

No. 20-1321

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN CHING EN LEE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

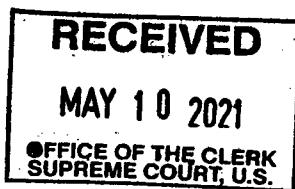
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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PETITION FOR REHEARING

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## PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44, this petition is filed within 25 days of this Court's decision in this case. Petitioner respectfully petitions for rehearing of the Court's decision issued on April 19, 2021, John Ching En Lee v. United States of America, No. 20-1321, denying a Certificate of Appealability.

This case involves Petitioner's wrongful conviction under 18 USC 1001, for allegedly making a false statement to government agents.

### REASONS FOR GRANTING THE PETITION

(1) Denial of this petition will set a **Conflicting Case Precedent** i.e., a certificate of appealability can be denied even after demonstrating a substantial showing of the denial of a constitutional right, contrary to this Court's holding in **Miller-El v. Cockrell**, 537 US 322, (2) Petitioner has made the requisite showing for a Certificate of Appelability, because Petitioner was denied Due Process under the Due Process Clause of the Constitution, i.e., the Government never proved beyond a reasonable doubt the elements of Falsity, Materiality, Intent.

### STATEMENT OF THE CASE AND FACTS

Petitioner took out a bank loan in August 2006 to help wife to start a massage therapy business. In March 2008, Petitioner's wife and 2 other girls were arrested for alleged solicitation of prostitution. Wife was never convicted and the other 2 girls were never prosecuted. Wife received 6 months diversion in June 2009, but diversion was terminated early in November 2009, after only 5 months, and wife became a naturalized U.S. citizen in June 2010.

Agent John Henderson and Agent Richard Fuentes from the Office of Inspector General came to interview Petitioner in August 2009. There was **No video tape, No audio tape, No Q&A, No signed sworn statement** by Petitioner for the interview. Agents claimed that Petitioner denied having provided start-up funding to wife's business during the August 2009 interview. This gave rise to Count 1 of the November 2015 indictment. There was also a second count in the November 2015 indictment. However, Petitioner was acquitted of that count after a Rule 29 motion hearing and will not be discussed here. An appeal was filed with the 9th Circuit but was denied in June 2018. A Petition for Writ of Certiorari was filed and denied by the U.S. Supreme Court in February 2019. A 2255 motion was filed with the District Court in October 2018 but was denied in August 2019 and District Court also refused to issue a certificate of appealability. A request for certificate of appealability was filed with the 9th Circuit in October 2019 but was denied on December 14, 2020. A motion to reconsider the denial was filed with the 9th Circuit and was denied on January 14, 2021. A petition for writ of certiorari was filed with this Court but was denied on April 19, 2021.

**I. (A) AGENTS' TRIAL TESTIMONIES DO NOT SHOW PETITIONER WAS ASKED ABOUT START-UP FUNDING DURING THE 2009 INTERVIEW.**

- It must first be pointed out that the Primary Job of **Agent John Henderson at the interview was to Take Notes, besides Being a Witness.** (TR 299, Lines 2-10).

- Agent Fuentes contends he asked Petitioner several times about funding (TR 273, Lines 13-15).
- Agent Fuentes claimed that Petitioner's answers about funding "varied" each time (TR 273, Lines 19-21).
- **Agent Henderson first said that Agent Fuentes asked Petitioner the funding question several times (TR 289, Lines 14-16 ).**
- **Agent Henderson then impeached both himself and Agent Fuentes by saying he ONLY REMEMBERED Agent Fuentes ASKING THE FUNDING QUESTION 1 TIME (TR 316, Lines 15-19).**
- **Agent Henderson said he DID NOT KNOW EXACTLY WHAT FUNDING QUESTION Agent Richard Fuentes asked because HE DID NOT RECORD the questions (TR 316, Lines 20-22).**
- **Agent Henderson also stated, "every time he (Agent Fuentes) asked a question about their financial arrangement, I WOULD CONSIDER that part of asking about how you fund—IF YOU FUNDED IT" (TR 315, Line 15-17).**

**I. (B) PETITIONER NEVER MADE A FALSE STATEMENT ACCORDING TO AGENT HENDERSON'S TRIAL TESTIMONY.**

The government's allegation that Petitioner made false statement was actually Agent Henderson's own Speculation/Conclusion after hearing Petitioner's response of not sharing money with wife.

- And in your handwritten notes, if you can turn to the second page, that's Government Exhibit 55, the bottom Bates Number says JL001014. (TR 302, Lines 4-6). And the **entirety of the statement reads “Not Fund Any of It”**; is that right? “That’s correct”. (TR 302, Lines 11-13).
- **Did you see any comments there about Mr. Lee’s funding of the business?** “Yeah, I would refer to the last two digits, 16, “not share money, no income, her money -- “her own money “I am sorry.” (TR. 303, Lines 6-10).
- **It doesn’t say anything about whether he funded her business; correct?** “I think the “not share money would be included in that”. (TR 303, Lines 14-16).
- How so? **“If they are not sharing money, that means he is not sharing the money, “GIVING HER CAPITAL TO IMPROVE THE BUSINESS, OPEN IT, or SOMETHING LIKE THAT.”** (TR 303, Lines 17-20).
- **So what you just said is a “SPECULATION” about what that note might have meant?** TR 303, Lines 24-25. “It was about money. That’s it.” (TR 304, Line 1).

#### **I. (C) GOVERNMENT DID NOT PROVE THE ELEMENT OF MATERIALITY**

Both Agent Fuentes and Agent Henderson were investigating (1) “if Mr. Lee had anything to do with any **IMMIGRATION BENEFITS** to the individuals that

were arrested there", TR 188, Lines 24-25, TR 189, Line 1, and (2) "if there had any type of **HUMAN TRAFFICKING**, what his role in that was", TR 189, Lines 2-3, and (3) "if he was getting outside gain or some type of monetary, I guess you'd say compensation for his role in that." TR 189, Lines 4-5. "That there might have been an **OUTSIDE INCOME** and that was mostly what **I WAS FOCUSING ON.**" TR 259. Therefore, any **diligent and competent agents** would have done what the Agents claim they did in this case, that is, going out of their way in subpoenaing financial records of Petitioner. The Agents' claim that the alleged false statement made their jobs difficult totally lacks merits.

#### **I. (D) GOVERNMENT DID NOT PROVE THE ELEMENT OF INTENT.**

The government never proved the element of intent. How can the government argue that there was intent when evidence does not even show Agents asking the relevant question, and no evidence of Petitioner making a false denial?

#### **CONCLUSION**

Petitioner respectfully requests a Certificate of Appealability be granted because a substantial showing of the denial of a constitutional right has been made, and a denial of this petition will set a conflicting case precedent.

