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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GINO CARLUCCI, AKA Gene David Odice, Defendant-Appellant.	No. 18-15659 D.C. Nos. 2:16-cv-00588-KHV 2:10-cr-00464-KHV-1 District of Arizona, Phoenix ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 14) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GINO CARLUCCI, AKA Gene David Odice, Defendant-Appellant.	No. 18-15659 D.C. Nos. 2:16-cv-00588-KHV 2:10-cr-00464-KHV-1 District of Arizona, Phoenix ORDER

Before: TROTT and MURGUIA, Circuit Judges.

The motion for reconsideration (Docket Entry No. 19) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GINO CARLUCCI,	)	
	)	
Petitioner,	)	**CIVIL ACTION**
	)	**No. 16-CV-588-KHV**
v.	)	
	)	**CRIMINAL ACTION**
UNITED STATES OF AMERICA,	)	**No. 10-464-01-KHV**
	)	
Respondent.	)	
	)	

MEMORANDUM AND ORDER

On July 25, 2011, a jury found petitioner guilty of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and willful filing of a false tax return in violation of 26 U.S.C. § 7206(1). Jury Verdict (Doc. #238 in Case No. 10-cr-464-KHV). On August 17, 2012, the Court, sitting by designation in the District of Arizona, sentenced petitioner to 188 months in prison. Judgment In A Criminal Case (Doc. #412 in Case No. 10-cr-464-KHV).

On March 2, 2016, petitioner filed a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (Doc. #1 in Case No. 16-cv-588, Doc. #477 in Case No. 10-cr-464-KHV). On May 4, 2017, the Honorable Michelle H. Burns issued a Report And Recommendation (Doc. #23) which recommended that the Court overrule petitioner's motion. This matter is before the Court on petitioner's objections to the Report And Recommendation. See Movant's Objections To Proposed Report And Recommendation And Recommended Disposition (Doc. #25) filed May 19, 2017. On December 27, 2017, the government responded to petitioner's objections. Government's Response To Petitioner's Objections To Report And Recommendation (Doc. #31). For reasons stated below, the Court overrules petitioner's objections and approves and adopts Judge Burns's recommendation. Accordingly, the Court overrules petitioner's Section 2255 motion.

Factual And Procedural Background

Because the Report And Recommendation summarizes petitioner's criminal activity and conviction in great detail, the Court provides an abbreviated overview of the factual and procedural history of this case. Doc. #23 at 2-11. In May of 2004, petitioner and Wayne Mounts began a scheme to defraud Joseph Flickinger. They targeted Flickinger because he had amassed more than $1 million in cash and assets through a ponzi scheme which defrauded many investors. Petitioner and Mounts met Flickinger and learned of his fortune through Robert Garback, a limo driver.

Petitioner and Mounts presented Flickinger with multiple fabricated investment opportunities. After some negotiation, Flickinger accepted the following agreement: he would help petitioner and Mounts pay a $200,000 deposit to the Securities and Exchange Commission ("SEC"). After they paid the deposit, the SEC would release $5.4 million of assets which the SEC had purportedly seized from petitioner. In turn, petitioner and Mounts would transfer Flickinger's ponzi scheme proceeds to an offshore bank to avoid government detection. Petitioner did not have any seized assets, owed no deposit fee to the SEC and did not intend to transfer Flickinger's funds offshore.

In late May of 2004, Flickinger, Garback and victims of Flickinger's ponzi scheme began transferring funds to the bank account of Associated Legal Mediation Services ("ALMS") – a shell corporation that petitioner and Mounts controlled. Flickinger and Garback also gave petitioner and Mounts two cars and two expensive watches to sell to help pay the SEC deposit. In late June of 2004, Flickinger and his ponzi scheme victims (at his direction) began wiring the remaining ponzi scheme proceeds to the corporate bank account. Flickinger believed that petitioner and Mounts would transfer these funds offshore. Flickinger also transferred his Ohio condominium to petitioner and Mounts, so they could sell it and move the proceeds offshore.

In late July of 2004, Flickinger completed his transfers to the ALMS account. Petitioner then

sent incriminating, anonymous fax messages to federal agents, hoping that they would arrest Flickinger – which they did. Around the same time, Mounts began withdrawing funds from the corporate account for personal use and that of petitioner. They used several tactics to avoid government detection, including funneling funds through petitioner's relatives, transferring assets to other shell corporations, fabricating loan documents and purchasing large assets such as boats. For example, Mounts wired funds to petitioner's father-in-law, who transferred money to petitioner's wife and bought a Scarab boat. Petitioner and Mounts forged names on the boat title, created a false document which stated that Flickinger transferred the boat to a fake corporation and stored it at an acquaintance's home. Petitioner did not report any of these proceeds to the Internal Revenue Service. In April of 2005, he reported $24,800 of business income on his 2004 tax return.

On April 8, 2010, a grand jury charged petitioner with conspiracy to commit money laundering (Count 1), conspiracy to defraud the United States (Count 2), willful filing of a false tax return (Count 3) and witness tampering (Count 4). Indictment (Doc. #1 in Case No. 10-cr-464-KHV). On July 25, 2011, the jury found petitioner guilty of Counts 1 through 3. Judgment (Doc. #412 in Case No. 10-cr-464-KHV). On August 17, 2012, the Court sentenced petitioner to 188 months in prison. Id. Petitioner appealed his conviction and sentence directly to the Ninth Circuit Court of Appeals, which affirmed.[1] United States v. Mounts, 584 F. App'x 482, 482-85 (9th Cir. 2014).

On March 2, 2016, petitioner filed a Motion Under 28 U.S.C. § 2255 (Doc. #1) with the aid of counsel, John D. Kirby. In his Section 2255 motion, petitioner asserts three grounds for relief:

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[1] Multiple attorneys represented petitioner. Petitioner initially retained Jason Lamm. Notice Of Appearance (Doc. #5 in Case No. 10-cr-464-KHV) filed April 13, 2010. On January 4, 2011, the Court appointed David Eisenberg as petitioner's counsel. Minute Entry (Doc. #119 in Case No. 10-cr-464-KHV). Eisenberg represented petitioner during trial. Eisenberg, Todd Nolan and Vicki Lopez served as co-counsel at sentencing. Report And Recommendation (Doc. #23) at 20, 31 n.6. The Nolan Law Firm represented petitioner on direct appeal.

(1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel and (3) prosecutorial misconduct. These claims include multiple sub-claims which the Court addresses in detail below. As noted, on May 4, 2017, Judge Burns issued a Report And Recommendation which recommended that the Court overrule petitioner's motion. Doc. #23. On May 19, 2017, petitioner filed his objection to the Report And Recommendation. Movant's Objections (Doc. #25). On November 30, 2017 the Court entered an Amended Order To Show Cause (Doc. #29) which directed the "government to show cause why the Court should not sustain Movant's Objections" because the government had not responded to them. On December 27, 2017, the government responded. Government's Response (Doc. #31).[2] This matter is before the Court on petitioner's objections to the Report And Recommendation. See Movant's Objections (Doc. #25).

Analysis

I. Ineffective Assistance Of Trial Counsel

First, petitioner asserts that trial counsel provided ineffective assistance. In particular, petitioner alleges that his attorneys provided ineffective assistance because they:

A. ineffectively argued a statute of limitations issue;

B. failed to challenge the source of government evidence;

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[2] On January 12, 2018, petitioner moved to strike the Government's Response (Doc. #31) pursuant to Rule 12, Fed. R. Civ. P. See Movant[']s Motion To Strike Respondent[']s Reply To Movant[']s Objections To The Magistrate[']s Report And Recommendation For Failure To Comply With The Court[']s Order To Show Cause (Doc. #32). Petitioner asserts that the Amended Order To Show Cause (Doc. #29) ordered the government to respond before December 24, 2017 and that the government did not comply with this deadline. Movant[']s Motion To Strike (Doc. #32) at 1-2.

The Amended Order To Show Cause (Doc. #29) ordered the government to respond before December 29, 2017 – not December 24. The Government complied with this deadline by filing its response on December 27, 2017. Government's Response (Doc. #31). Accordingly, the Court overrules petitioner's motion to strike.

C. had a personal interest conflict with him;

D. failed to interview and call the proper witnesses;

E. failed to properly rectify the issue of sleeping jurors;

F. failed to invoke the marital communications and adverse spousal testimony privileges;

G. failed to be present at every stage of trial;[3]

H. conceded guilt on two counts during closing argument;

I. failed to successfully argue that text messages should be excluded;

J. failed to object to the restitution order; and

K. failed to argue unfair sentence disparities among similarly-situated defendants.

Motion Under 28 U.S.C. § 2255 (Doc. #1) at 5-12.

To establish ineffective assistance, petitioner must show that counsel's (1) deficient performance (2) caused prejudice – 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). Petitioner must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" to establish deficient performance. Id. at 687. In other words, petitioner must prove that counsel performed "below an objective standard of reasonableness." Id. at 688. The Court may determine the second element, prejudice, before analyzing counsel's performance. Cooper v. Calderon, 255 F.3d 1104, 1109 (9th Cir. 2001). If the Court determines that the alleged error did not prejudice petitioner, it does not need to consider counsel's performance. Id.

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[3] Petitioner raises this ground for relief in his Motion Under 28 U.S.C. § 2255, but his supporting brief does not provide any argument supporting this claim. Movant[']s Brief In Support Of Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct A Sentence (Doc. #2) filed March 2, 2016.

In her Report And Recommendation, Judge Burns notes that some of the foregoing claims of ineffective assistance are procedurally barred because petitioner did not raise them on direct appeal. Doc. #23 at 14-15 (citing Bousely v. United States, 523 U.S. 614, 621-22 (1998) (must show cause and prejudice to bring habeas claim not raised on direct appeal). Petitioner objects, arguing that procedural bars do not apply to ineffective assistance claims. Movant's Objections (Doc. #25) at 2-3.

Supreme Court precedent supports petitioner's objection. In Massaro v. United States, 538 U.S. 500, 504 (2003), the Supreme Court held that the procedural default rule which requires petitioners to directly appeal claims before raising them on collateral review does not apply to ineffective assistance claims. Further, the Ninth Circuit has stated that claims of ineffective assistance "are generally inappropriate on direct appeal." See United States v. McKenna, 327 F.3d 830, 845 (9th Cir. 2003); see also United States v. Ross, 206 F.3d 896, 900 (9th Cir. 2000). Thus, in light of Massaro and Ninth Circuit precedent, petitioner did not procedurally default any ineffective assistance claims by failing to raise them on direct appeal.

A. Statute Of Limitations Issue

On January 4, 2011, District Judge Roslyn O. Silver denied petitioner's motion to dismiss Count 1 (conspiracy to commit money laundering) based on the statute of limitations. She reasoned as follows:

> [Petitioner] was indicted on April 8, 2010. Thus the conspiracy charge is timely provided [petitioner] acted in furtherance of the conspiracy after April 8, 2005. According to the indictment, [petitioner] filed a false tax return on April 12, 2005. The false tax return allegedly was in furtherance of the money laundering conspiracy. [Petitioner] also took steps after April 2005 to hide assets from the government, such as a boat and trailer. Given the date of these alleged actions, the conspiracy to commit money laundering count is timely.

Order (Doc. #120 in Case No. 10-cr-464) at 1. Petitioner generally asserts that his retained attorney, Jason Lamm, provided ineffective assistance when he failed to successfully argue that the Court should

have dismissed Count 1 because the statute of limitations had expired – i.e. more than five years had elapsed since his last overt act in furtherance of the money laundering conspiracy. Movant's Brief In Support (Doc. #2) at 3-13. In particular, petitioner asserts that counsel should have argued that (1) petitioner withdrew from the conspiracy before April of 2005; (2) under Grunewald v. United States, 353 U.S. 391, 401 (1957), acts of concealment "after the central criminal purposes of a conspiracy ha[s] been attained" do not constitute an overt acts in furtherance of the conspiracy; and (3) the law did not require petitioner's tax return to report illegally obtained funds. See id.

Judge Burns recommended that the Court overrule this claim because the omitted arguments for dismissal "fail[] factually and legally." Report And Recommendation (Doc. #23) at 17. Petitioner objects, asserting that Judge Burns "misunderstood the facts of this argument and relevant law pertaining to it." Movant's Objections (Doc. #25) at 3.

1. Withdrawal from conspiracy

In December of 2004, petitioner pled guilty to misprision of felony in the District of Utah. See Doc. #2-1 at 43 (plea agreement); Report And Recommendation (Doc. #23) at 18. In conjunction with that plea, he made multiple proffers to the government. Id. Petitioner contends that because he entered into a proffer agreement concerning a fraud investigation in Utah, he withdrew from the money laundering conspiracy on February 17, 2005 – more than five years before the grand jury charged him with conspiracy to commit money laundering. See Movant's Brief In Support (Doc. #2) at 11.

Petitioner argues that pursuant to the proffer agreement, he disclosed an asset which he purchased in furtherance of the laundering scheme, i.e. the Scarab boat. Id. at 11. Petitioner's disclosure was that the Scarab boat was "unavailable," and the government did not recover the boat until nearly two years after petitioner's proffer. Report And Recommendation (Doc. #23) at 17. This trivial

disclosure – along with petitioner's proffer and cooperation in a separate investigation – do not suggest withdrawal from the overall money laundering conspiracy. See United States v. Lothian, 976 F.2d 1257, 1261 (9th Cir. 1992) (withdrawal requires disavowing conspiracy's goal, affirmative act defeating purpose of conspiracy or "definite, decisive, and positive step" showing disassociation from the conspiracy).

Further, petitioner did not withdraw from the conspiracy in February of 2005 because after his proffer, he continued to conceal assets and funds from the government. Among other things, he filed a false tax return in April of 2005. As shown, petitioner's first suggested argument lacks merit. Accordingly, counsel did not perform deficiently or prejudice petitioner by failing to make this meritless argument.

