UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 27 2019

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SUSAN XIAO-PING SU, AKA Susan Su, Defendant-Appellant.	No. 18-15978 D.C. Nos. 3:17-cv-02885-JST 4:11-cr-00288-JST-1 Northern District of California, San Francisco ORDER

Before: SILVERMAN and WATFORD, Circuit Judges.

This appeal is from the denial of appellant's motion under 28 U.S.C. § 2255, subsequent Federal Rule of Civil Procedure 59(e) motion, and the denial of appellant's motion under 18 U.S.C. § 3582.

The request to file a supplemental brief in support of a certificate of appealability (Docket Entry No. 20) is granted. The documents received on August 28, 2018, and May 24, 2019 (Docket Entry Nos. 7 and 18), are deemed filed.

With respect to claims raised in her section 2255 motion and Rule 59(e) motion, appellant's request for a certificate of appealability (Docket Entry Nos. 4, 7, 8, 17, 18, and 21) 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); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016).

With respect to any appeal from the district court's denial of appellant's motion to reduce sentence under 18 U.S.C. § 3582, no certificate of appealability is required. *Cf.* 28 U.S.C. § 2253(c)(1)(B). Accordingly, the parties may proceed with briefing on that issue only. The opening brief is due October 23, 2019; the answering brief is due November 22, 2019; the optional reply brief is due within 21 days after service of the answering brief.

Appellant's motion for in forma pauperis status (Docket Entry No. 6) is granted. The Clerk shall change the docket to reflect appellant's in forma pauperis status. Because appellant is proceeding without counsel, the excerpts of record requirement is waived. *See* 9th Cir. R. 30-1.2.

The Clerk shall serve on appellant a copy of the "After Opening a Case – Pro Se Appellants."

The motions for bail and immediate release pending appeal (Docket Entry Nos. 10 and 19) are denied.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SUSAN XIAO-PING SU, Defendant.	Case No. 11-cr-00288-JST-1 **ORDER DENYING SECTION 2255 MOTION TO VACATE SENTENCE** Re: ECF No. 235

Before the Court is Defendant Susan Xiao-Ping Su's motion to vacate sentence pursuant to 28 U.S.C. § 2255. ECF No. 235. The Court will deny the motion.[1]

I. BACKGROUND

This criminal case centers on an entity Su founded called Tri-Valley University (TVU) in Pleasanton, California. ECF No. 199 at 1; ECF No. 209. The purpose of TVU was not to educate students: TVU offered no classes, employed no teaching faculty, and had no facilities for instruction. What it did have the status of an accredited university, which allowed Su to obtain F-1 student visas, which she did for any "student" who paid tuition or other fees to TVU. Although TVU's records showed these "students" as enrolled at TVU, none of them attended classes. ECF No. 199. Su made millions of dollars through this scheme.

On April 28, 2011, Su was charged by indictment with ten counts of violating 18 U.S.C. §§ 1343 & 2 (wire fraud, aiding and abetting), two counts of violating 18 U.S.C. §§ 1341 & 2 (mail fraud, aiding and abetting), one count of violating 18 U.S.C. § 371 (conspiracy to commit

[1] As the record conclusively shows that Su is not entitled to relief, the Court will decide this matter without an evidentiary hearing. *See United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998) (citation omitted).

visa fraud), four counts of violating 18 U.S.C. §§ 1546(a) & 2 (visa fraud, aiding and abetting), one count of violating 18 U.S.C. §§ 1001(a)(3) & 2 (use of false document, aiding and abetting), one count of violating 18 U.S.C. §§ 1001(a)(2) & 2 (false statements to a government agency, aiding and abetting), three counts of violating 8 U.S.C. §§ 1324(a)(1)(A)(iii), (a)(1)(A)(v)(II), (a)(1)(B)(I) (alien harboring), one count of violating 18 U.S.C. §§ 1030(a)(3) & 2 (unauthorized access of a government computer, aiding and abetting), and ten counts of violating 18 U.S.C. §§ 1957(a), 2 (money laundering, aiding and abetting). ECF No. 1 at 1-3. On November 10, 2011, the Government filed a superseding indictment that charged Su with two additional counts of violating 18 U.S.C. §§ 1343 & 2. *See* ECF No. 21 at 1-4.

The Court granted the Government's motion to dismiss three money laundering counts and one alien harboring count during trial. ECF No. 112. After a three-week jury trial, on March 24, 2014, the jury returned a unanimous verdict finding Su guilty on all remaining counts. *See* ECF No. 118. Su filed motions for a judgment of acquittal and new trial under Federal Rules of Criminal Procedure 29(c) and 33. ECF Nos. 166, 167. On October 31, 2014, the Court denied both motions and sentenced Su to 198 months imprisonment. ECF No. 203. The Court also ordered restitution in the amount of $1,015,795.64 and entered a forfeiture order permitting the United States to take possession of all proceeds and property traceable to her offenses. *See id.*; ECF Nos. 208, 226. On November 3, 2014, Su appealed her jury convictions and sentence to the United States Court of Appeals for the Ninth Circuit. ECF No. 205. The Ninth Circuit affirmed the conviction and sentence on December 7, 2015. *United States v. Su*, 633 Fed. Appx. 635 (9th Cir. 2015). On January 6, 2016, the Ninth Circuit denied Su's petition for rehearing en banc. ECF No. 235 at 78. On May 16, 2016, the United States Supreme Court denied Su's petition for writ of certiorari. *Su v. United States*, 136 S. Ct. 2043 (2016) (No. 15-8973); ECF No. 235 at 79. On May 15, 2017, Su filed her motion to vacate sentence pursuant to 28 U.S.C. § 2255.[2] ECF No.

