

Appendix A

Court of Appeals' decision

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 10 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRENT EDWARD LOVETT,

Defendant-Appellant.

No. 18-16498

D.C. Nos. 2:17-cv-01580-JCM
2:11-cr-00165-JCM-GWF-1

District of Nevada,
Las Vegas

ORDER

Before: SCHROEDER and CHRISTEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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.

Appendix B

The unpublished orders denying rehearing en banc

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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5/28/19

FEB 28 2019

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D.C. Nos. 2:17-cv-01580-JCM
2:11-cr-00165-JCM-GWF-1

District of Nevada,
Las Vegas

ORDER

Before: Trott and Murguia, Circuit Judges.

The “petition for panel rehearing and petition for rehearing en banc” (Docket Entry No. 7) is construed as a combined motion for reconsideration and motion for reconsideration en banc. So construed, the motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

Case No. 2:11-CR-165 JCM (GWF)

8 Plaintiff(s),

9 ORDER

10 v.

11 BRENT EDWARD LOVETT,

12 Defendant(s).

13 Presently before the court is petitioner Brent Lovett's motion to vacate, amend, or correct
14 his sentence pursuant to 28 U.S.C. § 2255. (ECF No. 305). The government filed a response (ECF
15 No. 307), to which petitioner replied (ECF No. 308).

16 **I. Background**

17 *i. Factual summary*

18 Evidence presented at trial supports the following factual summary.

19 Petitioner formed a number of business entities, among them Bay Resorts, Building the
20 American Dream, Project Consultants, Coke Horse, and Coke Maggie. Petitioner's step-father,
21 Paul Hummer, served as the president of these companies, and was responsible for signing certain
22 paperwork, including loan documents and payroll checks. However, even though Hummer was
23 nominally named as president, petitioner "was in charge of everything."

24 Petitioner also formed a company called Equity Resource, for which petitioner listed his
25 sister, Lori Lovett, as president. Ms. Lovett believed that Equity Resource was "a holdings
26 company of [petitioner's] real estate." Again, although Ms. Lovett was nominally named as
27 president, petitioner effectively controlled the company.

1 In August of 2004, Bay Resorts leased a building at 2400 North Tenaya Way in Las Vegas,
 2 Nevada (“the Tenaya building”). Rent was \$40,000 per month. Bay Resorts stopped paying rent,
 3 and the owner began eviction proceedings. During litigation related to these proceedings,
 4 petitioner offered to purchase the building from the owner. On June 9, 2006, the owner agreed to
 5 sell the building to petitioner for \$6 million. Ms. Lovett signed documents to assist her brother
 6 with a loan for the purchase of the Tenaya building.

7 Petitioner coordinated the Tenaya building purchase as a “double escrow” transaction,
 8 whereby Bay Resorts would purchase the property and immediately re-convey it to Equity
 9 Resource for \$10 million. Petitioner reached out to Lockheed Federal Credit Union (“Lockheed”)
 10 for a loan to finance the Equity Resource purchase.

11 As a part of the loan request, petitioner made a number of false representations and
 12 omissions. Petitioner created false Equity Resource tax returns, representing assets of over \$60
 13 million. Petitioner created a counterfeit bank statement representing that Equity Resource had
 14 \$3.3 million dollars in an account that actually contained \$2. Petitioner represented that Equity
 15 Resource would fund \$2.6 million of the \$10 million purchase price. Petitioner failed to disclose
 16 the double-escrow nature of the transaction. Finally, petitioner failed to disclose the \$1.3 million
 17 kickback that Bay Resorts would receive as a result of the \$7.5 million loan to Equity Resource.
 18 A Lockheed representative stated at trial that Lockheed would not have approved the loan to Equity
 19 Resource if it had knowledge of these false representations and omissions.

20 Lockheed approved Equity Resource’s \$7.5 million loan request based on the inaccurate
 21 and incomplete loan application. On August 9, 2006, Bay Resorts purchased the Tenaya building
 22 for \$6 million and immediately re-conveyed it to Equity Resource for \$10 million. This re-
 23 conveyance ostensibly netted Bay Resorts close to \$4 million in sale profits,¹ including
 24 approximately \$1.3 million in remaining proceeds from the Equity Resource loan.