2. Concealment

Next, petitioner claims that counsel provided ineffective assistance because he failed to argue that under Grunewald, 353 U.S. at 401, post-conspiracy acts of concealment – such as filing a false tax return – do not extend the statute of limitations. This argument fails because it mischaracterizes the crime charged in the indictment. Petitioner was not charged with the underlying scheme to defraud but was charged with conspiring to launder the proceeds of that scheme in various manners, including "using friends and associates to hide asset(s) from the government." Indictment (Doc. #1 in Case No. 10-cr-464), ¶ 17(d); see Government's Answer In Opposition To Petitioner's Motion To Vacate, Set Aside, Or Correct Sentence Pursuant To 28 U.S.C. § 2255 (Doc. #9) filed July 5, 2016 at 27. In other words, the charged conspiracy consisted entirely of laundering and concealing funds from the government. Because the crime "that [wa]s the object of the conspiracy ha[d] the intent to conceal as an element," any act of concealment furthered the conspiracy and extended the statute of limitations. See United States v. Upton, 559 F.3d 3, 13 (1st Cir. 2009) (acts of concealment that

facilitate central aim of conspiracy are in furtherance of conspiracy). Grunewald's holding – that post-conspiracy concealment does not further the conspiracy – does not apply. 353 U.S. at 401-02. Thus, petitioner's second argument fails because he concealed the Scarab boat and filed a false tax return within five years of the charge. Because petitioner fails to show that this Grunewald argument could have changed the outcome of his motion to dismiss based on the period of limitations, counsel did not provide ineffective assistance by failing to raise it.

3. Tax return

Finally, petitioner asserts that his 2004 tax return did not need to include illegally obtained income because the government subsequently required him to forfeit these assets and under 21 U.S.C. § 853(c), he retained no right, title or interest in forfeited assets. Movant's Brief In Support (Doc. #2) at 8. Accordingly, petitioner argues that filing his tax return in April of 2005 cannot constitute an overt act in furtherance of the conspiracy. Id.

This argument is facially invalid. As stated in the Report And Recommendation, "[i]llegal gain as well as legal gain constitutes taxable income." Doc. #23 at 17 (quoting James v. United States, 366 U.S. 213, 219 (1961)). Thus, for substantially the reasons stated in the Report And Recommendation, counsel did not provide ineffective assistance by failing to raise this argument. Doc. #23 at 17-18.

Because all of petitioner's suggested arguments with regard to the statute of limitations lack merit, he has not demonstrated deficient performance or prejudice. Accordingly, the Court overrules petitioner's first claim of ineffective assistance.

B. Source Of Government Evidence

Petitioner asserts that Lamm and David Eisenberg, who began representing petitioner in January of 2011, provided ineffective assistance by failing to request a hearing under Kastigar v. United States, 406 U.S. 441 (1972), to challenge the source of government evidence. Movant's Objections

(Doc. #25) at 5-6. In particular, petitioner claims that because of his cooperation in Utah, the government granted him immunity from further prosecution based on information he provided and then improperly used this information against him in this case in Arizona. Movant's Brief In Support (Doc. #2) at 15.

Judge Burns recommended that the Court overrule this claim because petitioner fails to demonstrate that his attorneys' inaction resulted in prejudice. Report And Recommendation (Doc. #23) at 18-19. Further, the Court and Ninth Circuit found that petitioner did not factually establish that the government ever promised him immunity. Id. (citing Order (Doc. #120 in Case No. 10-cr-464) and Mounts, 584 F. App'x at 483-84). Thus, if counsel had requested a Kastigar hearing, the Court would have denied the motion because the government never promised immunity. Petitioner argues that at trial, the Court "barely brushed over" whether he had immunity and the Ninth Circuit similarly erred in its ruling. Movant's Objections (Doc. #25) at 5-6.

Petitioner's vague assertion does not raise a material factual question concerning whether the government promised him immunity. Order (Doc. #120 in Case No. 10-cr-464-KHV). The Court had already rejected the factual basis for a Kastigar hearing, and counsel did not perform deficiently in failing to seek one. For substantially the reasons stated in the Report And Recommendation, the Court overrules petitioner's claim that counsel were ineffective in failing to challenge the source of government evidence. Doc. #23 at 18-19.

C. Personal Interest Conflict

Petitioner argues that Eisenberg provided ineffective assistance because his concern about a potential bar complaint or habeas claim created a personal interest conflict during petitioner's sentencing. Movant's Brief In Support (Doc. #2) at 29-45. Judge Burns recommended that the Court overrule this claim because petitioner does not establish prejudice and Eisenberg did not divulge

privileged information. Report And Recommendation (Doc. #23) at 21-22. Petitioner objects that Judge Burns focused on whether Eisenberg divulged privileged information instead of whether he had a personal interest conflict. Movant's Objections (Doc. #25) at 6-8.

Petitioner falsely asserts that his original claim did not, partly, rely on divulgence of privileged information. See Movant's Brief In Support (Doc. #2) at 45 ("Eisenberg continued to violate the attorney client privilege on several occasions"). To prove ineffective assistance based on a conflict of interest, petitioner must establish "(i) that counsel actively represented conflicting interests, and (ii) that the actual conflict adversely affected counsel's performance." United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001); see Earp v. Ornoski, 431 F.3d 1158, 1183 (9th Cir. 2005). Petitioner does not meet either requirement. First, petitioner's claim – that Eisenberg "was focused on his well[-]being, not [petitioner's]" – at best shows "the mere possibility of [a] conflict," not an actual conflict. Baker, 256 F.3d at 860. Second, petitioner does not explain how Eisenberg's alleged conflict adversely affected his performance. In fact, petitioner alleges that the conflict occurred when Eisenberg attempted to withdraw from the case. Movant's Brief In Support (Doc. #2) at 41. Petitioner does not indicate how Eisenberg's attempt to withdraw, which the Court rejected, resulted in prejudice. Thus, the Court overrules petitioner's claim that a conflict of interest rendered Eisenberg's assistance ineffective.

D. Interview And Call Witnesses

Petitioner asserts that Eisenberg provided ineffective assistance because he did not adequately investigate the case or present any witness testimony at trial. Movant's Brief In Support (Doc. #2) at 45-66. Petitioner's underlying claim is fundamentally incorrect because Eisenberg presented the testimony of Brandon Valero on petitioner's behalf at trial. Government's Response (Doc. #31) at 4. Petitioner identifies ten additional witnesses, however, that Eisenberg knew of but did not call to testify. See id. Judge Burns recommended that the Court overrule this claim. Report And Recommendation (Doc. #23)

at 22-26. After discussing petitioner's claim with respect to each potential witness, the Report And Recommendation generally concluded that petitioner did not establish what exculpatory testimony each witness would have provided or that such testimony "would have made a difference in the outcome of his trial or sentencing." See id. Petitioner objects, stating as follows:

> If [petitioner] can demonstrate that Joseph Flickinger and Rob Garback in fact concocted their story, as [petitioner] maintains his innocence, the introduction of testimony from all of the named un-interviewed witnesses as well as the impeachment evidence that would have been obtained from a handwriting specialist and an investigator regarding various items including the promissory notes and alleged power of attorney could have disproved the Government[']s theory and changed the outcome of the trial . . .

Movant's Objections (Doc. #25) at 9-10. Petitioner also requests an evidentiary hearing on this claim because he asserts that the record "certainly cannot justify Eisenberg's failure to investigate in any manner the witnesses that were provided to him." Id. at 9.

When analyzing whether trial counsel adequately investigated the underlying facts and law of a case, the Court grants "a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. The Ninth Circuit has characterized counsel's choice whether to call available witnesses as "a strategic decision." Hall v. Lewis, 99 F. App'x 829, 831 (9th Cir. 2004); see also Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992). Under the Strickland framework, the Court grants great deference to strategic decisions of trial counsel. 466 U.S. at 690-91. But see United States v. Span, 75 F.3d 1383, 1389 (9th Cir. 1996) (label of "trial strategy" does not automatically immunize attorney's performance from Sixth Amendment challenges).

Here, petitioner fails to demonstrate that Eisenberg performed deficiently by failing to call the suggested witnesses.[4] The omitted testimony would have impeached the character of government

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[4] "[A] petition may be dismissed without a hearing only when it consists solely of conclusory, unsworn statements unsupported by any proof or offer thereof." Phillips v. Woodford, 267 (continued...)

witnesses or directly contradicted their testimony. See Movant's Brief In Support (Doc. #2) at 45-66. Eisenberg attempted to accomplish these goals, however, through cross-examination. Counsel's decision to focus on impeachment through cross-examination or presentation of defense evidence – or both – represents a tactical decision "reflecting [their] skill and judgment." Denham, 954 F.2d at 1505. Even though specific instances of Eisenberg's cross-examination left petitioner dissatisfied, he has not shown that counsel's efforts were outside the "wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Further, petitioner does not establish prejudice. Even if the witnesses had testified, they would have primarily challenged the government's evidence on collateral matters. For example, petitioner alleges that one witness would have contradicted government testimony that "Scarlet Kitten" – the name written on the Scarab boat – was a promotions company, when petitioner alleges it was a porn company. See Movant's Brief In Support (Doc. #2) at 49. Another uncalled witness would have testified about the whereabouts of watches that petitioner allegedly stole. Id. at 47. Petitioner does not demonstrate that detailed testimony concerning trivial aspects of his money laundering scheme and Flickinger's fraud scheme create a reasonable probability that the jury would have returned a different verdict on any count. As shown, Eisenberg did not perform deficiently or prejudice petitioner by failing to call these witnesses. Thus, the Court overrules this claim.

E. Rectify Issue Of Sleeping Jurors

At trial, the Court notified counsel that certain jurors had fallen asleep while the government was

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[4](...continued)
F.3d 966, 973 (9th Cir. 2001). Petitioner provides no affidavits or reliable proof to support his allegations of how each potential witness would have testified. Further, the exhibits to Movant's Brief In Support (Doc. #2) do not support his claim that Eisenberg failed to investigate or contact any of the witnesses. Because petitioner's claim relies on unsupported accusations, an evidentiary hearing is not necessary to resolve it.

presenting its case. Movant's Brief In Support (Doc. #2) at 66-68. When the Court proposed that it could designate these jurors as alternates, Eisenberg and counsel for co-defendant Mounts objected, believing that the jurors had not missed any critical testimony. Report And Recommendation (Doc. #23) at 27-28. When the Court reported a second instance of sleeping jurors, Eisenberg did not object or request an investigatory hearing. Movant's Brief In Support (Doc. #2) at 69. On appeal, the Ninth Circuit held that petitioner waived issues concerning the Court's proposed solution of designating sleeping jurors as alternates. Mounts, 584 F. App'x at 483. Further, it held that the Court did not have a "clear or obvious" obligation to hold an investigative hearing or take alternative remedial measures after subsequent reports of sleeping jurors. Id.

Petitioner argues that Eisenberg provided ineffective assistance in (1) objecting to the Court's proposal to designate sleeping jurors as alternates and (2) failing to object or request a hearing when notified for the second time that jurors had been sleeping. Movant's Brief In Support (Doc. #2) at 66-71. Judge Burns recommended that the Court overrule this claim because Eisenberg's actions did not cause prejudice. Report And Recommendation (Doc. #23) at 27-28. The Report And Recommendation also noted that Eisenberg's response constituted "sound trial strategy" because the jurors slept during the presentation of the government's case. Id. at 27. Petitioner objects that (1) the Report And Recommendation (Doc. #23) did not address counsel's failure to object after the second report of sleeping jurors and (2) counsel's actions resulted in prejudice because jurors missed "key testimony" while sleeping during cross-examination of government witnesses. Movant's Objections (Doc. #25) at 10.

Petitioner's first objection lacks merit. Petitioner suggests that Eisenberg provided ineffective assistance because he failed to object or request an investigatory hearing in response to the second report of sleeping jurors. Movant's Brief In Support (Doc. #2) at 66-71. The Report And Recommendation

addresses this claim through multiple references to Eisenberg's "failure to request a hearing." See Doc. #23 at 27-28 (finding failure to request hearing did not result in prejudice); see Mounts, 584 F. App'x at 483 (discussing investigative hearing in response to second notice about sleeping jurors).

Petitioner's objection that jurors missing "key testimony" caused prejudice also falls short. Movant's Objections (Doc. #25) at 10. To prove prejudice, petitioner must show a "reasonable probability" – not "the mere possibility" – that counsel's actions affected the outcome of his proceedings. Correll v. Ryan, 539 F.3d 938, 961 (9th Cir. 1987). His speculative assertion that "sleeping jurors could have missed key testimony" – without identifying what specific testimony the jurors missed – does not meet this burden. Movant's Objections (Doc. #25) at 10 (emphasis added). Further, even if Eisenberg requested an investigative hearing concerning sleeping jurors, the Court retained "considerable discretion" over the issue and could have denied counsel's request. United States v. Barrett, 703 F.2d 1076, 1083 (9th Cir. 1983); United States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987) (new trial only necessary when Fifth or Sixth Amendment violation), overruled on other grounds by United States v. Benally, 843 F.3d 350 (9th Cir. 2016). Thus, for reasons stated above and reasons in the Recommendation And Report, the Court overrules the claim that counsel was ineffective in responding to the issue of sleeping jurors. Doc. #23 at 27-28.

F. Marital Communications And Adverse Spousal Testimony Privileges

Petitioner contends that Eisenberg provided ineffective assistance because he allowed petitioner's wife to testify and conceded that petitioner could not assert the marital communications or adverse spousal testimony privilege. Movant's Brief In Support (Doc. #2) at 72-77. Judge Burns recommended that the Court overrule this claim because (1) only the testifying spouse can invoke the adverse spousal testimony privilege; (2) counsel did not waive the marital communications privilege; and (3) testimony by petitioner's wife did not involve marital communications. Report And

Recommendation (Doc. #23) at 28-29. Petitioner objects to this recommendation by restating his position that "the privilege" does not belong exclusively to the testifying spouse. Movant's Objections (Doc. #25) at 11.