Dated this date of May 3, 2021

Respectfully submitted,

  
John Ching En Lee  
Petitioner

**CERTIFICATE OF A PARTY UNREPRESENTED BY COUNSEL**

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

Dated this date of May 3, 2021



John Ching En Lee  
Pro Se Petitioner

## INDEX OF APPENDICES

APPENDIX A	Verdict of the United States District Court for the Northern District of California (June 30, 2016).
APPENDIX B	Order of the United States District Court for the Northern District of California acquitting Petitioner of Count 2 but affirming Count 1 after a Rule 29 Motion (September 20, 2016).
APPENDIX C	Order of the United States Court of Appeals for the Ninth Circuit denying appeal (June 6, 2018).
APPENDIX D	Order of the United States Supreme Court denying Petition for a Writ of Certiorari (February 19, 2019).
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APPENDIX F	Order of the United States Court of Appeals for the Ninth Circuit denying a Certificate of Appealability (December 14, 2020).
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## **APPENDIX A**

FILED

JUN 30 2016

SUSAN Y. SOONG  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) CASE NO. CR 15-00541 SI  
Plaintiff, )  
v. ) VERDICT FORM  
JOHN CHING EN LEE, )  
Defendant. )

We, the members of the Jury in this action, have reached the following unanimous verdict with respect to each Count of the Indictment:

Count One: (False Statement to Government Agency on or about August 26, 2009, in violation of 18 U.S.C. § 1001)

We find the defendant, John Ching En Lee:

Not Guilty \_\_\_\_\_

Guilty 

Count Two: (False Statement to Government Agency on or about October 10, 2013, in violation of 18 U.S.C. § 1001)

We find the defendant, John Ching En Lee:

Not Guilty \_\_\_\_\_

Guilty 

DATED: June 30, 2016

  
JURY FOREPERSON

## **APPENDIX B**

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UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
JOHN CHING EN LEE,  
Defendant.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cr-00541-SI-1

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR JUDGMENT OF  
ACQUITTAL OR NEW TRIAL**

Re: Dkt. No. 136

Defendant John Ching En Lee moves for a judgment of acquittal or new trial on two charges of providing false statements to a government agency. Docket No. 136. Argument on the matter was heard on September 16, 2016. Having considered the arguments of the parties and the papers submitted, the Court hereby GRANTS IN PART and DENIES IN PART defendant's motion.

**BACKGROUND**

Defendant was charged with two counts of making false statements to the government in violation of 18 U.S.C. § 1001(a), based upon statements he made in interviews with government agents on August 26, 2009, and October 10, 2013. Docket No. 14. The first count of the indictment charged defendant with "making false statements to representatives of the Department of Homeland Security about his involvement in providing funding to the owner of Crystal Massage Parlor, who was arrested for prostitution in relation to the Crystal Massage Parlor. The statements and representations were false because JOHN CHING EN LEE then and there knew that he had provided \$30,000 to the owner to fund the Crystal Massage Parlor." *Id.* at 1-2. The second count charged defendant with "making false statements to representatives of the

1 Department of Homeland Security about his use of Treasury Enforcement Communications  
2 System (TECS) for personal reasons. The statements and representations were false because  
3 JOHN CHING EN LEE then and there knew that he had queried his own name, as well as the  
4 name of the owner of the Crystal Massage Parlor, using multiple spellings of the owner's name  
5 and using the owner's birthdate." *Id.* at 2.

6 On June 30, 2016, a jury found defendant guilty of both counts. Docket No. 123.  
7 Defendant now moves for a judgment of acquittal under Federal Rule of Criminal Procedure 29 or  
8 for a new trial under Rule 33. Docket No. 136. In the alternative, defendant "requests an  
9 evidentiary hearing to determine whether the government committed discovery violations, violated  
10 the Jencks Act, . . . or otherwise committed constitutional error with respect to the October 10,  
11 2013 interview of Mr. Lee." *Id.* at v.

12

### 13 **LEGAL STANDARD**

14 **I. Rule 29**

15 Rule 29 of the Federal Rules of Criminal Procedure requires the Court, on a defendant's  
16 motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to  
17 sustain a conviction." Fed. R. Crim. P. 29(a).

18 The Court's review of the constitutional sufficiency of evidence to support a criminal  
19 conviction is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979), which requires a court to  
20 determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any*  
21 rational trier of fact could have found the essential elements of the crime beyond a reasonable  
22 doubt." *Id.* at 319; *see also McDaniel v. Brown*, 558 U.S. 120, 133 (2010). This rule establishes a  
23 two-step inquiry:

24 First, a . . . court must consider the evidence presented at trial in the light most  
25 favorable to the prosecution. . . . [And s]econd, after viewing the evidence in the  
26 light most favorable to the prosecution, the . . . court must determine whether this  
evidence, so viewed, is adequate to allow "*any* rational trier of fact [to find] the  
essential elements of the crime beyond a reasonable doubt."

27 *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (quoting *Jackson*, 443 U.S.  
28 at 319) (final alteration in *Nevils*).

## II. Rule 33

“Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). The Ninth Circuit described the standard for granting a new trial in *United States. v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206 (9th Cir. 1992), which it reaffirmed in *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000):

[A] district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal. The court is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses. . . . If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

*Kellington*, 217 F.3d at 1097 (internal quotation marks and citations omitted).

## DISCUSSION

Defendant urges the Court to grant his motion based on the following: as to Count One, he argues that the evidence was insufficient to sustain a conviction as to the elements of falsity, intent, and materiality; as to Count Two, he argues that the evidence was insufficient to sustain a conviction as to the elements of intent and materiality. He also argues that the government's case was weak, that the government improperly and prejudicially focused its case on prostitution, that the government committed discovery and Jencks Act violations, that the government's closing argument was misleading, and that the Court erred by not giving the defendant's proposed jury instruction on falsity.

## I. Count One

Defendant argues, in part, that his conviction on Count One cannot stand because the government “did not offer sufficient evidence to prove beyond a reasonable doubt the exchange that was false, *i.e.*, the precise question asked and the answer that was false.” Mot. at 12. The Court is troubled by the fact that the August 26, 2009 interview was not recorded and that the agents’ notes do not detail the exact question asked. Nevertheless, “viewing the evidence in the

1 light most favorable to the prosecution," it finds that a "rational trier of fact could have found" the  
2 element of falsity beyond a reasonable doubt. *See Nevils*, 598 F.3d at 1164.

3 There was much testimony at trial from the agent who conducted the August 2009  
4 interview regarding precisely what he asked. DHS Agent Ricardo Fuentes testified as follows:

5     ♦ Q. And what questions did you ask?

6     A. Based on that answer, I was actually thinking now at this point well, how did she  
7 fund this business. So I had asked him, I said, "Well, did you loan her or give her any  
money to start this business?"

8     ...

9     Q. And what did you ask him?

10     A. I asked him if he had actually funded or assisted with that business.

11     Tr. 236:20-237:9 (Fuentes Direct).

12     ♦ Q. And so you asked him exactly "what about funding the business" during that  
interview?

13     A. I asked him if he had ever given money to his wife to fund this business, to start it  
up.

14     Q. Your precise question was, "If you ever -- Mr. Lee, have you ever given Ms. Liu  
any money to start up the business?"

15     A. To fund the business, yes.

16     ...

17     Q. The same question over and over again, "Did you give" --

18     A. Right.

19     Q. -- "your wife any money to fund the Crystal Massage Parlor?"

20     A. Correct. If he had provided any funds to her.

21     Q. Is it, "Did you provide any funds to her," or "Did you give her any money to fund" -

22     -

23     A. I think I probably asked it around three different ways.

24     Q. What three different ways did you ask him?

25     A. Probably, "Have you ever funded this" -- "have you ever provided money to fund  
this business," and then he denied doing that. And then later on I would ask him  
something similar and he would deny it.

26     Tr. 260:7-261:5 (Fuentes Cross).

27     ♦ Q. You asked him that question, "Did you give your wife any money to fund the  
business." He said no?

28     A. He denied that.

29     Tr. 261:17-19 (Fuentes Cross).

30     ♦ Q. You asked -- you testified that you asked Mr. Lee several times throughout the  
interview about funding of the massage parlor; is that right?