25 After Equity Resource defaulted on the loan, Lockheed foreclosed on the Tenaya building.
 26 The foreclosure netted approximately \$2 million, which resulted in a total loss amount of
 27 approximately \$5 million. This was “the largest single loss in [Lockheed] history.”

28 ¹ Bay Resorts did not in fact receive \$2.6 million from Equity Resource.

1 *i. Procedural history*

2 On April 27, 2011, the government filed an indictment charging petitioner with one count
 3 of bank fraud. Trial began on February 13, 2013. On the first day of trial, petitioner moved to
 4 represent himself. The court² canvassed the parties regarding the propriety of the request, during
 5 which defendant's counsel stated that he had "done [his] best to get up to speed and believe[d] that
 6 [he was] up to speed" and was "ready for trial." Petitioner thereafter stated that he was "not asking
 7 for any extensions or anything, I'm ready to proceed." The court granted petitioner's request to
 8 represent himself.

9 After seven days of trial, the jury convicted petitioner of bank fraud. The court sentenced
 10 petitioner to 98 months' imprisonment and ordered restitution in the amount of \$4,889,134.

11 Petitioner appealed his conviction to the Ninth Circuit. The court appointed counsel for
 12 petitioner, and denied petitioner's request to terminate appointed counsel. The court also did not
 13 accept petitioner's *pro se* brief. On August 8, 2016, the Ninth Circuit affirmed petitioner's
 14 conviction and sentence.³

15 **II. Legal Standard**

16 Federal prisoners "may move . . . to vacate, set aside or correct [their] sentence" if the court
 17 imposed the sentence "in violation of the Constitution or laws of the United States . . ." 28 U.S.C.
 18 § 2255(a). Section 2255 relief should be granted only where "a fundamental defect" caused "a
 19 complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also Hill*
 20 *v. United States*, 368 U.S. 424, 428 (1962).

21 Limitations on § 2255 motions are based on the fact that the movant "already has had a fair
 22 opportunity to present his federal claims to a federal forum," whether or not he took advantage of
 23 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 "is not designed
 24 to provide criminal defendants multiple opportunities to challenge their sentence." *United States*
 25 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

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 27 ² Prior to April 9, 2017, the Honorable Roger L. Hunt presided over this case.

28 ³ Petitioner filed a writ of certiorari to the Supreme Court of the United States, which was
 denied on April 3, 2017.

1 **III. Discussion**2 *a. The successive claim rule*

3 “When a defendant has raised a claim and has been given a full and fair opportunity to
 4 litigate it on direct appeal, that claim may not be used as a basis for a subsequent § 2255 petition.”
 5 *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000) (citing *United States v. Redd*, 759
 6 F.2d 699, 700-01 (9th Cir. 1985)). Restating an issue by using different language does not make
 7 a previously considered claim reviewable. *United States v. Currie*, 589 F.2d 993, 995 (9th Cir.
 8 1979).

9 Petitioner argues that certain comments made by government attorneys at trial were
 10 unfairly prejudicial. (ECF No. 305). Specifically, petitioner argues that prosecutors made
 11 inappropriate comments about his self-representation, and that they erroneously argued during
 12 closing that the government had proven federal jurisdiction. *Id.* at 147.

13 Petitioner raised both of these arguments in his direct appeal. The Ninth Circuit considered
 14 and rejected each argument. *See Lovett*, 668 Fed. App’x at 231. Therefore, petitioner is precluded
 15 from re-litigating these issues in a § 2255 motion. *See Hayes*, 231 F.3d at 1139.

16 *b. The procedural default rule*

17 When a defendant fails to raise a legal argument on direct appeal, the “procedural default”
 18 rule applies to bar collateral review under § 2255. *Massaro v. United States*, 538 U.S. 500, 504
 19 (2003). The two noted exceptions to this rule are when a defendant can show both cause and
 20 prejudice, *id.*, or “actual innocence,” *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003).