[2] Su filed a memorandum in support of her motion to vacate under 28 U.S.C. § 2255 on May 16, 2017. ECF No. 237. She filed a second amended memorandum on August 1, 2017. ECF No. 244. The memoranda are substantially identical. This order resolves the issues raised in both filings.

235.

II. LEGAL STANDARD

Su's motion to vacate her sentence arises under 28 U.S.C. § 2255, which provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). Thus, "[u]nder 28 U.S.C. § 2255, a federal court may vacate, set aside, or correct a federal prisoner's sentence if the sentence was imposed in violation of the Constitution or laws of the United States." *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (citation omitted).

III. ANALYSIS

Su challenges her convictions on four grounds. ECF No. 244 at 2.[3] First, Su argues her mail and wire fraud convictions should be vacated because her conduct fell outside the scope of the statutes. *Id.* at 3. She claims that, for the purposes of 18 U.S.C. §§ 1341, 1343, money or property must be obtained from the deceived party, and the I-17 and I-20 forms that were fraudulently obtained from the Department of Homeland Security (DHS) were certificates that did not constitute "property" in the hands of the DHS. *Id.* at 3, 5-24. Su asserts the jury instructions did not properly require the jury to determine whether the deceived party suffered a pecuniary loss. *Id.* at 23-24.

Second, Su argues her visa fraud convictions should be vacated because the I-20 forms employed in her scheme were not among the documents covered under 18 U.S.C. § 1546(a). *Id.* at 24-25, 27-29. She asserts that an element of the offense was identification of the I-20 as a document prescribed by statute and that this determination should have been submitted to the jury. *Id.* at 29-31. Su takes the position that this alleged error created a constructive amendment

[3] The Court will cite to the amended memorandum in this order.

triggering automatic reversal. *Id.* at 32-33.

Third, Su argues her alien harboring convictions should be vacated because the two individuals she shielded from immigration authorities were not "illegal aliens." *Id.* at 34, 36-40. She claims these individuals maintained valid F-1 visa status during the relevant period because they were rightfully employed on TVU's campus as permitted by 8 C.F.R. 214.2(f)(6)(i)(H). *Id.* at 37-39.

Fourth, Su argues her money laundering convictions should be vacated because they present an intrinsic merger problem with her other convictions. *Id.* at 40, 42-54. She claims the jury was not properly instructed that, under the money laundering statute, "proceeds" are to be interpreted as "profits." *Id.* at 52-53. Su asserts this instruction did not permit the jury to determine whether her purchases of real estate and a car were integral components of her other convictions. *Id.* Su also argues it was error for the Court to allow these purchases to be used as evidence of criminal intent in her other convictions. *Id.* at 48.

Finally, Su challenges the Court's restitution order on the grounds that it grants recovery in excess of her victims' actual losses. *Id.* at 54. She claims the Court's forfeiture order captured the entirety of the damages owed to her victims. *Id.* at 55-57.

In response, the Government argues that all of Su's claims are procedurally barred, were previously decided by the Ninth Circuit, or are legally infirm. ECF No. 256 at 8-14.

A. Procedural Default

"The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-51 (2006) (citation omitted); *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (citation omitted) ("A § 2255 movant procedurally defaults his claims by not raising them on direct appeal and not showing cause and prejudice or actual innocence in response to the default."). There is, however, "an exception if a defendant can demonstrate both 'cause' for not raising the claim at trial, and 'prejudice' from not having done so." *Sanchez-Llamas*, 548 U.S. at 351. A defendant who fails to show cause and prejudice can obtain review by demonstrating "that the constitutional error . . . has probably resulted in the conviction of one who is actually

innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotations and citation omitted).

"In procedural default cases, the cause standard requires the petitioner to show that some objective factor external to the defense impeded counsel's efforts to raise the claim [on direct appeal]." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (citation and internal quotation marks omitted). "If a petitioner succeeds in showing cause, the prejudice prong of the test requires demonstrating 'not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007) (emphasis in original) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). This prejudice standard "is significantly greater than that necessary under" the plain error standard. *Murray v. Carrier*, 477 U.S. 478, 494 (1986).

Su is procedurally barred from presenting her arguments challenging the mail fraud, wire fraud, and visa fraud convictions because she failed to raise them on direct appeal and also fails to demonstrate cause and prejudice to overcome the procedural default. *See Sanchez-Llamas*, 548 U.S. at 351; *Su*, 633 Fed. Appx. 635. Su hints at an ineffective assistance of counsel claim, but affirmatively rejects this position in her reply brief. *See* ECF No. 244 at 4-5; ECF No. 260 at 6 ("Defendant is not raising the claim of 'ineffective counsel' . . ."). Nowhere in her motion does Su sufficiently allege an objective external factor that prevented her from raising these claims on direct appeal.[4] *See McCleskey*, 499 U.S. at 493.

In her reply brief, Su argues that her claims are not procedurally barred because she is

[4] In *Thomsen*, the Ninth Circuit interpreted "other documents" in 18 U.S.C. § 1546(a) to include only "immigration-related documents." *United States v. Thomsen*, 830 F.3d 1049, 1059-63 (9th Cir. 2016). This decision was issued after Su filed her appeal. *See id.* at 1049; *Su*, 633 Fed. Appx. 635. Even if the Court construes this as cause for Su's delayed visa fraud challenge, she has still failed to meet her burden to show a resulting prejudice that "worked to [her] *actual* and substantial disadvantage, infecting [her] entire trial with error of constitutional dimensions." *See* ECF No. 244 at 28-29; *Frady*, 456 U.S. at 170. Further, the Court is not persuaded by Su's argument because the I-20 forms employed in her scheme are surely "documents of the type that an *alien* might use to validly enter, stay and work in the United States." *See* ECF No. 244 at 28-29; *Thomsen*, 830 F.3d at 1062.

