 and charged money laundering when defendant did not launder any money.

First, when defendant alleges that the grand jury based the indictment on "false statements," he appears to assert defects in the grand jury proceedings. Absent "flagrant or egregious misconduct" which significantly infringes on the grand jury's ability to exercise independent judgment, courts consider technical errors potentially affecting only the grand jury's finding of probable cause harmless after a petit jury has returned a guilty verdict. *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1245 (10th Cir. 1996); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988) (exception where grand jury proceedings fundamentally unfair); *United States v. Mechanik*, 475 U.S. 66, 70 (1986) (guilty verdict at trial means not only

[2] In sub-claim 1(a), defendant argues that the indictment was defective because the grand jury based it on false statements, insufficient evidence and government misconduct. Sub-claim 1(b) asserts that counsel should have asked for a mistrial because the indictment did not include victim names or loss amounts.

probable cause to believe defendant committed crime, but also that he is guilty beyond reasonable doubt).[3]

Defendant alleges that witnesses made numerous false and unsupported statements in the grand jury proceedings. Doc. #813-1 at 13-18. The government has responded to each allegation. Doc. #824 at 27-29, 47-49. The Court has carefully reviewed both and substantially agrees with the government's responses. In addition, because the jury found defendant guilty beyond a reasonable doubt on all counts, defendant cannot show that counsel's failure to object based on a lack of probable cause was deficient or prejudicial. *See Mechanik*, 475 U.S. at 70.

As to defendant's claims that counsel provided ineffective assistance because they did not object to the omission of victim names and loss amounts in the indictment and jury instructions, defendant has not shown deficient performance or prejudice. On appeal, the Tenth Circuit held that the loss amount is not an element of the offense that must be charged in the indictment and submitted to a jury. The Tenth Circuit stated as follows:

> The defendants' reliance on *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] and *Alleyne* [*v. United States*, 133 S. Ct. 2151 (2013)] is misplaced as none of the defendants were subject to mandatory minimum sentences or sentenced beyond the statutory maximums for their convictions. *See Alleyne*, 133 S. Ct. at 2155, 2160 (holding any fact increasing mandatory minimum sentence is element that must be submitted to jury); *Apprendi*, 530 U.S. at 490 (holding any fact increasing sentence beyond statutory maximum must be submitted to jury). *Cf.* 18 U.S.C. §§ 2957, 1343, 1344 (providing statutory maximum sentences for money laundering, wire fraud and bank fraud of imprisonment not more than 10 years, 20 years, and 30 years, respectively).
>
> Instead, the judicial fact finding the defendants complain of occurred in the context of determining their applicable sentencing ranges under the advisory sentencing guidelines. The *Apprendi/Alleyne* rule does not apply in this context.

[3] In *Mechanik*, the Supreme Court found a violation of Fed. R. Crim. P. 6(d) when two government agents testified in tandem before the grand jury. 475 U.S. 66, 73. Even so, the Supreme Court held that the violation did not justify relief *after* the jury had rendered its verdict because the verdict rendered harmless any conceivable error in the charging decision that might have flowed from that violation. 475 U.S. at 73.

> *See United States v. Ray*, 704 F.3d 1307, 1314 (10th Cir. 2013) (noting Supreme Court has definitely rejected *Apprendi*'s application to present advisory-Guidelines regime), *cert. denied*, 133 S. Ct. 2812 (2013); *see also United States v. Cassius*, 777 F.3d 1093, 1096-99 (10th Cir. 2015) (explaining that *Alleyne* applies only to judicial findings that alter the applicable *statutory* sentencing range, as opposed to findings that impact the applicable advisory Guidelines range).

Doc. #797 at 32-33. Here, the statutory sentencing ranges for the offenses did not impact defendant's Guidelines range. Accordingly, for sentencing purposes, neither *Apprendi* nor *Alleyne* applied and the Court properly relied on the number of victims and loss amounts. Defendant has not shown that counsel's failure to object to the omission of victim names and loss amounts in the indictment or jury instructions was deficient or prejudicial.

Finally, defendant alleges that he received ineffective assistance because counsel failed to object to a defective indictment, which double-charged ("stacked") charges for the same criminal acts of wire fraud (Counts 12-14) for properties that were also included in money laundering charges (Counts 1-11) and failed to argue that defendant did not launder any money. The government argues that it did not double-charge because Congress intended separate punishments for money laundering and underlying predicate crimes. Doc. #824 at 29 (citing *United States v. Lovett*, 964 F.2d 1029, 1041-42 (10th Cir. 1992)). Further, the government argues that it based the fraud and money laundering charges on separate conduct. Specifically, the government argues as follows:

> Count 1 was based on the fraud leading to a $220,117 wire transfer on September 28, 2005, while the laundering (Count 12) occurred on October 3, 2005, when Jacoby deposited the $45,450 check received from Mike Macy to pay off short-term lenders.
>
> Count 9 was based on the fraud leading to the $289,109 wire transfer on June 19, 2006, while the laundering (Count 13) occurred the next day when Jacoby transferred $192,000 from an account held by his Champoux Holdings, LLC to another account he held.

> Count 10 was based on the fraud leading to the $361,483 wire transfer on August 22, 2006, while the laundering (Count 14) occurred the next day when Jacoby transferred $327,718 from an account held by his Champoux Holdings, LLC to another account he held.

