Appendix

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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. KENNETH LYLE SPANGLE, Defendant-Appellant.	No. 18-56122 D.C. Nos. 8:17-cv-00485-JLS 8:12-cr-00194-JLS-1 Central District of California, Santa Ana ORDER

Before: IKUTA and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) 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.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Kenneth Lyle Spangle,

Petitioner,

v.

United States of America,

Respondent.

Case No. 8:17-CV-00485-JLS
Case No. 8:12-CR-00194-JLS-1

ORDER DENYING MOTION TO VACATE OR CORRECT FEDERAL SENTENCE (Doc. 1)

ORDER DENYING SUPPLEMENTAL MOTION TO VACATE OR CORRECT FEDERAL SENTENCE (Doc. 13)

ORDER DENYING MOTION TO APPOINT COUNSEL (Doc. 2)

ORDER DENYING ISSUANCE OF CERTIFICATE OF APPEALABILITY

This matter is before the Court on Petitioner's Motion to Vacate or Correct Federal Sentence and Petitioner's Motion to Appoint Counsel. (Doc. 1.) Specifically, Petitioner moves to vacate or modify the federal sentence imposed upon him by this Court on November 15, 2013 in *United States v. Kenneth Lyle Spangle*, SACR 12-00194-JLS-1. Also before the Court is the Supplemental Motion to Vacate, Set Aside, or Correct Sentence Under § 2255 filed by counsel for Petitioner.[1] (Doc. 13.) The Government filed an Opposition brief that addresses both the original and supplemental motions. (Doc. 20.) Habeas counsel filed a Reply brief (Doc. 33), and attached Petitioner's pro se response to the Government's Opposition Brief. (Reply, Exhibit A, Doc. 33-1.) Finally, Petitioner also seeks appointment of counsel (pursuant to the Criminal Justice Act) to assist him.[2] (Doc. 2.) As set forth below, the Court denies the relief sought.

I. Petitioner's Sentence

On November 15, 2013, the Court held Petitioner's sentencing hearing. (CR Doc. 130.)[3] In applying the United States Sentencing Guidelines ("Guidelines" or "USSG"), the Court found that Petitioner qualified as a "career offender" pursuant to the 2012 Guidelines. As explained in Petitioner's Presentence Investigation Report ("PSR"), application of the career offender status resulted in increases to Petitioner's base offense level (from 26 to 34) and his Criminal History Category (from Category III to Category VI). (PSR at 3, CR Doc. 121.) This had the effect of increasing Petitioner's Guidelines sentence of imprisonment from a range of 78 to 97 months to a range of 262 to 300 months. (*Id.*) The Court sentenced Petitioner to the low end of

[1] The Supplemental Motion addresses sentencing issues only. The Supplemental Motion (and the Reply in support thereof) were filed by habeas counsel, who was appointed for a limited purpose pursuant to the Court's General Order 15-08. (Supp. Mot. at 5 n.2.) Thus, some of Petitioner's arguments are raised by him, appearing *pro se*, while others are raised by his appointed habeas counsel. The Court has considered the merits of all issues raised by Petitioner and his habeas counsel.

[2] Because counsel's appointment is limited in scope, and because Petitioner raises other issues in support of his motion, Petitioner's request for appointment of counsel is not moot.

[3] Where a docket entry appears in the record in the underlying criminal case only, the Court cites to it as "CR Doc." to distinguish such docket entries from those in the § 2255 case.

the Guidelines range, 262 months of imprisonment and 5 years of supervised release.[4] (CR Doc. 131.)

II. Motion to Vacate or Correct Federal Sentence

Petitioner moves pursuant to 28 U.S.C. § 2255, which permits federal prisoners who "claim[] the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States" to file a motion "to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). The motion must be filed in "the court [that] imposed the sentence." *Id.*

Under § 2255, the Court generally must hold a hearing to determine the validity of a motion; however, where "the motion[s] and the files and records of the case conclusively show that the prisoner is entitled to no relief," no hearing is required. 28 U.S.C. § 2255(b). Thus, an evidentiary hearing is required only if: (1) a petitioner alleges specific facts that, if true, would entitle him to relief; and (2) the petition, files, and record of the case cannot conclusively show that the petitioner is ***not*** entitled to relief. *United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004).

As a matter of procedure, the Court is required to review the motion to determine whether the moving party may be entitled to relief. *See* Rule 4(b) of the Rules Governing Section 2255 Proceedings, 28 U.S.C. foll. § 2255. If, upon the Court's initial review, "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party." *Id.* Otherwise, the Court must order the United States attorney to respond to the motion. *Id.* Here, the Court set a briefing schedule as to the merits of the Petitioner's motion and to habeas counsel's Supplemental Motion. (Doc. 16.)

The issues before the Court are fully briefed, and the Court considers them now.

[4] The 2012 Sentencing Table identifies the applicable range as 262 to 327 months; however, the upper Guidelines range is capped at the statutory maximum sentence of 25 years, or 300 months.

III. Legal Standard for Ineffective Assistance of Counsel ("IAC") Claims

The Sixth Amendment guarantees the effective assistance of counsel at all critical stages of the criminal proceedings, including trial and sentencing. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffective assistance by his trial counsel, a petitioner must demonstrate both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Id.* at 688-93; *see also Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, . . . with performance being measured against an objective standard of reasonableness under prevailing professional norms . . . .") (internal quotation marks and citations omitted). "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

To establish deficient performance, a petitioner must show that, in light of all the circumstances, counsel's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Judicial scrutiny of counsel's performance "must be highly deferential," and must be evaluated from counsel's perspective at the time of the challenged conduct rather than with the benefit of hindsight. *Id.* at 689. Counsel's conduct must be "reasonable[] under prevailing professional norms." *Id.* at 688; *accord Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). Due to the difficulties inherent in making this evaluation, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. A petitioner for post-conviction relief "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation and citation omitted).