31     A. Correct.

32     Q. And that question was, "Did you give your wife any money to fund her business";  
correct?

1 A. Correct.

2 Tr. 276:7-13 (Fuentes Recross).

3 • Q. And to the best of your recollection, the precise terminology of that question was,  
4 "Did you give your wife any money to fund the business"?

5 A. "Did you assist her with funding," yes.

6 Q. "Did you assist her with funding" or "Did you give her any money to fund"?

7 A. "Give her any money."

8 Q. Which one is it?

9 A. "Give her any money."

10 Q. "Did you give her any money to fund the business"?

11 A. Right.

12 Tr. 277:11-21 (Fuentes Recross).

13 • Q. Now, without reading your notes, do you recall what specific thing the defendant  
14 said?

15 A. I asked him specifically if he had given money to fund this business, and he  
16 specifically said, "I have never funded this business."

17 Tr. 278:11-15 (Fuentes Further Redirect).

18 DHS Agent John Henderson, who also participated in the August 2009 interview, testified that he  
19 did not recall what question Agent Fuentes asked defendant during the interview. Tr. 304:17-20;  
20 306:19-307:16.

21 Although the testimony varies as to the exact wording of the question asked, it shares a  
22 common thread: the use of the word "fund" or "funding," which defendant attacks as ambiguous.  
23 Although this word may be susceptible to the interpretation that defendant put forward at closing  
24 argument—that it could be asking whether Mr. Lee funded his wife's business with money out of  
25 his own pocket rather than with a loan he obtained from a bank—a rational trier of fact could have  
26 found that the term "fund" included obtaining a loan. Moreover, upon further questioning from  
27 both defense counsel and government counsel, Agent Fuentes settled on the phrasing of his  
28 question as follows: "Did you give her any money to fund the business"? or "... specifically if he  
had given money to fund this business . . ."<sup>1</sup> See Tr. 277:11-21; 278:11-15. In this scenario, the  
operative term is not "fund" but is rather "give." A rational trier of fact could have found the  
element of falsity by concluding that whether Mr. Lee *gave* money to his wife for her business

27 <sup>1</sup> This is also the phrasing the parties agreed to in the jury instructions: "The statement  
28 charged in Count One is that Mr. Lee stated: 'No' to the question whether he gave his wife any  
money to fund her business." See Docket No. 121 at 36.

1 included giving her money he borrowed from a bank.

2 Defendant cites to two Ninth Circuit cases that, though analogous, do not justify  
3 overturning the jury's verdict here. The first, *United States v. Sainz*, 772 F.2d 559 (9th Cir. 1985),  
4 involved a perjury conviction where the grand jury transcript clearly documented the exchange at  
5 issue. In that case, the question asked was a compound question containing an imprecise term, to  
6 which the defendant gave a literally true answer. *See* 772 F.3d at 563-64. The second case,  
7 *United States v. Jiang*, 476 F.3d 1026 (9th Cir. 2007), involved a bench trial for a charge  
8 involving false statements to the government under 18 U.S.C. § 1001(a). The appeals court  
9 overturned the conviction in part based on factors that are not present here: that the agent's notes  
10 "were recorded some time after the day of the interview" rather than contemporaneously, as here,  
11 *see* Tr. 242:11-18, 250:1-3, 283:9-11, 299:2-10; that the agent requested that Jiang bring  
12 documents to the interview regarding the specific topics at issue, unlike here, where the agents did  
13 not tell Mr. Lee the interview topic in advance, *see* Tr. 194:21-195:4; and that Jiang's English was  
14 "broken" and "poor."

15 Defendant argues that his case is also analogous because, when questioned directly in  
16 August 2013 about whether he obtained a loan for his wife, he was forthcoming, as were the  
17 defendants in *Sainz* and *Jiang*. However, those cases involved much shorter lapses in time  
18 between the challenged question and the follow-up question that elicited the truthful response. *See*  
19 *Jiang*, 476 F.3d at 1028-29 (follow-up question asked one week after original interview); *Sainz*,  
20 772 F.2d at 561 (follow-up question asked during the same interview). Here, defendant gave his  
21 truthful answer four years after the alleged false statement, after his wife had revealed to agents  
22 that her husband had gotten a bank loan for her to purchase the massage parlor. Viewing the  
23 evidence here in the light most favorable to the prosecution, as it must, the Court cannot say that  
24 the evidence is insufficient as to the element of falsity in Count One.

25 The Court also disagrees with defendant that the evidence was insufficient to sustain a  
26 conviction on the elements of materiality and intent. A statement is material if it "is *capable* of  
27 influencing or affecting a federal agency," although the false statement "need not have actually  
28 influenced the agency." *United States v. Service Deli, Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *see*

1       also *United States v. De Rosa*, 783 F.2d 1401, 1408 (9th Cir. 1986) (statement is material if it  
2       “(1) could affect or influence the exercise of governmental functions; or (2) has a natural tendency  
3       to influence or is capable of influencing agency decision”). Even adopting the stated purposes for  
4       the investigation that defendant puts forth in his motion, a rational juror could have concluded that  
5       the false statement in Count One was material to DHS’s actions. See Mot. at 16. Further, a  
6       rational juror could have concluded that defendant had the requisite intent<sup>2</sup> because, as the  
7       government notes, he had a law degree, he had worked as a federal employee since 2001, and at  
8       the beginning of the interview he signed a *Garrity* form warning him that “[a]nything you say may  
9       be used against you as evidence both in an administrative proceeding or any future criminal  
10       proceeding.” See Oppo. at 8-9.

11       For these reasons, the Court DENIES defendant’s motion for a judgment of acquittal as to  
12       Count One. Likewise, finding that the evidence does not “preponderate[]sufficiently heavily  
13       against the verdict,” the Court DENIES defendant’s motion for a new trial on Count One. See  
14       *Kellington*, 217 F.3d at 1097.

15       

16       **II. Count Two**

17       Defendant also moves for acquittal as to Count Two. The Court agrees with defendant that  
18       the evidence, even viewed in the light most favorable to the prosecution, is insufficient to sustain a  
19       conviction on Count Two because no rational trier of fact could find the essential element of  
20       materiality beyond a reasonable doubt.

21       At trial, the government introduced evidence that on March 19, 2009, defendant ran three  
22       queries of his wife’s name in TECS, to which he had access as an Immigration Services officer.  
23       Tr. 378:2-379:10. Four and a half years later, on October 10, 2013, DHS Office of Inspector  
24       General Special Agent Lamont Scott interviewed defendant regarding his TECS usage, “to find  
25       out why he ran his wife in the TECS system . . . .” See Tr. 317:14-318:8; 386:10-387:4.

26       The jury found defendant guilty based on the following instruction:

27       

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28       <sup>2</sup> Defendant’s motion here focuses on whether there was sufficient evidence that he “knew  
his conduct was unlawful.” See Mot. at 15.

Mr. Lee is charged in Count Two with knowingly and willfully making a false statement on or about October 10, 2013, in a matter within the jurisdiction of a governmental agency or department, the United States Department of Homeland Security, in violation of Section 1001 of Title 18 of the United States Code. In order for Mr. Lee to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, Mr. Lee made a false statement in a matter within the jurisdiction of the Department of Homeland Security;

Second, Mr. Lee acted willfully; that is, Mr. Lee acted deliberately and with knowledge both that the statement was untrue and that his conduct was unlawful; and

Third, the statement was material to the activities or decisions of the Department of Homeland Security; that is, it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities.