actually innocent of the crimes for which she was convicted.[5] ECF No. 260 at 4-5. The Court need not entertain this argument because Su raises it for the first time in reply. *See Nunes v. Ashcroft*, 375 F.3d 805, 807-08, 810 (9th Cir. 2004) (citation omitted) (declining to consider an issue "raised for the first time in reply" and "accompanied by no meaningful argument" when reviewing a motion for reconsideration of a habeas petition); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (citation omitted) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."). Even if the Court were to consider this argument, however, Su presents no new evidence to support her claims. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (A credible claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial."); *see also McQuiggin v. Perkins*, 569 U.S. 383, 385 (2013) (citation omitted) ("A petitioner invoking the miscarriage of justice exception 'must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'"). Accordingly, the Court finds that Su has not shown either cause and prejudice or actual innocence to excuse her procedural default.

B. Non-Reviewable Claims

1. Claims Decided by the Ninth Circuit

It is well established that "[i]ssues disposed of on a previous direct appeal are not reviewable in a subsequent [§] 2255 proceeding" and the "fact that [an] issue may be stated in different terms is of no significance." *United States v. Currie*, 589 F.2d 993, 995 (9th Cir. 1979) (citations omitted).

Here, Su's arguments challenging her alien harboring and money laundering convictions have already been rejected by the Ninth Circuit. *See Su*, 633 Fed. Appx. at 637. With respect to

[5] In an untimely amendment to her reply brief, ECF No. 261, Su also raises a claim of jurisdictional error. Su asserts the superseding indictment failed to charge offenses that violated federal law. *Id.* at 7, 13-14, 21, 24. Even if the Court were to reach this argument, it would find that the superseding indictment sufficiently stated offenses against federal law and vested the Court with jurisdiction over this matter. *See* ECF No. 21 at 4-12; *United States v. Rider*, 282 F.2d 476 (9th Cir. 1960) (holding that a trial court lacked jurisdiction where information failed to allege offenses against federal law).

Su's claim that the individuals she harbored were not "illegal aliens," the Ninth Circuit held that "a rational juror could conclude that Su employed two individuals that remained in the United States *in violation of law* after they failed to maintain their F-1 student status . . . ." *Id.* (emphasis added). The court similarly addressed Su's merger allegations and concluded that her money laundering convictions "were independent, and not a 'central component' of Su's fraudulent scheme, and thus did not 'merge' with Su's fraud convictions."[6] *Id.* (internal citation and quotation marks omitted). As these claims have already been disposed of by the Ninth Circuit, the Court will not review them now.

2. Restitution

"28 U.S.C. § 2255 is available to prisoners claiming the right to be released from custody. Claims for other types of relief, such as relief from a restitution order, cannot be brought in a § 2255 motion, whether or not the motion also contains cognizable claims for release from custody." *United States v. Thiele*, 314 F.3d 399, 400 (9th Cir. 2002).

Although Su contests the Court's restitution order in her opening brief, she later concedes this argument in reply. *See* ECF No. 244 at 54-57; ECF No. 260 at 22 ("AUSA Gray is correct on Ground V that restitution is barred by the Ninth Circuit in 2255 motion."). Accordingly, the Court will not consider Su's argument challenging the restitution or forfeiture order.

C. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." 28 U.S.C. § 2255 R. 11(a). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

As reasonable jurists would not "find it debatable whether the petition states a valid claim of the denial of a constitutional right," the Court denies a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

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[6] Su also conceded that she raised her arguments about her money laundering convictions on direct appeal. *See* ECF No. 235 at 8.

CONCLUSION

For the foregoing reasons, the Court denies Su's motion to vacate her sentence under 28 U.S.C. § 2255 and declines to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: May 18, 2018

JON S. TIGAR
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SU,

Defendant.

Case No. 11-cr-00288-JST-1

ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY

Re: ECF No. 265

For the reasons described in the Court's order denying Su's motion to vacate sentence pursuant to 28 U.S.C. § 2255, the Court denies a certificate of appealability. *See* ECF No. 262 at 7-8. Su's motion for a certificate of appealability, ECF No. 265, is denied.

IT IS SO ORDERED.

Dated: June 1, 2018

JON S. TIGAR
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SUSAN XIAO-PING SU,

Defendant.

Case No.4:11-cr-00288-JST-1

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 6/1/2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Susan Xiao-Ping Su
15773111, Unit F
Dublin Federal Correctional Institution
5701 8th Street
Dublin, CA 94568

Dated: 6/1/2018

Susan Y. Soong
Clerk, United States District Court

By: _____
William Noble, Deputy Clerk to the
Honorable JON S. TIGAR

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SUSAN XIAO-PING SU,

Defendant.

Case No. 11-cr-00288-JST-1

ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY

Re: ECF No. 297

The Court denies Defendant Su's motion for a certificate of appealability, ECF No. 297, for the reasons described in the Court's order denying Su's motion for reconsideration of the Court's denial of Su's motion to vacate sentence pursuant to 28 U.S.C. § 2255, *see* ECF No. 292 at 6-9.

IT IS SO ORDERED.

Dated: April 17, 2019

JON S. TIGAR
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SUSAN XIAO-PING SU,

Defendant.

Case No. 4:11-cr-00288-JST-1

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that:

(1) I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California; and

(2) On 4/17/2019, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's office.

Susan Xiao-Ping Su
15773111, Unit F
Dublin Federal Correctional Institution
5701 8th Street
Dublin, CA 94568

Dated: 4/17/2019

Susan Y. Soong
Clerk, United States District Court

By: _____
William Noble, Deputy Clerk to
the Honorable Jon S. Tigar

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SUSAN XIAO-PING SU,

Defendant.