Doc. #824 at 29-30 (citations omitted).

After review of the *Superseding Indictment* (Doc. #167) and the *Instructions To The Jury* (Doc. #520-2), the Court finds that the wire fraud and money laundering charges were based on separate conduct. Thus, defendant fails to show that the government stacked the wire fraud and money laundering charges or that counsel's failure to object on this ground was deficient or prejudicial.[4] *See, e.g., United States v. Huff*, 641 F.3d 1228, 1231–33 (10th Cir. 2011) (wire transaction that served as basis for wire fraud charge — fax of fraudulent mortgage application — was separate and apart from monetary transactions supporting money-laundering charges — deposit of checks). Thus, the Court overrules sub-claims 1(a), 1(b), 1(t) and 1(u).

B. Sub-claims 1(c)

Defendant argues that counsel failed to "file the proper motion" to object to the "stacked charges" (Counts 12-14) or argue that defendant did not launder any money. Defendant fails to specify what the "proper" motion would have included. Further, as discussed above in sub-claim 1(u), the Court finds that the government based the wire fraud and the money laundering charges on separate conduct. As a result, defendant fails to demonstrate that counsel's failure to object to the stacked charges was deficient or prejudicial. *See, e.g., Huff*, 641 F.3d at 1231-33. Defendant also has not shown that counsel's failure to argue that defendant did not launder money was deficient or prejudicial. Therefore, the Court overrules sub-claim 1(c).

---

[4] In light of the overwhelming evidence of fraud by defendant, he also has not shown that counsel's failure to argue that he did not launder money was deficient or prejudicial.

C. Sub-claim 1(d)

Defendant argues that counsel failed to "file the proper motion" to sever his trial from the trial of his co-defendants. In 2008, agents interviewed co-defendants Derek Zar, Susanne Zar and Michael Macy. During those interviews, the three individuals admitted various elements of the scheme to defraud in question in this case, and each claimed that Jacoby had directed them to take many of these actions. *See Motion For Relief From Prejudicial Joinder Of Defendants* (Doc. #99) at 2.

The federal system maintains a preference for joint trials of defendants who are indicted together. *Zafiro v. United States*, 506 U.S. 534, 537 (1993). Joint trials promote judicial economy and "serve the interest of justice by avoiding the scandal and inequity of inconsistent trials." *Richardson v. Marsh*, 481 U.S. 200, 209 (1987). Rules 8(b) and 14, Fed. R. Crim. P., are designed "to promote economy and efficiency and to avoid a multiplicity of trials, [so long as] these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." *Bruton v. United States*, 391 U.S. 123, 131, n.6 (1968). Severance is a matter of discretion, not of right, and defendant bears a heavy burden of demonstrating prejudice to his case. *United States v. Hollis*, 971 F.2d 1441, 1456 (10th Cir. 1993).

In *Bruton*, the Supreme Court held that a defendant's Sixth Amendment rights are violated if a non-testifying co-defendant makes an extrajudicial confession that implicates defendant and the government introduces the confession at a joint trial, even if the court instructs the jury to consider the evidence only against the co-defendant. A *Bruton* violation may be avoided, however, where the relevant statement is redacted to remove references to defendant and the jury is given a proper limiting instruction. *Richardson v. Marsh*, 481 U.S. 200, 211

(1987) (Confrontation Clause not violated by admission of non-testifying co-defendant's confession with proper limiting instruction and redaction).

Counsel filed a six-page motion to sever. Doc. #99. In that motion, counsel cited the relevant legal standard and set forth the statements at issue. *Id.* Counsel's motion was within the wide range of reasonable professional assistance. Further, after the government filed a redacted version of the co-defendants' statements, counsel argued that even the redacted statements prejudiced defendant. *Defendant Michael Jacoby's Reply To Government's Supplemental Response To Defendant's Motion For Relief From Prejudicial Joinder Of Defendants* (Doc. #269) filed November 14, 2011. Defendant fails to show how his attorneys could have more effectively argued the issue or that if they had done so, the Court would have granted the motion to sever. Defendant therefore has not shown that counsel's performance was deficient or prejudicial. The Court overrules sub-claim 1(d).

D. Sub-claims 1(e) and 1(f)

Defendant argues that counsel provided ineffective assistance because they did not respond to the prosecution's motion in limine concerning unsupported hearsay testimony from their witnesses (sub-claim 1(e)) or the motion limiting the defense strategy of blaming others for the fraud (sub-claim 1(f)). In both arguments, defendant apparently refers to the *Government's Motion In Limine* (Doc. #459). Defendant never explains what counsel should have argued or how they should have properly responded to the prosecution motion. Further, counsel vigorously advocated for defendant and provided argument against the prosecution's motion in limine. *See* Doc. #470. As such, defendant has not shown that counsel's performance was deficient or prejudicial. The Court overrules sub-claims 1(e) and 1(f).