To show prejudice, a petitioner must show a "reasonable probability that, but

for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. In considering whether a petitioner has suffered prejudice, courts are concerned with whether "the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial." *Kimmelman*, 477 U.S. at 382.

At sentencing, *Strickland* prejudice is shown where trial counsel's deficient performance resulted in an incorrect Sentencing Guidelines calculation which, in turn, led to an increased sentence of incarceration. *See Glover v. United States*, 531 U.S. 198, 200 (2001); *see also Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016) (noting that some "courts recognize that . . . when a district court adopts an incorrect Guidelines range, there is a reasonable probability that the defendant's sentence would be different absent the error.").

As to appellate counsel, the *Strickland* analysis requires that a petitioner show deficient performance by showing that counsel "acted unreasonably in failing to discover and brief a merit-worthy issue." *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010) (citation omitted). Second, the petitioner shows prejudice as a result of appellate counsel's deficient performance by "demonstrat[ing] a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal." *Id.*

IV. IAC Claims Regarding Trial

Petitioner claims his counsel's performance at trial was deficient in a number of

ways.

A. Poor Relationship with Counsel

Generally, Petitioner claims that he was denied effective assistance of counsel because he had a poor relationship with trial counsel. (Mot. at 18, 20.) Minor conflicts between an accused and his counsel do not violate the Sixth Amendment right to counsel; however, an accused cannot be compelled "to undergo a trial with the assistance of an attorney with whom he has become embroiled in an irreconcilable conflict [that] deprives him of the effective assistance of any counsel whatsoever." *Daniels v. Woodford*, 428 F.3d 1181, 1197 (9th Cir. 2005) (internal alteration marks and citation omitted).

Petitioner states that defense counsel had a "moral bias against him." (Mot. at 20.) Without elaboration, Petitioner references complaints he made about counsel prior to the trial.[5] However, when questioned by the Court on July 3, 2013, less than a month before trial, Petitioner withdrew a request to represent himself and instead agreed to have trial counsel continue to represent him. (CR Doc. 66; Opp., Ex. L at 4.) At that same time, counsel informed the Court of efforts she had made to return his glasses to him.[6] (Opp., Ex. L at 3-4.) During the trial, counsel informed the Court regarding deficiencies in Petitioner's conditions of confinement and thanked the United States Marshals Service for ensuring that Petitioner was provided with lunch. (Opp., Exs. M, O.) Also during trial, the Court inquired of Petitioner whether he had voluntarily accepted counsel's advice to refrain from testifying on his own behalf, and Petitioner responded that he had voluntarily done so. (Opp., Ex. N.) This record does not evidence the type of breakdown in the attorney-client relationship that results in ineffective assistance of counsel. *See generally Daniels*, 428 F.3d 1181.

[5] Petitioner makes other arguments that he contends show that he had a poor relationship with defense counsel, but these arguments are addressed elsewhere in more detail. (*See* Mot. at 20.)

[6] Petitioner claims counsel was deficient in ensuring he had access to a hearing aid and/or listening device. (Mot. at 58.) However, the record does not reflect Petitioner made counsel or the Court aware of any difficulty in hearing he experienced before or during trial. Therefore, there is no deficient performance of counsel as to this issue.

B. Failure to Effectively Cross Examine and/or Impeach Witnesses

Petitioner contends that counsel was ineffective in handling the testimony of prosecution witnesses, bank tellers Vanesa Escudero and Brittni Moroyoqui. Petitioner contends that counsel failed to cross-examine these witnesses regarding inconsistent testimony and failed properly to impeach these witnesses. (*See generally* Mot. at 17, 23-33.) In assessing whether counsel's performance was deficient, the Court must give great deference to decisions such as whether to cross-examine or impeach a witness during trial. *See Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000) ("[C]ounsel's tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must . . . meet only objectively reasonable standards.")

First, Petitioner contends that the witnesses' statements to investigating agents were that they had not seen a gun used during the robbery. (Mot. at 17, 23-24, 30-33.) However, their testimony at trial is not inconsistent with their earlier statements to law enforcement investigators.

Initially, on the day of the robbery, August 2, 2012, Ms. Escudero gave a statement to a Placentia Police Officer, whose report states: "[Ms. Escudero] never saw a gun and a weapon was never mentioned by the suspect, but she believed he had a gun by the way his right arm was wrapped in [a] towel[]." (Mot., Ex. A.) The following day, Ms. Escudero was interviewed by an agent of the Federal Bureau of Investigation ("FBI"). The agent's report states:

> Escudero noticed that the robber was holding something in his right arm which was covered with a white material. . . . Escudero assumed the robber [had] a gun under the white material because she could see something dark or black. However, Escudero never actually saw a gun and the robber did not say he had a gun. Escudero was also afraid the robber had a gun because of his demeanor.

(Mot., Ex. B.) Just under a year later, on July 22, 2013, Ms. Escudero was again interviewed by the FBI:

> Escudero stated that . . . on August 2, 2012, the robber pointed something at her covered with a small towel. Escudero advised that she assumed it was a gun. Escudero stated that she assumed it was a gun because it was made of metal, it was a dark color, and because of its shape. Escudero advised that the part coming out of the towel "looked like the barrel part of a gun," and "[she] really thought he was going to shoot [her]."

(Mot., Ex. D.) At trial, Ms. Escudero's testimony was in accord: "He was holding something with his hand and it was covered with something that looks like a white towel. And it was showing something dark which I think it was the barrel of a gun. That was actually what I could see." (Opp., Ex. A.) Thus, the question of whether Ms. Escudero "saw a gun" during the robbery is not a strictly "yes-or-no" answer, and she testified that she saw something that appeared to be the barrel of gun hidden under a towel. Her statements and testimony are therefore consistent.