Case Nos. 11-cr-00288-JST
17-cv-02885-JST

SECOND ORDER DENYING MOTION FOR RECONSIDERATION; ORDER DENYING MOTION FOR SENTENCE REDUCTION

Re: ECF Nos. 269, 271, 275, 288, 289, 291

Before the Court are numerous pro se motions filed by Defendant Susan Su: (1) a motion for reconsideration of the Court's May 18, 2018 order, *see* ECF No. 262, denying Su's motion to vacate her sentence under 28 U.S.C. § 2255, ECF Nos. 269, 271, 291; (2) a motion for a sentence reduction under 18 U.S.C. § 3582(c)(2), ECF No. 275; and (3) two motions for bail pending appeal, ECF Nos. 288, 289. For the reasons that follow, the Court will deny the motions.[1]

I. BACKGROUND

A. Charges and Trial

From September 2008 to January 2011, Su created and ran Tri-Valley University ("TVU"), a school in Pleasanton, California that collected tuition and other fees from non-immigrant aliens in return for maintaining their student visa status. ECF No. 199 at 2. Su defrauded its students and the federal government, collecting at least $5.6 million in "tuition fees,"

[1] The record conclusively shows that Su is not entitled to relief. Moreover, it is sufficiently developed to controvert the allegations Su makes in her motion for reconsideration, so the Court will maintain its denial of Su's request for an evidentiary hearing. *See United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998) ("The district court has discretion to deny an evidentiary hearing on a § 2255 claim where the files and records conclusively show that the movant is not entitled to relief." (citation omitted)).

and using those funds to purchase a number of properties. *Id.*

On March 24, 2014, after a three-week trial, the jury unanimously found Su guilty of all 31 counts charged against her. ECF No. 209. The charges included wire fraud (18 U.S.C. § 1343); mail fraud (18 U.S.C. § 1341); conspiracy to commit visa fraud (18 U.S.C. § 371); visa fraud (18 U.S.C. § 1546(a)); use of a false document and false statements (18 U.S.C. § 1001(a)(3)); alien harboring (18 U.S.C. §§ 1324(a)(1)(A)(iii), (a)(1)(A)(v)(II), (a)(1)(B)(i)); unauthorized use of a government computer (18 U.S.C. § 1030(a)(3)); and money laundering (18 U.S.C. § 1957(a)). ECF No. 199 at 2.[2]

B. Sentencing

Subsequently, Su filed motions for a judgment of acquittal and new trial under Federal Rules of Criminal Procedure 29(c) and 33. ECF Nos. 166, 167. On October 31, 2014, this Court denied both motions and sentenced Su to 198 months' imprisonment. ECF No. 203. In determining the sentence, the Court adopted the recommendations in the Presentence Report with only minor exceptions not relevant here, and set Su's offense level at 40 under the United States Sentencing Guidelines ("Guidelines"). ECF No. 213 at 58, 69-70. When applied to Su's criminal history score of 0, that offense level yielded a sentencing range of 292 to 365 months. ECF No. 194 ¶¶ 73-80. But the Court departed downward four levels after considering the factors set forth in 18 U.S.C. § 3553(a). *See* ECF No. 213 at 44, 75-78.

The Court also ordered restitution in the amount of $1,015,795.64 and entered a forfeiture order permitting the United States to take possession of all proceeds and property traceable to her offenses. *See id.*; ECF Nos. 208, 226.

C. Direct Appeal

On November 3, 2014, Su appealed her convictions and sentence to the Ninth Circuit. ECF No. 205. The Ninth Circuit affirmed. *United States v. Su*, 633 Fed. Appx. 635 (9th Cir. 2015). On May 16, 2016, the Supreme Court denied certiorari. *Su v. United States*, 136 S. Ct. 2043 (2016); ECF No. 235 at 79.

[2] During the trial, the Court dismissed three money laundering counts and one alien harboring count on the Government's motion. ECF. No. 112.

D. Procedural History

On May 15, 2017, Su filed a motion to vacate her sentence pursuant to 28 U.S.C. § 2255. ECF No. 235.[3] The Court denied the motion on May 18, 2018, holding that all of Su's claims were either procedurally barred or non-reviewable; the Court also declined to issue a certificate of appealability. ECF Nos. 262, 265.

On May 30, 2018, Su filed a notice of appeal. ECF No. 267. She then filed a motion for reconsideration with this Court on June 15, 2018. ECF No. 269.[4] The Court initially denied the motion because it concluded that it lacked jurisdiction to decide the motion due to Su's pending appeal. ECF No. 270.

On July 11, 2018, while that appeal was pending, Su filed a motion for a reduction in sentence under 18 U.S.C. § 3582(c)(2). ECF No. 275.

On November 5, 2018, the Ninth Circuit concluded that the notice of appeal did not divest the Court of jurisdiction over Su's motion for reconsideration and remanded Su's appeal "for the limited purpose of permitting [this Court] . . . to consider the June 15, 2018 motion on its merits," while holding the appeal in abeyance. ECF No. 290 at 2.

With this guidance, the Court now considers Su's motion for reconsideration on the merits. Because, as explained below, Su's motion for a sentence reduction also seeks to amend her pending § 2255 petition, the Court resolves that motion in this same order.

II. MOTION FOR RECONSIDERATION

The Court first considers Su's motion for reconsideration. ECF Nos. 269, 271.

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[3] Su filed a memorandum in support of her motion to vacate under 28 U.S.C. § 2255 on May 16, 2017. ECF No. 237. She then filed a second amended memorandum on August 1, 2017. ECF No. 244. These memoranda are substantially identical. This order reconsiders the issues raised in both filings.