Petitioner fails to distinguish between the adverse spousal testimony privilege and the marital communications privilege. Only the testifying spouse can assert the adverse spousal testimony privilege. Trammel v. United States, 445 U.S. 40, 53 (1980). Eisenberg had no legal basis to assert it and did not perform deficiently in failing to do so. Either spouse may invoke the marital communications privilege, but petitioner has not identified any testimony from his wife that (1) fits within this privilege and (2) prejudiced him. Thus, for reasons stated above and in the Report And Recommendation, the Court overrules petitioner's claim that counsel was ineffective for failing to assert the marital communications and adverse spousal testimony privileges. Doc. #23 at 28-29.

G. Presence At Every Stage Of Trial

Petitioner asserts that Eisenberg provided ineffective assistance because he failed to "enforce the right to be present at every stage of the trial." Motion Under 28 U.S.C. § 2255 (Doc. #1) at 9. In particular, petitioner asserts that the government improperly influenced Flickinger during a trial recess and Eisenberg did nothing to remedy this prosecutorial misconduct. Id. Judge Burns recommended that the Court overrule this claim because "[petitioner] provides no support for his factual assertions and provides no authority for his argument that attorneys are forbidden from conferring with witnesses during trial." Report And Recommendation (Doc. #23) at 29-30. In his objection, petitioner does not provide facts or legal authority to support his claim. See Movant's Objections (Doc. #25) at 11-12. Thus, for substantially the reasons stated in the Report And Recommendation, the Court overrules this claim.

H. Closing Argument

Petitioner argues that Eisenberg provided ineffective assistance because during closing argument, he conceded guilt on Count 2 (conspiracy to defraud the United States) and Count 3 (filing false tax return). Movant's Brief In Support (Doc. #2) at 77-82. Judge Burns recommended that the Court overrule this claim because

> [Petitioner] fails to demonstrate that Mr. Eisenberg's conduct was not part of a strategic decision to detract jurors from the more serious counts, conspiracy to commit money laundering and witness tampering, both of which carried a maximum sentence of 20 years. The maximum sentence on count two, the conspiracy to defraud count, was 5 years, and on count 3, the tax count, was 3 years.

Report And Recommendation (Doc. #23) at 30. Judge Burns also noted that Eisenberg subsequently stated that petitioner was "okay with" conceding guilt on Counts 2 and 3. Id. (quoting Transcript Of Proceedings (Doc. #363 in Case No. 10-cr-464-KHV) filed April 24, 2012 at 104). Petitioner objects, claiming that Eisenberg did not receive his consent and the concessions resulted in prejudice. Movant's Objections (Doc. #25) at 12-13.

Counsel's failure to obtain a client's consent before conceding guilt on one of multiple charges in closing argument does not create a presumption of prejudice. United States v. Thomas, 417 F.3d 1053, 1058-59 (9th Cir. 2005). In fact, the Ninth Circuit has stated that "a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges." United States v. Swanson, 943 F.2d 1070, 1075-76 (9th Cir. 1991). Accordingly, even if the Court assumes that Eisenberg did not receive his client's consent, petitioner still must establish prejudice.

Petitioner asserts that Eisenberg's closing argument prejudiced him because the government argued that the concessions meant the jury should also return a guilty verdict on Count 1 (conspiracy to commit money laundering). Movant's Objections (Doc. #25) at 13. The record belies petitioner's

assertion. In closing, the government did not argue that Eisenberg's concession should cause the jury to find petitioner guilty of Count 1. Transcript Of Proceedings (Doc. #363 in Case No. 10-cr-464-KHV) at 88-93. Rather, the government asserted that it had presented overwhelming evidence of guilt on Count 1 and discussed specific instances of money laundering. Id. at 89-93; see also Transcript Of Proceedings (Sentencing) (Doc. #447 in Case No. 10-cr-464-KHV) filed April 12, 2013 at 68 (court noted "evidence was overwhelming on the issue of guilt"). Thus, because petitioner has not established prejudice, the Court overrules this claim of ineffective assistance. Doc. #23 at 30.

I. Text Messages

Petitioner argues that Eisenberg provided ineffective assistance because he failed to successfully exclude from evidence certain text messages between petitioner and Garback. Movant's Brief In Support (Doc. #2) at 82-85. Petitioner asserts that Eisenberg should have moved to exclude the messages because Garback admitted that he deleted many texts and the texts could have been "spoofed," i.e. sent by someone other than petitioner even though they appeared to be sent from petitioner's number. Id. at 82-83.[5] Judge Burns recommended that the Court overrule this claim because petitioner "fails to demonstrate that Mr. Eisenberg was ineffective with respect to the admission of the text messages, or that even if his performance was ineffective, [petitioner] was prejudiced." Report And Recommendation (Doc. #23) at 31. Petitioner objects that the Report And Recommendation incorrectly asserts that the record does not support his claim that Garback "spoofed" the text messages. Movant's

[5] To the extent petitioner asserts that admission of the text messages violated his Sixth Amendment Confrontation Clause rights, his claim is procedurally barred. See Movant's Brief In Support (Doc. #2) at 84; see also Movant's Objections (Doc. #25) at 13-14 (asserting he is entitled to relief pursuant to cases discussing Confrontation Clause). The Ninth Circuit rejected this claim on direct appeal. See Mounts, 584 F. App'x at 484. As discussed below, "federal prisoners may not use a motion under 28 U.S.C. § 2255 to relitigate a claim that was previously rejected on direct appeal." Foster v. Chatman, 136 S. Ct. 1737, 1758 (2016) (Alito, J., Concurring); see infra Section III.

Objections (Doc. #25) at 13-14.

Regardless whether the record supports petitioner's contention that the texts were spoofed, he fails to establish that Eisenberg's failure to exclude the messages caused prejudice. Petitioner does not show that the text messages had a pronounced effect on the jury's verdict. Absent argument to the contrary, the Court presumes that the text messages did not have a material effect on the outcome of the proceedings because "evidence was overwhelming on the issue of guilt." Transcript Of Proceedings (Sentencing) (Doc. #447 in Case No. 10-cr-464-KHV) at 68. Thus, petitioner fails to demonstrate a reasonable probability that the result of the proceedings would have differed had counsel successfully excluded the text messages. Because petitioner does not establish prejudice, the Court overrules this claim of ineffective assistance.

J. Restitution Order

Pursuant to the Mandatory Victims Restitution Act ("MVRA"), the Court ordered that petitioner, joint and severally with Mounts and Flickinger, pay $672,813 in restitution to the victims of Flickinger's original fraud scheme. Petitioner argues that Eisenberg and Vicki Lopez, co-counsel at sentencing, provided ineffective assistance because they did not object to this restitution order. Movant's Brief In Support (Doc. #2) at 85-88. Judge Burns recommended that the Court overrule this claim because (1) petitioner's crimes directly related to the loss of Flickinger's victims and (2) no prejudice resulted. Report And Recommendation (Doc. #23) at 32. Petitioner objects, arguing that he suffered prejudice, namely "an additional restitution amount of $672,813.00." Movant's Objections (Doc. #25) at 14.

In United States v. Thiele, 314 F.3d 399, 401-02 (9th Cir. 2002), the Ninth Circuit held that a petitioner "cannot collaterally attack his restitution order in a § 2255 motion" because such attacks do not seek relief from custody. Under Thiele, petitioner cannot challenge his restitution order through an ineffective assistance claim in Section 2255 motion. Thus, the Court denies relief on this ground. Id.

K. Unfair Sentence Disparity

Finally, petitioner asserts that Eisenberg provided ineffective assistance because he did not effectively argue that petitioner received an unfair sentence compared to his similarly-situated co-defendant Flickinger. Movant's Brief In Support (Doc. #2) at 89-91. Judge Burns recommended that the Court overrule this claim because (1) at sentencing, the Court found that "Flickinger and [petitioner] stand in dramatically different circumstances in terms of their role in this case" and (2) petitioner does not demonstrate how Eisenberg performed deficiently. Report And Recommendation (Doc. #23) at 33. Petitioner objects that counsel failed to cite supporting case law at sentencing when he argued that there was an unwarranted disparity between petitioner's sentence and that of Flickinger. Movant's Objections (Doc. #25) at 14.

Even if the Court presumes that Eisenberg failed to supplement his argument with proper legal support, petitioner fails to establish the factual predicate for his claim, i.e. that Flickinger and he were "similarly situated." Petitioner fails to rebut the Court's finding – which the Ninth Circuit affirmed – that the defendants were "in dramatically different circumstances." Mounts, 584 F. App'x at 486. Thus, the Court overrules this claim.

II. Ineffective Assistance of Appellate Counsel

Courts analyze claims of ineffective assistance of appellate counsel under the familiar Strickland framework, which requires petitioner to show deficient performance and prejudice. Moormann v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010). Petitioner asserts that appellate counsel – Cari Nolan – provided ineffective assistance because she (a) did not adequately communicate with petitioner before filing her opening brief; (b) made "incorrect and incomplete" arguments; and (c) failed to raise multiple claims

on appeal.[6] Movant's Brief In Support (Doc. #2) at 113-20.

A. Failure To Communicate

Petitioner asserts that appellate counsel provided ineffective assistance because she did not tell him which issues she planned to raise in the opening brief and did not respond to letters and calls after she filed the brief. Movant's Brief In Support (Doc. #2) at 113-20. Judge Burns recommended that the Court overrule this claim because petitioner's letters were sent after she filed the opening brief, and counsel could not have incorporated petitioner's notes in her briefing. Report And Recommendation (Doc. #23) at 34-35. Further, petitioner fails to show how this lack of communication resulted in prejudice because "nothing in [the] letters [] establishes that [petitioner] was in possession of issues or facts that appellate counsel should have raised." Id. at 35. Petitioner objects that he sent some letters before counsel filed the opening brief. Movant's Objections (Doc. #25) at 17-18.

Petitioner fails to factually support his objection. In fact, the opening appellate brief predates all of the letters attached to Movant's Brief In Support of his Section 2255 petition. See Doc. #2-1 Ex. S at 165-87. Thus, for reasons stated in the Report And Recommendation, the Court overrules this claim. Doc. #23 at 34-35.

B. Ineffective Arguments

Petitioner argues that appellate counsel provided ineffective assistance because she did not amend her briefs after petitioner identified issues with certain arguments and did not review relevant transcripts to prepare arguments. Movant's Brief In Support (Doc. #2) at 115-20. Petitioner maintains that her deficient performance resulted in inadequate arguments concerning his immunity and the statute of limitations. Id. Judge Burns recommended that the Court overrule this claim because "[petitioner]

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[6] Although petitioner presents this as one claim of ineffective assistance, the Court analyzes each claim individually below. Movant's Brief In Support (Doc. #2) at 113-120.

fails to identify any facts or law that should have been incorporated into the issues raised, or show that appellate counsel was ineffective in presenting or arguing the claims." Report And Recommendation (Doc. #23) at 35. In his objection, petitioner argues that his "letters clearly point out several relevant issues." Movant's Objections (Doc. #25) at 17.

Petitioner's vague objection does not identify deficiencies in appellate counsel's argument. The Court has already rejected the very arguments that petitioner's letters suggested. Compare Movant's Brief In Support (Doc. #2) at 115 (discussing argument that petitioner withdrew from conspiracy), with supra Section I.A.1. Failure to raise these claims did not result in prejudice. Thus, for reasons stated above and in the Report And Recommendation, the Court overrules this claim. Doc. #23 at 35.

C. Failure To Raise Issues

Petitioner asserts that appellate counsel provided ineffective assistance because she failed to raise the following issues on appeal: (1) trial counsel's failure to request a Kastigar hearing; (2) the government's discussion with a witness during trial recess; and (3) trial counsel's concession of guilt during closing argument. See Movant's Brief In Support (Doc. #2) at 113-20. Judge Burns recommended that the Court overrule these claims because petitioner has not demonstrated prejudice. Report And Recommendation (Doc. #23) at 35. Presumably, petitioner's objection that his "letters point out several relevant issues" extends to this claim. Movant's Objections (Doc. #25) at 17.

When claiming ineffective assistance for failure to raise a claim on appeal, petitioner must prove (1) that "counsel acted unreasonably in failing to discover and brief a merit-worthy issue" and (2) a reasonable probability that but for counsel's failure to raise the issue, the appeal would have resulted in a reversal of his conviction. Moormann, 628 F.3d at 1106. When assessing the merits of such a claim, the Court must "look to the merits of the omitted issue." Hooks v. Ward, 184 F.3d 1206, 1221 (10th Cir. 1999). Petitioner's claim does not establish prejudice because the Court has rejected each of

the omitted claims. Accordingly, even if counsel had included the claims, petitioner's conviction would not have been reversed on appeal. Thus, the Court overrules this clam.

III. Prosecutorial Misconduct

Petitioner asserts that the government engaged in prosecutorial misconduct because it (1) used petitioner's prior proffer statements as evidence; (2) improperly presented evidence through a summary witness; (3) improperly presented facts not in evidence during closing argument; (4) failed to grant witness Valero immunity; and (5) used perjured testimony. Movant's Brief In Support (Doc. #2) at 91-112. Petitioner only raised one of these prosecutorial misconduct claims on direct appeal. Appellant's Opening Brief On Appeal, 2013 WL 5880723 at *29, United States v. Carlucci (Oct. 25, 2013) (government misrepresented intent to use information that petitioner provided in Utah investigation at trial in Arizona). Judge Burns recommended that the Court overrule these claims as procedurally defaulted. Recommendation And Report (Doc. #23) at 34. Although petitioner's objection largely ignores the procedural default issue, he argues that ineffective assistance by appellate counsel caused the claims to be omitted on direct appeal. Movant's Objections (Doc. #25) at 15.