The same is true of Ms. Moroyoqui's accounts. On the date of the robbery, her statement to investigating police officers was that "it appeared as though the subject had a weapon in his right hand wrapped inside a white towel." (Mot., Ex. F.) Almost a year later, her statement to an FBI agent was that "she . . . saw the barrel of a gun sticking out of a towel[, that there] was a black tip, and [that] she 'thought it was a gun.'" (Mot., Ex. G.) Later, her trial testimony was similar:

> He was carrying, seemed like a weapon. It was covered with a white towel, from what I can see. Whether I know what specific weapon it was, I'm not sure. I did see a black—something, whether it be a barrel or whatnot, you know, that's all I can see. I don't know the specifics of what

it may be.

(Opp., Ex. B.) Therefore, like Ms. Escudero, Ms. Moroyoqui's statements to investigators and trial testimony were consistent.

Accordingly, although defense counsel did not call other witnesses to the robbery who, (Petitioner contends) would have testified that they did not see Petitioner possessing a weapon, Ms. Escudero's and Ms. Moroyoqui's testimony enabled defense counsel to argue at closing the witnesses who testified were not able to identify a weapon that was used in the robbery. (*See* Opp., Ex. C at 413.) Moreover, counsel was able to cross-examine the bank-teller witnesses effectively. (Opp., Exs. H-I.) Finally, because the witnesses' trial testimony was consistent with their prior statements, no attempt at impeachment was warranted.

Next, Petitioner contends counsel was deficient in failing to impeach Ms. Escudero as to the changing statements regarding the amount of cash involved in the robbery. (Mot. at 24.) On the day of the robbery, Ms. Escudero told police that she estimated the amount she gave to the robber was approximately $5,000 to $10,000. (Mot., Ex. A.) In the FBI interview the day after the robbery, Ms. Escudero stated that she "assumed the amount of cash she gave the robber was less than $10,000 but more than $5,000." (Mot., Ex. B.) Another FBI interview note of the same date states that Ms. "Escudero stated that as a result of the robbery . . . , the bank sustained a loss of $10,350. (Mot., Ex. C.) A final FBI interview note dated July 22, 2013, reports that Ms. Escudero "stated that the loss amount to the bank was $10,500." (Mot. Ex. D.)

The amount involved in the robbery was only slightly more than the upper range of Ms. Escudero's initial estimate, and whether the actual amount was $10,350 or $10,500, it was still around "10,000", which was the amount referenced by Ms. Escudero in her testimony. (Opp., Ex. J.) Counsel was not deficient in failing to cross-examine or impeach the witness based on these differences. Indeed, in light of how minor the differences were, foregoing any questioning regarding those

differences was within "sound trial strategy." *Strickland*, 466 U.S. at 689.

Petitioner also identifies a purported inconsistency because Ms. Escudero testified both that she was afraid and also that she moved slowly to allow others to respond/trigger the alarm. (Mot. at 27.) This is not inconsistent testimony. One can be in fear and still take deliberate action, such as moving slowly and stalling to give others additional time to act. Therefore, failing to further probe this area of testimony is also well within sound trial strategy, and counsel was not deficient in failing to further address this issue.

Finally, Petitioner contends that Ms. Escudero should have been impeached on the issue of whether the robber had hairy forearms. (Mot. at 25.) Petitioner points out that the robber was wearing a long-sleeve shirt during the robbery, so Ms. Escudero could not have seen his forearms. (*Id.*; Opp., Ex. K (still frame of surveillance video showing robber wearing long-sleeve sweatshirt).) Petitioner believes that the surveillance video tends to show that Ms. Escudero could not have seen his forearms. (Mot. at 25; Opp., Ex. K.) Petitioner states that he raised this issue with counsel but that counsel failed to address it. (Mot. at 24.) There are any number of tactical reasons that counsel may have had for not pursuing this line of questioning. For example, the witness's prior statement to the investigator, even if inconsistent with her testimony at trial, is not admissible. *See* Fed. R. Evid. 801(d)(1)(A) (requiring that a prior inconsistent statements be made under oath to be admissible as an exception to the hearsay rule). Therefore, counsel's performance was not deficient as to this issue.

In any event, Petitioner has not established the prejudice prong required by *Strickland*. Petitioner made admissions regarding going to Placentia to rob a bank, shedding his clothes while fleeing the bank, and planning to buy a truck with money obtained from robbing a bank. (*See* Order Denying Defendant's Motion for Judgment of Acquittal at 3, CR Doc. 114.) The teller's identification was consistent with Petitioner's admissions regarding the commission of the robbery. (*Id.*) Petitioner's appearance is consistent with the robber observed on the surveillance video. (*Id.*)

Petitioner was found near the bank at around the time of the robbery with a box of money in an amount consistent with the bank's loss during the robbery. (*Id.*) In light of this and other evidence offered at trial, Petitioner has not shown any probability that the result of the trial would have been different in the absence of error by counsel.

C. Failure to Offer Alternative Theory Regarding Weapon

Petitioner contends that counsel was deficient because she didn't offer an alternative theory about finding the BB gun. (Mot. at 40.) Specifically, Petitioner finds fault in the failure of counsel to point out that only the two bank-teller witnesses testified regarding the possible presence of a gun during the robbery, the failure to point out that the BB gun could have been hidden by someone other than Petitioner, and the failure to highlight the fact that no fingerprint analysis or DNA analysis was performed on the gun. But in fact, in closing argument, counsel addressed that the gun was found not on Petitioner but was found "in the bushes," that no witness identified the gun as being used in the robbery, and that the Government failed to offer fingerprint or DNA evidence connecting Petitioner to the gun found "in the bushes." (Opp., Ex. C, P.) In this manner, counsel formulated and implemented a strategy to distance Petitioner from the BB gun. Because counsel addressed the issues Petitioner identifies regarding the gun, Petitioner has not established deficient performance.[7] To the contrary, counsel's actions were well "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Moreover, because counsel addressed the evidence presented in a manner that distanced Petitioner from the found BB gun, Petitioner fails to establish any prejudice under *Strickland*.