[4] On June 12, 2018, Su also filed an addendum to her motion for reconsideration, ECF No. 271, which contains a motion substantially similar to her initial motion for reconsideration, ECF No. 269. The exhibits and attachments to which Su refers in both motions were attached to the addendum. *See* ECF No. 271-1.

A. Legal Standard

The Ninth Circuit has stated that "[m]otions for reconsideration after a final order are . . . available in § 2255 cases." *United States v. Martin*, 226 F.3d 1042, 1047 n.7 (9th Cir. 2000). Further, the Ninth Circuit has suggested that "it makes sense to conclude that a motion for reconsideration of an order finally resolving a § 2255 petition must meet the time limits set in Rule 59(e)" of the Federal Rules of Civil Procedure. *Id.* The Ninth Circuit's remand in this case, which cites Federal Rule of Appellate Procedure 4(a)(4), further confirms that the Court should treat Su's motion as a "motion[] under the Federal Rules of Civil Procedure" subject to "the time allowed by those rules." Fed. R. App. P. 4(a)(4)(A).

Because Su's motion for reconsideration was filed within 28 days, the Court therefore construes it as motion to alter or amend a judgment under Rule 59(e). *See Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001).

A motion under Rule 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (emphasis in original) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). A district court does not commit clear error warranting reconsideration when the question before it is a debatable one. *See McDowell*, 197 F.3d at 1256 (district court did not abuse its discretion in denying reconsideration where question whether it could enter protective order in habeas action limiting Attorney General's use of documents from trial counsel's file was debatable).

Courts construing Rule 59(e) have noted that a motion to reconsider is not a vehicle permitting the unsuccessful party to "rehash" arguments previously presented, or to present "contentions which might have been raised prior to the challenged judgment." *Costello v. United States*, 765 F.Supp. 1003, 1009 (C.D. Cal. 1991). These holdings "reflect[ ] district courts' concerns for preserving dwindling resources and promoting judicial efficiency." *Id.*

B. Discussion

1. Original § 2255 Motion

In her original § 2255 motion, Su raised four challenges to her convictions. First, Su argued that her mail and wire fraud convictions should be vacated because her conduct fell outside the scope of the statutes. ECF No. 244 at 3. She claimed that, for the purposes of 18 U.S.C. §§ 1341, 1343, money or property must be obtained from the deceived party, and the I-17 and I-20 forms that were fraudulently obtained from the Department of Homeland Security (DHS) were certificates that did not constitute "property" in the hands of the DHS. *Id.* at 3, 5-24. Su asserted the jury instructions did not properly require the jury to determine whether the deceived party suffered a pecuniary loss. *Id.* at 23-24.

Second, Su argued that her visa fraud convictions should be vacated because the I-20 forms employed in her scheme were not among the documents covered under 18 U.S.C. § 1546(a). *Id.* at 24-25, 27-29. She asserted that an element of the offense was identification of the I-20 as a document prescribed by statute and that this determination should have been submitted to the jury. *Id.* at 29-31. Su took the position that this alleged error created a constructive amendment triggering automatic reversal. *Id.* at 32-33.

Third, Su argued that her alien harboring convictions should be vacated because the two individuals she shielded from immigration authorities were not "illegal aliens." *Id.* at 34, 36-40. She claims these individuals maintained valid F-1 visa status during the relevant period because they were rightfully employed on TVU's campus as permitted by 8 C.F.R. § 214.2(f)(6)(i)(H). *Id.* at 37-39.

Fourth, Su argued that her money laundering convictions should be vacated because they presented an intrinsic merger problem with her other convictions. *Id.* at 40, 42-54. She claimed the jury was not properly instructed that, under the money laundering statute, "proceeds" are to be interpreted as "profits." *Id.* at 52-53. Su asserted this instruction did not permit the jury to determine whether her purchases of real estate and a car were integral components of her other convictions. *Id.* Su also argued that it was error for the Court to allow these purchases to be used

as evidence of criminal intent in her other convictions. *Id.* at 48.[5]

The Court rejected those claims. The Court concluded that the first and second claims failed because "Su is procedurally barred from presenting her arguments challenging the mail fraud, wire fraud, and visa fraud convictions because she failed to raise them on direct appeal and also fails to demonstrate cause and prejudice to overcome the procedural default." ECF No. 262 at 5 (citing *Sanchez-Llamas v. Oregon,* 548 U.S. 331, 351 (2006); *Su*, 633 F. App'x at 635). Moreover, the Court rejected Su's reply argument that actual innocence excused her procedural default because she presented no new evidence in support. ECF No. 262 at 6.

The Court concluded that the third and fourth claims were not reviewable because Su had unsuccessfully raised these arguments to the Ninth Circuit on direct appeal. *See United States v. Currie,* 589 F.2d 993, 995 (9th Cir. 1979); *see also Su*, 633 F. App'x at 637.[6]

2. Motion for Reconsideration

In her motion for reconsideration,[7] Su first disputes the Court's application of the procedural bar to her first and second claims. Su contends that the Court committed clear error because the "[d]octrine of procedural default does not apply to [a] claim of jurisdictional error." ECF No. 269 at 3 (citation omitted). Su argues that her third and fourth claims were likewise jurisdictional challenges and that the Court therefore clearly erred in finding them not reviewable. *Id.* at 6; ECF No. 291 at 8, 10. Su previously raised this argument in her reply brief in support of her original motion, and the Court rejected it, concluding that "it would find that the superseding indictment sufficiently stated offenses against federal law and vested the Court with jurisdiction

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[5] Su also argued that the Court's forfeiture and restitution orders were flawed, ECF No. 244 at 54-57, but then conceded that those challenges were not properly brought in a § 2255 motion, ECF No. 260 at 22. *See also* ECF No. 262 at 7.