E. Sub-claims 1(g), 1(h), 1(j), 1(k), 1(l), 1(n), 1(o), 1(p), 1(q) and 1(r)

Defendant argues that his attorneys provided ineffective assistance because they failed to prepare for trial; failed to consult with defendant and fully develop a defense strategy; failed to interview government and key witnesses; failed to develop a comprehensive witness strategy and have witnesses testify on defendant's behalf; failed to investigate government discovery and information received from defendant; failed to develop a defense strategy for cross-examination of government witnesses; failed to admit several key pieces of evidence through government witness testimony; made prejudicial statements against defendant; failed to object to prejudicial and irrelevant statements by the government, its witnesses and co-defendants' attorneys during opening and closing arguments, at trial and sentencing; failed to prepare legal arguments to rebut government objections or support their own objections; and failed to uphold key defense theories and prepare rebuttals to government attacks.

Defendant claims that he sent his attorneys "hundreds of emails and pieces of evidence" before and during trial and that counsel failed to review this information. Doc. #813-1 at 21-22. Defendant fails to explain the content of his "hundreds of emails." Defendant argues that certain documents should have been admitted, that counsel should have shown the jury that several witnesses made "self-serving" statements and cooperated with the government to avoid prosecution and that counsel "failed to show the jury that not one fraudulent document, email or fax produced by the government had any reference or indication [defendant] was involved with or had any knowledge of the fraud committed with any of the properties listed in the Indictment." Doc. #813-1 at 20-31.

The Court must not second-guess counsel's assistance with the benefit of hindsight. Defendant's conviction and lengthy prison term do not mean that counsel performed deficiently.

See Strickland, 466 U.S. at 689. Informed strategic or tactical decisions on the part of counsel are presumed correct, unless they were completely unreasonable, not merely wrong. *Anderson v. Attorney Gen. of Kan.*, 425 F.3d 853, 859 (10th Cir. 2005). Although defendant may have wanted his attorneys to proceed differently, he fails to demonstrate that their decisions regarding strategy and presentation lacked any justification. *See Bullock v. Carver*, 297 F.3d 1036, 1047 (10th Cir. 2002) (defendant bears burden of showing that counsel's action or inaction not based on valid strategic choice). Defendant has therefore failed to overcome the strong presumption that counsel's performance was within the wide range of reasonable professional assistance.

Even if defendant could demonstrate that counsel's performance was deficient, he fails to demonstrate prejudice, *i.e.* a reasonable probability that but for the alleged errors, the result of trial would have been different. *Strickland*, 466 U.S. at 694. At trial, the government presented overwhelming evidence regarding defendant's participation in the fraud. Even if counsel had performed as defendant claims they should have, he fails to demonstrate that the result of the proceedings would have been different. Therefore, the Court overrules sub-claims 1(g), 1(h), 1(j), 1(k), 1(l), 1(n), 1(o), 1(p), 1(q) and 1(r).

F. Sub-claim 1(i)

Defendant argues that counsel provided ineffective assistance because they failed to consult and hire the correct expert witnesses to testify on key issues. In particular, he asserts that counsel hired a real estate expert from San Diego, California who had no knowledge of Colorado real estate laws or mortgages processed in Colorado. Defendant states that failure to call licensed Colorado experts (on the subjects of real estate, mortgage brokers, appraisers, title closing agents, underwriters, short-term lending, simultaneous closes and flipping houses) resulted in prejudice. Defendant states that licensed Colorado experts could have testified about

their roles, responsibilities, communication processes, the requirements of their positions and other details of the real estate and lending process.

Defendant fails to identify what information Colorado licensed experts would have provided that would have been different than the real estate, appraisal and lending professionals who did testify at trial.[5] Because defendant has not specifically explained how the proposed experts would have changed the outcome of the trial, he fails to demonstrate prejudice from failure to call them as witnesses. The Court overrules sub-claim 1(i).

G. Sub-claim 1(m)

Defendant argues that counsel provided ineffective assistance because they failed to discover that Macy had a prior felony conviction for mortgage fraud in a case involving government witnesses Diana Rosswog and Mike Long as his mortgage broker and appraiser, respectively. Defendant provides no details as to the case he references. From the record, it appears that except for minor traffic violations, Macy had had no prior criminal convictions. *Presentence Investigation Report [Of Michael Macy]* (Doc. #586) at 9. If defendant is referring

[5] For example, defendant argues that an underwriter expert could have testified about the communication process and how "the lender's underwriter has no contact with the realtor (only the mortgage broker and title closing agent)." This information was presented at trial. Stephen Newcomb, who previously worked as an underwriter at Argent Mortgage, testified about how underwriting normally works. He testified that the underwriter receives the loan application and other documents from the mortgage broker. Doc. #697 at 151-53. He testified that he has "never seen it" where a real estate broker, rather than a mortgage broker, forwards the forms. *Id.* at 153.

Similarly, defendant argues that his attorneys should have moved to introduce Exhibit 1A (which identifies some of the roles and responsibilities of a realtor, appraiser, mortgage broker, title closing agent, underwriter and grant company, and identifies the source of the fraudulent documents associated with the properties listed in the indictment) and Exhibit 93A (which identifies the communication process between the buyer, seller, grant company, mortgage broker, appraiser, title closing agent and the lender's underwriter). *See* Doc. #813-1 at 19-20. Defendant fails to explain who prepared these exhibits, who could have testified about them, what additional information they included or how they would have changed the outcome of the trial.

to this case, where Macy pled guilty to one count of wire fraud, Macy's plea agreement was discussed on both direct and cross-examination. Doc. #702 at 3-44. Counsel questioned Macy in detail about his cooperation with the government and how the government wanted information about defendant. *Id.* at 49-52. Thus, defendant fails to demonstrate that counsel provided ineffective assistance in not discussing Macy's alleged conviction for mortgage fraud. The Court overrules sub-claim 1(m).