Absent a showing of cause and prejudice or actual innocence, petitioner cannot bring a Section 2255 claim that he did not raise on direct appeal. United States v. Frady, 456 U.S. 152, 164-168 (1982); Bousley, 523 U.S. at 623. To show cause, petitioner must demonstrate that "some objective factor external to the defense" – such as ineffective assistance of counsel – prevented him from raising the claim on appeal. Murray v. Carrier, 477 U.S. 478, 488 (1986).

While ineffective assistance may constitute cause to excuse a procedural default, as explained above, petitioner fails to prove ineffective assistance by appellate counsel. See supra Part II. Therefore, petitioner does not excuse his procedural defaults and for the reasons stated in the Report And Recommendation (Doc. #23), the Court overrules the prosecutorial misconduct claims that petitioner

failed to bring on direct appeal.

To the extent petitioner's appeal asserted that the government violated his prior proffer agreements, his attempt to raise the same claim in his Section 2255 motion also fails. "[A]s a general rule, federal prisoners may not use a motion under 28 U.S.C. § 2255 to relitigate a claim that was previously rejected on direct appeal." Foster, 136 S. Ct. at 1758; Paige v. United States, 456 F.2d 1278, 1279 (9th Cir. 1972) (per curiam); United States v. Castellano, 75 F. App'x 629, 630 (9th Cir. 2003). If petitioner demonstrates an intervening change in applicable law or that denying his claim would result in a manifest injustice, the Court can hear a claim disposed of on direct appeal. See Davis v. United States, 417 U.S. 333, 342 (1974); Walter v. United States, 969 F.2d 814, 816-17 (9th Cir. 1992). Petitioner fails to assert either exception to the procedural bar. Thus, to the extent petitioner raised this claim on direct appeal, the Court overrules it in the context of petitioner's Section 2255 motion.

Conclusion

The files and records in this case conclusively show that petitioner is not entitled to relief. Accordingly, no evidentiary hearing or government response is required. See 28 U.S.C. § 2255; Phillips, 267 F.3d at 973 (no evidentiary hearing when claims consist of conclusory statements unsupported by proof); United States v. McMullen, 98 F.3d 1155, 1159 (9th Cir. 1996) (no hearing when petitioner's allegations viewed against record fail to state claim); Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1982).

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." Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). For reasons stated above, the Court finds that petitioner has not satisfied this standard. The Court therefore denies a certificate of appealability as to its ruling on petitioner's Section 2255 motion.

IT IS THEREFORE ORDERED that petitioner's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (Doc. #1 in Case No. 16-cv-588, Doc. #477 in Case No. 10-cr-464-KHV) filed March 2, 2016 is **OVERRULED.**

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

IT IS FURTHER ORDERED that Movant[']s Motion To Strike Respondent[']s Reply To Movant[']s Objections To The Magistrate[']s Report And Recommendation For Failure To Comply With The Court[']s Order To Show Cause (Doc. #32) filed January 12, 2018 is **OVERRULED.**

Dated this 4th day of April, 2018 at Kansas City, Kansas.

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

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[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).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gino Carlucci, Movant/Defendant, vs. United States of America, Respondent/Plaintiff.	No. CV-16-00588-PHX-KHV (MHB) CR-10-00464-KHV-1 **REPORT AND RECOMMENDATION**

TO THE HONORABLE KATHRYN H. VRATIL, UNITED STATES DISTRICT JUDGE:

On March 2, 2016, Movant Gino Carlucci, an inmate currently incarcerated at the Federal Correctional Institution ("FCI"), Tucson, Arizona, filed a *pro se* Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, pursuant to 28 U.S.C. §2255 (hereinafter "2255 motion") listing three grounds for relief. (CVDoc. 1; CRDoc. 477.)[1] On the same day, counsel for Movant filed a Brief in Support (CVDoc. 2). Respondent filed an Answer on June 23, 2016 (CVDoc. 6), and on September 22, 2016, Movant filed a Traverse (CVDoc. 16).

BACKGROUND[2]

[1]CVDoc refers to the civil case docket, CV-16-00588, and CRDoc refers to the criminal case docket, CR-10-00464.

[2]This overview of the facts of the case are taken from Respondent's Answer. Respondent cites to the Court record in support of each asserted fact, and attaches as exhibits

Overview of Facts.

Movant and Wayne Mounts were alleged to have defrauded Joseph Flickinger and the victims of Flickinger's own investment fraud scheme of over $1,000,000 in cash and additional property. Movant and Mounts used three false promises to induce Flickinger into giving Movant and Mounts the money Flickinger took from the victims of his investment fraud scheme: the first involved an alleged casino investment in Antigua, the second related to a purported offer to settle a Securities and Exchange Commission (SEC) enforcement action against Movant, and the third involved a false promise to transfer Flickinger's money to a bank in Antigua to hide it from the government. After taking Flickinger's, Garback's, and Flickinger's victims' money and property, Movant and Mounts took several steps to conceal the proceeds of their fraud, including cash withdrawals of over $268,000 in amounts designed to avoid having currency transaction reports filed with the government.

a. Movant and Mounts's fraud on Flickinger

Movant and Mounts first became acquainted with Flickinger through Robert Garback, whom Movant had previously met while riding in the limousine Garback owned and drove. Garback was acquainted with Flickinger because Garback's mother was Flickinger's girlfriend.

In May 2004, Movant and Mounts met with Garback to discuss their proposal that Garback start a limousine business, in which Mounts would be a driver and Movant would be a "silent" partner. During this meeting, Movant told Garback he knew of other potential business ventures, including a potential real estate deal that required a $2 million investment. Garback then told Movant and Mounts that he knew of an investor, Flickinger, who had $1 million to invest and was interested in real estate investments. Movant then informed

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the transcripts of the trial, motion hearings and sentencing. Movant does not provide an overview of the facts, does not dispute that Respondent's asserted facts are supported by the cited record, and does not offer any alternative version of the overall facts supporting Movant's convictions and sentence. To the extent that Movant disputes some of Respondent's asserted facts during his discussion of the issues, the Court will address those disputes during its analysis.

Garback that he knew of another potential investment involving credit cards and loans to be issued by a bank in Antigua; Garback said he would discuss this deal with Flickinger.

Shortly before this meeting, Flickinger had been arrested in Utah, transported to Ohio, and then released on bond. Flickinger's arrest arose from charges related to his sale of illegal tax shelters and use of fictitious checks; Flickinger's scheme involved the sale of bogus "Euro checks" that purportedly could be used to eliminate federal tax liens. After his release on bond, Flickinger told Garback he had $1 million to invest. Flickinger had acquired this money from an investment fraud scheme separate from his tax scheme. This scheme was a Ponzi scheme: Flickinger lied to his clients about the investments he was making with their money, and paid money received from new clients to his old clients, falsely claiming that these payments represented returns on their investments. To conceal his investment scheme from the government, Flickinger had his investment clients sign documents that falsely characterized their investments as loans.

After meeting with Movant and Mounts, Garback told Flickinger about the Antigua bank investment proposal, which interested Flickinger. Garback relayed Flickinger's interest to Movant, but Movant responded that he had a "better idea," which involved a $1 million investment in a new casino in Antigua. Garback then told Flickinger about the casino investment, which also interested Flickinger; shortly afterwards, Flickinger and Movant began communicating directly. Flickinger told Movant about his indictment and arrest for the tax scheme, and that he had client funds from his investment scheme that he needed to "protect." Movant provided Flickinger with further information on the casino proposal, including profit projections that claimed the casino would make an annual profit of $1.9 million.

Flickinger asked Garback to go to Antigua to investigate the casino deal because his bond conditions did not permit him to travel; Garback and Movant traveled to Antigua for this purpose, at Movant's expense, on May 18, 2004. Upon arrival, Movant introduced Garback to Eddie Hadeed, a restaurant and nightclub owner in Antigua who was to be a partner in the proposed casino venture. The next day, Movant and Hadeed took Garback on a tour of the

proposed casino construction site, and showed Garback construction plans and profit projections for the casino. Movant asked Garback to call Flickinger after this tour, and urged him to have Flickinger wire the funds for the casino investment immediately; Garback called Flickinger, but Flickinger decided against going forward at that time, telling Movant, through Garback, that he did not currently have funds for the entire casino investment.

That same day, after Flickinger decided against the casino proposal, Movant told Garback that Garback could double his money by assisting Movant with his pending case with the SEC. Movant told Garback that his assets, worth $5.4 million, had been frozen in connection with the SEC case, and that he could obtain release of these assets if he could find $500,000 to put towards a proposed $700,000 settlement of the case. Garback told Flickinger about this proposal; Movant also made a similar proposal directly to Flickinger. Movant initially told Garback that his assets would be auctioned off by the SEC when they returned from Antigua on May 23, 2004, but then told Garback he could obtain a one-month extension from the SEC if he could make a $200,000 deposit towards the settlement by May 29, 2004. Then, when Garback and Flickinger told Movant they could not come up with the entire $200,000, Movant told Garback that he found other funds, and would only need $50,000 for the deposit. Garback then gave Movant a check for this amount.

Movant also made a third proposal to Flickinger regarding how to "protect" the funds he had taken from his investment clients. Movant promised Flickinger that, if Flickinger assisted with getting money for Movant's SEC settlement, Movant would arrange to have Flickinger's investment client funds transferred to a bank in Antigua owned by Hadeed, after first being transferred through a bank in St. Kitts. Movant and Flickinger referred to this transfer as the "big bounce" in their phone conversations, many of which were held on pay phones at Movant's insistence; they also used "concert" as a code word for their proposed transactions in their emails.

Movant's representations to Garback and Flickinger about the SEC settlement and about the planned "big bounce" of Flickinger's client funds to an Antiguan bank were false. Movant did not have $5.4 million in assets frozen by the SEC, and the SEC never made an

offer to Movant to release any frozen assets in exchange for a $700,000 payment.[3] Eddie Hadeed did not own a bank in Antigua, was not aware of any plans to "bounce" Flickinger's funds to his bank, and he never received any funds from Flickinger.

b. Assets Movant and Mounts took from Flickinger

After Movant made the casino, SEC, and "big bounce" proposals, Garback, Flickinger, and Flickinger's investment clients (at Flickinger's instructions) proceeded to transfer funds to an account directed by Movant but controlled by Mounts, and to transfer property to Movant and Mounts. Mounts opened this account in the name of Associated Legal Mediation Services ("ALMS"), an entity he and Movant incorporated in Utah on May 24, 2004. On May 22, 2004 (while Garback and Movant were still in Antigua), Mounts opened an account in ALMS's name at Bank One, listing himself as the sole signatory. Mounts used a false employer identification number to open this account.

Shortly after Mounts opened this account, Movant directed Garback to make the $50,000 check - purportedly to go toward the $200,000 deposit required to delay the SEC's sale of Movant's assets - payable to ALMS. Garback believed he was making this payment to a neutral third party, and was unaware that Mounts controlled ALMS's bank account. Garback hand-delivered this check to Movant, who then said he now had all the money needed for the deposit towards his SEC settlement.

After Movant told Garback the SEC settlement deposit had been paid, Flickinger and Garback proceeded to give property to Movant and Mounts, believing it would be used to raise funds for the SEC settlement. Garback then gave Movant two watches he had received from a wealthy client of his limousine business after Movant told him he could obtain loans using the watches as collateral, including a $10,000 loan secured by one of the watches.

Flickinger gave two vehicles to Movant and Mounts, believing they would be sold and the

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[3]Movant did have a pending SEC civil enforcement action against him at the time; the case was settled around October 2004. However, the settlement, which Movant tendered, required him to disgorge all of his assets the SEC had frozen. These assets were worth $1.014 million, not $5.4 million.

proceeds applied to the SEC settlement. Flickinger gave Movant a new Hummer he had in Utah, which Movant said he could sell for $51,000 to a friend in Arizona. Movant picked up the Hummer and the title at Garback's house on June 7, 2004. Garback completed Flickinger's portion of the transferor section on the title and signed it using Flickinger's signature stamp, but left the transferee section of the title blank. Mounts later completed and signed the transferee section of the title to reflect a transfer of the Hummer to ALMS, and then for $44,000 Movant sold the Hummer back to the dealer in Utah from which Flickinger originally purchased it.

Flickinger also agreed to give Movant and Mounts a Jaguar he had in Ohio, with the understanding that the Jaguar would be sold and the proceeds applied to the SEC settlement. Movant told Garback that his buyer in Arizona was interested in purchasing the Jaguar for $24,000 or $25,000. Mounts flew to Ohio on June 10, 2004, to get the Jaguar; Flickinger met Mounts at the airport and gave him the keys and title to the Jaguar. Mounts drove it back to Utah.

After giving these vehicles to Movant and Mounts, Flickinger began, on June 22, 2004, to transfer his investment clients' funds to ALMS, believing they would ultimately be transferred to Hadeed's bank in Antigua as part of the "big bounce." Flickinger wired client funds in his possession to ALMS's Bank One account, and directed his clients to wire funds directly to the ALMS account. These wires totaled $647,000, and continued through July 2004. Flickinger led his clients to believe that ALMS was either an investment account or an attorney trust account; he did not disclose to them the funds wired to ALMS were to be part of the "big bounce." Flickinger himself was unaware that Mounts controlled ALMS's account.

Flickinger also gave Movant and Mounts title to a condominium in Ohio that Flickinger had purchased using his investment clients' funds, believe in it would be sold and the proceeds transferred to Hadeed's bank in Antigua. Movant prepared and Flickinger signed a quitclaim deed transferring the condominium to NYC Entertainment, LLC, an entity Movant controlled. Movant and Mounts then transferred title to the condominium to ALMS.

c. Movant and Mounts attempt to hide the proceeds of their fraud

Instead of transferring Flickinger's client funds to Antigua and paying Flickinger and Garback the promised returns on their purported contributions towards Movant's purported settlement with the SEC, Movant arranged to have Flickinger arrested, while Mounts made a series of cash withdrawals and transfers of Flickinger's clients' funds from the ALMS bank account.