21 To demonstrate cause, a defendant must show “that some objective factor external to the
 22 defense impeded [his] efforts to raise the [barred] claim. . . . Objective factors that constitute cause
 23 include interference by officials that makes compliance with the State’s procedural rule
 24 impracticable, and a showing that the factual or legal basis for a claim was not reasonably available
 25 to counsel.” *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) (internal quotations omitted). To
 26 demonstrate prejudice, a defendant must show “a reasonably probability that his conviction or
 27 sentence would have been different.” *United States v. Lopez*, 577 F.3d 1053, 1060 (9th Cir. 2009)
 28 (quoting *Stickler v. Green*, 527 U.S. 263, 296 (1999)). If defendant cannot demonstrate cause and

1 prejudice, he must prove “actual innocence,” meaning “that it is more likely than not that no
 2 reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup v. Delo*,
 3 513 U.S. 298, 327 (1995).

4 Ineffective assistance of appellate counsel can constitute the cause required to establish
 5 procedural default. *Murray v. Carrier*, 477 U.S. 478, 488-92 (1986). However, “appellate
 6 counsel’s failure to raise issues on direct appeal does not constitute ineffective assistance when
 7 appeal would not have provided grounds for reversal.” *Wildman v. Johnson*, 261 F.3d 832, 840
 8 (9th Cir. 2001). Appellate counsel has “no constitutional duty to raise every non frivolous issue
 9 requested by a petitioner.” *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). “[W]eeding out weaker
 10 issues . . . is widely recognized as one of the hallmarks of effective appellate assistance.” *Miller*
 11 *v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).

12 Here, appellate counsel raised seven claims of error on appeal.⁴ Focusing on these claims
 13 was a reasonable tactical decision. *See id.* The additional claims that petitioner argues his
 14 appellate counsel should have made⁵ were frivolous and would have detracted from his already-
 15 weak claims raised on appeal. Therefore, petitioner has not established cause and prejudice to
 16 excuse his procedural default. Further, petitioner’s motion does not point to any evidence
 17 suggesting that he has a viable claim of actual innocence. Accordingly, all of petitioner’s claims
 18 that he did not raise at the appellate level are barred. *See Massaro*, 538 U.S. at 504.

19 c. *Ineffective assistance of counsel*

20 To prevail on a claim of ineffective assistance of counsel, a movant must show deficient
 21 performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

22

23 ⁴ (1) The district court erred when it did not require proof necessary to establish that LFCU
 24 was federally insured at the time of the loan application; (2) the prosecutor’s disparaging
 25 comments regarding Lovett’s invocation of his Sixth Amendment right to choice of counsel
 26 through self-representation constitutes reversible error; (3) failure to remove the vicarious liability
 27 instruction constructively amended the indictment; (4) due process precluded use of the vicarious
 28 liability instruction because conspiracy was not charged and the alleged relationship between the
 “co-schemers” and the offense was slight, (5) failure to remove vicarious liability instruction
 reduced the government’s burden of proof in violation of defendant’s due process rights, (6)
 cumulative error denied defendant a fair trial, (7) the district court erred in fixing the amount of
 restitution because it was not based upon this court’s mandated valuation methodology for
 mortgage fraud cases.

5 The court discusses these claims in more detail in discussion section (c)(ii).

1 “First, the defendant must show that counsel’s performance was deficient.” *Id.* at 687.
 2 “Judicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. “A fair
 3 assessment of attorney performance requires that every effort be made to eliminate the distorting
 4 effects of hindsight” *Id.* at 689. “[A] court must indulge a strong presumption that counsel’s
 5 conduct falls within the wide range of reasonable professional assistance; that is, the defendant
 6 must overcome the presumption that, under the circumstances, the challenged action might be
 7 considered sound trial strategy.” *Id.* at 689. To establish deficient performance, the petitioner
 8 “must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.*
 9 at 688.

10 “Second, the defendant must show that the deficient performance prejudiced the defense.
 11 This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair
 12 trial, a trial whose result is reliable.” *Id.* at 687. “The defendant must show that there is a
 13 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
 14 would have been different. A reasonable probability is a probability sufficient to undermine the
 15 confidence in the outcome.” *Id.* at 694.