H. Sub-claim 1(s)

Defendant argues that his attorneys failed to recognize and file a motion concerning prosecutorial misconduct, specifically witness tampering. Defendant asserts that his attorneys' investigator, Rayelle Nobel, made several attempts to interview Mike Farrelly before trial. Just before trial, she went to his home and interviewed him. According to Nobel's unsigned report, Farrelly told her that the prosecutor had told him "not to speak with the defense." Doc. #813-1 at 20. Defendant argues that his attorneys provided ineffective assistance of counsel because they failed to have Noble testify to this fact, failed to properly cross-examine Farrelly about it and failed to recognize and file a motion based on this prosecutorial misconduct.

The government concedes that if the prosecutor had told a witness not to speak with the defense, it would be a serious breach of defendant's rights. Doc. #824 at 45. The government disputes whether prosecutors made such a statement, but argues that the Court need not resolve this factual issue because defendant cannot demonstrate prejudice. Nobel's report indicates that Farrelly agreed to an extensive interview with defendant's investigator. Although a prosecutor should not interfere with a witness speaking with a criminal defense team, it is clear that on this record, defendant cannot demonstrate prejudice. The Court overrules sub-claim 1(s).

I. Sub-claim 1(v)

Defendant argues that counsel provided ineffective assistance because they failed to ask for a mistrial when co-defendants' counsel questioned Agent Beverly Hood in violation of a prior court order. As explained above, before trial, the Court overruled defendant's motion to sever because the government's proposed redactions of co-defendants' statements prevented any direct inference that the statements referred to defendant. On August 13, 2012, immediately before cross-examination of Agent Hood, defendant's attorney requested a sidebar to discuss the apparent plan of co-defendants' attorneys to elicit statements from Agent Hood regarding what the Zars had said about defendant in pretrial interviews. Doc. #696 at 145-46. A lengthy sidebar ensued. Co-defendants' attorneys argued that to clarify certain issues and satisfy the rule of completeness, they wanted to cross-examine Agent Hood about statements by the Zars regarding Jacoby's involvement. *Id.* at 146-58. The Court allowed the co-defendants' attorneys to ask basic questions to clarify certain issues without bringing up defendant.

According to defendant, the first violation of the Court's order occurred when Derek Zar's attorney asked Agent Hood if Derek Zar previously had told her that he met Jacoby when he was 21. Doc. #696 at 164. Agent Hood replied, "I don't believe I'm supposed to answer that question." *Id.* Then, the following exchange occurred:

> [Derek Zar's attorney]: Your Honor, how is this implicating Mr. Jacoby –
>
> [Prosecutor]: Your Honor, I'm going –
>
> THE COURT: Counsel. Counsel. Will you approach?
> (Side bar on the record.) ***
>
> THE COURT: I think she misunderstood your question. We're not saying she can't answer. I think she misunderstands what your question is.
>
> [Defendant's attorney]: Could I jump in? I don't –

[Derek Zar's attorney]: Judge, this is – I apologize. This is a very important issue and I –

[Defendant's attorney]: I don't have any objection to the question that [Derek Zar's attorney] asked. My concern is, is that the response was, "I don't think I'm supposed to say anything," which I understand what the agent's trying to do. She's been told not to mention Mike Jacoby, and I get that. My biggest concern is that [Derek Zar's attorney] then followed up with, "This doesn't implicate Mr. Jacoby." And by saying that in front of the jury –

THE COURT: Right.

[Defendant's attorney]: – that I have a strong objection to.

[Derek Zar's attorney]: I didn't realize I said that.

THE COURT: You did.

[Defendant's attorney]: I don't want the jury admonished or instructed to disregard that. It's just going to highlight it.

THE COURT: So what do you think we should do?

[Derek Zar's attorney]: I guess tell the jury to ignore that.

[Defendant's attorney]: I don't want the instruction to ignore the statement because it simply highlights it. I'm duty bound to ask for a mistrial at this point based upon that statement in front of the jury. And that's the end of my position on it.

[Prosecutor]: Your Honor, it's been a while, but I believe the standard for mistrial is manifest prejudice. And I don't think there's anything about that. The Court has made instructions to the jury that the statements by the lawyers are not evidence, they are not to be considered in any way. So I understand [defendant's attorney] doesn't want that repeated, but that has been said earlier in response to what [defendant's other attorney] said, and – when I asked. So I think the jury's on notice of that.

I would ask that defense counsel refrain from any future comments like that, but I don't think that has risen to the level that one is a mistrial. I think that this witness just misunderstood the question. And I think if she knew she could say what age Derek Zar was when he met Mr. Jacoby. I think she's heard "Mr. Jacoby" and just froze. * * *

> THE COURT: All right. I'm going to tell the jury to disregard this whole little exchange, and that the witness can answer. So the question that you guys got all excited about is something that is a legal issue and that they should just ignore it and move forward. * * *
>
> THE COURT: [Defendant's attorney] is looking skeptical about that. * * *
>
> [Defendant's attorney]: If it's phrased just as ignore this whole side bar, and the question to the witness, but [Derek Zar's attorney's] comments are not highlighted in particular, then I think that's fine.