The statement charged in Count Two is that Mr. Lee stated: "No" to the question whether he ever made any unauthorized queries of his wife in TECS for personal use.

Docket No. 121 at 37 (emphasis added).

Defendant argues first that the statement in question could not have been material because “Agent Scott told the grand jury that the purpose [of his investigation] was to ‘determine if Mr. Lee was associated with the brothel operating as a massage parlor’” and the massage parlor closed five years before the interview regarding the TECS search. Mot. at 17 (citing Tr. 424). The government counters that the March 2009 search date was “significant to [Special Agent Scott] because it raised the specter that Defendant had impermissibly run the queries to obtain restricted information about [his wife’s] judicial proceedings or immigration status, or both.” Oppo. at 15. But what the government fails to state, and what it failed to present at trial, was what activities or decisions of DHS were or could have been influenced by defendant’s October 2013 denial.

The government’s arguments that there was sufficient evidence as to materiality read rather like after-the-fact justifications. For instance, the government argues that defendant’s August 2013 admission that he had obtained a bank loan for his wife “called Defendant’s overall credibility into question” and so Special Agent Scott “then expanded his investigation to include Defendant’s use of the TECS system . . . .” Oppo. at 14. That Special Agent Scott decided, years into the investigation of defendant, to explore the possibility of TECS misuse years before does not mean that a false statement regarding that misuse was material. Nor is there materiality in the

1 government's assertion that the TECS question "was certainly an important part of the  
2 investigation regarding [defendant's] connection with Crystal Massage Therapy" when the  
3 business had been closed for several years by the time of the October 2013 interview. *See id.* at  
4 15.

5 It is also not persuasive that if defendant had been forthcoming in October 2013 this would  
6 have saved the agency "further investigative steps" into his TECS queries. Special Agent Scott  
7 testified that in February 2014 and April 2014 he requested further documentation about  
8 defendant's queries and TECS history from Customs and Border Protection. Tr. 327:10-14,  
9 399:2-25, 406:6-17. Special Agent Scott's reasons for wanting these documents were broad,<sup>3</sup> but  
10 several of the documents (a copy of the TECS exam, defendant's training records) appear to be  
11 related to TECS training, and Special Agent Scott testified that he had an opportunity to question  
12 defendant about TECS training during the October 2013 interview. *See id.* 393:1-9, 399:12-16.

13 Critically, Special Agent Scott testified that he knew defendant was lying at the October  
14 2013 interview. Prior to the October 2013 interview, Special Agent Scott obtained a print-out  
15 from TECS showing defendant's March 2009 queries of his wife's name. Tr. 395:25-396:11.  
16 Therefore, before defendant made the false statement, the agency had internal proof that defendant  
17 had run such a search, and Special Agent Scott testified that he confronted defendant with this  
18 information at the interview.<sup>4</sup> Tr. 395:25-396:17. Special Agent Scott further testified that "the  
19 answers that he was giving me in my opinion were not true" and that after Special Agent Scott  
20 confronted defendant with the document he "asked [defendant] a series of questions over again."  
21 Tr. 396:12-24. Where the agency knew that defendant's statement was false at the time it was  
22

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23 <sup>3</sup> Special Agent Scott testified that he wanted the information "[t]o gain more information  
24 into who Mr. Lee was and how he had authority, what his training was, all to basically let me  
25 know that he had -- he knew about TECS training, he knew about the rules and the regulations, he  
was a TECS user, to provide me more backup documentation." Tr. 399:17-22.

26 <sup>4</sup> Defendant states that the first time he learned of the allegation regarding the TECS print-  
27 out was upon hearing Special Agent Scott's testimony at trial. Mot. at 10. No mention of the  
TECS printout is made in the Scott's notes or report, or those of his assistant, Special Agent Lee,  
28 nor is a copy of it appended to any of those documents. These allegations form the basis of  
defendant's argument regarding discovery violations and his request for an evidentiary hearing.

1 made, the government's evidence does not suffice to show materiality.

2 Accordingly, the Court GRANTS defendant's motion for judgment of acquittal on Count  
3 Two. Where a court "enters a judgment of acquittal after a guilty verdict, the court must also  
4 conditionally determine whether any motion for a new trial should be granted if the judgment of  
5 acquittal is later vacated or reversed." Fed. R. Crim. P. 29(d)(1). For the same reasons stated  
6 above that the Court finds a judgment of acquittal should be granted, and because the evidence  
7 regarding the element of materiality in Count Two "preponderates sufficiently heavily against the  
8 verdict that a serious miscarriage of justice may have occurred," the Court conditionally finds that  
9 a new trial should be granted if this judgment of acquittal is later vacated or reversed. *See*  
10 *Kellington*, 217 F.3d at 1097. Should that occur, the Court further finds that an evidentiary  
11 hearing in advance of the new trial is necessary for the reasons stated in defendant's motion. *See*  
12 Mot. at 26-27.

13

14 **III. Other Matters**

15 Having granted defendant's motion for acquittal on Count Two, the Court need not rule on  
16 defendant's allegations regarding potential discovery and Jencks Act violations, defendant's  
17 concerns with the government's closing argument,<sup>5</sup> and defendant's request for an evidentiary  
18 hearing.<sup>6</sup> The Court is not persuaded by defendant's argument that "the government's case was  
19 weak at best," *see* Mot. at 19, as the Court is granting defendant's motion for a judgment of  
20 acquittal as to the weakest part of the government's case—materiality under Count Two. This  
21 leaves defendant's arguments that the Court erred in failing to give his proposed instruction on  
22 falsity and that the trial was improperly prejudiced by references to prostitution.

23 The Court does not find that it was error to fail to give defendant's proposed instruction on

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26 <sup>5</sup> These concerns pertain primarily to the timing of defendant's TECS query.

27 <sup>6</sup> This request is largely made to gather evidence in support of the defense's attack on  
28 Count Two.

1       falsity.<sup>7</sup> First, the Court does not find that the agent's question in this case was ambiguous to the  
2       same extent as the questions in *Jiang* and *Sainz*, which defendant cites in support. Second, the  
3       Court heard extensive argument on this point from both sides prior to the close of trial. *See* Tr.  
4       563:17-568:11. The Court permitted defense counsel to make the argument contained in the  
5       proposed instruction during closing, and defense counsel did so. *See* Tr. 568:6-11, 622:1-5 ("If  
6       you all can decide on the exact question that Agent Fuentes asked, that question still has to be  
7       clear. If that question is ambiguous and there is a reasonable response to that ambiguous question,  
8       it is not a false statement. That is not a knowing and deliberate false statement.") The jury heard  
9       this argument and still convicted defendant on Count One.

10       The Court also finds that references to prostitution did not unfairly prejudice the jury, as  
11       defendant argues. The Court discussed this with the parties during the pretrial conference and  
12       again during the first day of trial. *See* Docket No. 105 at 2; Tr. 5:1-13:20. The Court limited the  
13       government to one witness on the topic of the alleged prostitution activities and ordered "that the  
14       testimony shall be for the purpose of showing how the massage parlor's allegedly illegal activities  
15       triggered DHS's investigation and how defendant's statements were material to that  
16       investigation." Docket No. 105 at 2. The Court does not agree with defendant that the  
17       government exceeded those bounds at trial.