16 “When an accused manages his own defense, he relinquishes, as a purely factual matter,
 17 may of the traditional benefits associated with the right to counsel.” *Faretta v. California*, 422
 18 U.S. 806, 835 (1975). “For this reason, in order to represent himself, the accused must ‘knowingly
 19 and intelligently’ forgo those relinquished benefits.” *Id.* “In order to deem a defendant’s *Faretta*
 20 waiver knowing and intelligent, the district court must ensure that he understands 1) the nature of
 21 the charges against him; 2) the possible penalties; and 3) the dangers and disadvantages of self-
 22 representation.” *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004) (internal citation
 23 and quotation omitted). “[A] defendant who elects to represent himself cannot thereafter
 24 complain that the quality of his own defense amounted to a denial of ‘effective assistance of
 25 counsel.’” *Faretta*, 422 U.S. at 834 n.46.

26 ...
 27 ...
 28 ...

1 *i. Ineffective assistance of pretrial counsel⁶*

2 Petitioner alleges that appointed counsel failed to investigate his case, failed to confer with
 3 him, and failed to advise him of his rights. *See* (ECF No. 305 at 148). The government asserts
 4 that these conclusory statements are contradicted by the trial record in this case and that petitioner
 5 fails to provide any evidence of prejudice. (ECF No. 307).

6 Here, the court conducted an extensive *Faretta* hearing⁷ with the defendant prior to
 7 granting his motion to proceed *pro se*. (ECF No. 119). The following is an excerpt from the
 8 minutes of the hearing that concisely summarizes the proceedings,

9 The Court explain[ed] the duties and obligations of counsel and
 10 inquire[d] what the [petitioner] believe[d] should or should not have
 11 been done by his attorneys. [Petitioner] respond[ed], followed by
 12 counsel's representations. The Court [found] that appointed counsel
 13 provided proper representation and that no other attorney would or
 14 could do differently. Therefore, the Court [found] that appointing
 15 new counsel would not eliminate any of [petitioner's]
 16 complaints. . . . [T]he Court reiterate[d] the dangers and possible
 17 consequences of self-representation and *strongly* urge[d] [petitioner] to reconsider.

18 *Id.* (emphasis in original); *see also* (ECF No. 129) (“*The Court again strongly urges the Defendant*
 19 *to reconsider his decision to represent himself*”)(emphasis in original). After a tortured back-
 20 and-forth between petitioner, multiple attorneys, and the court that lasted five months, petitioner
 21 ultimately opted to represent himself *pro se*.⁸ (ECF No. 188). Accordingly, the trial court record
 22 in this case demonstrates that petitioner was adequately advised of his rights and made an informed
 23 decision to represent himself *pro se*.

24 ⁶ Although the court holds that petitioner procedurally defaulted on this claim, the court
 25 will address it given the constitutional implications of an ineffective assistance of counsel claim.
 26 *See Sunal v. Large*, 332 U.S. 174, 178 (1947) (holding that a defendant cannot attack a judgment
 27 through a habeas corpus proceeding on grounds that could have been raised at the trial level, “at
 28 least where the error does not trench on any constitutional rights of defendants nor involve the
 jurisdiction of the trial court.”).

29 ⁷ The referenced hearing was actually two hearings conducted on the same day (September
 30 7, 2012). *See* (ECF No. 119). The *Faretta* canvassing took approximately 45 minutes.

31 ⁸ *See* (ECF Nos. 119, 129, 137, 142, 152, 154, 185, 188). This lengthy back-and-forth
 32 demonstrates that petitioner's argument that he was “denied his equal protection, Due Process and
 33 Sixth Amendments rights by the refusal by the court, to appointment of new counsel due to being
 34 too poor” mischaracterizes the course of proceedings.

1 Further, the trial court record demonstrates that petitioner's pretrial counsel conducted an
 2 adequate investigation in his case. The district court reviewed the investigator's reports in this
 3 case *in camera* to decide whether "it is necessary for [petitioner] to travel for interviews." (ECF
 4 No. 119). The court held that it was unnecessary for petitioner to travel to conduct interviews
 5 because the "investigator's reports and statements [were] sufficient." *Id.*

6 To the extent that petitioner claims that his self-representation constituted ineffective
 7 assistance of counsel, this argument is foreclosed by *Faretta*. See 422 U.S. 806, 834 n.46 ("a
 8 defendant who elects to represent himself cannot thereafter complain that the quality of his own
 9 defense amounted to a denial of 'effective assistance of counsel.'").