D. Failure to Call Percipient and Expert Witnesses

Petitioner contends that counsel failed to present testimony of defense

[7] A final point raised by Petitioner actually connects him with the gun, and therefore it would have been *unhelpful* to his defense. Counsel's performance was not deficient for failing to advance Petitioner's theory. (*See* Mot. at 40 (arguing that "[i]f Petitioner [was] the robber and had possession of the BB gun (which he did not) he could have left it [in the bushes] prior to [the] robbery").)

witnesses. (*See* Mot. at 41-53.) Petitioner first contends that trial counsel was deficient for failing to call a number of witnesses who did not see a gun or a dangerous weapon during the robbery. (Mot. at 49.) However, as noted above, these witnesses' failure to see a gun or dangerous weapon is wholly consistent with the bank-teller witnesses' accounts that they observed what looked like the barrel of a gun wrapped in a white towel. Thus, these other witnesses' testimony would have been of little probative value, and Petitioner has not established either deficient performance or resulting prejudice in the failure to call these witnesses.

Petitioner also contends that a number of expert witnesses should have been called. First, he argues that a forensic psychologist should have been called to deal with the changed and inconsistent stories of the bank-teller witnesses. (Mot. at 22-23, 31-33.) However, as noted above, the testimony of these witnesses was not inconsistent, and counsel's failure to call expert witnesses on this topic was not deficient. Next, Petitioner criticizes counsel's failure to call an expert regarding his cross-racial identification. (Mot. at 26.) However, because he was wearing a mask at the time of the robbery, the bank witnesses did not identify Petitioner by his facial features; rather, they identified him by his "body structure." (Opp., Exs. E-F.) Similarly, Petitioner contends that counsel failed to call an audio expert regarding the authenticity of his confession (in the form of an audio recording from the booking process). (Mot. at 50.) Likewise, he contends that counsel failed to call a video expert regarding the authenticity of bank video. (Mot. at 51.) Petitioner has not offered any evidence that such experts would have offered testimony that would have furthered his defense. Counsel's failure to procure the expert testimony Petitioner believes was available is well within "the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 689, and therefore does not constitute deficient performance.

Moreover, Petitioner has failed to meet the burden of establishing resulting prejudice as a result of calling these experts. To make a sufficient showing of

prejudice for failure to call an expert witness, a Petitioner must offer evidence that an expert would have testified favorably on his behalf and that the testimony would have affected the outcome of the trial. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001). Petitioner's mere speculation is insufficient to establish prejudice. *See e.g.*, *id.*; *Davidson v. Sullivan*, No. 17CV0421 H (MDD), 2018 WL 2837472, at *24 (S.D. Cal. June 8, 2018) (finding no prejudice where Petitioner failed to offer evidence identifying a specific expert that could have been called or the substance of that expert's testimony); *Marks v. Davis*, No. 11-CV-02458, 2017 WL 2378067, at *17 (N.D. Cal. June 1, 2017); *Shepard v. Gipson*, No. 213CV1812JAMDBP, 2016 WL 7229115, at *9 (E.D. Cal. Dec. 13, 2016) ("Without evidence as to what expert witnesses would have testified to at trial, a habeas petitioner cannot establish prejudice with respect to a claim of ineffective assistance of counsel for failing to call trial witnesses."); *Wright v. Uribe*, No. CV 12-10787-GW (JEM), 2016 WL 6902486, at *16 (C.D. Cal. Aug. 4, 2016) ("An ineffective assistance claim cannot rest on mere speculation that counsel could have found an expert who disagreed with the prosecution expert's conclusions, or was ready to give other helpful testimony."), report and recommendation adopted, No. CV 12-10787-GW (JEM), 2016 WL 6902089 (C.D. Cal. Nov. 23, 2016), certificate of appealability denied, No. 16-56887, 2017 WL 6760790 (9th Cir. Sept. 7, 2017). In the absence of evidence regarding the substance of the expert testimony, Petitioner fails to meet his burden to establish prejudice.

Finally, Petitioner contends that counsel failed to call Agent Chris Gilking. Petitioner speculates that Agent Gilking would have testified that the original criminal complaint did not include a weapons charge because it was clear that such a charge could not be proven beyond a reasonable doubt. (Mot. at 40, 48.) The Government represents that Agent Gilking would have testified to the circumstances that led to charging Petitioner with armed robbery rather than unarmed robbery and that his testimony would not be helpful to the defense. (Opp. at 7-8.) Petitioner's speculation

is not a basis for finding ineffective assistance of counsel. As such, Petitioner does not establish either deficient performance or *Strickland*-type prejudice as a result of failing to call Agent Gilking.

E. Failure to Object to Prosecutorial Misconduct

Petitioner contends that counsel was deficient by failing to challenge prosecutorial misconduct. (Mot. at 28, 36-39.) Specifically, Petitioner contends that counsel failed to argue that prosecutors coached the bank-teller witnesses to lie in their trial testimony about seeing a gun. However, Petitioner does not provide any basis upon which to conclude that the prosecutor coached the witnesses to provide untruthful testimony. Instead, as noted above, the bank-tellers' initial statements regarding not seeing a gun or dangerous weapon are wholly consistent with their trial testimony, wherein they testified that they observed what looked like the barrel of a gun wrapped in a white towel.[8] Therefore, the failure of counsel to challenge the prosecutor's conduct in presenting this testimony was not deficient and there was no resulting prejudice.