18       Defendant mainly takes issue with two pieces of testimony: (1) that government witness  
19       Leslie Severe testified that "undercover agents 'were solicited for some type of sexual activity'" at  
20       the massage parlor, and (2) that "Agent Fuentes testified that he read a portion of the police report  
21       to Mr. Lee during the August 2009 interview stating that Ms. Liu solicited sex from an undercover  
22       agent . . ." *See* Mot. at 21-22. As to Ms. Severe's testimony, the government asked Ms. Severe  
23       on direct examination to respond "based on your personal observations." Tr. 157:18-22. When  
24       Ms. Severe stepped beyond those boundaries, defense counsel made a hearsay objection that the  
25       Court sustained. Tr. 157:23-158:6. Nor does the Court find that it was impermissible hearsay for  
26

27       <sup>7</sup> Defendant sought the following instruction: "If you find that a particular question asked  
28       of Mr. Lee was ambiguous and that Mr. Lee truthfully answered one reasonable interpretation of  
     the question under the circumstances presented, then his answer would not be false. It is the  
     burden of the government agents to clarify any ambiguous statements." Docket No. 119 at 2.

1 Ms. Severe to testify as to the direction she gave her officers regarding when to use a “bust  
2 signal.” *See* Tr. 160:23-162:2. As to Agent Fuentes’s testimony that he read a police report  
3 regarding defendant’s wife’s alleged solicitations, the Court gave a limiting instruction to the jury.  
4 Tr. 198:24-199:22. The references to defendant’s wife’s actions constituted only a brief portion of  
5 Agent Fuentes’s lengthy testimony, and was drawn out to show the effect on the listener as well as  
6 to explain why Agent Fuentes still remembered the interview conducted nearly seven years earlier.  
7 *See* Tr. 199:24-200:17. Overall, these limited references to sexual activity at the massage parlor  
8 did not “impermissibly taint[] the verdict,” as defendant argues. *See* Mot. at v.

9

10 **CONCLUSION**

11 For the foregoing reasons and for good cause shown, the Court hereby DENIES  
12 defendant’s motion for judgment of acquittal or a new trial on Count One. The Court GRANTS  
13 defendant’s motion for judgment of acquittal on Count Two.

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15 **IT IS SO ORDERED.**

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Dated: September 20, 2016

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18 SUSAN ILLSTON  
United States District Judge

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## **APPENDIX C**

**FILED**

**NOT FOR PUBLICATION**

JUN 06 2018

**UNITED STATES COURT OF APPEALS**

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

**FOR THE NINTH CIRCUIT**

**UNITED STATES OF AMERICA,**

Plaintiff-Appellee,

No. 16-10448

D.C. No. 3:15-cr-00541-SI

v.

**JOHN CHING EN LEE,**

**MEMORANDUM\***

Defendant-Appellant.

Appeal from the United States District Court  
for the Northern District of California  
Susan Illston, District Judge, Presiding

Argued and Submitted April 12, 2018  
San Francisco, California

Before: WARDLAW and NGUYEN, Circuit Judges, and OLIVER, \*\* District Judge.

Appellant John Ching En Lee (“Lee”) appeals the district court’s denial of his motion for judgment of acquittal following his jury trial conviction for making a false

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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 Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

statement to federal agents on the grounds that there was insufficient evidence of the false statement made to satisfy the elements of 18 U.S.C. § 1001(a)(2), and that the district court erred by failing to specifically instruct the jury on unanimity relative to which false statement Lee made. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. We review whether there was sufficient evidence to support a jury conviction *de novo*. *U.S. v. Vazquez-Hernandez*, 849 F.3d 1219, 1229 (9th Cir. 2017). There was ample evidence before the jury from which it could conclude that the questions the investigators asked Lee, numerous times in numerous iterations, about funding his wife's business were not misleading. Despite their clarity, Lee did not admit that he had provided her a bank loan. *See U.S. v. Jiang*, 476 F.3d 1026, 1028–30 (9th Cir. 2007). Lee's argument that these questions cannot support a conviction under § 1001(a)(2) has no merit, because a statement does not need to be recorded or transcribed in order to support a conviction. *Id.* Moreover, the false statement was material because the agents' testimony demonstrated it changed the scope of their investigation. *See U.S. v. De Rosa*, 783 F.2d 1401, 1408 (9th Cir. 1986). Thus, there was sufficient evidence to satisfy the elements of falsity, specific intent, and materiality under 18 U.S.C. § 1001(a)(2) given the lack of ambiguity in the possible versions of the question posed as recalled by the agents during their

testimony at trial; the context of the interview and Lee's background and experience; the agents' testimony as to the scope and course of their investigation; and the absence of other extrinsic factors weighing against conviction. *See Jiang*, 476 F.3d at 1029–30; *U.S. v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998).

2. Because Lee failed to preserve his objection to the district court's failure to give a specific unanimity instruction for appeal, by stipulating to the false statement he allegedly made, we review the district court's failure to instruct the jury on specific unanimity for plain error. *See U.S. v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); Fed. R. Crim. P. 30. Plain error is “error that is clear under the law and affects substantial rights.” *Campbell*, 42 F.3d at 1204. The district court did not plainly err because a specific unanimity instruction was not required in this case. The general unanimity instruction was sufficient to charge the jury on the relevant law as there was considerable evidence presented at trial to support the parties' stipulation regarding the false statement Lee allegedly made. *See* 9th Cir. Model Crim. Jury Instructions §§ 7.9, 8.73.

**AFFIRMED.**

## APPENDIX D



Search documents in this case:

## No. 18-597

Title: **John Ching En Lee, Petitioner**  
v.  
**United States**

Docketed: November 6, 2018

Linked with 18A203

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Numbers: (16-10448)

Decision Date: June 6, 2018

DATE	PROCEEDINGS AND ORDERS
Aug 21 2018	<p>Application (18A203) to extend the time to file a petition for a writ of certiorari from September 4, 2018 to November 3, 2018, submitted to The Chief Justice.</p> <p><b>Main Document</b> <b>Lower Court</b> <b>Orders/Opinions</b> <b>Lower Court</b> <b>Orders/Opinions</b> <b>Proof of Service</b></p>
Aug 24 2018	<p>Application (18A203) granted by The Chief Justice extending the time to file until November 2, 2018.</p>
Nov 02 2018	<p>Petition for a writ of certiorari filed. (Response due December 6, 2018)</p> <p><b>Certificate of Word Count</b> <b>Proof of</b> <b>Service</b> <b>Petition</b></p>
Dec 04 2018	<p>Motion to extend the time to file a response from December 6, 2018 to January 7, 2019, submitted to The Clerk.</p> <p><b>Main Document</b></p>
Dec 06 2018	<p>Motion to extend the time to file a response is granted and the time is extended to and including January 7, 2019.</p>

Jan 07 2019	Brief of respondent United States in opposition filed.		
	<b>Main Document</b>	<b>Proof of Service</b>	
Jan 22 2019	Reply of petitioner John Lee filed.		
	<b>Main Document</b>	<b>Certificate of Word Count</b>	<b>Proof of Service</b>
Jan 23 2019	DISTRIBUTED for Conference of 2/15/2019.		
Feb 19 2019	Petition DENIED.		

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
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SupremeCtBriefs@USDOJ.gov		
Party name: United States		

## **APPENDIX E**

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UNITED STATES OF AMERICA.

**Plaintiff,**

V.