[6] The Ninth Circuit held that "a rational juror could conclude that Su employed two individuals that remained in the United States in violation of law after they failed to maintain their F-1 status," and that Su's money laundering convictions "were independent, and not a 'central component' of Su's fraudulent scheme, and thus did not 'merge' with Su's fraud convictions." *See Su*, 633 Fed. Appx. at 637 (citation omitted).

[7] After the Ninth Circuit remanded Su's appeal for the Court to decide this motion, Su filed a motion to supplement the record containing additional legal argument, substantially similar to her preceding motions and briefs. ECF No. 291. In light of Su's pro se status, the Court GRANTS the motion and considers these arguments as well.

over this matter." ECF No. 262 at 6 n.5 (citing ECF No. 21 at 4-12; *United States v. Rider*, 282 F.2d 476 (9th Cir. 1960)).

Moreover, these arguments lack merit. Whether the conduct charged satisfies the elements of an offense is not an unwaivable jurisdictional question. A court "has jurisdiction of all crimes cognizable under the authority of the United States . . . [and][t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *United States v. Cotton*, 535 U.S. 625, 631 (2002) (alterations in original) (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)). Indeed, "courts have consistently determined that the jurisdictional element of federal crimes does not present a pure question of the court's subject-matter jurisdiction." *United States v. Ratigan*, 351 F.3d 957, 963 (9th Cir. 2003). Accordingly, claims that various forms were not "property" under 18 U.S.C. § 1341, or "documents" covered in 18 U.S.C. § 1546(a), are not "true jurisdictional question[s]" exempt from procedural default, *Ratigan*, 351 F.3d at 962. The same is true for claims that two individuals were not "illegal aliens" under 8 U.S.C. § 1324, or that Su's money laundering convictions "merged" with her visa fraud convictions as a matter of law. Because Su's claims are "simple question[s] of the legal sufficiency of the government's evidence of one element of the charged offense," they may be "barred by procedural default," *Ratigan*, 351 F.3d at 964, or found unreviewable.

Su's reliance on *United States v. Mitchell*, 867 F.2d 1232 (9th Cir. 1989) does not assist her. *See* ECF No. 291 at 4. There, an intervening Supreme Court decision established a different interpretation of the criminal statute that applied retroactively. *See Mitchell*, 867 F.2d at 1232 (citing *McNally v. United States*, 483 U.S. 350 (1987)). In concluding that the defendant's "failure before trial and on direct appeal to challenge the indictment on the ground now asserted does not bar collateral attack," the *Mitchell* court stated that if the defendant's "claim were correct, the indictment would fail to state an offense against the United States and the district court would be deprived of jurisdiction." *Id.* at 1233 n.1 (citation omitted). To the extent *Mitchell* indicates that defects in the indictment are jurisdictional (and that this is relevant to Su's claims), it cannot be reconciled with the Supreme Court's later guidance in *Cotton*. *See* 535 U.S. at 631 ("Insofar as it held that a defective indictment deprives a court of jurisdiction, [*Ex parte Bain*, 121 U.S. 1

(1887),] is overruled."); *see also United States v. Velasco-Medina*, 305 F.3d 839, 845-46 (9th Cir. 2002) (holding that an argument that "the indictment's failure to allege the specific intent required for attempted reentry deprived the district court of jurisdiction because the indictment failed to charge him with an offense against the United States" was "untenable in light of the Supreme Court's recent decision in [*Cotton*]").

Therefore, the Court concludes that it did not clearly err in applying the doctrine of procedural default to Su's first and second claims. The Court likewise concludes that it did not clearly err in holding that Su's third and fourth claims were unreviewable because they had been rejected by the Ninth Circuit on direct appeal. Moreover, as previously stated, even if the Court were to conclude that Su's claims raised jurisdictional questions, "it would find that the superseding indictment sufficiently stated offenses against federal law and vested the Court with jurisdiction over the matter." ECF No. 262 at 6 n.5 (citing ECF No. 21 at 4-12).

Second, Su argues that the Court clearly erred in rejecting her theory of actual innocence. ECF No. 271 at 5-6. The core of Su's "actual innocence" argument is a reprise of her statutory interpretation arguments that her conduct did not meet the elements of various offenses. "One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime." *Vosgien v. Persson*, 742 F.3d 1131, 1134 (9th Cir. 2014). Su relies on a line of cases where, consistent with this exception, binding authority issued after the petitioners' final judgments reinterpreted an essential element of an offense. *See Bousley v. United States*, 523 U.S. 614, 618 (1998) (intervening prior Supreme Court decision); *United States v. Avery*, 719 F.3d 1080, 1081 (9th Cir. 2013) (intervening Supreme Court decision); *Alaimalo v. United States*, 645 F.3d 1042, 1046 (9th Cir. 2011) (intervening Ninth Circuit en banc decision).

Su has identified no such case here. The only intervening case cited by Su in support of this argument, *see* ECF No. 271 at 6, is *United States v. Thomsen*, 830 F.3d 1049, 1059-63 (9th Cir. 2016). The Court previously rejected Su's argument based on *Thomsen*, and Su has not shown that this was clear error. *See* ECF No. 262 at 5 n.4.