10 The court holds that petitioner's motion does not reference any evidence that could support
 11 a finding of prejudice in this case. As petitioner is required under *Strickland* to demonstrate that
 12 counsel's deficient performance prejudiced petitioner in order to prevail on an ineffective
 13 assistance of counsel claim, the court will deny petitioner's motion to the extent that it relies on
 14 allegedly ineffective assistance of pretrial counsel.

15 *ii. Ineffective assistance of appellate counsel*

16 Petitioner argues that he received ineffective assistance of counsel on appeal. (ECF No.
 17 305). As the court noted previously, appellate counsel raised numerous issues on appeal.
 18 Petitioner highlights six primary points of error that he believes appellate counsel should have
 19 raised on appeal: (1) numerous allegations of improper interference by the court during the course
 20 of the trial; (2) improper waiver of attorney representation at trial; (3) government witnesses
 21 making false statements to the grand jury; (4) discovery violations; (5) erroneous admission of
 22 evidence; and (6) a speedy trial claim.

23 Petitioner points to the fact that the court sustained all of the government's objections and
 24 overruled all of petitioner's objections.⁹ However, all of the government's objections were
 25 legitimate, and petitioner's objections lacked a basis in law.¹⁰ Further, petitioner's citations to

27 ⁹ Petitioner alleges that the government lodged 57 objections, whereas petitioner lodged
 28 13.

¹⁰ This is not surprising, given that petitioner chose to represent himself *pro se*.

1 comments made by Judge Hunt during the trial do not demonstrate bias or animosity towards
2 petitioner. Therefore, petitioner's allegations of improper interference by the court during the
3 course of trial and erroneous admission of evidence lack merit, and the choice to withhold these
4 arguments from an appellate brief fell within a constitutionally reasonable range of reasonable
5 representation. *See Strickland*, 466 U.S. at 688.

6 Petitioner argues that he was denied the right to represent himself. (ECF No. 305). In the
7 alternative, petitioner argues that he did not want to represent himself but that he was forced to
8 because none of his court-appointed attorneys "interviewed a single witness, reviewed the
9 evidence, filed a substantial motion or in any way prepared the case for trial." *Id.* As the court
10 noted previously, both of these arguments are without merit. Petitioner cannot claim that he was
11 denied the right to represent himself because the court ultimately allowed him to represent himself
12 at trial. Further, the court conducted numerous hearings on the topic and repeatedly informed
13 petitioner of the dangers of self-representation. Furthermore, petitioner's bald claims that his
14 court-appointed attorneys did nothing to prepare for trial is belied by the record. Appellate
15 counsel's decision not to raise a meritless argument regarding denial of petitioner's right to self-
16 representation was a reasonable decision under the circumstances. *See Strickland*, 466 U.S. at 688.

17 Petitioner asserts that counsel should have argued on appeal that a government witness
18 made false statements to the grand jury. The district court considered and rejected this argument
19 at trial, noting that petitioner often mischaracterized the veracity of the witness's statements and
20 did "not present any evidence in [his] motion of any statement that was made intentionally, [or]
21 any wrong statement was intentionally wrong." (ECF No. 266). "[H]is allegations come nowhere
22 near the sufficient misconduct that would violate [his] due process or justify the Court in
23 dismissing the case." *Id.* Appellate counsel wisely chose not to re-raise this argument on appeal.
24 *See Strickland*, 466 U.S. at 688.

25 Petitioner alleges that prosecutors failed to disclose evidence prior to trial. (ECF No. 305).
26 As the government notes, petitioner's motion does not provide facts to adequately support his
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28

1 assertion.¹¹ Further, the district court considered and rejected petitioner's argument. (ECF No.
 2 278 ("there [have] been no violations of any obligations to supply you with discovery.").
 3 Appellant counsel's decision to not raise this argument on appeal was reasonable. *See Strickland*,
 4 466 U.S. at 688.

5 Petitioner argues that appellate counsel should have raised a speedy trial claim. (ECF No.
 6 305). Petitioner waived his speedy trial right by requesting multiple pre-trial continuances. *See*
 7 *United States v. Lam*, 251 F.3d 852 856-57 (9th Cir. 2001) (holding that no Sixth Amendment
 8 speedy trial violation occurred when a defense attorney sought continuances for the purpose of
 9 trial preparation). Therefore, appellate counsel properly chose to refrain from making this
 10 frivolous argument on appeal. *See Strickland*, 466 U.S. at 688.