JOHN CHING EN LEE,

**Defendant.**

Case Nos. 15-cr-00541-SI-1

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18-cv-06223-SI

**ORDER DENYING DEFENDANT'S  
MOTION UNDER 28 U.S.C. § 2255;  
DENYING DEFENDANT'S MOTION  
TO AMEND § 2255 MOTION; AND  
GRANTING DEFENDANT'S MOTION  
TO FILE REPLY BRIEF**

Re: Dkt. Nos. 164, 165, 183, 188

Now before the Court are several motions filed by defendant John Ching En Lee, who was serving a term of federal probation and who is currently representing himself *pro se*. For the reasons set forth below, the Court DENIES Lee's motion for relief under 28 U.S.C. § 2255 (Dkt. Nos. 164, 165); DENIES Lee's motion to amend his § 2255 motion (Dkt. No. 183); and GRANTS Lee's motion for leave to file a reply brief (Dkt. 188). A certificate of appealability will not issue.

## PROCEDURAL BACKGROUND

In an indictment filed in November 2015, Lee was charged with two counts of making false statements to the government in violation of 18 U.S.C. § 1001(a), based upon statements he made in interviews with government agents on August 26, 2009, and October 10, 2013. Dkt. No. 42. On June 30, 2016, a jury found defendant guilty of both counts. Dkt. No. 123. Lee then moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 or a for a new trial under Rule 33. On September 20, 2016, the Court denied Lee's motion for judgment of acquittal or a new trial on Count One but granted his motion for judgment of acquittal on Count Two. Dkt. No. 144. On October 14, 2016, the Court sentenced Lee to two years of probation, with a special assessment of

1 \$100 and a fine of \$500. Dkt. No. 154.

2 Lee then filed a direct appeal with the United States Court of Appeals for the Ninth Circuit.  
3 On June 6, 2018, in an unpublished memorandum, the Ninth Circuit affirmed this Court's denial of  
4 defendant's motion for judgment of acquittal on Count One. Dkt. No. 163; *see also United States*  
5 *v. Lee*, 726 Fed. App'x 589 (9th Cir. 2018).

6 On October 10, 2018, Lee filed in this Court a motion to vacate, set aside, or correct his  
7 sentence pursuant to 28 U.S.C. § 2255. Dkt. Nos. 164, 165. The government moved to dismiss  
8 Lee's motion, arguing that the motion was not ripe because Lee was seeking review of the Ninth  
9 Circuit's decision before the United States Supreme Court. Dkt. No. 171. This Court denied the  
10 government's motion to dismiss but stayed briefing on the § 2255 motion pending the Supreme  
11 Court's review of Lee's petition for a writ of certiorari. Dkt. No. 173.

12 After the Supreme Court denied Lee's petition on February 19, 2019, *see* Dkt. No. 174,  
13 briefing on Lee's § 2255 motion resumed. The government filed an opposition brief, attaching Lee's  
14 opening brief in his direct appeal before the Ninth Circuit. Dkt. No. 179. Lee requested and received  
15 an extension of time to file his reply brief, making his reply due on May 29, 2019. Dkt. Nos. 181,  
16 182. On May 16, 2019, Lee filed a motion to amend his § 2255 motion, which the government  
17 opposed. Dkt. Nos. 183, 186. On May 24, 2019, Lee filed a request for extension of time to file his  
18 reply brief on the § 2255 motion. Dkt. No. 184. The Court vacated the reply deadline pending its  
19 ruling on the motion to amend. Dkt. No. 185. However, on June 20, 2019, Lee filed a motion  
20 requesting the Court's leave to accept his reply brief to the § 2255 motion and attaching the proposed  
21 reply brief. Dkt. No. 188.<sup>1</sup>

22  
23 **LEGAL STANDARD**

24 A prisoner in custody under sentence of a federal court who wishes to attack collaterally the  
25 validity of his conviction or sentence must do so by filing a motion to vacate, set aside or correct

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<sup>1</sup> The Court GRANTS Lee's request that the Court accept his reply brief to the § 2255 motion  
28 and deems as FILED the reply brief attached to Lee's motion for leave to file a reply brief. See Dkt.  
No. 188. The Court has considered the reply brief in ruling on the pending motions decided in this  
Order.

1 the sentence pursuant to 28 U.S.C. § 2255 in the court which imposed the sentence. 28 U.S.C.  
2 § 2255(a). Under 28 U.S.C. § 2255, the federal sentencing court is authorized to grant relief if it  
3 concludes that “the sentence was imposed in violation of the Constitution or laws of the United  
4 States, or that the court was without jurisdiction to impose such sentence, or that the sentence was  
5 in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” *See Tripati*  
6 *v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). If the court finds that relief is warranted under  
7 § 2255, it must “vacate and set the judgment aside” and then do one of four things: “discharge the  
8 prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.”  
9 28 U.S.C. § 2255(b); *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999).

10 Section 2255 requires that an evidentiary hearing be held unless the record conclusively  
11 reveals that the petitioner is not entitled to relief. *See United States v. Mejia-Mesa*, 153 F.3d 925,  
12 929 (9th Cir. 1998). “The petitioner need not detail his evidence, but must only make specific  
13 factual allegations which, if true, would entitle him to relief.” *Id.* (internal alteration and citations  
14 omitted). An evidentiary hearing need not be held where the petition, files, and record of the case  
15 conclusively show the petitioner is entitled to no relief. *Id.*; *see also United States v. Howard*, 381  
16 F.3d 873, 877-79 (9th Cir. 2004) (a claim for ineffectiveness based on counsel’s failure to address  
17 defendant’s incompetence to plead guilty required an evidentiary hearing where specific, credible  
18 evidence existed that defendant was under the influence of powerful narcotic drugs). The district  
19 court may deny a § 2255 motion without an evidentiary hearing only if the movant’s allegations,  
20 viewed against the record, either do not state a claim for relief or are so palpably incredible or  
21 patently frivolous as to warrant summary dismissal. *See Mejia-Mesa*, 153 F.3d at 931 (district court  
22 did not abuse discretion in denying evidentiary hearing on claims that failed to state a claim for  
23 relief under § 2255 as a matter of law).

24

25

## DISCUSSION

26 Lee currently stands convicted of Count One of the indictment, for a violation of 18 U.S.C.  
27 § 1001(a). That count charged Lee with “making false statements to representatives of the  
28 Department of Homeland Security about his involvement in providing funding to the owner of

1 Crystal Massage Parlor [i.e., Lee's wife], who was arrested for prostitution in relation to the Crystal  
2 Massage Parlor. The statements and representations were false because JOHN CHING EN LEE  
3 then and there knew that he had provided \$30,000 to the owner to fund the Crystal Massage Parlor."

4 Dkt. No. 42 at 1-2.

5 Prior to the start of trial, Lee's counsel had proposed that the Court instruct the jury on  
6 "specific unanimity," in the form of the following proposed instruction:

7 In order for Mr. Lee to be found guilty on Count One, you all must agree that one or  
8 more of the following statements was materially false and made with Mr. Lee's  
9 knowledge that both the statement was untrue and that his conduct was unlawful,  
10 with all of you unanimously agreeing as to which statement or statements so qualify.  
In other words, even if you all agree that Mr. Lee made at least one false statement,  
but all of you do not agree on which specific statement was false, the crime of Making  
a False Statement has not been proven beyond a reasonable doubt.

11 [LIST STATEMENTS INTRODUCED AT TRIAL]

12 Dkt. No. 106 at 43-44. The Court indicated in a subsequent Order that "[i]f the government charges  
13 more than one false statement in . . . Count One . . . , the Court will give a specific unanimity  
14 instruction. If the government charges one statement in each count, the Court finds that no separate  
15 unanimity instruction will be required." Dkt. No. 113 at 6.