F. Failure to Challenge Confession as a Coerced Confession

Petitioner argues his counsel's performance was deficient based on her failure to challenge his confession as coerced. Petitioner's prior statements were the subject of a motion in limine filed by the Government, and the Court issued a written ruling on July 23, 2013. (CR Doc. 82.) The Court ruled that Petitioner's statements made during the booking process and recorded by the Placentia Police Department were "spontaneous statements" rather statements made in response to questioning. (*Id.* at 3.) As such, the Court held that the statements were admissible even in the absence of a prior *Miranda* warning.[9] (*Id.*) Defense counsel challenged admissibility of these statements by filing a comprehensive opposition brief to the Government's motion in

[8] To the extent that Petitioner may have intended a stand-alone prosecutorial misconduct challenge, it fails for the same reason. Additionally, because Petitioner failed to raise this issue on direct appeal, it is procedurally defaulted.

[9] The Court's ruling assumed that Petitioner was in custody at the time of the statements. (CR 82 at 2-3.)

limine. (CR 73.) Therein, counsel argued that the statements were in-custody statements obtained in violation of *Miranda*. (CR 73 at 5-9.) Counsel also argued that the statements should be excluded as prejudicial pursuant to Federal Rule of Evidence 403. (*See* CR 82.) The Court rejected both of these arguments. Thus, Petitioner's statements were admitted, not because of any deficient performance by counsel, but because the Court ruled in favor of the Government.

Petitioner identifies other potential arguments regarding the challenged statements: Petitioner was sick and dehydrated (and thus, perhaps did not know what he was saying), or there was the possibility that Petitioner was speaking facetiously. (Mot. at 55.) Foregoing these arguments was within counsel's discretion and does not constitute deficient performance.

To the extent Petitioner argues his confession was coerced, he represents he was detained in handcuffs for over an hour in the presence of six police officers, he was held and questioned in unfamiliar surroundings, and he was told he had better start talking and admit to the robbery. (Mot. at 54.) These factors do not suggest the degree of coercion sufficient to exclude Petitioner's statements made during the booking process, especially in light of the fact that Petitioner's statements were made spontaneously after these events occurred.[10] Moreover, as to the statements that were the subject of the Government's Motion in Limine, the Court's finding that the statements to be admitted were "spontaneous" or "volunteered" precludes a finding that they were coerced in a manner that violates the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (statements volunteered by a suspect in custody

[10] The question of whether a confession is inadmissible because it was coerced, courts examine "whether [the] defendant's will was overborne by the circumstances surrounding the giving of [the] confession," an inquiry that "takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Dickerson v. United States*, 530 U.S. 428, 434 (2000). "Although sometimes framed as an issue of 'psychological fact,' the . . . question of the voluntariness of a confession has always had a uniquely legal dimension." *Miller v. Fenton*, 474 U.S. 104, 104 (1985) (citation omitted). Ultimately, "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller*, 474 U.S. at 116.

are admissible despite the absence of *Miranda* warnings if they are free from interrogation or other coercion). Therefore, counsel's performance was not deficient for failing to assert this challenge.

* * *

Because Petitioner's IAC challenges have not established that his trial counsel's performance was deficient in any manner, he has failed to meet the first *Strickland* prong. Moreover, none of Petitioner's challenges carry his burden with respect to prejudice. For these reasons, Petitioner's IAC challenges to his trial counsel's performance fail.

V. Appointment of Habeas Counsel Pursuant to General Order 15-08 to Address Issues in Light of *Johnson v. United States*

Petitioner's current counsel raises a number of IAC claims based on trial counsel's and appellate counsel's performance related to sentencing. Counsel was appointed by this Court's General Order 15-08, which appoints counsel to represent indigent defendants who may be eligible for federal habeas relief in the wake of the United States Supreme Court case of *Johnson v. United States*. 135 S. Ct. 2551 (2015).

In *Johnson*, the Court addressed the constitutionality of a sentencing enhancement of the Armed Career Criminal Act of 1984 ("ACCA") that applies when a defendant has three or more convictions for a "violent felony." 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as including, *inter alia*, felonies that "otherwise involve[] conduct that presents a serious risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This provision is referred to as the "residual clause" of the ACCA. *Johnson*, 135 S. Ct. at 2563. The Supreme Court held that the residual clause is unconstitutionally vague and invalidated it.[11] *Id.*

However, two years later, the Supreme Court *rejected* a constitutional challenge

[11] Recently, the Supreme Court also invalidated a similarly worded residual clause found in 18 U.S.C. § 16(b). *See Sessions v. Dimaya*, 138 S.Ct. 1204 (2018).

to the residual clause found in the pre-2016 version of USSG § 4B1.2(a). *See Beckles v. United States*, 137 S.Ct. 886, 890 (2017). Specifically, the Court held that because the United States Sentencing Guidelines are advisory in nature, and are not binding, the Guidelines are not subject to vagueness challenges under the Due Process Clause. *See generally id.* Thus, in this manner, although the Supreme Court found this language *unconstitutionally vague* as used in the ACCA, it found that identical language used in the Guidelines is not subject to constitutional challenge.[12]

Here, although Petitioner was not sentenced pursuant to the ACCA, his habeas counsel argues that Petitioner's counsel was ineffective for failing to argue that, in light of the holding in *Johnson*, Petitioner's prior conviction for unarmed robbery was not a career-offender predicate. The Court now considers these arguments, all of which challenge Petitioner's sentence based on ineffective assistance of counsel at either the trial or appellate level.

VI. IAC Claims Regarding Sentencing

Petitioner contends that both his trial counsel and his appellate counsel were deficient in their failure to raise certain arguments regarding whether the career offender enhancement was properly applied based on the two predicate offenses of mailing threatening communication in violation of 18 U.S.C. § 876(c) and unarmed bank robbery in violation of 18 U.S.C. § 2113(a). The Court discusses the career offender guideline and Petitioner's predicate offenses in the sections that follow.