Doc. #696 at 164-69.

The second incident happened shortly after the first incident, when Derek Zar's attorney cross-examined Agent Hood concerning how Derek Zar stated that certain invoices were false and how he was required to deposit checks that matched invoices at the bank. The following exchange occurred:

> Q: [Derek Zar's attorney] And Mr. Zar said he never – he did not go to the bank alone to do this, to make these deposits.
>
> A: I think there may be something I'm not supposed to discuss.

Doc. #696 at 180-81. The Court recessed before Derek Zar's attorney could rephrase the question. *Id.* at 181-82. After excusing the jury, the Court had the following discussion with Agent Hood and the attorneys:

> THE COURT: I think we need to talk for a second before we leave. Every time you say, "I'm not allowed to talk about that," it creates a problem worse than if you talked about it. So you need to consult with your attorney and figure out a way — her question was pretty straightforward, and I think you could have answered it yes or no, without getting into that.
>
> But I don't know if there's anything else, counsel . . . want to address at this point, but that really creates a bad impression in front of the jury when you say that. And I don't want to have to get in and explain to them all the nuances of constitutional law [under *Bruton*] that . . . I would have to do for them to understand where you're coming from.

Id. at 182-83.

The third incident occurred the next day, on August 14, 2012, when Susanne Zar's attorney was cross-examining Agent Hood. At that time, the following exchange occurred:

> Q: [Susanne Zar's attorney] [Y]ou previously had known that Derek Zar had worked closely with, and when he purchased this real estate, with Mike Jacoby and Mr. Ed Schultz in making these real estate deals; is that correct?
>
> A: I'm not sure that I knew that at that point.
>
> Q: Okay. But that was something you learned later; is that correct?
>
> A: At some point I did learn that.
>
> Q: And you also previously knew that Ed Schultz was the manager of Champoux; is that correct?
>
> A: Yes. * * *
>
> Q: And that was a – and you knew previously that that was a company that was owned by Mr. Jacoby; is that correct?
>
> A: Yes.
>
> Q: Okay. And Mr. Zar was able to confirm that information; is that correct?
>
> A: Yes.
>
> [Discussion at side bar]: * * *
>
> [Defendant's attorney]: Judge, I actually have one other quick thing. If the Court could ask – remind [Susanne Zar's attorney], no mention of Mr. Jacoby or statements Mr. Zar made to Agent Hood about Mr. Jacoby. I didn't object when he asked question of – it was – Champoux is Mr. Jacoby's company. He should have stopped there. [Susanne Zar's attorney] went on to say, "And Mr. Zar confirmed that for you in the interview." In effect, bringing out Mr. Zar's statement about Mr. Jacoby, who – it was quick, and so I didn't object to it because I didn't want to highlight it, but I would like to get through this cross-examination without that constitutional issue with Mr. Jacoby becoming an issue.
>
> [Susanne Zar's attorney]: And if I said that, it was inartful of me. I should have said that – I should have just not brought – I understand. I won't do it again. I'm sorry. I apologize to the Court for that.

Doc. #697 at 63, 75-76.

Defendant fails to demonstrate that counsel provided ineffective assistance in failing to move for a mistrial after the third incident. Counsel had already moved for a mistrial following the first incident. The other incidents were not materially different and thus did not justify a mistrial. Defendant fails to carry his heavy burden of demonstrating that his counsel's inaction was unreasonable under prevailing professional norms or prejudicial to his defense. Therefore, the Court overrules sub-claim 1(v).

J. Sub-claim 1(w)

Defendant argues that counsel provided ineffective assistance because they failed to object to errors in the PSIR including lack of evidence of the actual victims, the number of victims, the loss amount for each property or the fact that the alleged victims/lenders listed in the HUD statements for properties listed in the indictment did not incur a loss.

The Tenth Circuit provided the following summary regarding defendant's PSIR and calculation of the advisory Guidelines range:

> In calculating Jacoby's advisory Guidelines range, the presentencing report ("PSR") grouped Jacoby's wire fraud, money laundering, and bank fraud convictions, resulting in a base offense level of 7. *See* U.S.S.G. § 3D1.2(c), (d); § 3D1.3(b). The PSR adopted the government's loss calculation of $3,160,267 and assigned an 18-level increase based on the amount of the loss. *See* U.S.S.G. § 2B1.1(b)(1)(J) (providing 18-level increase if loss is more than $2,400,000 but less than $7,000,000). Jacoby also received a two-level increase based on the number of victims. *See* U.S.S.G. § 2B1.1(b)(2)(A) (providing two-level increase for offenses involving 10 or more but less than 50 victims). Finally, for his role as an "organizer or leader" of the fraudulent scheme, Jacoby received a four-level increase under U.S.S.G. § 3B1.1(a). Jacoby's total offense level of 31 and his criminal history of I resulted in an advisory Guidelines range of 108-135 months' imprisonment for each of his 16 convictions.
>
> The district court sentenced Jacoby to a controlling term of 108 months' imprisonment followed by a five-year term of supervised release and ordered restitution of $2,926,467.

Doc. #797 at 30.