Movant told Flickinger he had arranged for a plane to fly Flickinger from Ohio to Antigua. Garback paid Movant about $20,000 for this flight, at Flickinger's direction, using Flickinger's clients' funds. Flickinger arrived at a small airport near Columbus, Ohio after 5:00 pm on July 31, 2004, with a substantial amount of luggage, and waited on the tarmac for his plane. No plane ever came, however. Flickinger, instead, was arrested by federal agents at the airport around 9:45 p.m. The agents were waiting for Flickinger before he arrived because they had received two faxes, both alerting them that Flickinger intended to flee the country for Antigua on a flight leaving from the Ohio airport. These faxes were sent on July 25, 2004, and July 29, 2004; the first was from "a concerned citizen," and the second purported to be from "Byron Chrishner." These faxes were in fact sent by Movant, from the telephone number for his address in Utah.

Although Movant led Flickinger to believe his clients' funds had been transferred to Antigua by July 31, 2004, in fact, these funds were never sent offshore. Instead, Mounts had already begun to withdraw the funds from ALMS's Bank One account. Between June 1, 2004, and August 10, 2004, Mounts made numerous cash withdrawals from this account, totaling $268,439. Mounts only made cash withdrawals in amounts under $10,000 in order to avoid having currency transaction reports filed with the government. In one instance, Mounts initially requested a $10,000 withdrawal, but changed the withdrawal amount to $9,990 after the bank teller told him she would have to prepare a currency transaction report for the withdrawal. Mounts used seven different branches in the Salt Lake City area to make these withdrawals.

Mounts also wired funds from and wrote checks drawn on the ALMS Bank One account.

Mounts wrote a $23,720 check to Movant's wife, Tracy, and wrote a $50,000 check and made wire transfers totaling $200,000 to an account held by Ralph Levine, Tracy's father and Movant's father-in-law. Mounts also obtained two cashier's checks drawn on the ALMS account to pay for a truck that Movant purchased from Garback; Mounts had "Happy Security" identified as the remitter on the check to conceal that the funds came from the ALMS account. Mounts wired $130,000 to Eriksen Marine to purchase a 38-foot Baja boat for Movant. By August 18, 2004, Mounts had drawn down all the funds in the Bank One ALMS account; Bank One closed the account shortly thereafter due to suspicious activity.

In addition to these transfers from the ALMS account, Movant and Mounts took several other steps to conceal the proceeds of the money taken from Garback, Flickinger, and Flickinger's clients. After Flickinger was arrested, Movant and Mounts listed Flickinger's condominium for sale, using the same real estate agent, Norma Schaechterle, that Flickinger was using to list the property. Movant and Mounts traveled to Ohio on August 2, 2004, to meet with Schaechterle; during this meeting, which Movant left early, Mounts signed the paperwork to transfer the condominium sale listing from Flickinger to ALMS. Later, Mounts sent a letter to Schaechterle, ordering her to re-key the condominium. In this letter, Mounts told Schaechterle that ALMS was the owner of the property, and no one besides a prospective buyer was to be allowed access to the property. Mounts also told Schaechterle that Flickinger was now in jail, and specifically warned that Flickinger's sister was not to be allowed in the property. Mounts identified himself as the CEO of ALMS in this letter and falsely identified Movant as an attorney. The condominium eventually sold for $210,000, with $195,792 of that going to ALMS as the seller; these sale proceeds were wired to an account in the name of ALMS that Levine, Movant's father-in-law, had recently opened.

Before Bank One closed the ALMS account, Mounts lied to Bank One officials about the purposes for his cash withdrawals from the ALMS account. When Mounts was questioned by a Bank One branch manager about the reason for his cash withdrawals, he falsely claimed that the cash was being withdrawn to purchase a boat (the boat was purchased with wired funds not cash). Later, when a Bank One investigator, Thomas Burnside, contacted Mounts

because the bank suspected that Movant was trying to avoid CTR requirements, Mounts at first refused to answer Burnside's questions about the purpose of the cash withdrawals from the ALMS account. Mounts then had Mark Flores, who identified himself as Mounts's attorney, contact Burnside. Flores falsely told Burnside, first on the phone and later in a letter, that Mounts operated ALMS as a cash business that bought property from "financially stressed" individuals, and then resold it at a profit. Flores gave Flickinger's Hummer - for which Movant and Mounts actually paid Flickinger nothing - as an "example" of the purchases and sales that ALMS was purportedly involved in using the withdrawn cash.

Movant and Mounts also used friends and family members as nominees to hide the proceeds of the Flickinger fraud. Levine, after receiving the money that Mounts sent to Levine's account from the ALMS account and the proceeds from the sale of Flickinger's condo, subsequently transferred $155,388 to Tracy Carlucci. With the balance of the money transferred to him, Levine made expenditures on Movant and Mounts's behalf: he wired $20,500 to Eriksen Marine to acquire a new 43-foot Scarab boat, which Movant and Mounts obtained by trading in the Baja boat they had earlier purchased using funds from the ALMS Bank One account; Levine paid $19,201 for one year's pre-paid rent for Movant's residence after Movant and his family moved from Utah to Arizona; and he wrote a check to purchase a new pickup truck for Movant's use.

Movant and Mounts also used an entity known as Essential Furniture to hide the proceeds of the Flickinger fraud. Essential Furniture, which had been established by a friend, Steve Leuder, was originally intended to be used to buy and sell used furniture. Without Leuder's knowledge, Levine purchased a $150,000 cashier's check payable to Essential Furniture in February 2005, which was later endorsed by Movant and Mounts. Later, Leuder asked Movant for a loan for Essential Furniture. Mounts lent Leuder $45,000, which was provided using a check written on Tracy Carlucci's account, not Mounts' account. Mounts, however, asked for the money back shortly thereafter, and, over approximately a month, Leuder repaid Mounts (not Movant or his wife), at least partially in cash.

Movant and Mounts also used false loan documents in an attempt to disguise the proceeds

of the Flickinger fraud. Movant and Mounts prepared two promissory notes that purported to show that Flickinger had loaned money to ALMS. One of these notes was for $210,000, and was signed by Mounts and Flickinger; Movant gave this note to Flickinger and told him it should be used to show the government that he had made a loan to Movant. The second note, for $490,000, was singed by Mounts and appeared to bear Flickinger's signature, although Flickinger never signed it; Flickinger's signature on the second note was cut and pasted from a document he signed when he transferred his condominium to Movant and Mounts. These notes purported to require payment of interest, but Flickinger never received interest payments.

Movant and Mounts also prepared and signed a false loan document that purported to show that ALMS had loaned $100,000 to Movant and his wife. Although this document provided for interest that would be retroactively payable beginning in 2011 if the loan was not repaid, Movant's wife, Tracy, did not believe this provision opposed any risk because Mounts was friend of the family. After the government discovered that Movant had received proceeds of Flickinger's investment fraud scheme, and interviewed Movant about his involvement, Movant's attorney provided the government with a copy of this false loan agreement.

Movant and Mounts also took steps to hide the Scarab boat that was acquired using the proceeds of their fraud. Movant asked that the seller fo the Scarab boat leave the section for the purchaser on the title blank; Movant then filled this section in, identifying Gawshawk, Ltd., as the purchaser, and Hadeed as the owner of Gawshawk. Hadeed in fact did not own or posses the boat, and never incorporated an entity named "Gawshawk, Ltd." Although denying knowledge of the whereabouts of the boat, Movant and Mounts placed the boat at the home of Brandon Valero, a longtime acquaintance of Movant, until it was located and seized in May 2007.

Movant and Mounts also devised a false document that claimed that he boat had been transferred from Flickinger to Gawshawk as payment for damages suffered as a result of the failure of the casino deal. This document was signed by Mounts, and bore Hadeed's

signature, although Hadeed did not sign it. Hadeed never entered into this agreement, and never suffered any damages from the refusal of Flickinger to invest in his casino.

Movant and Mounts did not report any of the proceeds of their fraud to the IRS. Movant and Mounts never filed a return for ALMS. Mounts did not file in 2005 an individual federal income tax return for 2004, despite receiving at least $294,439 of proceeds from Flickinger, Garback, and Flickinger's clients. Movant and his wife filed a joint 2004 return in April, 2005 but reported only $24,800 in business income, notwithstanding that they collectively received $590,408 in fraudulent proceeds.

On April 8, 2010, Movant was charged by indictment, along with co-defendant Wayne Mounts with one count of conspiracy to commit money laundering and one count of conspiracy to defraud the United States; Movant was also charged with one count of willful filing of a false tax return and one count of witness tampering. (CRDoc. 1.) After a trial, he was convicted on all but the witness tampering count; on that charge he was acquitted. (CRDoc. 238.) On August 17, 2012, Movant was sentenced to the Bureau of Prisons on count one for a term of 173 months; for a term of 60 months on count two, to be served concurrently to count one; for a term of 36 months on count three, for which 15 months would be ordered to be served consecutive to count one. (CRDoc. 412.) Movant appealed his judgment and sentence to the Ninth Circuit Court of Appeals, and on October 25, 2013, he filed his opening brief raising the following grounds for relief:

1. Did the trial court commit reversible error by denying the defense Motion to Dismiss based on the oral and written non-prosecution/immunity agreements and for related prosecutorial misconduct?

2. Did the trial court clearly abuse its discretion and reversible err by denying the Motion to Dismiss based on the prior plea agreement entered into by Mr. Carlucci?

3. Did the trial court commit reversible constitutional and rule based error by denying the defense Motion to Preclude text messages presented through witness Rob Garback?

4. Did the trial court commit reversible constitutional and rule based error by denying the defense Motion to Preclude hearsay statements of unavailable witness Branden

Valero regarding the substance of the charges?

5. Should the convictions be reversed and the case remanded for a new trial due to the trial court refusal to preclude Tracy Carlucci based on the spousal communications privilege?

6. Did the trial court violate Mr. Carlucci's right to counsel, right to a fair and impartial jury, right to due process, and right to a fair trial when it failed to *sua sponte* remedy the repeated and continuing issue of jurors sleeping during trial?

7. Did the trial court violate Mr. Carlucci's constitutional and statutory rights at sentencing by imposing an improper sentence establishing that reversal and remand for resentencing is required?

United States v. Carlucci, No. 12-10425, doc. 67 (October 25, 2013).

The Ninth Circuit Court of Appeals denied relief on August 8, 2014, in a 10 page Memorandum decision. (CRDoc. 460-1.) On the grounds raised by Movant, the Court denied grounds one through three, part of four, and seven on the merits. (Id.) As to ground four, the Court denied the confrontation clause argument on the merits, although under a plain error standard as the issue had not been raised by trial counsel; as to ground 5, the Court found that Movant waived the issue by not raising it at trial; and, as to ground 6, the Court denied the claim on the merits applying an abuse of discretion standard as trial counsel did not object. (Id.) The mandate issued on September 4, 2014. (CRDoc. 460.) Movant filed a petition for Certiorari to the United States Supreme Court, which was denied on March 23, 2015. (CVDocs. 1 at 3; 9 at 2.)

On March 2, 2016, Movant filed his 2255 motion and a Brief in Support. (CVDocs. 1, 2.) In his motion, Movant lists the following grounds for relief:

Ground One: Ineffective Assistance of Trial Counsel.

A. Movant's counsel made an incorrect argument in his motion to dismiss based upon a statute of limitations violation.

B. Movant's counsel failed to request a Kastigar hearing.

C. Movant's counsel had a personal conflict of interest in representing Movant in that he disclosed privilege attorney-client information to the Government and the

Court.

D. Movant's counsel failed to investigate witnesses and overlooked documents that Movant provided him, and failed to request appointment of a handwriting expert.

E. Movant's attorney failed to object when jurors were observed sleeping during trial.

F. Movant's attorney failed to object to Movant's wife's testimony on the basis of the marital communications and adverse spousal testimony privileges.

G. Movant's attorney failed to object when government witness discussed the case with members of the "prosecution team" between days of testimony.

H. Movant's attorney conceded Movant's guilt on counts 2 and 3 of the indictment in his closing argument.

I. Movant's attorney failed to file a motion to preclude text messages from being introduced into evidence.

J. Movant's attorneys failed to object to restitution that included victims' loss that Movant claims should have been attributed to a financial scheme he was not involved in.

K. Movant's attorney failed to argue at sentencing unwarranted disparities among similarly situated defendants.

Ground Two: Prosecutorial Misconduct.

A. The prosecution violated a Court ruling that precluded any evidence at trial relating to a plea and proffer agreements that Movant entered into with the prosecution.

B. The prosecution improperly utilized an FBI agent as a summary witness who commented on Movant's credibility.

C. The prosecution argued facts not in evidence to the jury and made improper comments to the jury.

D. The prosecution failed to grant immunity to witness Brandon Valero who invoked his Fifth Amendment and refused to testify.

E. The prosecution introduced perjured testimony (witness Garback) at trial.

Ground Three: Ineffective Assistance of Appellate Counsel.

A. Movant's appellate counsel failed to communicate with Movant and failed to investigate and raise the following issues: Movant's attorney's concession of guilt in closing argument, statute of limitations violation, violation of the immunity agreement. (Ground One, A-K, Ground Two, L-P)

Movant asserts that his judgement should be reversed and the charges against him be dismissed, or in the alternative that he should be granted a new trial.