A. Career Offender Provision as Applied to Petitioner's Sentencing

At sentencing, the Court found that Petitioner qualified as a "career offender"

[12] After *Johnson* was decided, but before *Beckles* was decided, the United States Sentencing Commission amended a similar sentencing enhancement in the Guidelines used in sentencing "career offenders." See USSG § 4B1.1. Specifically, for purposes of determining whether a defendant is a "career offender," the definition of "crime of violence" was amended to delete language identical to that found unconstitutional in *Johnson*. (*Compare* USSG § 4B1.2(a)(2) (2015 version) (defining "crime of violence" as, inter alia, felonies that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another") *with* USSG § 4B1.2(a)(2) (eff. Aug. 1, 2016) (eliminating this clause from the definition of "crime of violence").)

pursuant to the 2012 Guidelines. (Nov. 15, 2013 Tr. at 12-17, CR Doc. 146.) To be a career offender under the Guidelines, a defendant must meet these criteria:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

USSG § 4B1.1 (Nov. 1, 2012 ed.). Because Spangle was 62 at the time of his sentencing, the first criterion was clearly met, and habeas counsel does not contend that trial or appellate counsel were deficient for failing to challenge this issue.

The second criterion was met because Petitioner's offense of conviction was armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and the Guidelines define "crime of violence" as a felony "that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1) (Nov. 1, 2012 ed.). This Guidelines definition is unchanged in the current version of the Guidelines. *See* USSG § 4B1.2(a)(1) (Nov. 1, 2016 ed.). Moreover, the Ninth Circuit has held recently that armed bank robbery remains defined as a "crime of violence" under a statutory definition worded identically to the Guidelines definition. *See United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018). Specifically, the Ninth Circuit held that armed bank robbery is a "crime of violence" under 18 U.S.C. § 924(c)(1)(A). Therefore, despite habeas counsel's suggestion to the contrary, neither trial nor appellate counsel were deficient for failing to challenge the second criterion. (*See Supp. Mot.* 15 n.7.)

Whether the third criterion is met requires consideration of whether the two predicate offenses identified in the PSR were properly found to be "crimes of violence." The Court found that Petitioner's previous convictions for (1) mailing a threatening communication in violation of 18 U.S.C. § 876(c) and (2) unarmed bank

robbery in violation of 18 U.S.C. § 2113(a) were "crimes of violence." (Nov. 15, 2013 Tr. at 15-17; PSR 11, 13, CR Doc. 121.)

B. 18 U.S.C. § 876(c) as a "Crime of Violence" Predicate Offense

Section 876(c) criminalizes the mailing of a "communication . . . addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another." 18 U.S.C. § 876(c). The Ninth Circuit and others have held § 876(c) is a "crime of violence" under either USSG § 41B.2(a)(1) or an identical statutory definition.[13] *See United States v. De La Fuente*, 353 F.3d 766, 770-71 & n.3 (9th Cir. 2003) (holding that it was not plain error for a district court to conclude that § 876(c) was a "crime of violence" under 18 U.S.C. § 16(a)); *United States v. Chapman*, 866 F.3d 129, 134 (3d Cir. 2017), cert. denied, No. 17-8173, 2018 WL 1411935 (U.S. Apr. 16, 2018) (concluding that § 876(c) is a "crime of violence" under USSG § 4B1.2(a)(1)); *United States v. Stoker*, 706 F.3d 643, 648 (5th Cir. 2013) (holding § 876(c) is a "crime of violence" under USSG § 4B1.2(a)(1)); *United States v. Haileselassie*, 668 F.3d 1033, 1034-35 (8th Cir. 2012) (holding § 876(c) is a "crime of violence" within the meaning of the Mandatory Victims Restitution Act, which incorporates § 16(a)'s definition of a "crime of violence"). On direct appeal of Petitioner's conviction, in an unpublished decision, the Ninth Circuit also held that 18 U.S.C. § 876(c) is a "crime of violence" under § 4B1.2(a)(1). *United States v. Spangle*, 617 F. App'x 764, 765 (9th Cir. 2015).

Petitioner contends that trial and appellate counsel were ineffective for failing to raise the strongest argument that § 876(c) does not meet the "crime of violence" definition; specifically, Petitioner believes counsel should have argued that § 876(c) does not meet the "crime of violence" definition because a threat to kidnap does not necessarily include the threatened use of force, as kidnapping might be accomplished through non-forcible means, such as through deceit. (Supp. Mot. at 8-10.) Although

[13] *Compare* USSG § 4B1.2(a)(1) *with* 18 U.S.C. § 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another").

counsel may not have raised this issue, the Ninth Circuit expressly addressed it. *Spangle*, 617 F. App'x at 765. Specifically, the court drew a distinction between the crime of kidnapping and the crime of mailing a communication *threatening* to kidnap. *Id.* The court noted that there was no "realistic probability" that a communication would threaten to kidnap by means other than force. *Id.* (relying on *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Under *Duenas-Alvarez*, Petitioner could show such a "realistic probability" by relying on the facts of his own case or other cases in which defendants were prosecuted based on such facts. *Id.* And as noted in Petitioner's appeal, appellate counsel did not point to any cases that would tend to show the "realistic probability" the Ninth Circuit found lacking when it affirmed Petitioner's sentence. *Spangle*, 617 F. App'x at 765 ("Defendant has not pointed to any case in which a person was convicted for sending a threat to kidnap someone by deceit."). Habeas counsel contends such failure constituted ineffective assistance of counsel in light of the cases cited in Petitioner's Supplemental Motion. (Supp. Mot. at 9.)