16 During the course of trial, the parties reached an agreement on how to describe the false  
17 statements in the instructions. *See* Dkt. No. 137, Tr. at 501:2-15, 562:23-563:1. The parties  
18 submitted their agreement to the Court's clerk and the final jury instruction on Count One read, in  
19 relevant part, "The statement charged in Count One is that Mr. Lee stated: 'No' to the question  
20 whether he gave his wife any money to fund her business." Dkt. No. 121 at 36 (Jury Instr. No. 28).

21

22 **I. Section 2255 Motion**

23 In his § 2255 motion, Lee makes two interrelated arguments. First, he argues that his trial  
24 counsel provided ineffective assistance in violation of the Sixth Amendment "by stipulating in jury  
25 instructions the exact question asked by the agent and exact answer given by defendant." Dkt. No.  
26 164 at 2.<sup>2</sup> Second, Lee argues that the trial court violated his Sixth Amendment rights when it gave

27

28 <sup>2</sup> Because some of Lee's briefs lack page numbers, citations in this Order to page numbers  
in his briefs refer to the page numbers provided by the Court's Electronic Case Filing (ECF) system.

1 the above jury instruction that contained the stipulation his lawyer entered.

2

3 **A. Ineffective Assistance of Counsel**

4 The Sixth Amendment to the United States Constitution guarantees not only assistance, but  
5 effective assistance, of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The purpose  
6 of the right is to ensure a fair trial, and the benchmark for judging any claim of ineffectiveness is  
7 “whether counsel’s conduct so undermined the proper functioning of the adversarial process that  
8 the trial cannot be relied on as having produced a just result.” *Id.* To prevail on an ineffective  
9 assistance claim, a habeas petitioner must show that (1) counsel’s performance was “deficient,” i.e.,  
10 his “representation fell below an objective standard of reasonableness” under prevailing  
11 professional norms, *id.* at 687-88, and (2) prejudice flowed from counsel’s performance, i.e., that  
12 there is a reasonable probability that, but for counsel’s errors, the result of the proceedings would  
13 have been different. *See id.* at 691-94. “A reasonable probability is a probability sufficient to  
14 undermine confidence in the outcome.” *Id.* at 694.

15 “Judicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. “[A]  
16 court must indulge a strong presumption that counsel’s conduct falls within the wide range of  
17 reasonable professional assistance; that is, the defendant must overcome the presumption that, under  
18 the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* (quoting  
19 *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). A difference of opinion as to trial tactics does not  
20 constitute denial of effective assistance, *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981),  
21 and tactical decisions are not ineffective assistance simply because in retrospect better tactics are  
22 known to have been available. *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir. 1984). Tactical  
23 decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic  
24 considerations; (2) counsel makes an informed decision based upon investigation; and (3) the  
25 decision appears reasonable under the circumstances. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th  
26 Cir. 1994).

27 The Court finds that Lee’s claim for ineffective assistance of counsel fails because he cannot  
28 meet the first prong of the *Strickland* test; that is, he cannot show that his trial counsel’s stipulation

1 to the statement contained in Jury Instruction No. 28 was deficient. Although Lee did not raise an  
2 ineffective assistance of counsel claim on direct appeal, he did litigate the issue at the heart of the  
3 claim, which is whether it was error for the Court to fail to give a specific unanimity instruction.  
4 The Ninth Circuit found that “a specific unanimity instruction was not required in this case. The  
5 general unanimity instruction was sufficient to charge the jury on the relevant case law as there was  
6 considerable evidence presented at trial to support the parties’ stipulation regarding the false  
7 statement Lee allegedly made.” *Lee*, 726 Fed. App’x at 590. Under these circumstances, where the  
8 Ninth Circuit has squarely ruled that the evidence at trial supported the stipulation, this Court simply  
9 cannot find that trial counsel’s decision to enter the stipulation was “deficient” under the definition  
10 in *Strickland* rather than simply a matter of trial tactics.

11 Because Lee cannot meet the first prong of *Strickland*, the Court need not analyze whether  
12 Lee is able to meet the second prong regarding prejudice. Nevertheless, the Court notes that Lee’s  
13 argument on the prejudice prong amounts to little more than speculation that if the jury had received  
14 a specific unanimity instruction, then it would not have convicted him on Count One. *See* Dkt. No.  
15 164 at 3 (arguing that “[t]he error was prejudicial because uncertainty defeats an 18 USC 1001  
16 conviction. US v. Jiang, 476 F.3d 1026, 1029 (9th Cir. 2007)”; Dkt. No. 188 at 12 (“Defendant  
17 suffered prejudice[] because he was wrongfully convicted as a result of the faulty jury instruction.”).  
18

19 **B. Jury Instruction**

20 Lee also argues that this Court “violated defendant’s 6th Amendment rights by agreeing with  
21 an erroneous jury instruction” based upon the stipulation entered by his attorney. Dkt. No. 164 at  
22 3. Lee argues that this was error because, by accepting an instruction with the stipulation, the Court  
23 “wrongfully resolved the 8 different versions of that question [asked by the agent] into 1 clear  
24 statement.” *Id.* In opposition, the government argues that the Ninth Circuit rejected Lee’s  
25 contention on his direct appeal, and that “it is improper to use a petition under Section 2255 to re-  
26 litigate that same issue, in the guise of an ineffective assistance claim or a claim of other error.”  
27 Dkt. No. 179 at 10.

28 Section 2255 may not be used as a chance at a second appeal. *United States v. Berry*, 624

1 F.3d 1031, 1038 (9th Cir. 2010) (citing *United States v. Addonizio*, 442 U.S. 178, 184 (1979)).  
2 Claims presented and rejected on direct appeal may not be litigated again in a § 2255 motion. *See*  
3 *United States v. Scrivner*, 189 F.3d 825, 828 (9th Cir. 1999). Moreover, “[u]nder the law of the case  
4 doctrine, a court will generally refuse to reconsider an issue that has already been decided by the  
5 same court or a higher court in the same case.” *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th  
6 Cir. 2012) (en banc) (citing *Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc)).

7 In *Scrivner*, after the defendant was convicted in a jury trial, he filed a direct appeal, arguing  
8 that the district court violated his Fifth Amendment rights when it admitted an affidavit into evidence  
9 in which he asserted his ownership over a gun that the government had seized during a search of his  
10 home. The Ninth Circuit rejected this argument, finding he had waived his right to invoke the Fifth  
11 Amendment in the civil proceeding over forfeiture of the gun. *Scrivner*, 189 F.3d at 827. The  
12 defendant then filed a petition for relief under 28 U.S.C. § 2255 with the district court, arguing that  
13 there had been a change in the law. The district court rejected his § 2255 motion, and the Ninth  
14 Circuit affirmed. The Ninth Circuit explained that the defendant had presented his Fifth Amendment  
15 claim in his direct appeal and that it had been denied on the merits. As such, “[t]hat decision is  
16 binding on our resolution of the case. *See Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972)  
17 (‘The law in this circuit is clear that when a matter has been decided adversely on appeal from a  
18 conviction, it cannot be litigated again on a 2255 motion.’).” *Id.* at 828.