ANALYSIS

A federal prisoner may seek relief under §2255 if (1) his sentence was imposed in violation of the United States Constitution or the laws of the United States; (2) the sentencing court had no jurisdiction to impose the sentence on the prisoner; (3) the sentence imposed exceeded the maximum sentence authorized, or (4) the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255(a). A 2255 petition is an "extraordinary remedy," however, and "will not be allowed to do service for an appeal." Bousley v. United States, 523 U.S. 614, 621 (1998) (citation omitted); United States v. Frady, 456 U.S. 152, 165 (1982) (noting that a motion to vacate or modify a sentence under 28 U.S.C. § 2255 can not be used as a substitute for a direct appeal). If a prisoner could have raised a claim on direct appeal but did not do so, he has "procedurally defaulted" on that claim and cannot present it in a 2255 petition unless he shows (1) cause for failing to raise it on direct appeal and "actual prejudice" from that failure or (2) that he is "actually innocent." Id. at 622 (citations omitted). A claim is exempt from the procedural default rule, however, if it cannot be presented without further factual development. Id. at 621. A claim of ineffective assistance of counsel may fall within this exemption. Masaro v. United States, 538 U.S. 500, 509 (2003). A claim or issue that was decided on direct appeal may not be re-litigated in a 2255 proceeding, absent an intervening change in the applicable law. Foster v. Chatman, __ U.S. __; 136 S.Ct. 1737, 1758 (2016) (concurring opinion); Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012) (collecting cases).

A prisoner is not entitled to an evidentiary hearing on a claim if "the motion and the files and records of the case conclusively show that [he] is entitled to no relief." 28 U.S.C. §2255(b). To earn the right to a hearing, a prisoner must "allege specific facts which, if true, would entitle him to relief." United States v. McMullen, 98 F.3d 1155, 1159 (9th Cir. 1996). A hearing is not required when credibility issues can be conclusively decided on the basis of documentary testimony and evidence in the record. Watts v. United States, 841 F.2d 275, 276 (9th Cir. 1988). See also, Shah v. United States, 878 F.2d 1156, 1161 (9th Cir. 1989) ("[m]ere conclusory allegations do not warrant an evidentiary hearing.").

At the outset, it should be noted that some of Movant's claims of ineffective assistance of counsel and prosecutorial misconduct claims are barred because the underlying issues were raised and denied on their merits on appeal, and it is "well settled" that a movant can not "circumvent" an adverse ruling by re-raising the same issue in a 2255 motion. See United States v. Dyess, 730 F.3d 354, 360 (4th Cir. 2013) (citation omitted). Additionally, some of Movant's ineffective assistance of counsel claims are barred as procedurally defaulted because they could have been, but were not raised on appeal, and Movant can not demonstrate cause and prejudice. These procedural bars will be discussed in the analysis of Movant's claims.

The two-prong test for establishing ineffective assistance of counsel was established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail on an ineffective assistance claim, a convicted defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See id. at 687-88.

Regarding the performance prong, a reviewing court engages a strong presumption that counsel rendered adequate assistance, and exercised reasonable professional judgment in making decisions. See id. at 690. "[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995) (quoting Strickland, 466 U.S. at 689). Moreover, review of counsel's performance under Strickland is "extremely limited": "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.), judgment rev'd on other grounds, 525 U.S. 141 (1998). Thus, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct." Strickland, 466 U.S. at 690. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Along with the strong presumption that counsel's conduct conforms to professional standards, there is a "presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 at 689 (internal quotation marks and citation omitted).

If the prisoner is able to satisfy the performance prong, he must also establish prejudice. See id. at 691-92; see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (burden is on defendant to show prejudice). To establish prejudice, a prisoner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. A court need not determine whether counsel's performance was deficient before examining whether prejudice resulted from the alleged deficiencies. See Smith, 528 U.S. at 286 n.14. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. (quoting Strickland, 466 U.S. at 697).

GROUND ONE.

A. Movant's counsel made an incorrect argument in his motion to dismiss based upon a statute of limitations violation.

On September 17, 2010, Movant moved to dismiss count one of the indictment - conspiracy to commit concealment money laundering - on the grounds that the five-year statute of limitations had run since the time the offense was completed and when the indictment was returned. (CRDoc. 67.) Movant's counsel argued that the last overt act, related to the money laundering conspiracy, occurred more than five years before the return of the indictment. (Id.) The Court held oral argument on the motion, and on January 4, 2011, the trial court denied the motion, finding as follows:

> Defendant was indicted on April 8, 2010. Thus, the conspiracy charge is timely provided Defendant acted in furtherance of the conspiracy after April 8, 2005. According to the indictment, Defendant filed a false tax return on April 12, 2005. The false tax return allegedly was in furtherance of the money laundering conspiracy.

> Defendant also took steps after April 2005 to hide assets from the government, such as a boat and a trailer. Given the date of these alleged actions, the conspiracy to commit money laundering count is timely.

(CRDoc. 120.)

Movant asserts variously that the false tax return and the hiding of assets were not proper acts of conspiracy or acts in furtherance of the conspiracy and thus were not a proper basis for the extension of the statute of limitations on the money laundering conspiracy count. Movant clearly could have raised this same issue on appeal, by challenging the trial court's determination of this precise issue. Presenting a substantive issue under the guise of an ineffective assistance of counsel does not resurrect a procedurally defaulted claim.

Movant nevertheless fails to adequately explain what it is that Movant's trial counsel should have argued, but didn't. He argues, generically, that his trial counsel "argued his motion without researching the law and applied a mis-statement of law in his motion." Movant fails to demonstrate that, even had his counsel not made the "mis-statement," the trial court would have ruled in his favor. Movant's argument also fails factually and legally. His assertion that the transcript of Movant's supervised release hearing in 2007 demonstrates that Movant disclosed the scarab boat in 2004, and therefore did not conceal it, is specious, in that disclosing the existence of a thing and concealment can occur simultaneously. In fact, agent testified that Movant said the boat was "unavailable," and also testified that the boat was falsely titled in someone else's name, stored in someone else's back yard, and was only recovered on an informant's tip in 2007.

Additionally, Movant argues that, because the laundered profits are subject to forfeiture and become the property of the government by law, Movant was relieved from any obligation under the U.S. Tax Code to report the receipt of funds on his tax return. Movant cites numerous out-of-Circuit cases that stand for the proposition that, pursuant to 21 U.S.C. §853(c), all title and interest in the proceeds of Movant's crimes vest immediately with the government. Movant cites to no authority that provides that illegally-gotten gains can not be considered taxable income. In fact, it has long been well established that "[i]llegal gain as well as legal gain constitutes taxable income." James v. United States, 366 U.S. 213, 219

(1961) (unlawful gain is income, even if receiver is "not entitled to retain the money, and even though he may still be adjudged liable to restore" it.); Beck v. United States, 298 F.2d 622, 625 (9th Cir. 1962).

B. Movant's counsel failed to request a Kastigar[4] hearing.

In Movant's opening brief on appeal he claimed that the trial court committed reversible error in denying the defense motion to dismiss based on the non-prosecution/immunity oral and written agreements and for related prosecutorial misconduct. (United States of America v. Carlucci, 12-10425, doc. 40.) Movant asserted that Movant was given immunity from prosecution, or from the use of information he provided during a first proffer agreement between the government and Movant (March 30, 2004), in a Utah investigation involving Stem Genetics. In December 2004, Movant entered into a plea agreement in that case and agreed to cooperate against defendant Wolfson. Pursuant to that cooperation, Movant asserted that he engaged in trial preparation/cooperation discussions with the government, and that some of the discussion involved the Arizona investigation. Movant argued that some of the facts disclosed during those discussions, and during subsequent questioning were inappropriately used against him in the Arizona prosecution. After the trial court denied Movant's motion to dismiss, the government asserted that it would not, in any case, use in its case-in-chief any information provided by Movant during his earlier cooperation. Movant argued on appeal that the government violated this promise by introducing statements made by movant through witnesses Agent DiSalvo and Agent White.

The Ninth Circuit Court denied his claim, finding that:

> [Movant] was required to cooperate with the Stem Genetics prosecution pursuant to a plea agreement in that case. That such cooperation included discussions touching on the present case does not establish that the government promised immunity from prosecution in this case. Nor does the testimony of Jeffrey Wright show that prosecutors promised immunity. At most, there may have been an implied understanding between the parties that the government would be prohibited from using information that [Movant] divulged or statements that he made specifically in furtherance of his cooperation on the Stem Genetics Matter. [Movant] has not shown

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[4]Kastigar v. United States, 406 U.S. 441 (1972) (hearing to determine use of compelled testimony).

> that the government actually used evidence against him that was obtained from his cooperation in 2009 to prepare for the Stem Genetics trial. [Movant]'s discussions with the government in February 2005 were not in furtherance of his required cooperation under the 2004 plea agreement, but were governed by a separate proffer agreement. [Movant] did not show that he had immunity for the conduct underlying the convictions in this case, or that the government committed prosecutorial misconduct.

(CRDoc. 459-1 at 3-4.)

Movant now claims that his attorney erred in failing to request a Kastigar hearing. Even if Movant can demonstrate that his trial attorney erred, he fails to show prejudice. Movant's trial counsel filed a motion to dismiss based upon the purported use of immunized statements against him. (CRDoc. 52.) The trial court denied the motion after a two-day evidentiary hearing, during which the Court took the testimony of Jeffrey Wright, Utah AUSAs Mark Hirata and Trey Mayfield, and considered the Utah prosecution plea agreement and other documents proffered by the parties. (CR Docs. 101, 107.) The trial court found that Movant was not given immunity from prosecution in this case, and read its extensive factual findings into the record. (CRDocs. 107; 130 at 8-13.) The appellate court determined, as above, that Movant did not have immunity for the conduct underlying his convictions. Movant wants to rehash this issue, raised before trial and on appeal, through the guise of an ineffective assistance of counsel claim. Movant's claim fails as he does not demonstrate that his counsel was ineffective, and in any event does not demonstrate prejudice.

> C. Movant's counsel had a personal conflict of interest in representing Movant in that he disclosed privilege attorney-client information to the Government and the Court.

After Movant's conviction at trial on July 25, 2011, but before his January 5, 2012 sentencing (continued once), Movant's trial counsel, Mr. Eisenberg, filed a motion to withdraw, or, in the alternative, motion for extension of time to submit objections to draft presentence investigation report extension of date for sentencing. (CRDoc. 292.) In the motion, he indicated that he had learned that Movant had recently retained a private law firm to represent Movant at sentencing, and that sentencing should be continued in order to allow new counsel time to prepare, and that alternatively, because of trial counsel's involvement in other matters, if new counsel did not appear, Mr. Eisenberg would need additional time to file objections to the presentence report. (Id.) Trial counsel thereafter filed an amended

motion indicating that he had met with new counsel (Mr. Nolan) and Movant, and that Movant had made clear to him that he did not want him to do any further work on his case, and wanted Mr. Nolan to represent him. (CRDoc. 293.) The trial court held a telephonic conference with Mr. Eisenberg, after which it issued an order for Movant to show cause in writing why the Court "should not order him to reimburse the Treasury for the costs it has incurred in providing him court-appointed counsel in this matter," citing 18 U.S.C. § 3006(A)(f). (CRDoc. 295.)

During the telephonic hearing, Mr. Eisenberg represented to the Court that he would like to withdraw as counsel because of difficulties communicating with his client. (CRDoc. 340.) Mr. Eisenberg also eluded to an ethical issue had arisen that could interfere with his ability to advocate for Movant at sentencing, but at the same time indicated that he and Movant had a disagreement regarding sentencing tactics. (Id.) Mr. Eisenberg did not reveal any specifics regarding the conflict that caused him concern over represent Movant at sentencing. Shortly thereafter, Mr. Nolan entered a Notice of Appearance on behalf of Movant. (CRDoc. 302.)

On January 5, 2012, a hearing was held on the Court's order to show cause. (CRDoc. 305.) Present were Mr. Eisenberg, Mr. Nolan and Movant. The Court directed that the $5,000.00 paid to Mr. Nolan be paid to the Court for deposit in the treasury. (Id.) Mr. Nolan filed a motion for reconsideration, (CRDoc. 302), and the Court granted the request. (CRDoc. 346.) Mr. Nolan also filed a motion to withdraw, stating that he had a "new and separate unwaivable conflict" requiring him to withdraw. (CRDoc. 321) In a subsequent motion, filed under seal, Mr. Nolan indicated that the conflict was resolved, as another attorney in his firm, Vicki Lopez, would represent Movant. The Court then issued an order denying Mr. Nolan's request to withdraw, and that Mr. Nolan or his associate, Vicki Lopez would represent Movant at sentencing. (CRDoc. 350.) The Court also ordered Mr. Eisenberg to continue as co-counsel, citing several cases in which appointed counsel could serve as co-counsel to new privately-retained counsel, at least until such time as new counsel got up to speed on Movant's case. (Id.)

Thereafter, Mr. Nolan or Ms. Lopez filed Objections to Presentence Investigation Report,

(CRDoc. 370), and a Sentencing Memorandum, (CRDoc. 389), and appeared for Movant at sentencing on August, 16, 2012. Ms. Lopez argued objections to the Court, and Mr. Eisenberg argued other sentencing considerations. (CRDoc. 447.)

Movant now claims that Mr. Eisenberg was ineffective because he sought to withdraw from representing him shortly before sentencing. First, he complains that Mr. Eisenberg filed a motion to withdraw instead of a substitution of counsel, causing the Court to inquire into the source of funds. Even if a substitution had been filed, Movant can not establish that the Court would nonetheless not have inquired into the source of funds to retain Mr. Nolan, given the fact that Mr. Eisenberg had represented Movant for nearly a year, and throughout the 8-day trial, and thus significant CJA funds were expended on his defense. Additionally, the government was interested in the inquiry, to ensure that the funds were not proceeds of, or related in any way to the charges in the indictment. Furthermore, Movant did not file any objections to the trial court's order that Mr. Eisenberg remain on the case as co-counsel through sentencing.

Movant also complains that Mr. Eisenberg divulged attorney-client privilege to the Court. Upon review of the transcript of the telephonic hearing on December 19, 2011, the record reveals no such divulgence. Mr. Eisenberg merely alluded to an ethical conflict he may have going forward with respect to raising certain sentencing issues that Movant wanted to raise. He also expressed his belief that he had lost the confidence of his client, that he may be accused on ineffective assistance in a 2255 motion, and that he did not want to make objections or arguments that Movant wanted him to make. Although it may have been prudent for Mr. Eisenberg to insist on his client's presence during the hearing, there is no showing that any communications of substance were revealed to the Court, or that Movant was prejudiced. Movant does not demonstrate that Mr. Eisenberg's performance was affected by any conflict he perceived.

Additionally, trial courts routinely rule on motions to withdraw by attorneys who, because withdrawal is based upon ethical issues either caused by, or bear on the attorney-client relationship, necessarily must allude generally to the nature of the conflict. Nothing more

than that occurred here. Movant does not demonstrate that any statements made by Mr. Eisenberg affected the Court's subsequent rulings or sentencing. Additionally, a review of the sentencing memorandum filed by Mr. Eisenberg and the transcript of sentencing, make clear that the Court's refusal to allow Mr. Eisenberg to withdraw, and his own perceived conflict of interest, did not negatively affect his advocacy. Furthermore, Movant could have, but did not raise the issue of Mr. Eisenberg's divulgence of attorney-client communications on appeal, but chose not to, so he can not now raise the issue under the guise of ineffective assistance of counsel.

D. Movant's counsel failed to investigate witnesses and overlooked documents that Movant provided him, and failed to request appointment of a handwriting expert.

Movant claims that Mr. Eisenberg should have investigated Bill Branscum, a purported former federal investigator who was hired by Flickinger in 2004 to conduct an investigation of Movant. To support his claim that Branscum had information helpful to his case, Movant attaches an IRS memo reporting that Robert Garback told investigators that Flickinger had hired Branscum, a copy of an email sent by Branscum to Mr. Eisenberg on March 29, 2011, requesting Movant's contact information, and a copy of an email sent by Branscum to Movant on March 30, 2011, that says nothing of substance. Movant's unsupported allegation is not sufficient to establish that Mr. Eisenberg was (1) aware that Branscum possessed any helpful information, (2) that Branscum would have conveyed the helpful information, or (3) that the information would have made any difference in his trial or sentencing. Respondent also asserts that Branscum's report was produced in discovery and was a damning report on Movant, Mounts and Flickinger, and that any decision by Mr. Eisenberg not to call Mr. Branscum at trial would have been strategically sound.

Movant claims that Mr. Eisenberg should have contacted Nedra Roney ("Roney"), who Movant claims would now testify and contradict Garback's trial testimony that Movant swindled watches from him in 2004. Movant also claims that Roney would testify that she was solicited by Garback to invest in a Ponzi scheme, and that she had an affair with Garback. Movant does not attach any statements or affidavits from Roney, but relies on his

own self-serving affidavit (Movant did not testify at trial), an email sent to Mr. Eisenberg, and on hearsay concerning what Roney would say concerning these allegations. Also, Movant attaches a copy of a Utah police report that details the investigation into an August, 2006, report of a burglary by Roney of her residence during which over one million dollars in jewelry, cash and other items were stolen. In Roney's description of the missing jewelry to police she describes a white, gold Icelink watch and a Bentley watch, both having numerous diamonds on them and worth a substantial sum of money. Ultimately the property was recovered and Roney declined to continue any investigation and the crime went unsolved.

Movant fails to demonstrate that these two items are the "very expensive watches" Garback testified that were given to him two years earlier in 2004 (a Breitling and a Cartier), and fails to otherwise establish that Roney would confirm Movant's assertions regarding the Ponzi scheme or an affair with Garback. Movant also fails to demonstrate that, even if these allegations were true, that they would have made a difference in the outcome of his trial or sentencing.

Movant also claims that Mr. Eisenberg failed to call Alicia Thomas, a notary public, and that had he done so, she would have denied notarizing a power of attorney that Flickinger allegedly granted to Movant. Movant provides no affidavits or documents supporting this assertion, and his claim as to what Thomas would say is purely speculative. Respondent asserts that even if the notary was fraudulent, this would not change the fact that Movant and Flickinger used the power of attorney to liquidate Flickinger's assets as part of the scheme to defraud. Movant fails to establish that Mr. Eisenberg was ineffective in not investigating Thomas, or how any testimony she would provide would have made a difference in the outcome of Movant's trial or sentencing.

Movant also claims that Mr. Eisenberg failed to investigate Jon Clark, an attorney and friend of Movant in Salt Lake City. He claims that Clark would contradict the trial testimony of Paul Bangater, who testified that the Scarlet Kitten Company was an investment Movant had asked for, and that it was a promotional company, when in fact Scarlet Kitten was

Clark's idea and was in fact a porn company. Movant provides no affidavits or documents supporting this assertion, and fails to establish that, even if this assertion were true, it would have made a difference in the trial or sentencing. Additionally, the Government asserts that, even if Movant could establish these facts, it would make no difference: "[w]hether it was going to be used for and as a promotional item at events such as Lake Havasu as Bangater testified, or to promote a porn company," the term Scarlet Kitten "was merely the name painted on the Scarab boat that [Movant] bought with funds he [fraudulently obtained]." (CVDoc. 6 at 37.)

Movant also claims that Mr. Eisenberg should have interviewed Angela LaPour, Garback's wife because Movant told Mr. Eisenberg that she was present for several meetings between Movant and Garback, and that she would testify as to different facts about the casino deal. Again, Movant provides no affidavits or documents in support of this vague assertion, and fails to establish that, even if this assertion were true, it would have made a difference in the trial or sentencing.

Movant also claims Mr. Eisenberg should have interviewed Michael Garback, Rob Garback's brother, because Movant told Mr. Eisenberg that Michael was present when the yellow hummer was picked up and had information about the private jet. Again, Movant provides no affidavits or documents in support of these vague assertions and fails to establish that, even if the assertions were true, the facts would have made a difference in the trial or sentencing.

Movant also claims that Mr. Eisenberg did not contact Bertha Garback, the girlfriend of Mr. Flickinger. Movant does not assert that Mr. Eisenberg was aware that Bertha may have exculpatory evidence. Movant claims that Bertha e-mailed Movant and had information regarding Flickinger's financial transactions. Movant also references an exhibit he claims is a "Flickinger letter" that Bertha received. Movant provides no affidavits or documents in support of these vague assertions, and there is no evidence that Bertha received the "Flickinger letter" and that, even if she had, that it would have impacted the trial or sentencing.

Movant also claims that Mr. Eisenberg did not contact Ed Flickinger, Mr. Flickinger's twin brother. Movant asserts he told Mr. Eisenberg that Ed flew to Utah and other places using his jet and prepared most of the documents regarding American Financial, and could have provided American Financial documents. Movant provides no affidavits or documents in support of these vague assertions, and fails to establish that, even if the assertions were true, the facts would have made a difference in the trial or sentencing.

Movant also claims that Mr. Eisenberg did not contact Christina Valero, the wife of Brandon Valero. Movant claims that Mr. Eisenberg was "made aware" of statements that IRS agent Kiatola made that were false and that agent Kiatola manipulated the statements Christina made to him. Movant provides no affidavits or documents in support of these vague aspersions, and fails to establish how these facts would make a difference in the trial or sentencing.

Movant also claims that Mr. Eisenberg failed to contact the confidential informant ("CI"), Movant claims that Mr. Eisenberg was "made aware" of the CI, whose statements were used in the affidavit to seize the scarab boat and at a hearing in Utah, and that the CI never identified Movant. Movant provides no affidavits or documents in support of these vague assertions, and fails to establish how these facts would make a difference in the trial or sentencing.

Movant also complains that Mr. Eisenberg did not cross-examine Flickinger at all on a letter he had written Garback in which he informs Garback of what to expect before the grand jury, and advises him of what he previously told Richard Rowling concerning Movant's involvement. Movant also complains that he did not cross-examine Garback "hard" on the letter. He also complains that Mr. Eisenberg did not investigate or use several other letters written by Flickinger written between 2005 and 2007, that include statements about "going after" Movant, and offered up drug dealers, money launderers, tax evaders and even asks if he can become a confidential informant.

Even if Movant could demonstrate that the letters were authored by Flickinger and received and read by Garback, and that the statements made were admissible, he does not

demonstrate prejudice. On cross-examination, Flickinger admitted to being a liar, that he had lied some 40 times, and lied to anyone in order to get what he wants, that he ran a ponzi scheme, that he is a felon, that he received a sentence reduction for his cooperation, that he was motivated to assist in Movant's prosecution so that Movant would share responsibility for the 3 million dollars he had been ordered to pay in restitution, and that he committed a new scheme while on supervised release. Flickinger also admitted to sending sizable checks to Garback. Flickinger was extensively cross-examined by Mr. Eisenberg about the letter he had sent to Garback, admitting that he shared his statements to the grand jury, told Garback what to say to the grand jury, and what not to say to Rowling and that he had encouraged Garback to lie.

Garback was also cross-examined by Mr. Eisenberg about his relationship with Flickinger, admitting that he received immunity from the government for his role in assisting Flickinger in his attempt to flee the United States, and that he received several hundred thousand dollars from Flickinger. Additionally, Mr. Eisenberg argued in his closing statement that the evidence showed that Mr. Flickinger told Garback what to say before the grand jury. Movant does not demonstrate any prejudice.

Movant next claims that Mr. Eisenberg should have hired a special investigator and handwriting expert that "could have somehow provided relevant evidence concerning a printed promissory note allegedly signed by Flickinger." Movant does not attach any affidavit or document in support of this assertion. In any event, the excerpts of trial transcript cited by Movant do not demonstrate that Flickinger denied that the promissory note contained a fax header with his name, just that he could not tell (which is consistent with the copy of the promissory note/exhibit Movant identifies as his 2255 petition as Exhibit U-(a)). Additionally, the government's theory of the case was that Flickinger's signature on the promissory note was cut and pasted, not that it wasn't Flickinger's signature. Thus, even if Movant had a handwriting expert who would opine that the promissory note contained Flickinger's signature, it would not have necessarily undermined his testimony.

E. Movant's attorney failed to object when jurors were observed sleeping

during trial.

Movant claims that Mr. Eisenberg failed to object to jurors that were observed sleeping during the trial. On day five of the trial, after being alerted to the issue, the trial court held a discussion with counsel. The Court referenced a note received from a juror concerning a juror that was sleeping and another one that might be sleeping, and noted that it had observed juror number 8 nodding his head. Mr. Eisenberg noted that juror number 5 was "virtually asleep in the afternoon." Counsel for the government suggested that the Court "consider taking measures, whatever measures are necessary to enliven [the] trial any more than it already is, but consider designating those two jurors as alternatives when deliberations arise." Counsel for co-defendant Mounts objected:

> I mean, look, the government's putting on their case nice and slow. It's a warm day. We had all just kind of come back from lunch. I don't believe they missed any testimony when they were nodding off.

Mr. Eisenberg then joined in co-defendant's assessment and position. The Court advised that, unless there was an objection, it would talk to the jurors about the issue when they returned. The parties voiced no objection.

When the jury was brought back in, the Court announced that it had visited with members of the jury, planned to get more air conditioning into the courtroom and jury room, and had encouraged the jurors to stand up and stretch at any time and to let the Court know if they would like a break.

Movant raised the issue on appeal, arguing that the trial court abused its discretion in not holding *sua sponte* an investigative hearing once the trial court was informed of the jurors sleeping. The appellate court determined that it was in the trial court's discretion whether to hold a hearing, and that under the circumstances it was not "clear or obvious" that the trial court had an obligation to hold such a hearing. Thus, even if Mr. Eisenberg had requested a hearing, there is no guarantee the trial court would have held one. Additionally, Mr. Eisenberg's decision to object to having the sleeping jurors designated as alternates, or his failure to request a hearing, could have been sound trial strategy. The issue of jurors sleeping occurred during the presentation of the Government's case. As the Government suggests,

it may have been to Movant and his co-defendant's advantage to have jurors less attentive during the presentation of incriminating testimony and evidence presented. Furthermore, even if Movant could establish Mr. Eisenberg's ineffectiveness, he can not demonstrate that juror inattentiveness during his 8-day trial affected the verdict.

F. Movant's attorney failed to object to Movant's wife's testimony on the basis of the marital communications and adverse spousal testimony privileges.

Movant claims that Mr. Eisenberg should have objected to his wife Tracy's testimony based upon the adverse spouse privilege, and should have objected to her testifying to marital communications. As to the adverse spousal testimonial privilege, that privilege can only be invoked by the testifying spouse. Trammel v. United States, 445 U.S. 40, 53 (1980). Movant conflates this privilege with the marital communications privilege. Movant can not unilaterally prevent his spouse from testifying, but can, however, object to her revealing any marital communications, that are not subject to any exceptions. Movant complains that Mr. Eisenberg waived Movant's spousal communication privilege, and that as a result, "inside information connecting Movant to the banking transactions at issue," and that noone else could have provided that information.

Movant makes several misstatements in this claim. First, he claims that Mr. Eisenberg filed a notice invoking Movant's marital privileges "on the day" of Tracy's testimony. In fact, Mr. Eisenberg filed the notice on July 18, 2011, two days before Tracy testified. (CRDoc. 222.) Movant next claims that Mr. Eisenberg waived the spousal communications privilege, and states that "[a]fter a brief side bar, the Court asked Mr. Eisenberg .. . [] you don't think you need to address anything further in regard to the privilege issue?," and Mr. Eisenberg responded:

> No, Your Honor, I think as an officer of the Court I have to analyze this correctly and not make up an argument that I can't support. And I think the law is in favor of the Government in this instance.