The Court briefly addresses these cases. Petitioner first relies on *United States v. Berrigan*, 482 F.2d 171, 177-78 (3d Cir. 1973), wherein defendants were prosecuted for written threats to kidnap presidential advisor Henry Kissinger. (Supp. Mot. at 11.) Likely because the jury was unable to reach a verdict regarding the § 876(c) counts, the case does not examine the contents of the letters containing the threat. *Berrigan*, 482 F.2d at 173. However, some of the details contemplated by the co-defendants were evidenced by letters between the co-defendants.[14] *Id.* at 177-79. Petitioner points to language in the case which discusses the perceived advantage of kidnapping a presidential advisor rather than a presumably more protected, higher-profile target. (Supp. Mot. at 11.) However, other passages reveal a discussion in

[14] The Government points out certain details in each of the cases cited by Petitioner. (Opp. at 21-23.) Petitioner unfairly characterizes these arguments as mere "unsavory aspects lurking in the background of each case." (Reply at 3.) Contrary to Petitioner's characterization, these details provide context regarding whether the prosecuted threat represented a threat to kidnap by non-forcible means. As noted in the text, they do not.

which one defendant communicated to the other about "grabbing the gentleman," which he predicted would "take a force of perhaps 10 of your best people." *Berrigan*, 482 F.2d at 178. Thus, this case is not an example of a prosecution based on a threat to kidnap by non-forcible means.

Petitioner next relies on *United States v. Nishnianidze*, 342 F.3d 6, 11-12 (1st Cir. 2003), in which the defendant demanded money, told adoptive parents that he knew their address, and would send someone to "take the child from [their] yard" if they did not pay. (Supp. Mot. at 11.) A threat to kidnap a small child, Petitioner reasons, does not necessarily implicate a threat to kidnap using force. (*Id.*) However, the evidence in *Nishnianidze* recounted a conversation between the defendant and the child's parent in which the defendant said: "If you are afraid for [your son] and his life in this case you must do right for [your] son; you must pay." *Nishnianidze*, 342 F.3d at 12. Thus, the communication in *Nishnianidze* conveyed a threat to the life of the child and cannot be viewed as an example of a prosecution based on a threat to kidnap by non-forcible means.

Petitioner also cites *In re Michele D.*, 29 Cal. 4th 600 (2002), which construed the California kidnapping prohibition when the victim is an infant whose kidnapping could be effectuated simply by carrying her away. (Supp. Mot. at 11.) This case does not support Petitioner's argument. Even assuming that "carrying away" an infant is an act of deceit rather than an act of force,[15] it is still an act rather than a threat to act. In contrast, Petitioner's case implicates a mere threat to act. This critical distinction was drawn by the Ninth Circuit in Petitioner's direct appeal. *Spangle*, 617 F. App'x at 765. Therefore, *In re Michele D.* is not an example of a prosecution based on a threat to kidnap by non-forcible means.

Neither is Petitioner's next case, *United States v. Hill*, 943 F.2d 873, 874 (8th

[15] California law views such action as constituting force rather than deceit. Specifically, the California Supreme Court in *In re Michele D.* held that the carrying away of an infant or a young child is a sufficient quantum of "force" to sustain a kidnapping conviction where the "carrying away is done for an illegal purpose or with an illegal intent." 29 Cal. 4th at 611-12 (citation omitted).

Cir. 1991). (Supp. Mot. at 11-12.) Although the eighteen-year-old defendant may have initially believed that his thirteen-year-old victim was willing to go with him to another state voluntarily, when the defendant was told the victim did not want to go, he stated he would "take her anyway and that no one could stop him because [the victim] was 'bought and paid for.'" *Hill*, 943 F.2d at 874.

Thus, it was not unreasonable for appellate counsel to fail to "discover and brief" the issue of the threat to kidnap using non-forcible means. *See Moormann*, 628 F.3d at 1106. The cases upon which Petitioner relies do not support his contention, and therefore he establishes no "merit-worthy issue" that was left unbriefed. *Id.* Indeed, as noted above, a wealth of case law from other circuits support the Ninth Circuit's conclusion regarding Petitioner's direct appeal. Moreover, Petitioner fails to show prejudice. The Ninth Circuit considered and rejected the very argument identified by habeas counsel, and no authority cited by habeas counsel "demonstrates a reasonable probability that" Petitioner would have prevailed in his appeal if the issue had been raised.

C. Unarmed Bank Robbery as a "Crime of Violence" Predicate Offense

Unarmed bank robbery criminalizes the actions of "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . ." 18 U.S.C. § 2113(a).

Petitioner argues that unarmed bank robbery in violation of 18 U.S.C. § 2113(a) requires neither the "threat of violent force" nor the "intentional threat of force" required to meet the definition of a "crime of violence." (*See* Supp. Mot. at 15-18.) Both of Petitioner's arguments have been rejected by the Ninth Circuit. *See Watson*, 881 F.3d at 785.

Petitioner's first argument, that for a threat crime to be a "crime of violence," it must have as an element the "threat of violent force," draws its roots from *Johnson v. United States*, 559 U.S. 133, 140 (2010).[16] *Johnson* holds that "[t]o qualify as a crime of violence under the force clause, the element of 'physical force' must involve 'violent' physical force—'that is, force capable of causing physical pain or injury.'" *Watson*, 881 F.3d at 784 (quoting *Johnson*, 559 U.S. at 140). The *Watson* court rejected the argument that "[unarmed] bank robbery by intimidation does not necessarily involve the threat of violent physical force," because "even its least violent form requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard." *Watson*, 881 F.3d at 785 (citations omitted). As noted in *Watson*, four other circuits have reached the same conclusion. *Id.* (collecting cases).

Second, as to intent, Petitioner argues that the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004), which held that a "crime of violence" requires "a higher degree of intent than negligent or merely accidental conduct," precludes a finding that § 2113(a) is a "crime of violence." *Leocal*, 543 U.S. at 9. (*See* Supp. Mot. at 14-17.) Petitioner relies on *Carter v. United States*, 530 U.S. 255, 268 (2000), for the proposition that to violate § 2113(a), a defendant need only "possess[] knowledge with respect to the *actus reus* of the crime." (Supp. Mot. at 15.) Petitioner argues that this requires that defendant merely "kn[o]w he was physically taking money," which is, in light of *Leocal*, an insufficient intent element to support a conclusion that § 2113(a) constitutes a "crime of violence." (*Id.* at 16).