19 The same is true here. Lee concedes that he raised the argument regarding the allegedly  
20 erroneous jury instruction on his direct appeal. *See* Dkt. No. 165 at 5. His opening brief at the Ninth  
21 Circuit also shows that he argued on appeal that “the district court erred because there is insufficient  
22 evidence to determine what was the exact statement that was uttered[,]” pointing to an alleged eight  
23 different versions of the question that the agents asked. *See* Dkt. No. 179-1 at 19. However, he now  
24 argues in his reply brief that this claim should not be barred because, according to Lee, “a court may  
25 depart from the law of the case if . . . the decision is clearly erroneous and its enforcement would  
26 work a manifest injustice.” Dkt. No. 188 at 17 (citing *Gonzalez*, 677 F.3d at 390 n.4). Lee provides  
27 no argument in support of his assertion that the Ninth Circuit’s decision was “clearly erroneous.”  
28 Rather, in his § 2255 motion and the reply brief, he simply restates the same arguments that the

1 Ninth Circuit has already considered and rejected. He also raised these arguments in his post-trial  
2 motions before this Court, and this Court rejected them. *See* Dkt. No. 144 at 3 (“Defendant argues,  
3 in part, that his conviction on Count One cannot stand because the government ‘did not offer  
4 sufficient evidence to prove beyond a reasonable doubt the exchange that was false, *i.e.*, the precise  
5 question asked and the answer that was false.’”). Because these issues were previously litigated and  
6 decided in this case, they are not proper grounds for a § 2255 motion. *See Berry*, 624 F.3d at 1038.<sup>3</sup>  
7 Nor does the Court find that the decisions already rendered were clearly erroneous such as to warrant  
8 departing from the law of the case. Accordingly, the Court DENIES Lee’s motion to vacate, set  
9 aside, or correct his sentence under 28 U.S.C. § 2255.

10

## 11 II. Motion to Amend Section 2255 Motion

12 In the motion requesting permission to amend his § 2255 motion, Lee states that in addition  
13 to the ineffective assistance of counsel claim raised in the original motion, he would like “to add 1  
14 additional claim, that is, insufficient evidence to prove he made a false statement . . .” Dkt. No.  
15 183 at 1. He argues that the evidence at trial cannot support his conviction because “testimony by  
16 Agent John Henderson clearly shows the alleged funding question was never asked, and defendant  
17 never made a false denial.” *Id.* at 2. Citing to the transcript of the trial, he states that the two agents  
18 who testified gave testimony that contradicted each other, that “[t]he so-called funding question was  
19 nothing more than Agent John Henderson’s **own characterization** of income-sharing question  
20 posed by Agent Fuentes[,]” and that “[t]he government’s allegation that defendant made [a] false  
21 statement was actually Agent Henderson’s **own Assumption/Speculation** after hearing defendant’s  
22 response of not sharing money with [his] wife.” *Id.* at 3. Lee concedes that “the issue of false  
23 statement was raised and rejected on appeal at the 9th Circuit” but argues that because the evidence

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25 <sup>3</sup> Lee raises one argument here that was arguably not raised on direct appeal, when he takes  
26 the position that the agents never asked him the funding question at all. However, this argument  
27 cannot be squared with the Ninth Circuit’s finding that “there was considerable evidence presented  
28 at trial to support the parties’ stipulation regarding the false statement Lee allegedly made.” *See Lee*, 726 Fed. App’x at 590. Moreover, arguments that should have been raised on direct appeal but  
that were not, such as this one, may not then form the basis for a § 2255 motion. *See Torres v. United States*, 469 F.2d 651, 652 (9th Cir. 1972) (per curiam) (citing *Evans v. Mitchell*, 458 F.2d 993 (9th Cir. 1972)).

1 he cites shows that the agents asked no funding question and Lee made no false denial, “the  
2 conviction was clearly erroneous and its enforcement will work a manifest injustice.” *Id.* at 5.

3 The Civil Rule governing pleading amendments, Federal Rule of Civil Procedure 15, made  
4 applicable to habeas proceedings by 28 U.S.C. § 2242, Federal Rule of Civil Procedure 81(a)(4),  
5 and Habeas Corpus Rule 12, allows amendments with leave of court any time during a proceeding.  
6 *Mayle v. Felix*, 545 U.S. 644, 654-55 (2005) (citing Fed. R. Civ. P. 15(a)). There are several  
7 accepted reasons to deny leave to amend, including the presence of bad faith by the moving party,  
8 undue delay, prejudice to the non-moving party, futility of amendment, and previous amendments.  
9 *See Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989); *McGlinchy v. Shell*  
10 *Chem. Co.*, 845 F.2d 802, 809-10 (9th Cir. 1988). Leave may be denied if the proposed amendment  
11 is futile or would be subject to dismissal. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir.  
12 1991). “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.”  
13 *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

14 Here, the Court finds that the amendment to the § 2255 motion that Lee proposes would be  
15 futile. It does not substantially differ from the second grounds for error that he raises in his original  
16 § 2255 motion, which he argues more fully in his reply brief, and the Court would reject the  
17 amendment for the same reasons as stated above, that Lee already raised or could have raised these  
18 challenges on direct appeal. Accordingly, the Court DENIES Lee’s request to amend his § 2255  
19 motion.

20 Lee also argues that he is entitled to an evidentiary hearing. A habeas petitioner may be  
21 entitled to an evidentiary hearing on a claim “if he alleges facts that, if proven, would entitle him to  
22 relief.” *Tapia v. Roe*, 189 F.3d 1052, 1056 (9th Cir. 1999) (regarding § 2254 motion); *see also*  
23 *Mejia-Mesa*, 153 F.3d at 929. The district court may deny a § 2255 motion without an evidentiary  
24 hearing only if the movant’s allegations, viewed against the record, either do not state a claim for  
25 relief or are so palpably incredible or patently frivolous as to warrant summary dismissal. *See Mejia-*  
26 *Mesa*, 153 F.3d at 931 (district court properly denied evidentiary hearing on claims that failed to  
27 state a claim for relief under § 2255 as a matter of law).

28 The Court finds the claims Lee raises here fail as a matter of law, and thus no hearing is

1 required to resolve a factual dispute. The request for an evidentiary hearing is DENIED.  
2

3 **CONCLUSION**

4 Lee has not made a substantial showing of the denial of a constitutional right, and  
5 accordingly the Court does not issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2).  
6 Lee's motion under 28 U.S.C. § 2255 is DENIED. Lee's motion to amend his § 2255 motion is  
7 DENIED.

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9 **IT IS SO ORDERED.**

10 Dated: August 28, 2019



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12 SUSAN ILLSTON  
13 United States District Judge  
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## **APPENDIX F**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

DEC 14 2020

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

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
v.  
JOHN CHING EN LEE,  
Defendant-Appellant.

No. 19-16745

D.C. Nos. 3:18-cv-06223-SI  
3:15-cr-00541-SI-1

Northern District of California,  
San Francisco

ORDER

Before: BYBEE and HURWITZ, Circuit Judges.

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

## **APPENDIX G**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

JAN 14 2021

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN CHING EN LEE,

Defendant-Appellant.

No. 19-16745

D.C. Nos. 3:18-cv-06223-SI  
3:15-cr-00541-SI-1

Northern District of California,  
San Francisco

ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See*  
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

## **APPENDIX H**

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

April 19, 2021

Mr. John Ching En Lee  
1750 Toyon Drive  
Concord, CA 94520

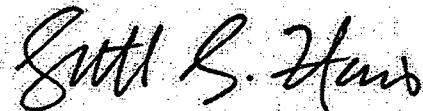
Re: John Ching En Lee  
v. United States  
No. 20-1321

Dear Mr. Lee:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk