

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 15 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD ALAN KING,

Defendant-Appellant.

No. 18-16566

D.C. Nos. 2:16-cv-00086-SRB
2:08-cr-00045-SRB-1

District of Arizona,
Phoenix

ORDER

Before: CANBY and WARDLAW, Circuit Judges.

The motion to file an oversized application for a certificate of appealability (Docket Entry No. 12) is granted.

The request for a certificate of appealability (Docket Entry Nos. 10, 13 & 15) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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District of Arizona,
Phoenix

ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

Appellant's petition for en banc determination is construed as a motion for reconsideration en banc (Docket Entry No. 17) and 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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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Richard Alan King,

10 Petitioner,

11 v.

12 USA,

13 Respondent.
14

NO. CV-16-00086-PHX-SRB

JUDGMENT

15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation
18 of the Magistrate Judge as the order of this court; defendant's motion pursuant to 28
19 U.S.C. 2255 to vacate, set aside or correct a sentence is denied and the civil action
20 opened in connection is hereby dismissed with prejudice.

21 Brian D. Karth
22 District Court Executive/Clerk of Court

23 August 2, 2018

24 By s/ Ginelle Puraty
25 Deputy Clerk
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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Richard Alan King,

Defendant/Movant.

No. CV-16-00086-PHX-SRB
CR-08-00045-PHX-SRB

ORDER

Movant Richard Alan King filed his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on January 14, 2016. The Motion was later amended to correct typographical errors. The United States filed its Answer Limited to Affirmative Defenses on October 6, 2017 and King filed his Reply on April 9, 2018. On June 5, 2018 the Magistrate Judge issued his Report and Recommendation recommending that the Motion be denied and dismissed with prejudice. Timely written objections were filed by King and by the United States. The Report and Recommendation also recommended that two pending Motions to Amend be denied. The Magistrate Judge denied King's Motion to Show Cause and Motion for Extension of Time and denied as moot the United States' Motion to Permit It to Respond Only When Ordered.

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GOVERNMENT'S OBJECTION

The Government filed a single objection to the Report and Recommendation. The objection states it was filed solely to preserve the issues in the event of a defense objection or appeal. The objection to the Report and Recommendation is based on its failure to recommend that the Court deny the United States' petition for the alternative reasons set forth in the response. The objection is overruled. The Court is not required to decide cases on all alternate grounds suggested or argued by the parties.

KING'S OBJECTIONS

King objects to the Report and Recommendation on what the Court considers a frivolous ground, namely, that because there was no specific mention of his reply the Magistrate Judge must not have considered it. According to King both references by the Magistrate Judge to the Amended Motion to Vacate being fully briefed somehow means that the Magistrate Judge did not consider his reply. Following this argument to its logical conclusion, the Magistrate Judge's failure to mention the Government's answer would mean that when the Magistrate Judge said the matter was fully briefed he had not considered that either. In this Court's view when a matter is "fully briefed" that means that the motion, response and reply have been filed and have been considered. King's objection on the grounds that his reply was not considered is overruled.

King's next objection is to the Magistrate Judge's recommendation that his Motion to Amend to add a claim under *United States v. Sanchez-Gomez* be denied. This objection is also a frivolous one in that King does not explain why the Magistrate Judge's ruling is incorrect. King only claims that it is insufficiently specific and, therefore, he is prejudiced. He claims to have no knowledge of the ruling in *Sanchez-Gomez* but considers it "highly improbable that the Supreme Court would find that the Ninth Circuit does not have jurisdiction to en banc over-rule its former decision." This is an insufficient objection to the Report and Recommendation of the Magistrate Judge.