11 Petitioner also cites appellate counsel's delay in filing petitioner's opening brief on appeal.
 12 (ECF No. 305). Petitioner's motion fails to place this delay into context. The appellate counsel
 13 who filed petitioner's brief was appointed after initial appellate counsel was removed for what the
 14 court held was an excusable failure to file an opening brief with the Ninth Circuit. *See Appellate*
 15 *Dkt. No. 56*. Further, petitioner swamped both appellate counsel and the court with numerous
 16 motions, requests for rehearing, and similar filings in an attempt to represent himself *pro se*. In
 17 context, appellant counsel's requests for extension and ultimate brief fell within the range of
 18 constitutionally adequate representation. *See Strickland*, 466 U.S. at 688.

19 Here, petitioner has not established that appellate counsel provided constitutionally
 20 deficient performance. *See id.* The choice to refrain from raising frivolous arguments on appeal
 21 was a "reasonable tactical choice based on an adequate inquiry [and] is [therefore] immune from
 22 attack under *Strickland*." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997).

23 *d. Whether cumulative error provides a basis to grant petitioner's motion*

24 Petitioner claims that the sheer number of cumulative errors in this case amount to a
 25 constitutional violation. As the Ninth Circuit stated on defendant's direct appeal: "where, as here,
 26 'there is no single constitutional error in [the] case, there is nothing to accumulate to the level of a

27
 28 ¹¹ The government contends that some of the "evidence" that petitioner points to does not
 exist. (ECF No. 307). The government further contends that petitioner has failed to demonstrate
 that any evidence that did in fact exist was not given to petitioner prior to trial. *Id.*

1 constitutional violation,' and a defendant's allegation that the cumulative effect of errors prejudiced
2 his right to a fair trial fails." *United States v. Lovett*, 668 Fed. App'x 230 (9th Cir. Aug. 8, 2016)
3 (alteration in original) (quoting *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (citing
4 *Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir. 1999))).

5 *e. Certificate of appealability*

6 The controlling statute in determining whether to issue a certificate of appealability is 28
7 U.S.C. § 2253, which provides as follows:

8 (a) In a habeas corpus proceeding or a proceeding under section
9 2255 before a district judge, the final order shall be subject to
10 review, on appeal, by the court of appeals for the circuit in which
the proceeding is held.

11 (b) There shall be no right of appeal from a final order in a
12 proceeding to test the validity of a warrant to remove to another
13 district or place for commitment or trial a person charged with a
14 criminal offense against the United States, or to test the validity of
such person's detention pending removal proceedings.

15 (c)

16 (1) Unless a circuit justice or judge issues a certificate of
17 appealability, an appeal may not be taken to the court of appeals
18 from—

19 (A) the final order in a habeas corpus proceeding in which
20 the detention complained of arises out of process issued by
a State court; or

21 (B) the final order in a proceeding under section 2255.

22 (2) A certificate of appealability may issue under paragraph (1) only
23 if the applicant has made a substantial showing of the denial of a
constitutional right.

24 (3) The certificate of appealability under paragraph (1) shall indicate
25 which specific issue or issues satisfy the showing required by
paragraph (2).

26 28 U.S.C. § 2253.

27 Under § 2253, the court may issue a certificate of appealability only when a movant makes
28 a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a

1 substantial showing, the movant must establish that “reasonable jurists could debate whether (or,
2 for that matter, agree that) the petition should have been resolved in a different manner or that the
3 issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v.*
4 *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

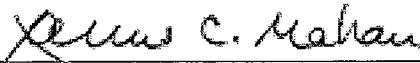
5 The court holds that petitioner has not made the required substantial showing of the denial
6 of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists
7 would not find the court’s determination that movant is not entitled to relief under § 2255
8 debatable, wrong, or deserving of encouragement to proceed further. *See id.* Accordingly, the
9 court declines to issue a certificate of appealability.

10 **f. Conclusion**

11 Accordingly,

12 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner’s motion to
13 vacate, amend, or correct (ECF No. 305) be, and the same hereby is, DENIED.

14 DATED July 10, 2018.

15 
16 UNITED STATES DISTRICT JUDGE

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