Defense counsel objected to the PSIR. Doc. #575; Doc. #590. Counsel argued that the correct methodology for calculating loss is by "summing the total loans existing at the time of foreclosure and then subtracting the amount the Bank resold the property for at a later time." Doc. #575 at 1. Counsel attached a three-page spreadsheet detailing the loss calculations and 66 pages of supporting documents. Doc. #575-1 at 1-71.

In calculating loss under USSG § 2B1.1(b), the Court must use the greater of the actual or intended loss. *United States v. Washington*, 634 F.3d 1180, 1184 (10th Cir. 2011). In a mortgage fraud scheme, the loss equals the unpaid portion of the loan as offset by the value of the collateral. *Id.* at 1185. That means "[w]here a lender has foreclosed and sold the collateral, the net loss should be determined by subtracting the sale price from the outstanding balance on the loan." *Id.* at 1184. Defense counsel advocated for the *Washington* loss approach, which the Court adopted. On direct appeal by the Zars, the Tenth Circuit approved the *Washington* loss approach. *See* Doc. #797 at 33 (rejecting claim that the Court did not use reasonable method to calculate loss under Guidelines and for Mandatory Victim Restitution Act). Defendant fails to demonstrate that counsel had any meritorious objection to the loss calculation in the PSIR. Accordingly, he cannot show deficient performance or prejudice. The Court overrules sub-claim 1(w).

K. Sub-claim 1(x)

Defendant raises a catch-all argument that counsel failed to show that his conviction and sentence were based on false statements and insufficient evidence and failed to show that the Court erred in convicting and sentencing defendant based on conduct that was not proved, admitted, charged or shown beyond a reasonable doubt, resulting in a violation of his jury rights. At trial, however, the government presented overwhelming evidence of defendant's guilt. He

therefore fails to meet his "heavy burden" to demonstrate that these allegations amounted to ineffective assistance. Sub-claim 1(x) is overruled.

II. Ineffective Assistance of Appellate Counsel

Courts also apply *Strickland* to determine the effectiveness of appellate counsel. *See, e.g.*, *United States v. Dixon*, 1 F.3d 1080, 1083 (10th Cir. 1993), *abrogated on other grounds by Florida v. White*, 526 U.S. 559 (1999); *United States v. Walling*, 982 F.2d 447, 449 (10th Cir. 1992). Defendant must show that appellate counsel's performance was deficient and resulted in prejudice. *Strickland*, 466 U.S. at 687. When defendant alleges that appellate counsel rendered ineffective assistance by failing to raise an issue, the Court examines the merits of the omitted issues. *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995). The Sixth Amendment does not require an attorney raise every nonfrivolous issue. *Id.* at 394; *see also United States v. Challoner*, 583 F.3d 745, 749 (10th Cir. 2009) (winnowing out weak arguments and focusing on those more likely to prevail, far from evidence of incompetence, is hallmark of effective appellate advocacy); *Fox v. Ward*, 200 F.3d 1286, 1295 (10th Cir. 2000) (counsel need not raise every nonfrivolous claim, but rather may select claims to maximize likelihood of success). Counsel's performance is only ineffective when the issue that is omitted is a "dead bang" winner or an issue that was obvious from the trial record and would have resulted in a reversal on appeal. *Cook*, 45 F.3d at 395.

Defendant asserts that Hostetler provided ineffective assistance because he:

2(a) did not conduct a complete review of the trial record;

2(b) did not object to the indictment and jury instructions because they did not identify the victims;

> 2(c) did not object to the loss amount, how it was calculated, the lack of victim identification, the incorrect victim total and victims listed in the PSIR and the judgment or the sufficiency of the evidence;
>
> 2(d) did not appeal the Court's ruling on severance and failed to demonstrate that trial counsel provided ineffective assistance in failing to sever defendant's trial;
>
> 2(e) did not argue that defendant's conviction was based on insufficient evidence;
>
> 2(f) did not argue that the indictment improperly stacked money laundering charges (Counts 12-14) for the same properties that were included in wire fraud charges (Counts 1-11) and did not argue that defendant did not launder money; and
>
> 2(g) argued, without defendant's consent, that trial counsel provided ineffective assistance.

On direct appeal, counsel argued that the "[t]he trial court reversibly erred when, at sentencing, the court increased the offense level by 18-levels based on the court's determination of the amount of loss. The amount of loss was not charged in the indictment, submitted to the jury and found by the jury to be proven beyond a reasonable doubt in violation of the Fifth and Sixth Amendment and the reasoning in *Apprendi* and *Alleyne*." *See United States v. Zar*, No. 13-1119, 790 F.3d 1036 (10th Cir. 2015), Doc. #01019241221 (Opening Brief, filed April 29, 2014). In addition, counsel joined issues raised on appeal by co-defendants, including: (1) Derek Zar's claim that a stipulation effectively instructed the jury to convict; (2) Susanne Zar's claim that jury instruction 17 violated defendants' Fifth and Sixth Amendment rights to a jury determination of guilt as to every element of the wire fraud offenses and (3) Susanne Zar's claim that instruction 17 amounted to a constructive amendment of the indictment in violation of the Fifth and Sixth Amendments. *See id.*, Doc #01019275401 (Jacoby's Supplemental Opening Brief, filed July 8, 2014).