King also objects to the Magistrate Judge's denial of his Motion to Show Cause Why the United States Should Not be Held in Civil Contempt and his Motion for

1 Extension of Time to File Objections to Reports and Recommendations and Replies to
 2 any of Respondent's Moving Papers and Magistrate Decisions. While King requests *de*
 3 *novo* review of these denials, *de novo* review is not the standard for the Court's review of
 4 a non-dispositive order of the Magistrate Judge. An order of a Magistrate Judge on a non-
 5 dispositive matter is reviewed by this Court for clear error or decisions contrary to law.
 6 Rule 72(a), Fed. R. Civ. P. The Magistrate Judge explained that because the United
 7 States had not failed to comply with a court order the Motion for an Order to Show Cause
 8 Why the United States Should Not be Held in Civil Contempt cannot stand. This Court
 9 agrees. Moreover, there was nothing clearly erroneous or contrary to law in denying
 10 King's request for a blanket extension.

11 Finally, King objects to the Magistrate Judge's recommendation denying a
 12 Certificate of Appealability and leave to proceed *in forma pauperis* on appeal and cites in
 13 support of his objections his motion and reply. Because the Court agrees with the
 14 Magistrate Judge's Report and Recommendation that this Court cannot consider his
 15 claims of ineffective assistance of counsel and is procedurally barred from considering
 16 his claim that could have been, but was not raised on appeal, this objection is also
 17 overruled. The Court finds itself in agreement with the Report and Recommendation
 18 of the Magistrate Judge.

19 IT IS ORDERED adopting the Report and Recommendation of the Magistrate
 20 Judge as the Order of this Court. (Doc. 65)

21 IT IS FURTHER ORDERED that Movant's Amended Motion to Vacate, Set
 22 Aside or Correct Sentence is denied and dismissed with prejudice.

23 IT IS FURTHER ORDERED that Movant's Motion to Amend to expand his
 24 ineffective assistance of counsel claims is denied. (Doc. 25)

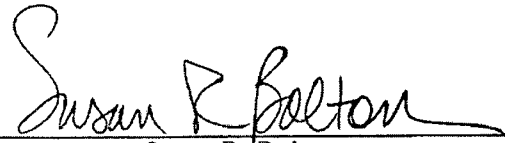
25 IT IS FURTHER ORDERED that Movant's Motion to Amend to add a claim
 26 under *United States v. Sanchez-Gomez* is denied. (Doc. 26)

27 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to
 28 proceed *in forma pauperis* on appeal because dismissal of the Motion is justified by a

1 plain procedural bar and jurists of reason would not find the ruling debatable.

2 IT IS FURTHER ORDERED directing the Clerk to enter judgment accordingly.

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4 Dated this 2nd day of August, 2018.

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8 Susan R. Bolton
9 United States District Judge
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Richard Alan King,

10 Petitioner,

11 v.

12 USA,

13 Respondent.
14

NO. CV-16-0086-PHX-SRB (DKD)

REPORT AND RECOMMENDATION

15
16 **TO THE HONORABLE SUSAN R. BOLTON, SENIOR U. S. DISTRICT JUDGE:**

17 Richard Alan King's Amended Motion to Vacate, Set Aside or Correct Sentence
18 pursuant to 28 U.S.C. § 2255 ("2255 Motion") is now fully briefed. (Doc. 24) King
19 claims he received ineffective assistance of counsel and that he did not knowingly and
20 voluntarily represent himself. (Doc. 24) Respondent argues that he cannot raise this
21 claim because he chose to represent himself at various points in his criminal proceedings.
22 (Doc. 32) As explained below, the Court recommends that King's Motion be denied and
23 dismissed with prejudice.

24 **Procedural Background**

25 After King's indictment, he requested self-representation. (2:08-cr-45 ("CR")
26 Doc. 135 at 2) The Court warned him that it was "a bad idea" and, after time to consult
27 with counsel, King rescinded his request. (CR Doc. 135 at 3-11)
28

1 Subsequently, King again requested self-representation. (CR Doc. 199, 367 at 4-
2 12) After a lengthy discussion about the limited obligations of advisory counsel, the
3 Court granted King's request and appointed his counsel as his advisory counsel. (CR
4 Doc. 367 at 12:3-9) For approximately two months, King represented himself and filed
5 numerous papers, including a Motion to Dismiss Advisory Counsel. (CR Doc. 221, 223,
6 226, 230, 238) Thereafter, King filed a motion titled "Ex Parte Request to Amend
7 Advisory Counsel's Appointment to that of Trial Counsel." (CR Doc. 259) The Court
8 granted that request and appointed King counsel. (CR Doc. 260)

9 Approximately four months later, King again informed the Court that he wanted to
10 represent himself. (CR Doc. 332) At a hearing on his motion, the Court granted his
11 request. (CR Docs. 352, 819 at 7-14) For the next month, King represented himself and
12 filed and responded to pretrial motions. (CR Docs. 354, 362, 365, 380, 381, 387, 388,
13 389, 412, 417, 418, 419, 420, 421). King represented himself for the first three days of
14 trial. (CR Docs. 422, 423, 425) During the fourth day of trial, the Court granted King's
15 request that his advisory counsel become his counsel of record. (CR Doc. 426)

16 Approximately two weeks after the jury found him guilty, and again two months
17 later King again requested to represent himself. (CR Docs. 500, 562) At a hearing
18 intended for sentencing, the Court granted King's request to represent himself. (CR Doc.
19 584) King filed various papers over the next three months. (CR Docs. 576, 581, 582,
20 583, 587, 592, 593, 594, 595, 607, 608, 609, 610, 611, 613, 614, 624, 625, 627, 631, 632,
21 633, 634, 635, 644, 649, 652, 653, 654, 655, 656, 658)

22 After sentencing, King filed more papers, including a "Motion for Appointment of
23 Advisory Counsel for direct appeal" and "Motion for New Trial Pursuant to F.R.C.P.
24 33(a) (b) (1)." (CR Docs. 627, 669; CR Docs. 664, 668, 670, 675, 676, 678, 679, 684,
25 685, 686, 707, 713) The Court granted King's request and appointed him appellate
26 advisory counsel until the Ninth Circuit informed King that it does not appoint advisory
27 counsel. (CR Docs. 691, 779) King proceeded *pro se* and the Ninth Circuit first stayed
28 his appeal and remanded to the District Court "for the limited purpose of enabling the

1 district court to address” the various motions King had filed. (CR Doc. 807) After those
 2 motions were denied, the Circuit addressed the merits of his appeal. (CR Doc. 847-3)
 3 King raised several claims and the Circuit rejected all of them and affirmed his
 4 conviction. (CR Doc. 847-3) King’s request for rehearing and rehearing *en banc* were
 5 denied and the mandate issued on July 30, 2014. (CR Doc. 847-2) The U.S. Supreme
 6 Court denied King’s petition for writ of *certiorari* on January 12, 2015, and denied his
 7 petition for rehearing on March 9, 2015. (Ninth Circuit Court of Appeals Case 10-10005,
 8 Doc. 186, 187)

9 In January 2016, King timely initiated post-conviction proceedings in this Court.
 10 (Doc. 1) The Court granted King’s request to amend his 2255 Motion to address
 11 “scribeners errors.” (Doc. 7, 23) After a stay and an extensive motions practice, this
 12 matter is now fully briefed. (Docs. 10, 23, 52)

13 Analysis

14 King raises two claims for relief. First, he argues that he received ineffective
 15 assistance of counsel in various ways and second, he argues that he should have been
 16 represented when he filed a motion for a new trial. (Doc. 24) Respondents argue that
 17 King cannot raise either claim. (Doc. 32) The Court agrees.

18 When a criminal defendant requests self-representation, the District Court must
 19 determine that the request is knowing and intelligent. *Faretta v. California*, 422 U.S.
 20 806, 819-20, 835 (1975). After that determination, the Court can choose to appoint
 21 advisory counsel but a *pro se* defendant has no right to such counsel. *U.S. v. Moreland*,
 22 622 F.3d 1147, 1155 (9th Cir. 2010); *U.S. v. Olano*, 62 F.3d 1180, 1193 (9th Cir. 1995).
 23 “[A] defendant who elects to represent himself cannot thereafter complain that the quality
 24 of his own defense amounted to a denial of “effective assistance of counsel.” *Faretta*,
 25 422 U.S. at 834, n.46. This means that the Court cannot consider post-conviction claims
 26 of ineffective assistance of counsel or advisory counsel. *Cook v. Ryan*, 688 F.3d 598, 609
 27 (9th Cir. 2012); *see also Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982).
 28

1 Accordingly, under longstanding and binding precedent, King's claims of ineffective
2 assistance of counsel cannot stand. (Doc. 24 at 5-50)

3 Likewise, the Court cannot review King's claim that he should have received
4 *Faretta* warnings before he moved for a new trial. (Doc. 24 at 51-52) King could have
5 raised this claim in his direct appeal, when he was proceeding *pro se*, but did not.
6 Accordingly, this claim is also barred from consideration.

7 Motions. After the Court granted King's motion to amend, he filed two more.
8 First, King moved to amend his 2255 Motion to expand his ineffective assistance of
9 counsel claims. (Doc. 25) Because these claims cannot stand, this proposed amendment
10 cannot go forward.

11 King also moved to amend his 2255 Motion to include a claim under *U.S. v.*
12 *Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017). (Doc. 26) In light of the Supreme Court's
13 recent ruling, 2018 WL 2186177, the Court will deny this motion.

14 King has also moved for an order to show cause. (Doc. 53) Because Respondent
15 has not failed to comply with a Court order, King's motion cannot stand. Finally, the
16 Court will deny King's request for a blanket extension. (Doc. 60)

17 **IT IS THEREFORE RECOMMENDED** that Richard Alan King's Amended
18 Motion to Vacate, Set Aside or Correct Sentence be **denied and dismissed with**
19 **prejudice.**

20 **IT IS FURTHER RECOMMENDED** that King's Motion to Amend to expand
21 his ineffective assistance of counsel claims be denied. (Doc. 25)

22 **IT IS FURTHER RECOMMENDED** that King's Motion to Amend to add a
23 claim under *United States v. Sanchez-Gomez*, be denied. (Doc. 26)

24 **IT IS FURTHER ORDERED** denying King's Motion to Show Cause Why the
25 United States Should Not be Held in Civil Contempt. (Doc. 53)

26 **IT IS FURTHER ORDERED** denying King's Motion for Extension of Time to
27 File Objections to Reports and Recommendations and Replies to any of Respondent's
28 Moving Papers and Magistrate Decisions. (Doc. 60)

1 **IT IS FURTHER ORDERED** denying as moot Respondents' Motion to Permit
2 the United States to Respond Only When Ordered. (Doc. 64)

3 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and
4 leave to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition
5 is justified by a plain procedural bar and jurists of reason would not find the ruling
6 debatable.

7 This recommendation is not an order that is immediately appealable to the Ninth
8 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules
9 of Appellate Procedure, should not be filed until entry of the district court's judgment.
10 The parties shall have fourteen days from the date of service of a copy of this
11 recommendation within which to file specific written objections with the Court. *See*, 28
12 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter,
13 the parties have fourteen days within which to file a response to the objections. Failure
14 timely to file objections to the Magistrate Judge's Report and Recommendation may
15 result in the acceptance of the Report and Recommendation by the district court without
16 further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).
17 Failure timely to file objections to any factual determinations of the Magistrate Judge will
18 be considered a waiver of a party's right to appellate review of the findings of fact in an
19 order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule
20 72, Federal Rules of Civil Procedure.

21 Dated this 5th day of June, 2018.

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25 _____
26 David K. Duncan
27 United States Magistrate Judge
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**Additional material
from this filing is
available in the
Clerk's Office.**