Su also argues that additional evidence submitted with her motion for reconsideration

supports her actual innocence claim. ECF No. 271 at 6-9. The 500-plus pages of exhibits she submitted relate to the operation of TVU. *See* ECF No. 271-1. This evidence is not convincing. First, Su has not shown that this is "newly discovered evidence" that emerged after her original § 2255 motion, such as would justify granting this motion for reconsideration under Rule 59(e). *McDowell*, 197 F.3d at 1255. Second, even if Su had presented this evidence with her first motion, the Court would not have concluded that "in light of new evidence, it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt." *Jones v. Taylor*, 763 F.3d 1242, 1247 (9th Cir. 2014) (alteration in original) (quoting *House v. Bell*, 547 U.S. 518, 537 (2005)).[8] Su's evidence consists of putative TVU records, and given that the Government's evidence controverted TVU's appearance of legitimacy despite similar records, these additional records do not meet the "extraordinarily high" bar to show that Su was actually innocent. *Id.* at 1246 (citation omitted).

The Court therefore DENIES Su's motion for reconsideration of her § 2255 motion.

III. MOTION FOR SENTENCE REDUCTION

The Court next turns to Su's motion for a sentence reduction. ECF No. 275.

A. Jurisdiction

As an initial matter, Su's appeal of her § 2255 motion is still pending at the Ninth Circuit, although held in abeyance pending the Court's above resolution of her motion for reconsideration. *See* ECF No. 290 at 2. The Ninth Circuit remanded that appeal for "the limited purpose" of permitting the Court to address on the merits Su's motion for reconsideration of that order. ECF No. 290 at 2. Therefore, the Court may lack jurisdiction to grant Su's motion for a sentence reduction. *See United States v. Maldonado-Rios*, 790 F.3d 62, 64 (1st Cir. 2015) (holding district court lacked jurisdiction to grant motion for sentence reduction while conviction was on direct appeal); Fed. R. Crim. P. 37 advisory committee's note. The Court need not decide the question, however, because the Court retains jurisdiction to deny the motion on the merits, and it does so

[8] Because the Supreme Court has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013), the Court assumes without deciding that such a claim is cognizable and applies this standard. *See Jones*, 763 F.3d at 1246.

here. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984); Fed. R. Crim. P. 37(a)(2); Fed. R. Civ. P. 62.1(a)(2).[9]

B. Legal Standard

A federal court generally "may not modify a term of imprisonment once it has been imposed," though Congress has opened an exception for a defendant whose sentence is based on a Guidelines range the Sentencing Commission has subsequently lowered. 18 U.S.C. § 3582(c). When the Commission makes an amendment *and* designates it as retroactive, § 3582(c)(2) authorizes a court to reduce an otherwise-final sentence based on the amended provision:

> Because the Commission has statutory authority [under 28 U.S.C. § 994(u)] both to amend the Guidelines and to "determin[e] whether and to what extent an amendment will be retroactive . . . [a] court's power under § 3582(c)(2) . . . depends in the first instance on the Commission's decision not just to amend the Guidelines but to make the amendment retroactive."

United States v. Navarro, 800 F.3d 1104, 1110 (9th Cir. 2015) (quoting *Dillon v. United States,* 560 U.S. 817, 826 (2010)). Section 1B1.10(d) of the 2016 Guidelines Manual identifies the amendments a court may apply retroactively to reduce an already-imposed sentence.

At the first step in § 3582(c)(2)'s limited inquiry, a court should consider the sentence it would have originally imposed had the Guidelines, as amended, been in effect at that time. U.S.S.G. §1B1.10(b)(1). At step two, a court revisits 18 U.S.C. § 3553(a) to see if its factors warrant the reduction. 28 U.S.C. § 3582(c)(2). But consulting § 3553(a) "is appropriate only at the second step of this circumscribed inquiry, [so] it cannot serve to transform the proceedings under § 3582(c)(2) into plenary resentencing proceedings." *Dillon*, 560 U.S. at 828. In other words, these provisions cannot properly "be used as a 'full resentencing' that reconsiders a sentence based on factors unrelated to a retroactive Guidelines amendment." *United States v. Fox*, 631 F.3d 1128, 1132 (9th Cir. 2011) (quoting U.S.S.G. § 1B1.10(a)(3)).

[9] Because the potentially applicable criminal and civil provisions are identical, the Court also need not decide which one applies. *Cf. Kingsbury v. United States*, 900 F.3d 1147, 1151 (9th Cir. 2018) (holding that a specific provision of the civil rules applies to § 2255 proceedings but declining to "reach a conclusion about the civil or criminal nature of § 2255 proceedings generally").

C. Discussion

Su contends that "amendments and clarifications" to the 2016 Guidelines authorize a twelve-level reduction of her sentence. ECF No. 275 at 2. The Court disagrees.

Su relies on Amendment 791 and Amendment 792. ECF No. 275 at 5-8. Amendment 791 adjusted § 2B1.1's monetary tables. *See* U.S.S.G., Supplement to Appendix C, Amendment 791. Amendment 792 changed the benchmark for § 2B1.1(b)(2)(C)'s six-level increase from offenses that "involved 250 or more victims" to offenses that "resulted in substantial financial hardship to 25 or more victims." U.S.S.G., Supplement to Appendix C, Amendment 792. The Court cannot modify Su's sentence based on either amendment because the Sentencing Commission did not designate them as retroactive. *See Navarro*, 800 F.3d at 1110; *cf.* U.S.S.G. § 1B1.10(d).