A. Sub-claim 2(a)

Defendant argues that Hostetler provided ineffective assistance because he failed to review the trial record. Defendant does not support this conclusory allegation, and counsel's detailed appellate brief belies his assertion. Defendant has not shown that counsel's review of the record, or lack thereof, was deficient or prejudicial. The Court overrules sub-claim 2(a).

B. Sub-claim 2(b)

Defendant argues that Hostetler provided ineffective assistance because he did not object to the fact that the indictment and jury instructions failed to identify the victims. As discussed above, nothing required the indictment or jury instructions to disclose the victims. The Court overrules sub-claim 2(b).

C. Sub-claim 2(c)

Defendant argues that Hostetler provided ineffective assistance because he did not object to the loss amount, how it was calculated, the lack of victim identification, the incorrect victim total, the victims listed in the PSIR and the judgment or the sufficiency of the evidence. As explained above, for sentencing purposes, the Court properly calculated the number of victims and loss amounts. Defendant has not shown that an appeal on these issues had merit. Thus, the Court overrules sub-claim 2(c).

D. Sub-claim 2(d)

Defendant next argues that Hostetler provided ineffective assistance because he (1) failed to appeal the denial of the motion to sever and (2) failed to demonstrate that trial counsel did not properly argue for severance of defendant's trial. As explained above, severance is a matter of discretion. *Hollis*, 971 F.2d at 1456 (10th Cir. 1993). To establish an abuse of discretion on appeal, defendant must show that actual prejudice resulted from the denial of his motion to sever.

In light of the deferential standard of review and the government redactions in the statements, an appellate claim that the Court erred by failing to sever defendant's trial would not have been a "dead bang winner." *Cook*, 45 F.3d at 395. Likewise, an appellate claim that trial counsel provided ineffective assistance in arguing severance, if the Tenth Circuit had addressed it at all on direct appeal, would not have been a "dead bang winner." *Id.* Accordingly, the Court overrules sub-claim 2(d).

E. Sub-claim 2(e)

Defendant argues that Hostetler provided ineffective assistance because he failed to argue that defendant's conviction was based on insufficient evidence. The government presented overwhelming evidence of defendant's fraud; thus, counsel's failure to challenge the sufficiency of the evidence was not deficient or prejudicial. The Court therefore overrules sub-claim 2(e).

F. Sub-claim 2(f)

Defendant argues that Hostetler provided ineffective assistance because he did not argue that the indictment improperly stacked money laundering charges (Counts 12-14) for the same properties that were included in wire fraud charges (Counts 1-11), and did not argue that defendant did not launder money. As noted above, the government based the fraud and money laundering charges on separate conduct. Thus, defendant has not shown that counsel provided ineffective assistance in failing to argue this issue. The Court overrules sub-claim 2(f).

G. Sub-claim 2(g)

Finally, defendant argues that Hostetler provided ineffective assistance because without defendant's consent, he argued that trial counsel provided ineffective assistance. The Tenth Circuit declined to address the claim on direct appeal. Doc. #797 at 29. Defendant has had an

opportunity to raise ineffective assistance claims in this collateral proceeding. Defendant therefore fails to show prejudice. The Court overrules sub-claim 2(g).

III. Fifth Amendment Due Process Claim (Claim 3)

Defendant argues that the government violated his Fifth Amendment due process rights through prosecutorial misconduct and malicious prosecution.[6] Defendant alleges that prosecutors engaged in improper conduct because they:

a. prepared and presented purposely misleading, vague or materially false evidence to the grand jury to induce an indictment;

b. influenced the grand jury to indict defendant based on false and unsupported theories, allegations and statements;

c. interjected and influenced answers grand jurors questions to government witnesses;

d. tried to influence a key government witness not to speak to defendant's attorneys before trial;

e. withheld evidence that identified the government witnesses who were lying and exculpatory information about defendant;

f. blocked defendant from severing the trial from co-defendants;

g. along with co-defendants' attorneys, promoted theories and allegations and made materially false statements at trial;

h. induced government witnesses through their testimony to support the government's allegations and theories against defendant even though prosecutors knew that witness testimony was unsupported by evidence.

---

[6] Defendant's claim appears to be barred because he did not raise these issues on direct appeal. Even so, the government did not raise this potential procedural bar. A court may raise procedural bars *sua sponte* but must afford the movant an opportunity to respond to the defense. *See United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994); *see also United States v. Barajas-Diaz*, 313 F.3d 1242, 1247 (10th Cir. 2002) (court may raise procedural bar sua sponte where transcendent interests served by that defense warrant it). Because defendant's claim obviously lacks merit, in the interests of judicial efficiency, the Court does not consider this apparent procedural bar.

i. failed to disclose to the jury the victims and loss amounts and then admitted several pieces of prejudicial evidence against defendant that had no relation to the victims listed in the PSIR or judgment;

j. presented falsified evidence or allowed false evidence to be presented at trial;

k. illegally influenced what the jury saw and heard and continually blocked defendant's material evidence throughout trial;

l. filed a pretrial motion to allow unsupported hearsay testimony from their witnesses to be admitted at trial;

m. filed a pretrial motion to limit the defense strategy of blaming others for the fraud;

n. failed to disclose material or exculpatory evidence;

o. failed to disclose government witness and co-defendant Mike Macy's prior felony conviction for mortgage fraud; government witness Diana Rosswog was his mortgage broker and government witness Mike Long was the appraiser;

p. used circumstantial evidence that had not factual or legal basis to confuse and mislead the jury;

q. prosecution and co-defendants' attorneys used excessive interference to mislead the jury;

r. FBI Agent Beverly Hood and co-defendants' attorneys violated a pretrial order three times during Hood's testimony by referencing defendant;

s. stacked charges against defendant for the same criminal act of money laundering on Counts 12-14 for properties that were also included in Counts 1-11 wire fraud charges; and charged defendant with money laundering when he did not launder any money; and

t. failed to produce any evidence at sentencing that verified that the true victim and loss amount stated in the PSIR and judgment matched the victims listed in the HUD statements (for the properties listed in the indictment).