The Ninth Circuit rejected this argument. *See Watson*, 881 F.3d at 785. The court noted that, under *Carter*, "a defendant may be convicted of bank robbery only if the government proves that he at least possessed knowledge with respect to the taking

[16] *United States v. Johnson*, decided in 2010, is not to be confused with *Johnson v. United States*, decided in 2015. The former addressed the type of force required for a crime to fall into the definition of a "crime of violence," while the latter found unconstitutional the ACCA's residual clause defining "violent felony."

of property of another by force and violence or intimidation." *Watson*, 881 F.3d at 785. That meant that an unarmed bank robbery "must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Id.*

Thus, Petitioner has not established that counsel's performance was deficient for failing to challenge whether the elements of unarmed bank robbery fall within the definition of "crime of violence." Petitioner's argument does not involve a "merit-worthy issue" and counsel's performance was not deficient based on the failure to discover and brief it. *See Moormann*, 628 F.3d at 1106. Additionally, Petitioner has not demonstrated prejudice. The Ninth Circuit considered and rejected the very arguments identified by habeas counsel, and therefore Petitioner has not "demonstrate[d] a reasonable probability that" Petitioner would have prevailed in his appeal if the issue had been raised. *Id.*

* * *

Petitioner has failed to establish that the performance of his trial or appellate counsel was deficient in any way or that he established prejudice as the result of counsel's deficient performance. Accordingly, because Petitioner has not established that his "sentence was imposed in violation of the constitution or laws of the United States," 28 U.S.C. § 2255, the Court DENIES the Motion to Vacate or Correct Federal Sentence and the Supplemental Motion to Vacate of Correct Federal Sentence.

VII. Motion to Appoint Counsel

At the outset, the Court notes that the Federal Public Defender, appointed as habeas counsel by operation of the Court's General Order 15-08, filed a Supplemental Motion (and Reply brief in support thereof) on behalf of Petitioner. (Docs. 13 & 33.) Moreover, habeas counsel has facilitated Petitioner's pro se filings, attaching documents to the Supplemental Motion (as Exhibit G) and to the Reply. (Docs. 13-1 & 33-1.) The Supplemental Motion outlines the scope of habeas counsel's representation. (Supp. Mot. at 5 n.2.) Therefore, the Court considers Defendant's

Motion to Appoint counsel in light of the scope of existing habeas counsel's representation.[17]

The Criminal Justice Act ("CJA") provides for appointment of counsel for a § 2255 motion when the petitioner is financially eligible for appointment of counsel and the interests of justice require the appointment of counsel. 18 U.S.C. § 3006A(a)(2)(B). Appointment of counsel is mandatory if an evidentiary hearing is required. *United States v. Duarte-Higareda*, 68 F.3d 369, 370 (9th Cir. 1995) (citing Rule 8(c) of the Rules Governing Section 2255 Proceedings, 28 U.S.C. foll. § 2255). However, where no evidentiary hearing is required, the decision to appoint counsel is discretionary. *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986).

A court's exercise of its discretion in deciding whether to appoint counsel is guided by the purpose of the CJA, which is to provide for appointed counsel whenever required by the Constitution. *See Knaubert*, 791 F.2d at 728. The Sixth Amendment right to counsel does not apply in habeas corpus actions. *Id.* Therefore, the Court's primary focus is whether there is any danger that Petitioner's due process rights may be violated.

In making this inquiry, the Ninth Circuit has identified the "three distinct factors" that must be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 728-29 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[17] Appointed counsel represented Defendant in the underlying criminal action.

For the reasons set forth in the previous sections, the record here conclusively establishes that Petitioner is not entitled to relief, and therefore no evidentiary hearing is required. Because no evidentiary hearing is required, whether to appoint counsel is a matter of discretion, and the Court's discretion is guided by consideration of the *Mathews* factors.

Here, Petitioner's interest in release from imprisonment or reduction in sentence is undoubtedly high. However, as noted above, Petitioner's counsel was not deficient, and Petitioner was not sentenced pursuant to an unconstitutional sentencing enhancement. Because there is no risk of erroneous deprivation of his liberty interest, additional procedural safeguards will not add any value to the protection of Petitioner's liberty interest.[18] Accordingly, upon consideration of the *Mathews* factors, the Court determines that the denial of the Motion to Appoint Counsel results in no danger that Petitioner's due process rights will be violated. The interests of justice are therefore not served by appointment of counsel, and the Court DENIES the Motion to Appoint Counsel.

VIII. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings requires the district court to issue or deny a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B) when a final order adverse to the petitioner is entered.

A certificate of appealability may be issued only when the petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

As set forth herein, Petitioner has not made any showing of the denial of a constitutional right. His trial and appellate counsel were not deficient, he was not sentenced pursuant to an unconstitutional sentencing enhancement, there is no Sixth Amendment right to counsel in this proceeding, and there is no due process violation.

Accordingly, the Court DENIES the issuance of a certificate of appealability.

[18] The Government's interest is unaffected; it has already submitted full briefing on the issues raised by Petitioner.

Petitioner is directed to Federal Rule of Appellate Procedure 4(a), which sets forth time limitations for the filing of an appeal, and to Federal Rule of Appellate Procedure Federal Rule of Appellate Procedure 22(b)(1)-(2), which relates to Certificates of Appealability.

IX. Conclusion

Because Petitioner has not established that his "sentence was imposed in violation of the constitution or laws of the United States," the Court DENIES the Motion to Vacate or Correct Federal Sentence and the Supplemental Motion to Vacate or Correct Federal Sentence.

Because the interests of justice do not require appointment of counsel in this instance, the Court DENIES the Motion to Appoint Counsel.

Because Petitioner has not made any showing of the denial of a constitutional right, the Court DENIES issuance of a certificate of appealability.

IT IS SO ORDERED.

Dated: August 20, 2018

Hon. Josephine L. Staton
United States District Judge