Su argues that the Court may nonetheless apply certain provisions of Amendment 791 and Amendment 792 because they are clarifying (as opposed to substantive). ECF No. 286 at 8-12. Even were the Court to accept this characterization, it is immaterial. Su's reliance on cases that involve the retroactive application of clarifying amendments on direct appeal is misplaced. *See, e.g.*, *United States v. Aquino*, 242 F.3d 859, 865 (9th Cir. 2001). A sentence modification under 18 U.S.C. § 3582(c)(2) must be "consistent with applicable policy statements issued by the Sentencing Commission." The Commission has explicitly stated that a reduction "is not consistent with [its] policy statement . . . and therefore not authorized under 18 U.S.C. § 3582(c)(2) if . . . [n]one of the amendments listed [as expressly retroactive] is applicable to the defendant." U.S.S.G. § 1B1.10(a)(2); *see also United States v. Mercado-Moreno*, 869 F.3d 942, 949 n.1 (9th Cir. 2017) ("Because § 3582(c)(2) motions must be based on a retroactive Guidelines amendment, § 1B1.10 functions as a gatekeeper, specifying which amendments apply retroactively and thus give rise to a sentence reduction motion under § 3582(c)(2)."). Su's argument therefore lacks merit.

Su's remaining arguments dispute the calculation of the economic loss figure, ECF No. 275 at 3-6, the application of an "obstruction of justice" increase, *id.* at 7-8, and the denial of an "acceptance of responsibility" decrease, *id.* at 8-11. These claims are not based on any

before and during the trial, and urged them to give false testimony," ECF No. 213 at 56 – the basis for the obstruction of justice enhancement – "differ in both time and type" from whether Su was guilty of the crimes charged, the subject of her original § 2255 motion. *Mayle*, 545 U.S. at 650. Moreover, amendment would be futile because (1) her counsel did review the emails, *see* ECF No. 213 at 55, and so was not ineffective; and (2) Su was not prejudiced because the Ninth Circuit did address her obstruction of justice argument on direct appeal and rejected it, *see Su*, 633 F. App'x at 638.

Similarly, whether Su accepted responsibility for her crimes after the fact does not relate back to the facts of the illegality of her conduct that form the basis for her original motion. Alternatively, amendment would be futile because Su had not taken responsibility at sentencing, *see* ECF No. 213 at 75, and still has not done so now. Therefore, counsel was not ineffective for failing to raise this meritless argument, nor was Su prejudiced.

Whether counsel failed to argue the 18 U.S.C. § 3553(a) factors at sentencing likewise does not relate back, and in the alternative, amendment would be futile because counsel actually did so. ECF No. 213 at 60-63.

Even if the facts underlying the "sophisticated means" enhancement and loss amount arguably share a common core of operative facts with Su's challenges to her convictions, amendment would be futile. Counsel did object to sophisticated means, ECF No. 213 at 50, and the underlying claim is meritless, *id.* at 53-54. Similarly, Su's brief makes clear that she is attempting to raise the same loss amount argument counsel already raised, ECF No. 286 at 11, which was rejected by this Court and the Ninth Circuit, *see Su*, 633 F. App'x at 638.

Su's second new claim is that her sentence violated the Eighth Amendment because it was grossly disproportionate. *See* ECF No. 286 at 16-17 (citing *Solem v. Helm*, 463 U.S. 277 (1983)). It appears to the Court that Su's proportionality argument, which focuses on sentences given in similar cases, ECF No. 286 at 16-17, does not share a common core of operative facts sufficient for relation back. *See Alfaro v. Johnson*, 862 F.3d 1176, 1184 (9th Cir. 2017) (holding that new claim based on "systemic delay" in state capital system did not relate back to claim based on "the procedural history of [petitioner's] own case, and the delay she has personally experienced").

CONCLUSION

For the foregoing reasons, the Court (1) denies Su's motion for reconsideration of the Court's order denying Su's 28 U.S.C. § 2255 motion to vacate her sentence; (2) denies Su's motion to reduce her sentence under 18 U.S.C. § 3582(c)(2); (3) denies Su's constructive motion to amend her § 2255 motion; and (4) denies Su's motions for bail pending appeal.

Pursuant to the Ninth Circuit's intervening guidance in *Kingsbury v. United States*, 900 F.3d 1147, 1150 (9th Cir. 2018), the Court will enter judgment regarding Su's § 2255 motion in a separate document.

IT IS SO ORDERED.

Dated: March 20, 2019

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California

NOT FOR PUBLICATION

FILED

MAR 11 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SUSAN XIAO-PING SU, AKA Susan Su, Defendant-Appellant.	No. 18-15978 D.C. Nos. 4:17-cv-02885-JST 4:11-cr-00288-JST-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted March 3, 2020**

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

Susan Xiao-Ping Su appeals pro se from the district court's order denying her motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Su contends that the district court erred by denying her motion for a sentence

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

reduction under Amendments 791 and 792 to the Sentencing Guidelines. We review de novo whether a district court had authority to modify a sentence under section 3582(c)(2). *See United States v. Leniear*, 574 F.3d 668, 672 (9th Cir. 2009). The district court correctly concluded that it lacked authority to reduce Su's sentence under Amendments 791 and 792 because those amendments are not retroactive under U.S.S.G. § 1B1.10(d). *See* U.S.S.G. § 1B1.10 cmt. n.1(A) ("Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d)."); *United States v. Ornelas*, 825 F.3d 548, 550 (9th Cir. 2016). We do not reach Su's additional arguments regarding her counsel's performance, conviction, and underlying sentencing because these claims are not cognizable in a section 3582(c)(2) proceeding. *See Dillon v. United States*, 560 U.S. 817, 826-27, 831 (2010).

We decline to consider Su's claims for relief under the First Step Act of 2018 and U.S.S.G. § 1B1.13(2) because they were not raised before the district court or in her opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (appellate court will not consider issues not properly raised before the district court or in the opening brief).

To the extent Su is seeking reconsideration of this court's prior order denying a certificate of appealability with respect to her claims under 28 U.S.C. § 2255, that request is denied. *See* 9th Cir. R. 27-10(a)(3).

Su's motion for immediate release and all other pending motions are denied.

AFFIRMED.