This dialogue between the Court an Mr. Eisenberg did not occur at a "brief sidebar." The Court began the day of trial by indicating that it was taking up the marital privilege issue. Mr. Eisenberg concedes that a Supreme Court case makes clear that the testimonial privilege

belongs to the testifying spouse. (CRDoc. 360 at 518-525.) As to the spousal communication privilege, Mr. Eisenberg then invited the Government to set forth on the record what marital communications would be the subject of Tracy's testimony. (Id. at 7.) The Government then detailed those communications, and then argued that her testimony would either not concern "communications" between her and Movant, or would be instructions given to her by Movant which were intended to be communicated to third parties and thus would not fall within the communications privilege. (Id.) It was only after hearing the Government's proffer that Mr. Eisenberg made the above statement. He was clearly not "waiving the privilege" but indicating that he was satisfied that Tracy's testimony would not involve communications protected by the marital privilege. Additionally, to the extent Movant objects to admission of Movant's instructions to her meant to be communicated to others, instructions to carry out transactions are not covered by the privilege because they are not intended to be communicative or confidential. See, United States v. McCown, 711 F.2d 1441, 1452 (9th Cir. 1983). Furthermore, Movant does not identify in his pleadings the testimony he claims was presented in violation of the marital communication privilege.

> G[5]. Movant's attorney failed to object when government witness discussed the case with members of the "prosecution team" between days of testimony.

Movant asserts that after Flickinger's testimony on July 15, 2011, the Court recessed for the weekend and instructed Flickinger not to discuss his case or testimony with anyone, but that when Flickinger resumed the witness stand on Monday, Movant could tell that Flickinger had changed his testimony, and Mr. Eisenberg informed Movant that the prosecution team had met with Flickinger over the weekend. This Court has reviewed the transcript and notes that the trial court gave no such admonition to Flickinger (CRDoc. 283 at 136). In any event, Movant provides no support for his factual assertions and provides no

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[5]The letter designation for the issues raised hereinafter is different in Movant's 2255 motion than in the Brief in Support filed by his counsel, because Movant's issue G was not addressed in the Brief in Support. Thus, the letter designation in Movant's Brief in Support will be one letter lower in the alphabet than the letter designations in this Order.

authority for his argument that attorneys are forbidden from conferring with witnesses during trial.

H. Movant's attorney conceded Movant's guilt on counts 2 and 3 of the indictment in his closing argument.

Mr. Eisenberg conceded in his closing argument that Movant did not declare income on his tax returns:

> I'll also say to you that respect to the tax charge, there are two tax charges, Count 2 and 3. When you have the use of funds and you are using it for your own benefit, your own self, it's technically a loan. And there's no doubt in this case that what the Government has shown is that he did have access to those funds., . . .I am going to tell you [] straight up, hard fact, he did not declare that income with respect to those funds.

Although Mr. Eisenberg referred to the tax "charges" as counts 2 and 3, Movant was only charged with one substantive tax count, count 3 (willful filing of a false tax return). Several of the manner and means and overt acts alleged in the count 2 conspiracy, however, involved the filing of the false tax return. (CRDoc. 1.) Nonetheless, Mr. Eisenberg argued extensively in his closing argument that Movant was not guilty of conspiracy and witness tampering, (CRDoc. 363), and, Movant was ultimately acquitted on the latter charge. After his closing argument, Mr. Eisenberg advised the Court, during a discussion concerning Movant's release pending sentencing and his acceptance of responsibility, that with respect to the factual concessions in his closing argument, his client was "ok with that." (CRDoc. 363 at 104.)

Movant fails to demonstrate that Mr. Eisenberg's conduct was not part of a strategic decision to detract jurors from the more serious counts, conspiracy to commit money laundering and witness tampering, both of which carried a maximum sentence of 20-years. The maximum sentence on count two, the conspiracy to defraud count, was 5-years, and on count 3, the tax count, was 3-years. See, United States v. Swanson, 943 F.2d 1070, 1075-76 (recognizing there may be trial strategy in conceding guilt on one count of several charges.); United States v. Thomas, 417 F.3d 1053, 1058 (9th Cir. 2005) ("Unlike Swanson, Thomas was tried on multiple counts, and counsel decided to focus on the charges on which Thomas had a chance."); Gallegos v. Ryan, 820 F.3d 1013, 1033 (9th Cir.2016) (trial counsel's acknowledgment that his client was responsible for death of victim "could reasonably have

been a strategic maneuver.").

Furthermore, Movant does not demonstrate prejudice, in that the evidence presented was insufficient to convict Movant as charged, or that had Mr. Eisenberg not made the statements, he would not have been convicted on counts 2 and 3. In fact, the jury found Movant guilty of all 75 overt acts alleged in the indictment, the trial court commented at sentencing that the evidence of guilt was overwhelming, and the jury only took 2 hours over an 8-day trial to reach its decision. (CRDocs. 363 at 97-98; 447 at 68.)

I. Movant's attorney failed to file a motion to preclude text messages from being introduced into evidence.

Movant's objection at trial to the Garback/Movant text messages based upon the Rule of Incompleteness was overruled. Movant cross-examined Garback concerning the text messages, during which Garback admitted that he had deleted well over 100. Movant then raised as an issue on appeal the trial court's "abuse of discretion and reversible err[or] by denying the defense Motion to Preclude text messages presented through witness Garback." (CVDoc. 1 at 20.) The court of appeals found that Movant failed to demonstrate that the text messages lacked foundation or violated the Confrontation Clause. Movant argues however that Mr. Eisenberg should have challenged the admission of Garback's text messages because he admitted deleting some of the messages, and that this "destruction of evidence [] could have been exculpatory," and "could have [] explicitly contradicted Garback's self-serving assertions." Movant claims that some of his text messages to Garback were "spoofed," but provides no evidence in support of this assertion. Movant fails to demonstrate that Mr. Eisenberg was ineffective with respect to the admission of the text messages, or that even if his performance was ineffective, Movant was prejudiced.

J. Movant's attorneys[6] failed to object to restitution that included victims' loss that Movant claims should have been attributed to a financial scheme he was not involved in.

On appeal, Movant argued that he should not have been ordered to pay restitution to

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[6]Movant was represented by both Mr. Eisenberg and Vicki Lopez at sentencing.

Flickinger's victims in the two Ohio cases, in which Flickinger was convicted, and that such an order by the trial court was an abuse of discretion. The Court of Appeals found that the trial court's conclusion that Movant essentially made Flickinger's victims "his own" by unlawfully obtaining their money was not plainly erroneous. The appellate court also found that the inclusion of the $20,000.00 flight was a loss attributed to his U.S.S.G. Guidelines calculation, as the "plain language of the Guidelines provision does not preclude the attribution of losses that may have been ill-gotten in the first place."

Movant argues however, that because Mr. Eisenberg and Ms. Lopez failed to object to the inclusion of the Flickinger victims' losses in his restitution amount, the appellate court applied the plain error standard. Although Movant does not suggest what standard would have been applied had Mr. Eisenberg objected, he claims that the financial loss of Flickinger's investment victims were losses too far removed from Movant's conduct to be attributed to Movant, that the funds "had been illegally obtained prior to Movant's involvement with Mr. Flickinger," and the Movant "had nothing to do and did not participate in any way in obtaining those funds." The appellate court already held that the fact that losses may have been ill-gotten in the first place does not preclude their inclusion in a restitution order. Additionally, Movant and his co-defendant caused Flickinger to wire victim funds to them, and that they laundered those funds to conceal them. The evidence also demonstrated that Movant was aware of Flickinger's fraud against his investors. The loss to the Flickinger victims is directly relating to the conduct of Movant.

Respondent argues that the trial court could have ordered the restitution to be paid directly to Flickinger. Instead, the restitution was ordered directly to Flickinger's victims, to be paid jointly and severally by Movant, his co-defendant, and also Flickinger, as a restitution order had already been entered against him in his Ohio case. As such, no prejudice resulted, especially in light of the fact that the total amount Movant and his co-defendant laundered was less than the amount already surrendered or forfeited. Movant's claim fails as Movant does not demonstrate that Mr. Eisenberg was ineffective by not objecting to the restitution order.

K. Movant's attorney failed to argue at sentencing unwarranted disparities among similarly situated defendants.

On appeal, Movant claimed that the trial court violated the statutory requirement of considering the need to avoid unwarranted sentence disparities among similarly situated defendants when it sentenced Movant to 188 months in prison, when Flickinger was sentenced to 78 months. The appellate court ruled that the trial court did not abuse its discretion when it arrived at Movant's sentence after weighing the multiple considerations described in 18 U.S.C. 3553(a), and that the trial court's finding that "Flickinger and Movant stand in dramatically different circumstances in terms of their role in this case." Movant claims now that Mr. Eisenberg should have made a more substantive argument that he and Flickinger's roles were dramatically different. Respondent argues that Movant's conduct was far more severe than Flickinger's, and that Flickinger pled guilty, accepted responsibility, testified in two trial for the government, had served his time, had forfeited assets, and convinced others not to contest the forfeiture of assets in order to make the victims whole.

Movant does not demonstrate that the trial court was not aware of the differences in Movant and Flickinger's criminal actions, or of the sentence disparity. On appeal, the Ninth Circuit Court of Appeals addressed the sentencing discrepancies at length and rejected Movant's argument. Movant fails to demonstrate that Mr. Eisenberg was ineffective, or that even if his performance was deficient, he suffered any prejudice.

GROUND TWO.

A. The prosecution violated a Court ruling that precluded any evidence at trial relating to a plea and proffer agreements that Movant entered into with the prosecution.

B. The prosecution improperly utilized an FBI agent as a summary witness who commented on Movant's credibility.

C. The prosecution argued facts not in evidence to the jury and made improper comments to the jury.

D. The prosecution failed to grant immunity to witness Brandon Valero who invoked his Fifth Amendment and refused to testify.

E. The prosecution introduced perjured testimony (witness Garback) at trial.

Movant did not raise any of these prosecutorial misconduct claims on appeal, and thus they are precluded. Additionally, Movant does not show cause or prejudice. With respect to Movant's argument that the evidence relating to his claim that the prosecution committed a Brady[7] and Mooney-Napue[8] violation, Movant asserts that testimony regarding the stolen watches, discussed above under issue D, ground one above, "had to exist." Movant's speculation as to the prosecutor's knowledge of the information relating to the watches is not sufficient to establish prosecutorial misconduct. Furthermore, Movant fails to establish that the information satisfies the requirements of Brady and Mooney-Napue, in that it does not demonstrate that witness Garback lied during his testimony.

GROUND THREE.

A. Movant's appellate counsel failed to communicate with Movant and failed to investigate and raise the following issues: Movant's attorney's concession of guilt in closing argument, statute of limitations violation, violation of the immunity agreement. (Ground One, A-K, Ground Two, L-P)

Movant asserts that his appellate counsel was ineffective in failing to communicate with him and failed to effectively argue the issue of immunity as argued in his 2255 motion, failed make certain arguments relating to his statute of limitations violation (issue A, ground one discussed above), failed to raise Mr. Eisenberg's failure to request a Kastigar hearing (issue B, ground one discussed above), failed to raise the issue of a government witness's discussion with the prosecution team during trial (issue G, ground one discussed above), and failed to raise the issue of Mr. Eisenberg's concession of guilty during closing argument (issue H, ground one discussed above). Movant attaches copies of several letters he claims were sent to his appellate counsel while she was preparing the opening brief that demonstrate the lack of communication and her failure to effectively argue his claims. In reviewing the letters submitted, the Court notes that none of the letters are dated prior to the filing of his opening brief on appeal (filed October 25, 2013), and thus fail to show what, if any issues

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[7]Brady v. Maryland, 373 U.S. 83 (1963).

[8]Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

or facts Movant discussed with appellate counsel that should have, but did not get raised in his opening brief. Nine of the letters are dated after the date his reply brief was filed (filed June 19, 2014). With respect to the letters dated after his opening brief was filed, but before the filing of the reply brief, there is nothing in those letters that establishes that Movant was in possession of issues or facts that appellate counsel should have raised. Mostly, Movant takes issue with what he perceives as a lack of forcefulness on the issues raised.

With respect to the issues appellate counsel raised on appeal, trial counsel's failure to request a Kastigar hearing and a violation of the statute of limitations, Movant fails to identify any facts or law that should have been incorporated into the issues raised, or show that appellate counsel was ineffective in presenting or arguing the claims. Although appellate counsel did not raise on appeal the issue of a government witness discussing the case with the prosecution team during trial, or the issue of his trial counsel's concession of guilt on the tax count during closing argument, even if the failure to raise the issues constitutes ineffective assistance, Movant does not demonstrate prejudice for the reasons noted above.

Furthermore, Movant does not demonstrate how any lack of communication with appellate counsel prejudiced him in any way. He does not establish that any lack of communication with counsel prior to the filing of her opening brief affected her performance. Additionally, although Movant complains in his letters of a failure to orally communicate, he clearly had the ability to send letters to appellate counsel and communicate any facts or issues he felt needed to be raised. Movant also does not assert that he filed any request in the appellate court to terminate appellate counsel. Thus, Movant fails to establish ineffective assistance of appellate counsel, and, for all of the reasons outlined above, fails in any event to demonstrate prejudice.

In Movant's Traverse, he raises for the first time the trial court's lack of jurisdiction over his case due to an alleged failure to follow the Chief Justice's Guidelines for the inter-circuit assignment of Article III judges. (CVDoc. 16 at 56.) Movant did not raise this issue on appeal, and as such, this Court will not consider this claim. Movant also has pending a

separate Motion to Disqualify Judge, based upon the same argument, filed on April 10, 2017. (CVDoc. 19.)

CONCLUSION

Movant has failed to establish in his 2255 motion that his claims, if proven, would entitle him to relief. To permit an evidentiary hearing on Movant's claims would amount to a "fishing expedition," and thus, Movant's request for an evidentiary hearing is denied. For all of the reasons outlined above, and based upon the files and records in this case, Movant's 2255 motion should be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (CVDoc. 1 and CRDoc. 1444) be **DENIED and DISMISSED WITH PREJUDICE**;

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because Movant has not made a substantial showing of the denial of a constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered

pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 4th day of May, 2017.

Michelle H. Burns

Michelle H. Burns
United States Magistrate Judge