Doc. #813-1 at 6-9.

Prosecutorial misconduct does not warrant federal habeas relief unless the conduct complained of so infected the proceedings with unfairness as to make defendant's conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also United*

States v. Anaya, 727 F.3d 1043, 1052 (10th Cir. 2013) (prosecutorial misconduct violates due process if it denies right to fair trial). In cases of prosecutorial misconduct, the touchstone of the due process analysis is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). If government conduct was improper, the Court considers several factors when assessing whether it resulted in a due process violation: (1) the weight of evidence of guilt, (2) whether the prosecutor's conduct or comments tended to mislead the jury or prejudice defendant, (3) whether the prosecutor's conduct or comments were invited by or responsive to the defense, (4) whether the prosecutor's conduct or comments were isolated or extensive, (5) whether the court issued a curative jury instruction and (6) whether defense counsel was able to cast the prosecutor's conduct and comments "in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner." *United States v. Darden*, 477 U.S. 168, 182 (1986); *Slagle v. Bagley*, 457 F.3d 501, 515 (6th Cir. 2006).

Above, the Court has considered many of defendant's allegations of prosecutorial misconduct through his claims of ineffective assistance. As stated, at trial, the government presented overwhelming evidence of defendant's guilt. Further, defendant fails to prove any of the alleged misconduct resulted in prejudice. Viewing defendant's allegations "against the backdrop of the overwhelming evidence against" him, the Court finds that he has failed to prove that government or prosecutorial misconduct, if any, amounted to a denial of due process. *See Armstead v. Neven*, 460 F. App'x 728, 730 (9th Cir. 2011) (comparing effect of misconduct to evidence against defendant at trial). Thus, the Court overrules defendant's due process claim.

IV. Actual Innocence And Fundamental Miscarriage Of Justice (Claim 4)

Defendant asserts a freestanding claim that he is entitled to relief because he is actually innocent and the jury trial produced a fundamental miscarriage of justice. For purposes of

defendant's motion, the Court assumes that defendant can maintain a freestanding claim of actual innocence or miscarriage of justice. See *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 1931 (2013) (question unresolved whether habeas petitioner may assert freestanding claim of actual innocence). To establish actual innocence, petitioner must demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). To be credible, a claim of actual innocence ordinarily must be supported with new reliable evidence such as exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence. *See id.* at 324. In the vast majority of cases, such evidence is obviously unavailable, so claims of actual innocence are rarely successful. *Id.*

Defendant does not support his conclusory allegation of innocence with evidence that is new or reliable. In light of the Court's rulings above, defendant also fails to show a fundamental miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) (fundamental miscarriage of justice exists where constitutional violation has probably resulted in conviction of actually innocent defendant). The Court therefore overrules defendant's fourth claim.

CONCLUSION

Defendant does not allege specific and particularized facts which, if true, would entitle him to relief. Accordingly, the Court denies defendant's request for an evidentiary hearing. *See* 28 U.S.C. § 2255; *United States v. Cervini*, 379 F.3d 987, 994 (10th Cir. 2004) (standard for evidentiary hearing higher than notice pleading); *United States v. Kilpatrick*, 124 F.3d 218 (Table), 1997 WL 537866, at *3 (10th Cir. 1997) (conclusory allegations not warrant hearing); *United States v. Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988) (no hearing required where factual matters raised may be resolved on record); *United States v. Barboa*, 777 F.2d 1420, 1422-23

(10th Cir. 1985) (hearing required only if allegations, if proved, would entitle defendant to relief and not contravened by record).

CERTIFICATE OF APPEALABILITY

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).[7] To satisfy this standard, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)). For reasons stated above, the Court finds that defendant has not satisfied this standard. The Court therefore denies a certificate of appealability as to its ruling on defendant's Section 2255 motion.

IT IS THEREFORE ORDERED that defendant's *Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody* (Doc. #813) filed January 19, 2016 is **OVERRULED.**

IT IS FURTHER ORDERED that defendant's *Motion For Evidentiary Hearing* (Doc. #838) filed September 15, 2016 is **OVERRULED.**

IT IS FURTHER ORDERED that a certificate of appealability as to the ruling on defendant's Section 2255 motion is **DENIED.**

---

[7] The denial of a Section 2255 motion is not appealable unless a circuit justice or a circuit or district judge issues a certificate of appealability. *See* Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1).

Dated this 9th day of November, 2017 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

November 6, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL JACOBY,

Defendant - Appellant.

No. 17-1431

ORDER

Before **MATHESON**, **EID**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk